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FOREIGN DIRECT INVESTMENT

CONTENTS

INTRODUCTION

Foreign direct investment control mechanisms are different across the globe, both in substance and procedure. Although some jurisdictions traditionally have strong control mechanisms in this field, other jurisdictions, such as the European Union, have relatively open investment regimes. However, there is growing concern in the EU (and in non-EU countries) about investment by foreign actors, including state-owned enterprises, in strategic activities. Foreign direct investment is, therefore, an increasingly important topic in cross-border transactions.

This is underscored by the recent EU Regulation dealing with foreign direct investment, which aims to strike the balance between protecting critical infrastructures, technology and knowhow of the EU and its Member States and welcoming foreign investments as major source of economic growth. The Regulation provides for a multinational screening process of foreign investments involving the Commission. This process does not replace national foreign investment control and there will be no one-stop shop solution for foreign investors either. However, any views of the Member States and the Commission on foreign investments will have to be taken into account by authorities in Member States. Screening may thus have substantial political weight for the national decision-making process and could emerge as an important control instrument for EU inbound investments from China and other security sensitive third countries.

Against this backdrop, this guide provides an overview of regulations on foreign direct investment in the EU and a number of EU Member States, namely France, Germany, Italy, Portugal, Spain, the United Kingdom and the Netherlands.

This guide first summarizes the current situation at the EU level, focusing on the new EU foreign direct investment Regulation, its practical implications and expected timeline. The subsequent parts dealing with the various Member States are organised in a Q&A format, in order to provide a quick and easy overview of the relevant subjects and their application in practice.

This guide reflects applicable laws at February 2019.

1. EUROPEAN UNION

1. Currently applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control)

The EU has one of the world's most open investment regimes and there is currently no comprehensive legal framework on foreign direct investment in the EU. However, there are EU-level restrictions on investments in the air services and energy sectors. EU rules on the operation of air services prohibit licensing of an air carrier in the EU if 50% or more of its shares are owned by non-EU persons, unless there is an agreement with its home country. In the energy sector, there is a certification mechanism for foreign gas and electricity transmission system operators controlled by non-EU countries. Such operators are prohibited to operate in the EU unless they have demonstrated that they will not put at risk the security of energy supply to the Member State in which they would operate or to the Union.

On 14 February 2019, the final text of the Regulation establishing a framework for screening of foreign direct investments into the EU was approved by the European Parliament. The Regulation aims to strike a balance between protecting critical infrastructures, technology and knowhow of the EU and its Member States and welcoming foreign investments as major source of economic growth. The Regulation is expected to enter into force in March 2019 and will fully apply 18 months later.

2. The Regulation

The Regulation does not harmonize the existing national foreign investment control regimes, nor does it introduce a central EU-wide screening mechanism for foreign direct investments. Clearance, restriction or prohibition of foreign investments remains a matter of national administrative practice and primarily subject to national laws.

The main features of the Regulation are the following:

(i) The Regulation establishes certain minimum requirements for those Member States that decide to establish a foreign direct investment screening mechanism or that already have one in place, e.g. the possibility to seek recourse against

decisions adopted under the screening mechanism, the obligation that screening mechanisms do not discriminate between third countries and that such mechanisms are transparent. However, it does not oblige Member States to establish a foreign direct investment screening mechanism.

(ii) Screening is a restriction to free movement of capital or freedom of establishment and will therefore be strictly limited to grounds of public order or security. According to settled case law of the European Court of Justice, acquisitions may only endanger public order or security if they affect fundamental interests of society. In screening foreign direct investments on the grounds of security and public order, the potential effects on, amongst others, the following fields may be considered:

a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate, crucial for the use of such infrastructure;
b) critical technologies and certain dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace, defence, energy storage, nuclear technology, nanotechnologies and biotechnologies;
c) the security of supply of critical inputs, including energy or raw materials, as well as food security;
d) access to sensitive information, including personal data, or the ability to control such information; and
e) the freedom and plurality of the media.

Moreover, Member States and the Commission may also take into account:

f) whether the foreign investor is directly or indirectly controlled by the government, state bodies or armed forces of a third country, including through ownership structure or significant funding;
g) whether the foreign investor has already been involved in activities affecting security or public order of a Member State; and
h) whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

The Regulation does not apply to "portfolio investments".

(iii) Member States can comment upon, and the Commission can issue an opinion on foreign investments undergoing screening in three different scenarios. Firstly, the Regulation introduces some form of control by Member States over foreign direct investments carried out in another Member State. When a Member State (i) considers that a foreign direct investment undergoing screening in another Member State is likely to affect its security or public order, or (ii) has information

relevant for such screening in relation to that foreign direct investment , it may provide comments to the Member State in which the foreign direct investment will take place. The latter is obliged to give utmost consideration to the comments, but will not be bound by them. The Commission shall notify other Member States that comments were provided or an opinion was issued.

(iv) Secondly, the Regulation also introduces a regime for the Commission to exercise some influence over foreign direct investments carried out in Member States. The Commission *may* issue an opinion addressed to the Member State in which the foreign direct investment undergoes screening, if (i) it considers that a particular foreign direct investment is likely to affect security or public order in more than one Member State; or (ii) it has relevant information in relation to that foreign direct investment, or (iii) a Member State where a foreign direct investment is taking place requests the Commission to issue an opinion. The Commission is *obliged* to issue an opinion after at least one third of Member States consider that a foreign direct investment is likely to affect their security or public order. The Member State is obliged to give due consideration to opinions of the Commission, but is not bound by it.

If the foreign direct investment is likely to affect projects or programmes of EU interest, the Member State assessing the foreign direct investment must "take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed". Projects or programmes of EU interest include, inter alia, those involving a substantial amount or a significant share of EU funding, or which are covered by EU legislation regarding critical infrastructure, critical technologies or critical inputs. An indicative list of projects or programmes of EU interest is included as an annex to the Regulation. These currently include European GNSS programmes (Galileo & EGNOS), Copernicus and Horizon 2020, Trans-European Networks for Transport, Trans-European Networks for energy, Trans-European Networks for Telecommunications, European Defence Industrial Development Programme and Permanent structured cooperation.

(v) Thirdly, Member States which consider that a foreign investment undergoing screening on their territory is likely to affect its security or public order, may request the Commission to issue an opinion or other Member States to provide comments upon such investment.

(vi) The Regulation sets new transparency and information requirements for Member States to address the current low level of information exchange on foreign direct investments. The following time periods for foreign direct investments undergoing screening apply: (i) In particular, the national authorities shall inform the Commission and all Member States of any foreign direct investment undergoing screening as soon as possible. (ii) Subsequently,

Member States and the Commission may request from the national authorities any additional information necessary to provide their comments or opinions, if the information is duly justified and not unduly burdensome for the Member State in question. (iii) Member States and the Commission have 15 calendar days to notify the Member State of their intention to provide comments or an opinion in relation to the foreign direct investment undergoing screening. (iv) Comments and opinions shall be provided within 35 calendar days. (v) If the Commission follows up on comments of the Member States, it shall have another 20 working days for issuing its opinion. Under exceptional circumstances, Member States can issue a screening decision before these time periods have terminated. The Member States and Commission will then provide comments or issue an opinion expeditiously. In addition, both screening and non-screening Member States need to submit an annual report on foreign direct investments inflows.

(vii) If a foreign direct investment in one Member State has not undergone screening, the Regulation still allows other Member States and the Commission to provide comments or issue an opinion. Member States and the Commission can do this up to 15 months after that foreign direct investment has completed, under the same conditions as have been outlined in paragraphs (iii)-(iv). The possibility to issue an opinion or comment after the foreign direct investment has been completed adds uncertainty for investors, who may be faced with an opinion of the Commission even after having completed the entire national review process. However, final decision-making power will remain with the Member States.

3. Process and timeline

The Council is expected to formally endorse the Regulation on 5 March 2019 and the Regulation will enter into force on the twentieth day following its publication in the Official Journal of the European Union. The Regulation, however, will only apply fully 18 months later. As a result, foreign direct investments which are completed up to 15 months prior to the date of full application, are within the scope of the cooperation mechanism and may be commented upon or receive opinions once the Regulation is fully applicable.

2. FRANCE

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: In France, investment is in principle unrestricted. However, by way of exception, foreign investments carried out in business sectors deemed to be sensitive may be subject to prior authorisation from the French Minister for the Economy. The principle of this prior authorisation is laid down in Article L. 151-3 of the French Monetary and Financial Code ("**CMF**"). Details of the authorisation procedure and the full list of activities deemed to be of strategic importance for the French State are defined in Articles R. 153-1 *et seq*. of the CMF.

At the start, foreign investment control was limited to a small number of specific activities, such as gambling, cryptology, weapons and warfare equipment. This list has grown considerably over time and the system has been profoundly overhauled, in particular by Decree no. 2014-479 of 14 May 2014 and Decree no 2018-1057 of 29 November 2018. At present the list includes 14 sensitive sectors, notably energy, transport, electronic communications networks and services, artificial intelligence, robotics, semiconductor as well as public health.
In addition, the Decree of 14 May 2014 extended the conditions that may be imposed by the Minister for the Economy in return for granting the authorisation and extended the possibility of making the granting of the authorisation subject to the transfer of the activity concerned to a company which is independent of the foreign investor.

Generally speaking, foreign investment control is becoming a real public policy tool to prevent "national economic flagship companies" from being sold to foreign investors under conditions that would not safeguard national interests. However, it seems that the French authorities use their powers reasonably and that this procedure has given rise to few refusals.

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

A: The CMF's provisions establish an authorisation system that differs according to the investor's nationality. There are more types of investment falling within the scope of the authorisation procedure for non-EU foreign investors than for EU investors.

For EU and non-EU investors prior authorisation may be required if the investment results in the investor:

- acquiring control, within the meaning of Article L. 233-3 of the French Commercial Code, of a company which has its headquarters in France;
- acquiring all or part of a business division of a company which has its headquarters in France.

Furthermore, for non-EU investors prior authorisation may be required if the investment results in the investor:

- exceeding the ownership threshold of 33.33% of shares or voting rights in a company which has its headquarters in France.

Regarding the notion of "control" set out in Article L. 233-3 of the French Commercial Code, this article provides that a company is considered as controlling another company (i) when it directly or indirectly holds a portion of the share capital of such company giving it a majority of voting rights at such company's general meetings, (ii) when it holds on its own a majority of voting rights in such company by virtue of an agreement entered into with other shareholders of such company (to the extent it is not contrary to such company's corporate interests), (iii) when it effectively (on a de facto basis) determines the decisions taken at that company's general meetings through the voting rights it holds, or (iv) when it is a shareholder of that company and has the power to appoint or dismiss a majority of members of that company's administrative, management or supervisory bodies.

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A: The foreign investment rules apply to transactions in which, cumulatively, a non-EU company or an EU company makes an investment falling within the scope of Articles R. 153-1 and R. 153-3 of the CMF (See 2.a) in a company which has its headquarters in France and which is active in a "strategic" sector listed in 1° to 14° of Article R. 153-2 of the CMF.
The list of sensitive sectors includes:

1. activities within the gambling industry (except for casinos);

2. regulated activities of private security;

3. activities related to the research and development or the manufacture of methods intended to counter the illegal use, in connection with terrorist activities, of pathogens or toxic substances and preventing the public health consequences of such use;

4. activities relating to equipment or technical devices permitting the interception of correspondence or designed for the remote detection of conversations or the capture of IT data;

5. service activities relating to the auditing and certification of security provided by information technology systems and products;

6. activities relating to the manufacture of security goods or the provision of security services in the information technology security industry of a company having entered into a contract with a public or private operator that manages critical facilities;

7. activities relating to dual-use items and technologies as listed in Annex IV of EU Council Regulation nº 428/2009 dated 5 May 2009 setting up a community regime for the control of exports, transfer, brokering and transit of dual-use items and technology;

8. activities relating to cryptology or the provision of cryptology methods;

9. activities performed by companies holding national defence secrets or classified information;

10. activities related to the research, development and sale of weapons, munitions, powder and explosive substances for military use or war equipment;

11. activities performed by companies having entered into an agreement for the design or supply of equipment for the French Ministry of Defence, either directly or through sub-contracting, for the delivery of goods or the performance of services in the industry areas listed in the three preceding points;

12. activities relating to equipment, products or services, including activities relating to security and the proper functioning of installations and equipment, essential to safeguarding the interests of the country in terms of public order, public security or national defence in the following cases:
    - integrity, security and continuity of supply of electricity, gas, hydrocarbons or other energy sources;

- integrity, security and continuity of supply of water in accordance with the norms adopted in the interest of public health;
- integrity, security and continuity of supply of networks and transportation services;
- integrity, security and continuity of space operations;
- integrity, security and continuity of supply of operating networks and electronic communication services;
- Integrity, security and continuity of the operations of the specific electronic and computer systems necessary for the performance of the missions of the national police, the national gendarmerie, the civil security services or the exercise of the public security missions of the customs;
- integrity, security and continuity of operation of an establishment, installation or structure of vital importance within the meaning of Articles L. 1332-1 and L. 1332-2 of the French Defence Code and the informations systems relating to the operators of such facilities, installations and work of vital importance
- protection of public health.

13. Research and development activities relating to means intended to be implemented within the framework of an activity defined in items 4., 8., 9. and 12. above and relating to the following areas:

- cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductor;
- dual-use items and technologies listed in Annex I to the above-mentioned EU Council Regulation nº 428/2009 dated 5 May 2009

14. Data hosting activities the compromise or disclosure of which is likely to impair the exercise of the activities or the interests described in items 11 to 13 above.

The list of the sectors concerned by the authorisation procedure differs according to the origin of the investment. The list is longer for investments from outside the European Union.

Investments made in certain sectors, whether from an EU or non-EU country, are systematically subject to prior authorisation: cryptology, companies holding national defence secrets, research, production or trade in weapons, ammunition, powders and explosive substances, companies that have concluded a contract to study or supply equipment to the Ministry of Defence for the production of goods or services in a sensitive sector, other activities relating to equipment, products or services essential to safeguarding the country's public order, public security or national defence interests.

c) which authorities are competent to carry out such review;

A: The formal review process and communications with foreign investors are carried out by the French Treasury (*Direction générale du Trésor*) within the French Ministry for the Economy in cooperation with other governmental agencies depending on the strategic sectors concerned. The administrative authorities empowered to instruct the prior authorisation may seek international cooperation in order to verify the information provided by the foreign investor, in particular with respect to the source of the funds.

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?;

A: A prior approval of the French Minister for the Economy is required to close a transaction subject to foreign investment control. The transaction cannot be completed without this approval.

e) who must make the notification (buyer, seller, both);

A: The application must be presented by the buyer. However, for the preparation of the file, it is common that the buyer contacts the seller to obtain the required information.

f) the timetable for such review (both in law and practice, including possible pre-notification tracks).

A: The French Minister for the Economy has a two month period to issue his decision. This two month period runs from date on which the application is considered to be complete. If no answer is received by the end of the two month period, the authorisation is deemed to have been granted.

However, it is very common for the French Minister for the Economy to request additional information at the end of the two month period, enabling him to continue negotiating the commitment letter (see further below under 3). Most of the time, the French Minister for the Economy needs four to six months to take his decision.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The French Minister for the Economy does not have discretionary powers. His decision-making powers in this matter are strictly regulated by articles R. 153-8, R. 153-9 and R. 153-10 of the CMF. The logic of these articles is as follows:

In principle, the Minister for the Economy is obliged to authorise the planned foreign investment unconditionally, but this situation is unusual.

When the French Minister for the Economy considers that the investment could threaten national interests, he must seek to identify the conditions that would avoid such a threat in order to be able to approve the investment (Article R. 153-9 of the CMF). These conditions take the form of commitments given by the investor. They are negotiated beforehand between the French Ministry for the Economy and the investor and are set out in a letter attached to the authorisation. In practice, when an investment falls within the scope of the foreign investments regime, commitments are always requested by the French Minister for the Economy.

The commitments typically pursue the objectives of maintaining the company's activities and industrial capacities on the French territory, protecting the company's industry, research and development capacities and related technologies and ensuring performance of the company's contractual obligations relating to public safety, national defence, or weapons research or manufacture. It is also a public policy tool to maintain and increase national employment. The commitments must comply with the principle of proportionality.

By way of exception, due to the absence of any other possible solution, the Minister for the Economy must refuse the authorisation.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: Applicable provisions of French law do not specify any fees.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: The commitments, which the investor may be requested to give, mainly concern the objectives of maintaining the company's activities and industrial capacities on the French territory, protecting the company's industry, research and development capacities and ensuring performance of the company's contractual obligations relating to public safety, national defence, or weapons research or manufacture.

If the commitments are not sufficient to ensure the protection of the public interest, the French Minister for the Economy may make the authorisation of the transaction subject to the sale of any "sensitive" activity listed in the CMF to a company which is independent of the foreign investor. This kind of measure is very rare.

By way of exception, the French Minister for the Economy must refuse the authorisation if it appears that:

- the acquirer is likely to commit certain specific criminal offences; or

- the conditions which could be imposed on the investor would not suffice to safeguard national interests because (i) the continuity of the company's business, industrial, research and development capacities or related know-how would not be able to be protected in the future, (ii) the integrity, safety and continuity of the supply chain, the integrity, safety and continuity of operation of a facility, installation or structure of vital importance, transport networks and services, electronic communications, public health or data protection could be jeopardized or (iii) the performance by the company of its obligations under procurement contracts, whether as contractor or subcontractor, or under contracts concerning public order, public safety, national defence, or research, manufacture or trade of weapons, ammunitions or explosive powders or substances, could be compromised.

The French Minister for the Economy's refusal is extremely unusual.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: Any transaction falling within the scope of the foreign investments regime but carried out without the prior authorisation of the French Minister for the Economy is null and void, and any interested party can invoke this nullity in a claim in court.

In the case of non-authorised investments, the French Minister for the Economy may issue an injunction ordering the foreign investor: (i) not to proceed with the transaction, (ii) to modify its terms or (iii) to take any required actions at the investor's own cost to re-establish the former situation within a maximum period of twelve months.

If the injunction is not complied with, (i) the investor can be fined up to an amount equal to twice the value of the investment, (ii) the investment may be seized and (iii) the investor may be sentenced to up to five years of imprisonment.

So far, the foreign investments regime has never given rise to legal action in France.

7. Please indicate whether there are options available for the parties to challenge negative decisions by authorities.

A: Decisions by which the French Minister for the Economy refuses the transaction may be challenged before the administrative courts. As specified in Article L. 151-3 of the CMF, the legal action is a "*recours de plein contentieux*". Unlike "*recours pour excès de pouvoir*" (*ultra vires* claim), the administrative judge has a very wide range of powers enabling him to act in place of the Minister. The judge not only has the power to annul but also to review the decision.

A fast track procedure could be filed before an interim relief judge to obtain the suspension of the implementation of the French Minister for the Economy's decision. This type of claim can only be filed jointly with a "*recours de plein contentieux*" but only takes about one month to be dealt with. To be successful, the claim must fulfil two conditions: (i) demonstrate the existence of a situation of urgency, given that the judge will take into account, to assess the existence of such a situation, the impact of the refusal on the claimant's situation but also the presence of a public interest in upholding the decision; (ii) establish a serious doubt as to the lawfulness of the disputed decision, that is to say, more or less, a manifest illegality.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: In France, foreign investment decisions are not published. In case of refusal, the French Minister for the Economy must explain the grounds for his decision. These grounds are precisely laid down by Article R. 153-10 of the CMF.

The procedure for examination of applications is strictly confidential. Civil servants are under an obligation of professional secrecy prescribed by the law. They must exercise professional discretion for any act, information or document which comes to their knowledge in the performance of their duties.

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9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: The French Minister for the Economy has announced that the regulation of foreign investment is to be reinforced by provisions in the "PACTE" draft law (Action Plan for Growth and Transformation of Enterprises), which is expected to be adopted in the first half of 2019.

Several elements could be modified:

- implementation of tools to monitor compliance with the commitments given by investors and introduction of more progressive sanctions in the event of non-compliance. For instance, if necessary, the Ministry of Economy will have to take protective measures such as the suspension of the voting rights, the temporary prohibition or limitation of dividend distributions, the restriction or temporary prohibition of the disposal of any assets relating to strategic activities or the appointment of a representative in charge of supervising the protection of national interests in the strategic company. The Ministry may also order the foreign investor to comply with its commitments within a certain time period or to complete other actions in substitution of the initial commitments. Ultimately, the Ministry could withdraw its approval of the foreign, investment;
- increase of the power of the Ministry of Economy to impose financial penalties if an investment was completed without seeking its prior authorisation or such authorisation was obtained by fraud. Non-compliance with the commitments given by investors or the orders or decision of the Ministry, could also give rise to financial penalties. The amount of the financial penalties will have to be proportionate to the infringement and could amount up to the highest of: (i) the double of the amount of the irregular investment, (ii) 10% of the turnover of the strategic company, (iii) 1M€ for individuals or (iv) 5M€ for entities.
- more frequent "golden shares" in the capital of strategic companies in which the State has a stake. These golden shares could possibly enable the State to:
  - block asset disposals, transfers of intellectual property or locations outside France,
  - benefit from information rights,
  - appoint a State representative with no voting power within the board of the strategic company, or
  - subject to the State's prior approval the crossing of certain shareholding thresholds in the strategic company.

3. GERMANY

10. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Foreign direct investment screening in Germany is mainly governed by the following laws and regulations:

- Foreign Trade Act (*Außenwirtschaftsgesetz*, "**AWG**")
  - includes the general framework on foreign direct investment screening implemented by a governmental ordinance (*Rechtsverordnung*)

- Foreign Trade Ordinance (*Außenwirtschaftsverordnung*, "**AWV**")
  - contains detailed provisions on foreign direct investment screening

- Circular orders (*Runderlasse*) and general rulings (*Allgemeinverfügungen*) of the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*, "**BMWi**") as competent authority for foreign direct investment screening
  - provide regulatory guidance on the BMWi's application of the legal framework and in particular on required documentation

An application for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*) also in cases in which notification is not required becomes more and more common with foreign direct investment in German companies to increase transaction security in a reasonable timeframe.

11. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

A: The German foreign investment regime covers the following investments:

- Cross-sectoral review (*sektorübergreifende Prüfung*)

- a non-European (non-EU/EFTA) person or entity (the BMWi considers investors incorporated in the Channel Islands as non-European investors in this sense) acquires directly or indirectly a German business (by a share deal or – if related to a business – an asset deal) or a direct or indirect shareholding in a German company and, after the acquisition, directly or indirectly holds at least 25% or, as the case may be, 10% of the voting rights in the German company (see the applicable thresholds as amended in December 2018 below), each irrespective of the target's or investor's industry, the target's size and economic importance or the transaction value
- Based on a recent reform of December 2018, the threshold is 10% of the voting rights if the German company to be acquired is deemed to be particularly relevant under public order or security aspects, in particular relating to the operation of critical infrastructure (e.g., energy, transport or healthcare facilities services, if the facilities concerned are vital to the functioning of the community) – as conclusively defined in a separate ordinance on critical infrastructure (Ordinance on the Definition of Critical Infrastructures under the BSI Act (*Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz*)) –, certain software products for the operation of critical infrastructure, the entrustment with or operation of telecommunications surveillance measures and certain cloud computing services, telematics infrastructure components and services and, as also introduced in December 2018, in relation to certain activities in the media industry.
- The threshold is 25% for all other foreign investments subject to the cross-sectoral review.

- Sector-specific review (*sektorspezifische Prüfung*)
  - a foreign (i.e. non-German) person or entity acquires directly or indirectly a German business (by a share deal or a business asset deal) or a direct or indirect shareholding in a German company and, after the acquisition, directly or indirectly holds at least 10% of the voting rights in the German company (instead of 25% of the voting rights under the previous regime until December 2018), if the target develops or manufactures (i) specific military weapons or goods or (ii) products with certain IT security functions to process classified information or (iii) goods listed in specific sections of certain export lists.

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A: Foreign direct investment screening is applicable under the following conditions:

1. <u>Foreign investor</u>

- The German foreign direct investment regime generally applies to any non-European (non-EU/EFTA) investors, whether they are state-owned or private investors (cross-sectoral review).
- If the German target develops or manufactures (i) specific military weapons or goods or (ii) products with certain IT security functions to process classified information or (iii) goods listed in specific sections of certain export lists, the German foreign direct investment regime applies to any foreign (non-German) investors (sector-specific review).
- Further acquisitions by EU or EFTA-incorporated investors (including German investors) may only be reviewed, if the BMWi has indications that the structure has been chosen to circumvent the applicability of the foreign direct investment screening regime.

2. Relevant threshold

- Any acquisition that leads directly or indirectly to a holding of 25% or, as the case may be, 10% or more of the voting rights may be reviewed, including any acquisition of shares, capital increases and debt-equity swaps as well as asset deals for a German business (i.e. not only single assets). In contrast, acquisitions of non-voting shares, put or call rights, or pre-emptive rights are, as such, not subject to review.
- The 25% or, as the case may be, 10% threshold is relevant (and sufficient) at each level, e.g. in case the direct acquirer is a group company with multilevel shareholder structures.
- As the wording of the relevant provision is not fully clear and due to the lack of case law on foreign direct investment review in Germany, it is controversially discussed in legal literature, if an acquisition may only be reviewed if it triggers passing the applicable threshold or if also any further increase by an investor already exceeding that threshold before the contemplated acquisition is reviewable.
- Voting rights in the German target held by a third party are attributed to the investor if the investor holds at least 25% or, as the case may be, 10% of the voting rights in the third party, or if the third party and the investor have entered into an agreement on the joint exercising of voting rights in the German target (acting in concert).
- The establishment of a new business is not restricted under the foreign investment regime. It will, however, have to meet any other applicable regulatory requirements for such a business or operation under German law.

c) which authorities are competent to carry out such review;

A: The BMWi is the competent authority for foreign direct investment screening in Germany. The BMWi will generally consult with further ministries and authorities. Further, any prohibition or restriction order in the cross-sectoral foreign direct

investment screening requires consent of the full federal government (i.e. the federal cabinet).

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

A: The German foreign direct investment screening provides for various types of review:

- Approval Requirement (sector-specific review proceedings)
  - In cases of sector-specific foreign direct investment screening, the (direct) acquirer has to notify the transaction to the BMWi. The transaction (i.e. its completion) is preliminarily invalid until BMWi has cleared it (or it is deemed to be cleared).

- Notification Requirement (certain cross-sectoral review proceedings)
  - Since 2017, certain foreign investments – which are subject to cross-sectoral foreign direct investment screening – in German companies that are deemed to be particularly relevant under public order or security aspects also have to be notified to the BMWi, namely those foreign investments to which the 10 % threshold (as newly introduced in December 2018) applies

- Certificate of Non-Objection (all cross-sectoral review proceedings)
  - In case of any transaction subject to cross-sectoral foreign direct investment screening – irrespective of any notification requirement –, the purchaser can apply for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*). Such certificate confirms that there is no objection to the acquisition in terms of public order or security of the Federal Republic of Germany. It provides legal certainty to the purchaser, seller and target as the effectiveness of the agreement is subject to the statutory condition subsequent of a (possibly much later) prohibition within the respective review periods. Issuance (or deemed issuance) of a non-objection certificate is often included as closing condition in the respective purchase agreement.

- Review ex officio (all review proceedings)
  - BMWi may also review foreign investments on its own initiative (ex officio) – e.g. if the transaction has not been notified and a certificate of non-objection has not been applied for –, but has conducted such a review ex officio only twice between 2008 and December 2017 according to statistics of BMWi published by the German Federal Parliament (*Bundestag*) in March 2018.

e) who must make the notification (buyer, seller, both);

A: The purchaser must notify the BMWi or apply for a certificate of non-objection with the BMWi. Generally, the purchaser will closely cooperate with the seller in the preparation of any filings, e.g. with regard to information necessary to provide a fair and accurate description of the target, and any further documentation requests and steps in the review proceeding.

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: In straightforward cases, the purchaser often gets a non-objection certificate (cross-sectoral review) or clearance (sector-specific review) within a few weeks up to two months (cross-sectoral review) or three months (sector-specific review) upon application respectively notification. In case of in-depth review, the proceedings may take up to six (certificate of non-objection and sector specific review proceedings) or seven months (cross-sectoral review proceedings on notification or ex officio) of initial and in-depth review by the BMWi, plus any time needed by the parties to collect and submit the requested information and documents to the BMWi as well as any suspension period for negotiation. The overall duration of the review proceedings thus depends on the specifics of the case.

The specific timetable depends on the applicable review scheme:

- Approval Requirement (sector-specific review proceedings)
  - The purchaser has to notify the (envisaged) acquisition to the BMWi. Such notification is typically made shortly after signing the acquisition agreement, but can also be made in advance once the acquisition scope and structure is sufficiently clear.
  - The transaction is deemed cleared if the BMWi has not opened an in-depth review within three months upon receipt of the notification. If the purchaser has not notified the investment, BMWi may review ex officio (without any time restrictions).
  - If the BMWi opens an in-depth review, it may require all (directly/indirectly) participating entities to submit further documentation.
  - The BMWi has three further months from receipt of the complete documents to complete its in-depth review. Unless the BMWi prohibits the transaction or imposes restrictions, the transaction is deemed cleared upon expiry of the three-month period. However, the BMWi may explicitly clear the transaction in advance.
  - The expiry of the three-month period is suspended if and while the BMWi negotiates with the parties to the acquisition contractual provisions to address substantial security interests of the Federal Republic of Germany.

- Notification Requirement (certain cross-sectoral review proceedings)

- The BMWi must be notified on certain foreign investments in sectors deemed particularly relevant under German public order or security aspects. Upon notification, the further proceedings correspond with the steps described below for “Review ex officio”.

- Review ex officio (all cross-sectoral review proceedings)
  - The BMWi may formally review a transaction only if it notifies the acquirer within three months of obtaining actual knowledge of the signing of the acquisition agreement (negligent lack of knowledge is not sufficient). However, a review may not be conducted if more than five years have passed since the signing of the relevant acquisition agreement. Unless BMWi notifies the purchaser and the involved German target company within this three-month period, the transaction is deemed cleared upon expiry of the three-months period, and the BMWi is precluded from prohibiting the transaction or imposing restrictions under the foreign direct investment review scheme.
  - If the BMWi opens an in-depth review within three months of obtaining knowledge, it may require any entity directly or indirectly participating in the transaction to submit further documentation. The BMWi has a further four months from receipt of the complete documents to complete its in-depth review. Unless the BMWi prohibits the transaction or imposes any restrictions, the transaction is deemed cleared upon expiry of the four-month period. However, the BMWi may explicitly clear the transaction in advance.
  - The expiry of the four-month period is suspended while the BMWi negotiates with the parties to the transaction contractual clauses to ensure public order or security.

- Certificate of Non-Objection (all cross-sectoral review proceedings)
  - There are no particular timing constraints or deadlines for the application for a certificate of non-objection. The application is typically filed shortly after signing the acquisition agreement, but can also be filed in advance once the acquisition scope and structure is sufficiently clear.
  - The BMWi may open an in-depth review, and notify the purchaser thereof, within two months of receipt of the application. Unless the BMWi prohibits the transaction, imposes any restrictions or notifies the purchaser of an in-depth review, the transaction is deemed cleared upon expiry of the two-month period. However, the BMWi may explicitly certify its non-objection in advance. In straightforward cases, the purchaser often gets such non-objection certificate within few weeks.
  - If the BMWi opens a formal procedure within two months of receipt of the application, the same timetable as in case of an in-depth review ex officio applies (cf. above).

12. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The applicable test is slightly different for cross-sectoral and sector-specific foreign direct investment screening. Due to the rather vague, broad scope of the respective requirements, the BMWi generally has considerable discretion in its review, however only public order or security aspects are relevant.

Under both investment screening schemes, the application for clearance, notification or application for a non-objection certificate must include a description of the acquisition, the (direct and indirect) acquirer and the German company to be acquired as well as the basic features of the fields of business of the acquirer and the target.

- cross-sectoral review procedures
  - The BMWi reviews whether the investment endangers the public order or security of Germany. The endangerment has to be actual and sufficiently important and affect fundamental public interests. General economic or political goals do not justify a restriction or prohibition of a transaction.
  - While the investment review is not limited to particular sectors, acquisitions in specific sectors listed in the AWV are deemed to be of particular relevance for public order and security, e.g. critical infrastructure.
  - The term 'public order or security' refers to Articles 36, 52 (1) and 65 (1) of the TFEU and has to be understood in accordance with EU law. The ECJ takes a rather restrictive approach on these terms (e.g. abstract concerns on investments in strategic sectors do not qualify as reasons for endangerment of public order or security) and considers an acquisition to endanger public order or security if and to the extent it affects fundamental interests of society.

- sector-specific review procedures
  - The BMWi reviews whether the acquisition endangers fundamental security interests of the Federal Republic of Germany. This does not only include imminent dangers to the internal/external safety (e.g. threat of armed conflicts), but also further security interests such as e.g. vital security considerations or military precautionary measures (e.g. security of supply).

13. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: Foreign direct investment screening proceedings do not trigger any filing fees or other fees payable to the competent authorities.

14. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: The BMWi – in case of cross-sectoral reviews only upon the federal government's (i.e. the federal cabinet's) consent – may (i) prohibit an acquisition or (ii) impose conditions or restrictions in order to ensure the public order or security (cross-sectoral review) respectively essential security interests (sector-specific review) of Germany. Such prohibitions or conditions/restrictions may be imposed within the timetables described, i.e. in case of cross-sectoral reviews also post-closing.

- In case an approval is needed (sector-specific review) the completion of the acquisition of a German business or a shareholding in a German company is invalid unless it is cleared (with retroactive effect). Thus, (deemed) clearance by the BMWi qualifies as statutory closing condition. If no approval (clearance) is required (cross-sectoral re-view), the effectiveness of a purchase agreement is subject to the condition subsequent that the BMWi prohibits the transaction within the applicable time frames. In case of such a prohibition the purchase agreement becomes invalid. In order to avoid complex unwinding of a completed acquisition, parties more and more commonly include (deemed) non-objection certification as closing condition in the respective purchase agreements.

- Possible instructions may *inter alia* include restrictions related to the shareholding, e.g. restrictions on potential further increase of the participation, minimum holding periods, limits on the investor's influence, or approval requirements for potential de-investment, and/or restrictions or commitments related to the business, e.g. commitments to keep certain production or activities in Germany or in the EU/EFTA or commitments on certain security safeguards.

Further, the BMWi may – instead of unilaterally imposing instructions or prohibiting the acquisition – enter into negotiations with the (direct or indirect) purchaser (or other parties to the transaction) to address public order or security-related concerns in a (security) agreement. These negotiations suspend the review deadlines.

The BMWi has not formally blocked any transaction under the foreign direct investment screening schemes until December 2017 (and to our knowledge also not until today). On 1 August 2018, the German government passed a resolution to prohibit the acquisition of Leifeld Metal Spinning AG envisaged by a Chinese investor. The investor ultimately cancelled its application for clearance and withdrew from the acquisition and, in this way, prevented the government from issuing a prohibition order.

The federal government has concluded in several cases security agreements with or requested public order or security related commitments of the (direct/indirect) purchaser (in 2016/2017: seven cases). Moreover, between 2016 and 2017, the federal government has in four cases imposed terms and conditions which, however, according to the government did not restrict the acquisition "as such", i.e. the intended acquisition of the shares or assets of the target.

15. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: As the decisions of the BMWi under the foreign direct investment screening schemes qualify as administrative acts, they may be enforced in accordance with the general rules on administrative enforcement (e.g. by penalty payments (*Zwangsgeld*)).

Further, the foreign direct investment regime provides for additional consequences, including *inter alia*:

- Non-compliance with instructions of the BMWi qualifies as administrative offence.

- To enforce a prohibition under the cross-sectoral review, the BMWi may prohibit or restrict the exercise of voting rights in the acquired company which belong to the non-EU acquirer or are attributed to him, or appoint a trustee to unwind a completed acquisition.

- In case, an approval is needed (sector-specific review) the agreement on the acquisition of a German company or a shareholding in the company is provisionally invalid unless it is (deemed) cleared by the BMWi.

16. Please indicate whether there are options available for the parties to challenge negative decisions by the authorities.

A: The (direct/indirect) purchaser as well as the seller can challenge a prohibition or restriction of an acquisition under the foreign direct investment screening schemes before the administrative courts. The target is not entitled to make a claim in court based on its own rights. A third party (e.g. a competing bidder) may generally not challenge a (deemed) clearance or (deemed) non-objection in court. The foreign direct investment regime shall primarily protect public interests rather than those of third parties.

There is no established case law on challenges of foreign direct investment decisions, presumably mainly because the BMWi has, to our knowledge, so far not formally disallowed any transaction and typically negotiated any restrictions with the parties, instead of unilaterally imposing such restrictions.

17. Please indicate to what extent the authorities in are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: Decisions of the BMWi on the clearance, non-objection to, restriction or prohibition of an acquisition under the foreign direct investment screening scheme are not published.

The BMWi generally has to keep information and documents relating to the acquisition provided by the parties to the transaction confidential and may not disclose them to any unauthorised third party. While everyone can file an application for file access under the freedom of information acts (*Informationsfreiheitsgesetze*), business or trade secrets generally remain protected.

Foreign direct investment review proceedings are not public and do not comprise public hearings or other forms of public participation. The BMWi may require any (directly/indirectly) participating entities to submit necessary documentation for its foreign direct investment review.

Under general German administrative laws decisions rejecting an application must include a reasoning. Since the BMWi has not disallowed any transaction so far, there is no established practice for the extent and depth of a reasoning with regard to foreign direct investment decisions. Certificates of non-objection generally only include the non-objection statement without stating any further reasons.

The BMWi has provided statistical overviews in response to parliamentary inquiries showing the number of foreign direct investment review procedures between 2008 and December 2017 (in total 407 of which 359 concerned the cross-sectoral review; only two ex officio review procedures).

18. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Germany passed a significant reform of its foreign direct investment screening scheme by the Ninth Ordinance amending the AWV of 18 July 2017. The reform included *inter alia* the following changes:

- increased requirements (in particular notification requirement) for certain critical infrastructures (e.g. energy) and further sensitive sectors (e.g. entrustment with or operation of telecommunications surveillance measures or, since December 2018, certain activities in the media industry) deemed relevant for public order and security,
- extended review deadlines for BMWi,
- extended scope of the sector-specific review,
- additional procedural options (e.g. BMWi may require all parties to the transaction to submit additional documentation) and
- additional measures to protect security interests (e.g. option to suspend review deadlines for negotiations on agreements with the parties to the transaction to address security concerns of the federal government).

By the Twelfth Ordinance amending the AWV of 19 December 2018, there have been changes to the thresholds triggering the review, namely the lowering from 25% to 10% of the voting rights with respect to certain particularly security-relevant acquisitions, inter alia, in the defence sector and relating to the operation of critical infrastructures. This reform is the result of a political debate (also reflected in several parliamentary inquiries) which came up in the recent months on a potential lowering of the threshold, in particular in the context of acquisitions by Chinese investors (e.g. in the energy sector). The German Federal Council (*Bundesrat*), as federal legislative body consisting of members of the state governments, has adopted a (non-binding) recommendation to lower the threshold[1]. Having monitored the need for potential modifications of the foreign direct investment screeing scheme over serval months, the Federal Government has finally lowered the applicable thresholds with effect from 29 December 2018.

Although there have been no formal prohibitions on the basis of the foreign direct investment screening scheme thus far, also foreign direct investment screening by BMWi reflects the trend to increased scrutiny over foreign investment screening. There have been recently a number of cases that have been subject to comprehensive investigations by the BMWi, including negotiations on security arrangements. E.g. in October 2016, the BMWi withdrew a certificate of non-objection provided for the Aixtron acquisition, which in December 2016 was prohibited by the United States on national security grounds. In August 2018, a Chinese investor withdrew from the acquisition of Leifeld Metal Spinning AG after the German government had explained that it would prohibit the acquisition. At about the same time, an envisaged investment of a Chinese state-owned corporation into the German network operator 50Hertz has failed due to an

[1] German Federal Council, Annex to document no. 78/18, p. 2.

intervention by the federal government “for security policy reasons and for the protection of critical infrastructures in the energy sector” (such intervention not being effected, however, by means of a prohibition under the German foreign direct investment screening scheme).

Further, Germany is the co-initiator of the current EU initiative on an EU foreign direct investment screening scheme.

4. ITALY

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Foreign direct investment supervision in Italy is governed by the following laws and decrees:

- Law Decree No. 21 of 15 March 2012 (converted into Law No. 56 of 11 May 2012), as modified by Law Decree No. 148 of 16 October 2017 (converted into Law No. 172 of 4 December 2017): "**Rules on special powers** over corporate structures in the defence and national security sectors, and over activities of strategic importance in the energy, transport, communications and technology-intensive sectors";

- Prime Minister's Decree No. 108 of 6 June 2014: "Rules on the **identification of activities** of strategic importance to national defence and security";

- Presidential Decree No. 35 of 19 February 2014: "Rules on the **identification of procedures** to follow to activate special powers in the defence and national security sectors";

- President of the Republic's Decree No. 85 of 25 March 2014: "Rules on the **identification of assets** of strategic importance in the energy, transport and communications sectors";

- President of the Republic's Decree No. 86 of 25 March 2014: "Rules on the **identification of procedures** to follow to activate special powers in the energy, transport and communications sectors";

- Prime Minister's Decree of 6 August 2014: "Identification of the **organisational and procedural methods** needed to carry out the preparatory activities to exercise special powers"; and

- Prime Minister's Decree of 15 December 2014: "**Establishment of the Group** in charge of coordinating activities to exercise special powers under Art. 3 of the Prime Minister's Decree of 6 August 2014".

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;
b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime):

A: Italian foreign direct investment supervision is an *ex ante* control that covers the following situations (which the Italian government must be notified of – see the answer to question 2, point c), below).

- **IN THE DEFENCE AND NATIONAL SECURITY SECTORS**
  1. **The purchase, in any capacity, of shareholdings** in companies that carry out activities of strategic importance to defence and national security.

     Corresponding golden power – The Italian government may:
     - **impose specific conditions** in relation to the security of supply, the security of information, technological transfers and the control of exports;
     - **reject the purchase** and order the resale of the shareholdings within a year **if the buyer is not**: (a) the Italian State itself, (b) an Italian public subject/body, or (c) an entity controlled by either (a) or (b), and the buyer comes to hold, directly or indirectly (including through shareholders' agreements, subsequent purchases, a third party or linked third parties), a shareholding carrying voting rights which could compromise in the specific case the national defence and security interests.

  2. **Resolutions of shareholders' meetings** or of administrative bodies of any company that carries out activities of strategic importance to defence and national security when the resolutions concern: the merger or division of the company, the transfer of the company or of its branches or subsidiaries, the transfer abroad of the company's registered office, the change to the company's corporate purpose, the winding-up of the company, the amendment of certain clauses in the company's articles of association, or the transfer of property rights or usage rights relating to tangible or intangible assets.

     Corresponding golden power – The Italian government may **veto** the resolutions.

- **IN THE ENERGY, TRANSPORT, COMMUNICATIONS AND TECHNOLOGY-INTENSIVE SECTORS**
  1. **Any decision, act or transaction** adopted by a company holding one or more of its strategic assets (*i.e.*, assets that are of strategic relevance to the national interest) – in the energy, transport, communications or technology-intensive sectors – if the decision, act or transaction modifies the ownership, control, availability or use of those assets. This includes resolutions of the company's shareholders' meetings or administrative bodies concerning the merger or division of the company, the transfer abroad of the company's registered office, the transfer of the company, or of one of its branches if it includes these assets, and the assignment of these assets as collateral.

     Corresponding golden power – The Italian government may **veto** the decision, act or transaction.

  2. The **purchase**, in any capacity, **by a non-EU subject** of **shareholdings** in a company that holds strategic assets in the energy, transport, telecommunications or technology-intensive sectors, of such importance as to determine a permanent establishment of the buyer by means of the acquisition of the control on the society whose shareholdings are object of the acquisition.

     Corresponding golden power – The Italian government may:
     - **impose specific conditions** to ensure protection of the Italian State's interests;
     - **reject the purchase**.

As to jurisdictional thresholds, foreign direct investment rules apply to all the above situations – no specific jurisdictional threshold triggers review.

However, if the company concerned operates in the **defence and national security sectors** and **is listed on the stock exchange**, notification is required when the following shareholding thresholds are exceeded: **2%**, **3%, 5%, 15%, 20%** and **25%**.

Golden powers do not apply to **purely intra-group transactions**. Nonetheless, notification of these transactions is required – and golden powers may be exercised – if any information exists of a possible threat of serious damage to the essential interests of national defence and security, or if it is in the public interest in terms of the security and functioning of networks and plants or the continuity of supply.

Every three years, the Italian government – after consulting with the Italian parliament – issues a decree that lists the activities of strategic importance to

defence and national security. The decree currently in force is Prime Minister's Decree No. 108 of 6 June 2014, which lists the following activities: the study, research, design, development, production, integration and life-cycle support (including the logistics chain) of a series of systems, materials and equipment intended for national defence and security. For instance, the decree refers to electronic and acoustic warfare systems, ballistic protection systems and explosive device detection systems.

The same applies to strategic assets in the **energy, transport, communications and technology-intensive sectors**, which are currently governed by Presidential Decree No. 85 of 25 March 2014. This decree lists as strategic assets the networks and plants, including those necessary to ensure the minimum supply and functioning of essential public services, assets and relationships of strategic importance to national interest in the energy, transport, telecommunications sectors. This decree was then amended by Law Decree No. 148 of 16 October 2017, meaning that **technology-intensive sectors** are now subject to Italian foreign direct investment rules. **Technology-intensive sectors**, comprise: (a) critical or sensitive infrastructures, such as data storage, data management and financial infrastructures; (b) critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual-use applications, network security, space technologies and nuclear technologies; (c) security of critical input supply; and (d) access to, or the ability to control, sensitive information.

c) which authorities are competent to carry out such review:

A: Reviews are carried out by the Italian government. More precisely, notification must be addressed to the President of the Council of Ministers, and golden powers are exercised through decrees of the Prime minister. These decrees must be adopted based on a positive resolution of the Council of Ministers, which must then send the resolution to the competent parliamentary committees.

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: If shareholdings are acquired, the burden of notification is on the buyer. Conversely, if notification concerns a resolution of the shareholders' meeting or of the administrative bodies of a company, the burden of notification is on the company concerned.

In any case, the obligation to notify also entails a standstill obligation. Consequently, the Italian government has up to 15 days (with a possible extension of another 10 days if an information request is submitted) following notification to decide whether to exercise its golden powers. During this period the operation is suspended, the company's decisions do not become effective, and the rights linked to the acquired shareholdings are suspended until the Government adopts a decision. However, the suspension expires if the Government fails to act by the deadline.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: "Special powers" (or "Golden powers") can be exercised in the following two situations.

(i) A THREAT OF SERIOUS DAMAGE TO DEFENCE AND NATIONAL SECURITY ESSENTIAL INTERESTS:

In this case, the Italian government evaluates whether the set-up resulting from the decision or transaction – in light of the object of the act and the strategic importance of the goods or undertakings being transferred – is adequate to ensure the integrity of: (a) national defence and security; (b) military defence information security; (c) the international interests of the State; and (d) the protection of national territory, critical and strategic infrastructure, and borders.

To assess the threat of serious damage, the Italian government considers the following factors in the light of the potential influence of the acquirer on the undertaking, also in consideration of the size of the acquired shareholding:

- The adequacy (also taking into account the modalities in which the operation is financed) of the economic, financial, technical and organizational capacity of the purchaser as well as of the industrial project, with respect to the regular continuation of the activities, the maintenance of the technological asset, also with reference to key strategic activities, security and continuity of supply, as well as the correct and timely execution of contractual obligations taken in relation to public administrations, directly or indirectly, by the company whose investments are subject of acquisition, with specific regard to the relations relating to national defence, public order and national security;

- The existence, having regard also to the official positions of the European Union, of objective reasons on the basis of which it can be considered possible the existence of links between the buyer and third countries that: (a) do not recognise the principles of democracy or the rule of law; (b) do not respect rules

of international law; (c) have adopted conduct that threatens the international community (including as determined from the nature of their alliances); or (d) have relations with criminal or terrorist organisations, or with natural or legal persons in any way connected to them.

(ii) IN THE ENERGY, TRANSPORT, COMMUNICATIONS AND TECHNOLOGY-INTENSIVE SECTORS:

In this case, the Government may choose to exercise special powers if:

- The adoption of resolutions, acts and operations represents an exceptional circumstance - not governed by national or European sector legislation – that poses a threat of serious damage to the public interests of the safety and functioning of networks and facilities and to the continuity of supply;

- An acquisition by a non-EU subject poses a threat of serious damage to the State essential interests of the safety and functioning of networks and facilities and to the continuity of supply or a danger to safety or to public order.

In these cases the special powers must be exercised exclusively on the basis of objective and non-discriminatory criteria. To this end, the criteria that the Government considers, having regard to the nature of the transaction, are the following:

- The existence, having regard also to the official positions of the European Union, of objective reasons on the basis of which it can be considered possible the existence of links between the purchaser and third countries which do not recognize the principles of democracy or the rule of law, which do not respect rules of international law or that have taken risky behaviour towards the international community, taken from the nature of their alliances, or have relations with criminal or terrorist organizations or with subjects in any way connected to them;

- Whether the set-up resulting from the legal act or the transaction - also taking into account the modalities in which the operation is financed, of the economic, financial, technical and organizational capacity of the purchaser - is adequate for ensuring:
  - The security and the continuity of supply;
  - The maintenance, the security and the operation of networks and plants.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: No filing fees are required for foreign direct investment supervision in Italy.

5. Please describe to what extent authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: See the answer to question 2, points a) and b), above.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: The powers at disposal of the Government are the same both in case of non-compliance with its decisions and in case of non-notification or violation of the standstill obligation. In particular, in case of breach of foreign direct investment provisions, the following sanctions apply:

- Nullity of the resolutions, of the transactions or of other acts implemented in violation of Government decisions, in breach of the notification and standstill obligations or approved thanks to the voting rights linked with the shareholdings concerned;
- Possibility for the Government to order the company to restore at its own expenses the situation previously existing;
- In case of non-compliance with or non-implementation of a decision imposing conditions, all non-capital rights linked with the shareholdings concerned are suspended;
- In case of non-compliance with a decision rejecting the acquisition and ordering to resale the shareholding within a year, the Government may ask a national court to order the resale of the shareholding concerned, in accordance with Art. 2359-ter of the Civil Code;
- Except where the act constitutes a criminal offence, the violation of a foreign direct investment provision implies an administrative fine up to twice the transaction value and in any case not less than 1% of the cumulative turnover (in the last fiscal year) of the companies involved.

7. Please indicate whether there are options available for the parties to challenge negative decisions by authorities.

A: Parties may challenge Government decisions before national courts. Specifically, all disputes relating to the exercise of special powers over the activities of strategic importance examined above (defence, national security, energy, transport,

communications and technology-intensive) are subject to the exclusive jurisdiction of the administrative courts – more precisely, the Lazio regional administrative court ("TAR Lazio") in the first instance, which will apply the accelerated procedure, and to the Council of State on appeal.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: In general terms, Italian administrative law requires that decisions include clear reasoning. Moreover, President of the Republic's Decree No. 35 of 19 February 2014 and President of the Republic's Decree No. 86 of 25 March 2014 also require that decisions on the exercise of golden powers indicate, in detail, the threat of serious damage to the essential interests of defence and national security, or the threat of serious damage to the State's essential interests in terms of: (a) the security and functioning of networks and facilities, and (b) the continuity of supply. The decision must clearly specify any conditions the Government imposes and the administrative fines due in the event of non-compliance or non-implementation.

The Government's decisions on foreign direct investment are not published. Nonetheless, Art. 3-bis of Law Decree No. 21 of 15 March 2012 requires Prime Minister to send – by 30 June of each year – a report to the Italian parliament on activities carried out under golden powers legislation. The report must specify the cases and the public interests that motivated the exercise of these powers. This report is published on the Italian parliament's website.

Government notification is a separate obligation: neither the Prime Minister nor the buyer is required to notify the public under Art. 114 of Legislative Decree No. 58 of 24 February 1998 (*Testo Unico della Finanza*).

Information and data contained in documents produced by public administrations or private parties for the purposes of foreign direct investment supervision are not subject to the right of access.

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Italy's current foreign direct investment system is the result of a recent amendment introduced by Law Decree No. 148 of 16 October 2017. Specifically, this decree has: (a) extended notification requirements to **technology-intensive sectors**, (b) set out specific rules on the supervision of non-EU investments, and (c) established administrative fines in the event of non-notification, including as regards defence and national security.

As decisions are not public, it is not possible to have a clear and complete overview of all cases in which the Italian government imposed conditions or vetoed an operation. However, two cases in which the Government imposed conditions warrant attention (in addition to the Telecom case mentioned below):

1. The listing of the shares of ENAV S.p.a. (the company that manages civilian air traffic in Italy) on the electronic stock market, organized and managed by Borsa Italiana S.p.a. and aimed at selling a stake of minority of the stock package held by the Ministry of Economy and Finance in ENAV up to a maximum of 49%.

   In this case, the Italian Government imposed governance tools in order to protect the integrity of information and the adoption of appropriate internal measures aimed at regulating the obligation of confidentiality and protecting the access and confidentiality of sensitive data for the purposes of state security.

2. General Electric's acquisition of GE Avio S.r.l. (a company that designs and produces components and systems for aerospace propulsion – both civil and military applications): the Italian government imposed specific conditions to preserve the company's technological, industrial and research capabilities.

The Italian foreign direct investment system has been at the centre of debate in recent months due to the Telecom-Vivendi case. The case concerns the progressive purchase of Telecom's shareholdings by the French company Vivendi. Neither Vivendi nor Telecom notified this operation and the Presidency of the Council of Ministers decided to exercise its golden powers, imposing conditions on Vivendi and Telecom under Art. 1(1)(a) of Law Decree No. 21 of 15 March 2012.

Vivendi has challenged all the decisions issued by the Presidency of the Council of Ministers before the TAR Lazio, and Telecom has lodged extraordinary appeals to the President of the Republic.

An extraordinary appeal to the President of the Republic is a judicial remedy available under Italian law that is an **alternative** to the standard judicial remedy of administrative law. *Inter alia*, it can be exercised within 120 days following the notification of the contested act (whereas the appeal against an administrative act must be lodged within 60 days), it must be limited to reasons of legitimacy (it cannot regard substantive reasons) and it will be normally examined by the Council of State.

However, the President remanded the appeals to the TAR Lazio; consequently, both Vivendi's and Telecom's appeals are currently pending before the TAR Lazio.

5. THE NETHERLANDS

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: The Netherlands have a liberal policy with regard to foreign direct investment and Dutch law does not provide for a foreign direct investment screening mechanism. However, sectoral rules provide for certain limitations and/or requirements on foreign investment in publicly owned or controlled sectors, including:

- Energy
- Water
- Transport
- Nuclear
- Defence

This will be described in more detail below. Since these sectoral rules are not part of a foreign direct investment mechanism as such, some of the questions that have been addressed in the previous parts of this guide concerning other jurisdictions have been left out in this part on the Netherlands.

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

c) which authorities are competent to carry out such review;

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?;

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: Although there is no overarching regulatory framework dealing with foreign direct investment in the Netherlands, certain limitations and/or requirements on foreign investment exist in the following sectors:

- Gas and electricity
  - The Electricity Act ("*Elektriciteitswet*") and the Gas Act ("*Gaswet*") require companies with a production plant with a nominal electrical capacity of more than 250 MW to report a change of control to the Ministry of Economic Affairs (the "**Ministry**") no later than four months before the intended change of control. The Ministry has the ability to prohibit the change of control or give additional instructions, based on considerations of public security, security of services or supply. Legal acts that trigger a change of control without reporting to the Ministry are voidable.

- Mining
  - The Mining Act ("*Mijnbouwwet*") requires that state-owned company Energie Beheer Nederland ("**EBN**") must hold 40% of the shares in all mining activities. Foreign investments in mining activities are possible. However, EBN has a veto right with respect to the outsourcing of mining operations, obligations towards the supply of gas and the transportation of gas. In addition, companies that are responsible for the national electricity and gas transmission systems are entirely state-owned. Foreign ownership in a Dutch systems operator is not possible. Furthermore, the Mining Act prescribes that gas can only be stored in empty gas fields and salt caverns in the Netherlands if the company holds the required permit. The Ministry has the ability to revoke the required permit if there are justifiable grounds to believe that it is in the interest of national security and national defence.
  - The Mining Act also prohibits the exploration for and extraction of gas without a permit of the Ministry. The Mining Act does not explicitly oblige the Ministry to revoke the permit in the event of a change of control. However, a change in the technical and financial abilities of the permit holder may cause the Minister to revoke the permit. Such a situation may for example occur if a foreign investor with controlling interest wants to divest parts of the company on a large scale.

- Crude Oil Extraction

- Legislation in relation to crude oil does not provide for explicit protection against foreign investment, except in the field of extraction of crude oil. EBN holds 40% of the shares in all extraction activities. The regime of the Mining Act also applies here. For example, if a foreign investor decides to divest a large portion of the crude oil production, the Ministry may revoke the extraction permit. The Ministry may also revoke a storage permit if there are justifiable grounds to believe that it is in the interest of national security or national defence.

- Water
  - The drinking water companies in the Netherlands are government-owned. Under the Drinking Water Act (*"Drinkwaterwet"*), drinking water companies can only be controlled by legal entities under public law or companies whose shares can only be held by legal entities governed by public law. Therefore, foreign ownership of drinking water companies is not permitted.

- Transport infrastructure
  - The transport infrastructure, such as the road network, is owned by the state. The port of Rotterdam and Schiphol airport are owned by public entities. Only after privatisation, would foreign investment in these fields be possible. Privatisation is, however, not planned at this time.

- Nuclear sector
  - Most companies in the nuclear sector are fully or partially state-owned, either solely by the Dutch state or jointly with other states. For instance, the nuclear fuel company Urenco Ltd, is owned by the Dutch and British states. Urenco is also subject to the Almelo Treaty, which contains provisions with respect to the protection of sensitive information in relation to national security and non-proliferation. The Joint Committee ("*Gemengde Commissie*") of government representatives that supervises Urenco must consent unanimously to any disposal of Urenco's shares.
  - The nuclear power plant in Borssele (*"Kernenergiecentrale Borssele"*) is majority-owned (70%) by state-owned company DELTA. The Dutch government concluded an agreement with DELTA and other shareholders in relation to the ownership of and exploitation of the nuclear power plant in Borssele. Any changes in the shareholder structure of the power plant must be reported to the Ministry. The Ministry has the power to block the proposed change, based on considerations of public security, security of services or supply. Non-compliance with the prohibition to dispose of the shares is punishable by a penalty of EUR 35 million.

- Defence
  - While foreign investors cannot invest in the Netherlands Ministry of Defence, foreign investment is possible in private suppliers of defence material, such

as vehicles and ships. However, all companies having a contractual relationship with the Netherlands Ministry of Defence must meet the requirements set forth in the General Security Requirements for Defence Assignments 2017 (*"Algemene Beveiligingseisen voor Defensieopdrachten 2017"*). In particular, such companies must notify the Military Intelligence and Security Service (*"Militaire Inlichtingen- en Veiligheidsdienst"*) if they intend to transfer the ownership largely or completely to foreign persons, to nominate directors that are not Dutch citizens or to work with foreign persons. The Military Intelligence and Security Service may suspend or end the contract if it believes that there will be too much foreign influence.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: Please refer to question 2 and the limitations and/or requirements cited there.

4. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: Please refer to question 2 and the limitations and/or requirements cited there. The Ministry of Economic Affairs can block changes of control in the electricity and gas sectors or give instructions relating to such a change of control and also block changes in shareholder structures in nuclear power companies. The Ministry may also revoke certain permits in the mining and crude oil extraction sectors in specific circumstances.

5. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Similar to developments on EU level, in 2017 Dutch political stakeholders have voiced concerns regarding the risks associated with foreign direct investment and proposed legislation addressing such risks.

In February 2017, the Minister of Economic Affairs and Climate Policy introduced a legislative proposal tackling undesirable control in the telecommunications sector. The proposal aims to give the Minister of Economic Affairs the power to prohibit undesirable influence/control in telecommunications operators on grounds of national security and public order. The proposal does not only target telecommunication and internet providers, but also companies that for example manage internet hubs or host data centres. Following the public consultation of the legislative proposal, in April 2018, amendments to the draft law were submitted.

Most notably, the amendments include an obligation for a company that intends to acquire relevant control in a Dutch telecommunications operator to notify the Ministry of Economic Affairs and Climate Policy. The Council of State rendered an advice on the proposal in August 2018. The State Secretary has not yet submitted an amended legislative proposal to the Second Chamber of the Dutch Parliament.

In the summer of 2017, parliament discussed a possible legislative proposal to introduce a legal cooling off period of a year for bidders on listed companies, in order to protect these listed companies against foreign hostile takeovers. The debate on this topic was triggered by the foreign acquisition attempts of Dutch multinational companies PostNL, AkzoNobel, and Unilever. The cooling off or "stand still" period is intended to create more space and time for boards to evaluate the social impact of the takeover and the consequences for all stakeholders. The cooling off period, however, cannot be used to block a takeover, but rather will create time to properly negotiate its terms. An actual legislative proposal has not yet been introduced.

6. PORTUGAL

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: As a general rule, foreign direct investment in Portugal is not subject to additional requirements or restrictions vis-à-vis investments made by Portuguese entities.

However, Decree-Law 138/2014, of 15 September ("**Decree-Law**") does indeed set out specific restrictions on foreign direct investment, by entities from outside of the European Union and the European Economic Area ("**Foreign Investor**"), in specific sectors of the economy: main infrastructures and assets related to defence, national security, energy, transportation and communication services ("**Strategic Assets**").

The application of the restrictions set out in the Decree-Law to foreign direct investment in Strategic Assets will depend on the verification of certain criteria that are further described in our answer to question 2.

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

c) which authorities are competent to carry out such review;

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?;

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: As referred in our answer to question 1, the Decree-Law sets out some restrictions specifically applying to Foreign Investors that intend to acquire direct or indirect control ("**Control**") over Strategic Assets.

According to the framework set out in the Decree-Law, the Portuguese Council of Ministers (*Conselho de Ministros*), following a proposal of the Minister overseeing the sector to which the relevant Strategic Asset pertains ("**Sector Minister**"), may oppose the conclusion of a transaction in relation to such Strategic Asset in case it results in the direct or indirect acquisition of control of that Strategic Asset by a Foreign Investor and such circumstance poses a real and severe threat to national security or the provision of basic services considered fundamental to the country. The procedure *ex officio* for clearing the acquisition of Control by a Foreign Investment over a Strategic Asset follows the following procedure:

(i) Within 30 calendar days from the execution date of the relevant agreement - or other legal instrument, as applicable - pursuant to which the Foreign Investor will directly or indirectly acquire control over a Strategic Asset, or of the date the transaction became of public knowledge, if later, the Sector Minister may open an assessment procedure in order to determine the risk that such acquisition may pose to national security or the provision of basic services considered fundamental to the country.

(ii) When the procedure referred to in item (i) above is opened, the Foreign Investor is legally obliged to provide all information and documentation requested by the Sector Minister. The Minister in charge for foreign affairs and the Minister in charge of national and homeland security are immediately notified of the opening of the procedure;

(iii) Within 60 calendar days of the delivery, by the Foreign Investor, of the information or documentation requested by the Sector Minister, the Council of Ministers may oppose to the completion of the transaction envisaged by the Foreign Investor;

(iv) If the Council of Ministers opposes to the completion of the transaction envisaged by the Foreign Investor, the legal instruments underlying the transaction, and any subsequent acts related thereto, including transfer of ownership of the Strategic Asset, are null and void.

(v) The decision of opposition from the Council of Ministers is subject to appeal by the Foreign Investor.

In addition to the procedure *ex officio* described above, which is triggered by the Sector Minister, the Foreign Investor may, by its own initiative, request confirmation

from the Sector Minister that the envisaged transaction will not be opposed by the Council of Ministers. If the request for confirmation is not answered within 30 days, the Decree-Law assumes that tacit confirmation is given. The request for confirmation must be accompanied by a description, by the Foreign Investor, of the terms and conditions of the intended transaction involving the acquisition of Control over the Strategic Asset.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: As mentioned, foreign direct investment may be opposed by the Council of Ministers, whenever it entails the Control over Strategic Assets by a Foreign Investor in terms that poses a real and severe threat to national security or the provision of basic services considered fundamental for the country.

The real and severe nature of the threat is asserted exclusively on the following criteria:

(i) the physical security and the integrity of the relevant Strategic Asset;

(ii) the permanent availability and operability of the relevant Strategic Asset, as well as its ability to fully comply with its obligations, in particular the functions of public service that fall under the responsibility of the entities that control them, in the terms prescribed by law;

(iii) the continuity, regularity and quality of the services of public interest to be provided by the person or company who controls the relevant Strategic Asset; and

(iv) the conservation of the confidentiality, imposed by law or public contract, of the data obtained during the course of activity by those who control the relevant Strategic Asset and of the technological resources required for the management of the relevant Strategic Asset.

Moreover, the acquisition by a Foreign Investor of Control of a Strategic Asset is considered to be potentially capable of representing a threat to national and homeland security or to the provision of basic services considered to be fundamental for the country, whenever:

(i) there is serious evidence, based on objective factors, of the existence of a connection between the purchaser and third countries that (a) do not observe the principles of the rule of law, (b) represent a risk to the international

community as a result of the nature of its alliances or (c) maintain relations with criminal or terrorist organisations or with persons associated with such organisations, taking into account the official positions of the European Union in these matters, if any; or

(ii) The Purchaser:
   a) has used, in the past, a controlling shareholding held over other assets with the purpose of creating serious difficulties in the regular provision of essential public services in the country where it was located or in neighbouring countries;
   b) does not ensure neither the allocation of the assets to its main function, nor their reversion at termination of the corresponding concession agreements, if applicable, in particular considering the absence of appropriate contractual provisions for said purpose;

(iii) The relevant transaction alters the function of the relevant Strategic Asset, threatening the permanent availability and operability of the Strategic Asset to comply with its applicable obligations, in particular the functions of public service, in the terms prescribed by law.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: Not applicable.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: Please refer to our answer to question 2 on the ability of the Council of Ministers to oppose to the acquisition by a Foreign Investor of Control of a Strategic Asset. The opposition may be determined post-closing in the event completion of the transaction occurred before the decision on opposition, assuming in any case that the opposition is determined within the required timeframe, as set out in our answer to question 2.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: The Council of Ministers holds the right to assess *ex officio* if a certain transaction involving the acquisition by a Foreign Investor of Control of a Strategic Asset was subject to its opposition, and if the relevant criteria are met, oppose such a transaction. Therefore, provided that the *ex officio* procedure was started within the

period set out in our answer to question 2, then if the Council of Ministers decides to oppose to the transaction, the transaction will be null and void.

7. Please indicate whether there are options available for the parties to challenge negative decisions by the authorities.

A: Opposition by the Council of Ministers to the completion of the transaction involving the acquisition by a Foreign Investor of Control over a Strategic Asset is subject to appeal pursuant to the terms established in the Portuguese Code of Administrative Court Procedure (*Código de Processo nos Tribunais Administrativos*).

The recitals to the Decree-Law expressly state that the criteria that may lead to opposition from the Council of Ministers should be devised in clear and objective terms (see our answer to question 2 above), with a view toward allowing effective control by the administrative courts in the event of an appeal from the relevant Foreign Investor upon a decision of opposition from the Council of Ministers.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: Any decision of opposition from the Council of Ministers must be grounded on clear and objective criteria. Moreover, according to Portuguese administrative law, any decision by a body of public administration must be sufficiently reasoned, otherwise being null and void according to the Portuguese Code of Administrative Procedure. Decisions from the Council of Ministers are published on the Portuguese Republic Gazzette.

In addition to the above, we note that pursuant to Law 26/2016, of 22 August, administrative documents are generally accessible to anyone requesting access thereto, without the need to present the reasons thereof. However, if the relevant administrative documents are still of internal use only - such as internal documentation being prepared by the cabinet of the Sector Minister pursuant to the assessment of the envisaged acquisition of Control by a Foreign Investor of a Strategic Asset - the disclosure of such document may be deferred until a final decision is adopted or one year has passed since the start of the procedure.

Documents included in courts proceedings are generally available for consultation, except (i) on criminal procedures where secret has been determined; and (ii) on procedures relating to family relations.

FOREIGN DIRECT INVESTMENT

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Not applicable.

7. SPAIN

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Spain has a favourable legal framework for foreign investors. Spanish law has adapted its foreign investment rules to a system of general liberalisation, without distinguishing between European Union (EU) residents and non-EU residents. As a result, Spain is considered the ninth economy most open to foreign direct investment according to the Foreign Direct Investment Regulatory Restrictiveness Index prepared by the Organisation for Economic Co-operation and Development.

Foreign investments are mainly regulated by Royal Decree 664/1999 of 23 April on external investments (RD 664/1999), which establishes a liberalised system that is explained below. In addition, Spanish law provides for specific rules on foreign investments by non-EU persons in certain sectors: national defence-related activities, gambling, audiovisual communications, air transportation, telecoms, energy and financial activities. For EU residents, the only sectors with a specific regime are the manufacture and trade of weapons or national defence-related activities.

2. Please indicate/describe, for your jurisdiction:

a) which types of investments are caught by foreign direct investment rules;

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

c) which authorities are competent to carry out such review;

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?;

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: RD 664/1999 provides for two declaration regimes to inform the Investments Registry of the Ministry of Economy and Competitiveness: (i) an *ex ante* declaration regime for investments made from a tax haven (as defined under Spanish law), except if the investment (a) is made in listed shares or investment funds registered with the Spanish Securities Exchange Commission (CNMV), (b) involves less than 50% of the target's share capital or (c) is made by non-EU Member States acquiring property to be used as diplomatic and consular offices; and (ii) an ex post declaration regime applicable to all foreign investors, for administrative, statistical and economic purposes only. The Council of Ministers can suspend this liberalised system on an ad hoc basis if investments affect, or may affect, public powers, public order, security or public health-related activities.

As for foreign investments in specifically regulated sectors:

- Foreign investments in national defence-related activities require the authorisation from the Council of Ministers except if they are made in listed companies, below 3% of the share capital and do not provide access to the managing bodies.

- Foreign investments in gambling are subject to RD 664/1999 but a licence is required to operate gambling activities in Spain. Supervision is carried out by the General Directorate of Gambling Planning of the Ministry of Finance and Public Authorities.

- Foreign investments in audiovisual communications from a non-EEA member are subject to the reciprocity principle and cannot exceed 25% of the share capital. Total shareholdings in audiovisual communication licence holders by non-EEA members cannot exceed 50% in aggregate. These restrictions are supervised by the Ministry of Industry, Energy and Tourism.

- Foreign investments in the telecommunications sector are liberalised, although certain restrictions exist on the simultaneous holdings of telecom operators. Telecom services can be rendered by EU or non-EU companies (in this case, subject to the existence of an international treaty with the relevant country) subject to prior communication. If the use of spectrum is required, the Ministry of Industry, Energy and Tourism must grant a prior concession.

- Foreign investments in the energy sector are supervised by the Ministry of Industry, Energy and Tourism, mainly following an ex post communication regime. Investors with more than 3% of the share capital of more than one

principal operator in the same energy market cannot exercise their voting rights in excess of that threshold.

- Investments in specific financial entities (credit entities, insurance and reinsurance companies and investment services entities) higher than 10% of the voting rights (or less but allowing to exercise a significant influence within the entity) must follow an authorisation or non-opposition process before the European Central Bank (through the Bank of Spain), the General Directorate of Insurance and Pension Funds or the CNMV, respectively.

The authorisation period ranges from 30 days to six months, depending on the affected sector. In general, these periods may be suspended by the relevant competent body (by means of information requests) and therefore extended. As a general rule, if a resolution denying the acquisition is not issued after the expiration of the period, the authorisation can be presumed.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The substantive test carried out by Spanish authorities for assessing foreign direct investments depend on the sector in which the investment is intended to be made.

- The substantive test applicable to foreign investments in national defence-related activities is not specifically regulated, although it is naturally linked to national public security concerns.

- Licences required to operate gambling activities can only be granted provided the licensee proves its technical, economic and financial solvency as well as the absence of specific legal, judicial or administrative sanctions or convictions.

- Foreign investments in audiovisual communications are solely restricted by the reciprocity principle and quantitative limits, thus the test is limited to verifying that the non-EEA country where the investor resides has a reciprocal approach towards foreign investments from Spain and the individual and aggregate foreign investment in the relevant company is below legal thresholds.

- Foreign investments in the telecommunications sector made by non-EU residents are subject to the existence of an international treaty with the relevant country. As for the concession needed to use spectrum, it can only be granted to electronic operators who are not subject to any prohibition to contract with the Spanish public sectors, which include having been convicted for serious or very

serious crimes, being insolvent or not having fulfilled tax payments or social security contributions.

- Supervision of foreign investments in the energy sector is made *ex post.* Conditions may be imposed if there is a threat to the guarantee of energy supply or the acquisition is made by an energy sector company or a non-EEA resident company.

- The substantive test for assessing foreign investments in the financial sector mainly consists in evaluating the investor's financial strength and suitability with the aim to ensure a sound and prudent management of the financial entity.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: No relevant filing fees must be paid in order to submit the declarations required by RD 664/1999 or to request any authorisation described above. However, Spanish authorities may charge a fee for the opening of an administrative file.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: See answer to question 2 for information on conditions or restrictions that competent authorities can impose to foreign investments in different sectors. Except in the case of the energy sector, authorisations generally operate as a condition precedent, and the transaction cannot be closed until the authorisation is obtained and, if any, imposed conditions are met.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: RD 664/1999 does not set out any consequences if declaration regimes provided therein are not submitted. Nevertheless, Spanish administrative authorities are entitled to impose sanctions upon breach of legal obligations or administrative resolutions relating to the matters under their supervision. Spanish law typically classifies infringements in very serious, serious and minor infringements and sets out sanctions associated to each such category. Sanctions may consist of fines, public admonitions, revocation or suspension of previously granted licences or a prohibition to render the relevant services during a limited period of time.

7. Please indicate whether there are options available for the parties to challenge negative decisions by the authorities.

A: Any public resolution granted by Spanish administrative authorities is subject to administrative or judicial challenge, or both. However, resolutions granted by specific bodies with no superior in the relevant matter such as members of the government, ministers or general directors can only be challenged before the resolving body at the administrative level or, alternatively, through a judicial process.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: As a general rule, resolutions adopted by public authorities must be reasoned and so notified to interested parties. During the review process, the public bodies are obliged to keep the information confidential, but the dissemination of information between different departments has an inherent risk of leakage. With the exception of competition files, authorisation processes are handled only with the interested parties (the acquirer, the seller or both). Once the authorisation is granted, all or part of the information can be accessed by third parties in the internal registries that most regulatory bodies maintain.

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Following the recent completion of some significant transactions in Spain, it appears that Spanish competent authorities will now require that indirect transfers in sectors operating under a public concession follow an authorization or non-opposition process. Apart from that, there are no relevant recent or upcoming developments with regard to foreign direct investment supervision at the national level.

8. UNITED KINGDOM

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: The UK does not currently have a specific foreign investment regime and most investments into the UK will be assessed solely under the UK's merger control and public takeover regimes. However, the UK Government has the power under the Enterprise Act 2002 ("**EA02**") to formally intervene in a proposed transaction on public interest grounds, which include cases involving national or public security, the media or prudential controls within the financial system. Please see Annex 1 for details of public interest decisions under the EA02. The relevant UK secretary of state, as competent decision-maker, also has a wider power to intervene in any other case deemed to be of public interest by issuing an order to this effect.

As discussed below, in July 2018, the UK government published detailed proposals to introduce a new foreign investment regime with powers to scrutinise transactions raising national security concerns. The new proposed regime would be independent from the UK's merger control and public takeover regimes. The government has published a Green Paper and a White Paper and consulted on the proposals. The next step is the introduction of primary legislation.

In addition, the UK government holds golden shares in a number of UK defence companies which may be used to prevent a foreign investor from acquiring a certain percentage shareholding in a company or to veto arrangements resulting in certain levels of influence or control.

For completeness we also note that, formally, the Industry Act 1975 allows the UK secretary of state to prevent control of an "important manufacturing undertaking" passing to a non-UK resident where this would be contrary to the UK's national interests. However, this power has never been exercised and would require approval by both houses of the UK Parliament to enact.

There are also a number of industry specific licensing and regulatory regimes in the UK which may require, among other things, the consent of a UK sector regulator before a foreign investment by way of acquisition can be made.

2. Please indicate/describe, for your jurisdiction:

a) which types of investments are caught by foreign direct investment rules;

A: Foreign investor or foreign investment is not defined in the EA02 and there is currently no distinction between foreign and domestic investors in UK legislation.

Under the EA02 public interest intervention regime, the UK government has the power to intervene on public interest grounds in:

(i) public interest mergers, in essence these are transactions where the jurisdictional tests of the UK merger control regime are met and where one or more "public interest considerations" (defined below) are relevant and need to be considered in relation to the transaction (see sections 42(1) and (2) of the EA02). For transactions in which the target is a "Relevant Enterprise", defined as an entity active in the development or production of items for military or military and civilian use, quantum technology and computing hardware, the UK government recently introduced different lower jurisdictional thresholds (see sections 23A EA02). The thresholds are: for the "turnover test" the Relevant Enterprise's annual UK turnover is more than £1m and for the "share of supply test" the share of supply of purchase of the Relevant Enterprise that is being merged or acquired is at least 25% in a substantial part of the United Kingdom (whether or not this is increased by the merger). The purpose of the lower thresholds is to enable government intervention on public interest national security grounds in transactions concerning Relevant Enterprises (NB: the Relevant Enterprise thresholds do also apply in respect of the CMA's jurisdiction to review a transaction from a competition law perspective). The CMA has published guidance on the circumstances in which parties should notify the CMA for a competition assessment in relation to transactions involving Relevant Enterprises. The Department for Business, Energy & Industrial Strategy (BEIS) has also published draft guidance explaining why the lower thresholds have been introduced, setting out their legal and practical effect and advising businesses on what they should do following the changes; and

(ii) special public interest mergers, these are transactions where: the jurisdictional tests of the UK merger control regime are not met but which would otherwise be considered to be within the scope of the UK merger control regime;[2] where one or more "public interest considerations" is relevant to a consideration of the

[2] That is, the transaction is one where "two or more enterprises have ceased to be distinct" or where "arrangements are in progress or in contemplation" which, if carried into effect, will lead to the enterprises ceasing to be distinct (see sections 23 and 33 of the EA02).

transaction; and where at least one of the businesses concerned meets the conditions set out in section 59(3B-3D) of the EA02 (set out in further detail below).

For completeness, we note that the UK Government also has the power to intervene in transactions that meet the jurisdictional thresholds of the EU Merger Regulation ("**EUMR**") to protect a legitimate interest of the UK under article 21(4) EUMR so long as the conditions for public interest mergers (set out above) are also met (see sections 67(1) and (2) of the EA02 and article 21(4) of the EUMR). The UK Government also has the power, under Article 346 of the Treaty on the Functioning of the European Union, to instruct a company not to supply information to the Commission under the EUMR where it considers that disclosure of such information is contrary to the essential interests of the UK's security and to take measures it considers necessary for the protection of the essential interests of the UK's security that are concerned with the production of or trade in arms, munitions or war material.

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A: The conditions for public interest and special public interest mergers are described in more detail below:

Public interest mergers

The secretary of state must have reasonable grounds for suspecting that it is or may be the case that:

(i) the UK merger control regime is applicable;

(ii) the relevant UK merger control jurisdictional thresholds are met, or if the target is a Relevant Enterprise the jurisdiction thresholds for Relevant Enterprises are met; and

(iii) one or more "public interest considerations" are relevant. The current identified public interest considerations are set out in section 58(2) of the EA02 and include defence, accurate news and free expression, media plurality, broadcasting, media standards and prudential regulation in the interest of maintaining the stability of the UK financial system.

Special public interest mergers

The secretary of state must have reasonable grounds for suspecting that it is or may be the case that:

(i) while the jurisdictional tests of the UK merger control regime are not met, the structure of the transaction is of the type to which the UK merger control rules would otherwise apply (see footnote 2 above) (section 59(1) EA02);

(ii) one or more public interest considerations are relevant (see above); and

(iii) either:

a) immediately prior to implementation, at least one of the enterprises concerned was carried on in the UK or was under the control of a body corporate incorporated in the UK and a person carrying on one or more of the enterprises concerned was a relevant government contractor, meaning that the person had been notified by the secretary of state that they or their employees,held information relating to defence and of a confidential nature (section 59(3B) EA02); or

b) the person or persons by whom one of the enterprises was carried on supplied at least 25% of all newspapers of any description, or all broadcasting of any description in the UK or a substantial part of it (sections 59(3C) and (3D) EA02).

c) which authorities are competent to carry out such review;

A: The Secretary of State for Business, Energy and Industrial Strategy is the competent decision-maker for all cases excluding media mergers. The latter are reviewed by the Secretary of State for Digital, Culture, Media and Sport. The UK Competition and Markets Authority ("**CMA**") are responsible for conducting the relevant Phase I and Phase II investigations for public interest cases and will report to the relevant secretary of state. Where relevant, specific sectoral regulators may also be involved in the process.

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?;

A: There is no separate formal notification for UK public interest mergers outside the UK and EU merger control notification processes. As the UK operates a voluntary merger control regime there is no legal requirement to obtain prior approval before closing. In the event that the relevant secretary of state has reasonable grounds to suspect that the respective public interest tests (set out above) are satisfied, they may issue a public interest intervention notice or a special intervention notice. Once the secretary of state has intervened, the CMA (in conjunction with sectoral regulators as appropriate) is obliged to report to the secretary of state setting out its views on the competition law issues and the public interest considerations raised by the case.

While the secretary of state will be bound by the CMA's findings on competition issues, the secretary of state has the power to refer a transaction to the CMA for formal (Phase II) investigation based on public interest considerations, notwithstanding the CMA's initial views on those considerations. Following a reference, the CMA must investigate and submit a report to the secretary of state within the normal Phase II UK merger control timetable considering whether the transaction operates, or may be expected to operate, against the public interest, taking account of any substantial lessening of competition and the public interest considerations identified and on whether any remedies would be appropriate.

Following the CMA report the secretary of state will then decide whether or not to make an adverse public interest finding and what, if any, remedies are appropriate. As with the initial report, the secretary is bound by the CMA's findings on competition law issues but not in relation to public interest considerations. As such, the secretary of state has the power to prohibit a transaction based solely on public interest considerations regardless of the CMA's findings on the matter, albeit any such decision will be reviewable by the UK courts.

e) who must make the notification (buyer, seller, both);

A: As noted above, there is no separate notification process for public interest mergers. The UK merger regime does not dictate who should secure merger approval, although the acquiring party generally makes the notification in practice.

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: The usual UK merger control timetable applies to public interest cases. However, the involvement of the secretary of state may, in practice, extend the review process significantly, since the secretary of state must first consider the CMA's position before he or she can issue a final decision.

Conversely, the secretary of state has the power to expedite a Phase I merger review and proceed to a Phase II referral immediately, provided that the transacting parties agree and it is likely that a Phase II referral will be made. As a consequence of following this fast-track procedure, the parties are required to waive certain procedural rights under the Phase I process.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: As noted above, public or special public interest mergers must raise public interest considerations (see response 2(b)). The substantive test will depend on the public interest consideration that has prompted the intervention. Specifically:

(i) Public interest mergers. The transaction will be referred to a formal Phase II investigation where the secretary of state believes that the transaction falls within the UK merger regime and that it operates or may be expected to operate against the public interest (sections 45(2)-(5) of the EA02). Once the Phase II investigation has concluded, the secretary of state will apply the same test in reaching a final decision.

(ii) Special public interest mergers. The transaction will be referred to a formal Phase II investigation where the secretary of state believes that the relevant criteria (set out at response 2(b) above) are, or may be, met and that the transaction operates, or may be expected to operate, against the public interest, taking into account the relevant public interest considerations (sections 62(2) and (3) EA02). Again, once the Phase II investigation has concluded, the secretary of state will apply the same test in reaching a final decision.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: The standard CMA merger notification fees apply to public interest and special public interest merger cases. The fees increase on a scale depending on the value of the UK turnover of the acquired enterprise(s). For completed mergers the relevant turnover is from the year preceding the date of completion. For anticipated mergers it is either the year preceding the date of the CMA's decision on reference or an earlier business year if the CMA or Secretary of state considers it appropriate. The following fees apply:

£40,000	Value of the UK turnover of the enterprises being acquired is £20 million or less
£80,000	Value of the UK turnover of the enterprises being acquired is over £20 million but not over £70 million
£120,000	Value of the UK turnover of the enterprises being acquired exceeds £70 million, but does not exceed £120 million
£160,000	Value of the UK turnover of the enterprises being acquired exceeds £120 million

A fee is not payable if the acquirer meets the criteria to be a small or medium sized enterprise, which is defined by reference to provisions of the Companies Act 2006.

The acquirer must meet the criteria by reference to its financial year before the time the fee would become payable.

5. Please describe to what extent authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: The relevant secretary of state can prohibit a UK public interest or special public interest merger if, following the Phase II CMA report, an adverse public interest finding is made and such action is considered reasonable and practicable to remedy, mitigate or prevent any of the adverse public interest effects that have resulted from, or may be expected to result from, the transaction (sections 55(2) and 66(6) and Schedule 8 of the EA02 and section 12(7) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order). This power can be exercised post-closing if the relevant test above is met.

The secretary of state and the CMA may also impose separate obligations on the parties to prevent integration or impose obligations to undo any integration which has already occurred. The secretary of state may refer a UK public interest or special public interest merger to a Phase II investigation up to four months after the transaction completes or the material facts become public knowledge, whichever is the later, or accept undertakings in lieu of a reference.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: As explained at responses 2(d) and 5 above, transactions under national review do not need to receive clearance before the transaction can close, although obligations to prevent or unwind integration may be imposed on the parties.

7. Please indicate whether there are options available for the parties to challenge negative decisions by authorities.

A: Merger control decisions taken by the CMA and the relevant secretary of state can be challenged in the Competition Appeal Tribunal ("**CAT**"). The relevant secretary of state's decision may also be subject to judicial review by the High Court. CAT and UK High Court decisions may be appealed on a point of law before the Court of Appeal of England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland, subject to judicial permission. In certain circumstances, the UK Supreme Court may hear the case.

When reviewing merger decisions by the CMA and the relevant secretary of state, the CAT (and the UK High Court) is required to apply UK judicial review principles

(see section 120(4) EA02). In principle, judicial review is not concerned with the merits of the decision being challenged and the grounds of appeal are instead limited to errors of law and procedure. This means that the CAT (or UK High Court) can only review a merger decision (or lack thereof) for unreasonableness, unfair treatment of the parties or if the decision maker has misdirected itself.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: Merger decisions by the CMA and secretary of state are published on the CMA website and are required by the EA02 to state reasons. As a matter of UK law, these reasons must be intelligible and adequate and must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. The CMA has stated its commitment to transparency while maintaining appropriate confidentiality. Its approach is set out in its statement on Transparency and Disclosure. Parties involved are given the opportunity to request the excision of confidential information from decisions before they are published.

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: On 17 October 2017, the UK government published a Green Paper setting out proposals to increase the UK Government's powers to scrutinise transactions that raise national security concerns. The Green Paper set out proposals for "short term" and "long term" reforms. The "short term" reforms consisted of the lower jurisdictional thresholds for Relevant Enterprises which, as set out above, have already been enacted into UK law. On 24 July 2018, the UK government published a White Paper, setting out detailed proposals in relation to the "long term" reforms. The government held a consultation on the proposals from 24 July 2018 to 16 October 2018. The government will use the responses to the White Paper to refine the proposals ahead of the introduction of primary legislation.

<u>The "long term" proposals</u>

The key features of the longer term proposals set out in the White Paper are:

- <u>the proposals are directed at investments from potentially hostile foreign states</u>. The proposals note that some transactions could give rise to an increased risk of espionage, the disruption of critical national infrastructure and / or inappropriate leverage in geopolitical or commercial negotiations. The proposals suggest that these risks may arise in certain sectors in particular – national

infrastructure, advanced technologies and services that are critical to the government and emergency services. The proposals indicate that foreign acquirers are more likely to pose a national security risk than UK-based or British acquirers. Reflecting the gravity of the harm the proposals aim to prevent, breaches of the rules would give rise to criminal as well as civil sanctions;

- a much wider range of transactions are caught by the proposals than under most merger control regimes. For example, loans (e.g. where they are granted by potentially hostile lenders and / or on the basis of collateral over sensitive entities or assets), acquisitions of land (e.g. where that land is in close proximity to critical national infrastructure or government facilities) and acquisitions of intellectual property (e.g. where that IP is necessary for the supply of crucial services to national infrastructure) could all be reviewed under the proposed regime;

- reflecting the wide reach of the proposals, the Government expects 200 national security notifications to be made each year. The government considers that around 100 of these may be subject to a full assessment, with around 50 of these 100 requiring remedies. By comparison, in 2017 and 2018, there were only five public interest reviews under existing powers, of which only two were on grounds of national security;

- notification under the proposed regime would be voluntary. The government would have powers to 'call in' transactions for review (potentially up to six months after the relevant trigger event has occurred) and parties could voluntarily notify their transactions;

- a review under the proposed regime may be lengthy. Following voluntary notification, the government could take up to 30 working days to decide whether to undertake a full national security assessment, with any subsequent full assessment then taking a further 30 working days (extendable by 45 working days and subject to powers to "stop-the-clock" if information requests are outstanding);

- the proposed national security regime would be standalone and would take priority over applicable merger control regimes. In particular, the government would have the power to clear an anti-competitive transaction where it has national security grounds for allowing the transaction to proceed. However, such powers would effectively apply only where the CMA was the sole relevant merger control authority – the government would be unable to over-ride the decision of other competition authorities (including the European Commission); and

- except for transactions giving rise to national security concerns, the pre-existing public interest regime would continue. When these proposals come into force, the national security provisions currently in force in the EA02 (including those introduced by the government as recently as June 2018) would fall away, with the pre-existing public interest regime continuing in place, currently only for transactions giving rise to media plurality and / or financial stability issues.

Annex 1 - Public interest decisions under the EA02

Case	Date	Sector	Basis of intervention	Result
Northern Aerospace / Gardner Aerospace	2018	Defence	Section 42 EA02 Notice, national security	public interest intervention notice issued on 17 June 2018, decision pending
Trinity Mirror / Northern & Shell assets	2018	Media	Section 42 EA02 Notice, media plurality and free expression of opinion	Cleared unconditionally
Hytera / Sepura	2017	Communications	Section 42 EA02 Notice, national security	Undertakings in lieu accepted
NewsCorp / BSkyB	2010	Telecommunications	European Intervention Notice, media plurality	Undertakings in lieu accepted
Atlas Elektronik GmBH UK / Qinetiq's UWs Winfrith Division	2009	Defence	Special Intervention Notice, national security	Undertakings in lieu accepted
Lloyds TSB plc/HBOS plc	2008	Banking services	Section 42 EA02 Notice, stability of the UK financial system	Secretary of State announced that he was not referring to the Competition Commission
British Sky Broadcasting Group plc/ITV plc	2007	Broadcasting	Section 42 EA02 Notice, media plurality	Divestments and undertakings required
General Electric Company/Smiths Aerospace	2007	Defence	European Intervention Notice, national security	Undertakings in lieu accepted
Finmeccanica/BAE	2005	Defence	European Intervention Notice, national security	Undertakings in lieu accepted

Insys Group/Lockheed Martin UK Holding Limited	**2005**	**Defence**	**Special public interest intervention, national security**	**Undertakings in lieu accepted**
Finmeccanica SpA/AgustaWestland NV	**2004**	**Defence**	**European Intervention Notice, national security**	**Undertakings in lieu accepted**
General Dynamics/Alvis	**2004**	**Defence**	**European Intervention Notice, national security**	**Undertakings in lieu accepted**

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