A BDO Legal Guide to

Foreign Direct Investment screening mechanisms in Europe

BDO

On 11 October 2020, the European Union Regulation establishing a framework for the screening of Foreign Direct Investments into the European Union (EU) became applicable.

The first thing to note is that Regulation 2019/452 does not obligate Member States to apply a Foreign Direct Investment (FDI) control mechanism, rather it establishes a European framework of recommendations and requirements to be followed by those countries that do apply this type of mechanism, as well as standard Cooperation Mechanisms between the European Commission and the Member States.

In other words, the Regulation does not establish a mandatory European system for controlling FDIs.

Therefore, the final decision lies with individual Member States in terms of approving, modifying, or prohibiting Foreign Direct Investments.

To date, the countries with investment screening mechanisms are the following:

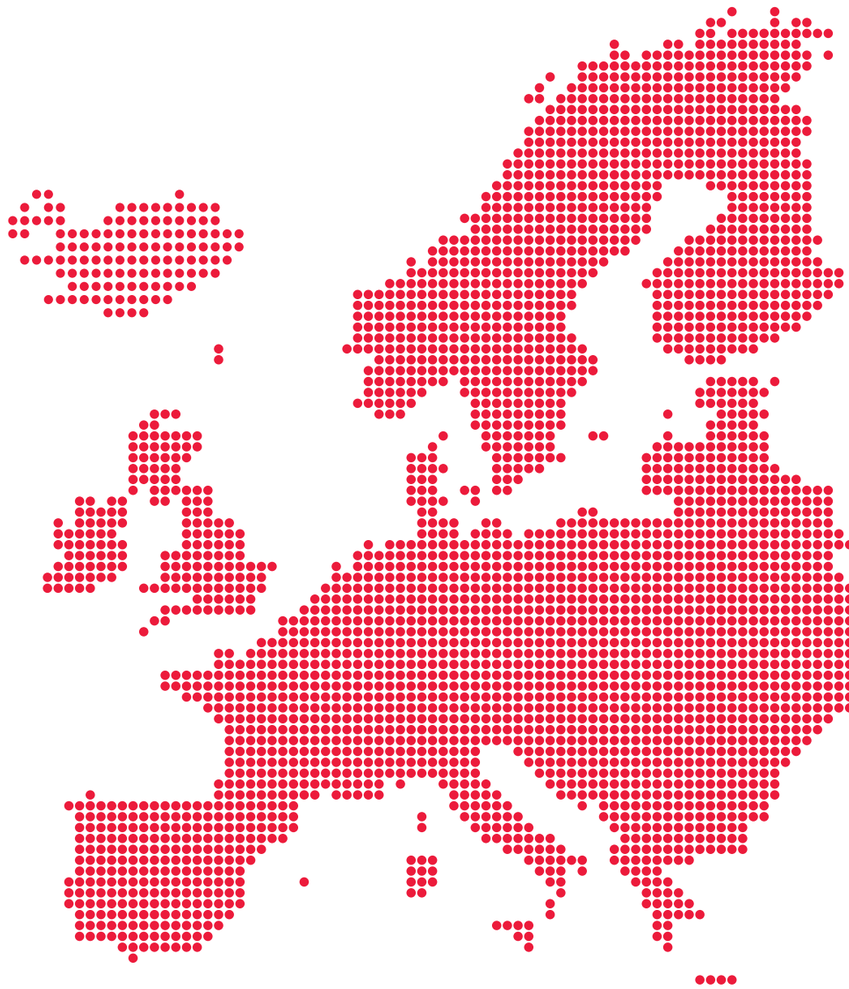
- Austria
- Czech Republic
- Denmark
- Finland
- France
- Germany
- Hungary
- Italy
- Latvia
- Lithuania
- Malta
- The Netherlands
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain

FOREIGN DIRECT INVESTMENT: DEFINITION AND REGULATORY OVERVIEW

That being said, what does Foreign Direct Investment actually mean?

This is an investment of any kind by a foreign investor aiming to establish or maintain lasting and direct links with a local business or businessperson to whom capital is made available for the purpose of carrying out an economic activity in a Member State.

This includes investments that enable effective participation in the management or control of a company carrying out an economic activity.



When determining whether an FDI could affect security or public order, Member States and the Commission may take into account its potential effects.

NOW WE KNOW WHAT AN FDI IS, WE NEED TO UNDERSTAND WHICH OF THESE ARE A THREAT TO A COUNTRY'S SECURITY OR PUBLIC ORDER.

As with other regulations, such as, for instance, the National Security and Investment Act (NSIA), **the Regulation purposely refers to such concepts in general terms only**. However, when determining whether an FDI could affect security or public order, Member States and the Commission may take into account its potential effects on:

- Critical infrastructure;
- Critical technologies and dual use items;
- Supply of critical inputs;
- Access to sensitive information or the ability to control such information; and
- The freedom and pluralism of the media.

In addition, **when considering whether an FDI is likely to affect security or public order, Member States and the Commission may also take into account**, in particular:

- **Whether the foreign investor is directly or indirectly controlled by the government,** including state bodies or armed forces, of a third country.
- **Whether the foreign investor has already been involved in activities affecting security or public order in another Member State.**
- **Whether there is a serious risk that the foreign investor engages in illegal or criminal activities.**

As mentioned above, **the EU Regulation includes a series of guidelines to be implemented by the Countries with FDI control mechanisms**. These are as follows:

- Control mechanisms shall be governed by transparent and non-discriminatory rules between third countries and shall detail the circumstances that give way to such controls, the reason for these and any applicable rules.
- Member States will apply deadlines in their mechanisms and thus, when said period expires, the Countries must issue an express resolution.
- Confidential information will be protected.
- Foreign investors and interested companies will have the opportunity to appeal against national authorities' decisions on control.
- Member States shall make every effort to avoid the circumvention of control mechanisms and control decisions.

In addition to the above requirements, **the Regulation also includes a series of Cooperation Mechanisms between the European Commission and Member States that require the submission of annual reports, which should include a list of Foreign Direct Investments examined and notification to the Commission and other Member States of any Foreign Direct Investment in their territory that is undergoing screening.** As a result of the mentioned notification, two outcomes are foreseen:

- It is possible that other Member States, if they consider that an FDI undergoing screening in another Member State is likely to affect its own security or public order, may provide comments to the Member State undertaking the screening and to the Commission.
- Irrespective of whether other Member States have provided comments, if the Commission considers that an FDI undergoing screening is likely to affect security or public order in more than one Member State, it may issue an opinion addressed to the Member State undertaking the screening.

Cooperation Mechanisms are also foreseen for an FDI that is not subject to screening and for an FDI that could affect projects or programmes of consequence for the EU. In the latter, when the Commission issues an opinion, the Member State where the FDI is planned or has been completed shall take the Commission's opinion very seriously and provide an explanation to the Commission if this opinion is not followed. However, it should be noted again that the Commission lacks the power to bind FDIs in this regard, so the measures indicated in the opinions must be applied in accordance with Member States' national legislation.

Lastly, it should be noted that on 23 November 2021 the Commission published its First Annual Report on the screening of Foreign Direct Investments into the EU. According to this report, Member States confirm the clear added value of the Regulation and associated Cooperation Mechanisms and, of all Foreign Direct Investments that underwent formal screening, 79% of them were authorised without conditions, with 25 (2%) being prohibited; 7% aborted and 12% authorised with conditions.

Besides the EU, other European countries will be impacted by Foreign Direct Investment screening mechanisms. The EFTA states (Island, Norway, Liechtenstein, and Switzerland) will also need to consider the implementation of such measures.

This BDO Legal Guide aims to provide an overview of country-specific situations, conditions, and consequences of Foreign Direct Investments in a selection of principal European countries.

Member States confirm the clear added value of the Regulation and associated Cooperation Mechanisms.

Belgium

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN BELGIUM?

On 19 March 2019, the European Union adopted Regulation (EU) 2019/452 establishing a framework for the screening of FDIs in the EU. Following this, **Belgium decided to follow in the footsteps of its neighbours by setting up a cooperation agreement on 30 November 2022, providing for an FDI screening mechanism which came into force on 1 July 2023.**

To this end, an Interfederal Screening Commission, made up of representatives of the federal state and federated entities, controls investment projects envisaged by foreign investors in a Belgian company, but only in certain cases.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN BELGIUM?

A foreign investor is defined as:

- **Any individual whose main residence is outside the EU;**
- **Any third-country company, incorporated or organised under the law of a non-EU country, whose registered office or principal place of business is in a country outside the EU; or**
- **Any company with a beneficial owner whose main residence is outside the EU.**

An FDI consists of an investment of any kind made by a foreign investor with the aim of establishing or maintaining direct and lasting relations between the foreign investor and the entrepreneur or company, including investments allowing effective participation in the management or control of that company.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN BELGIUM?

The FDI mechanism applies only to the following acquisitions:

- **Direct or indirect acquisitions of at least 10% of the voting rights in companies established in Belgium operating in the defence, energy, cybersecurity, electronic communications or digital infrastructure sectors, and whose annual turnover in the year preceding the acquisition exceeded 100 million EUR; and**
- **Direct or indirect acquisitions of at least 25% of the voting rights in companies or entities established in Belgium and whose activities relate to, in particular, critical infrastructures for energy, transport, water, health, the private security sector, access to sensitive information, etc.**

4 WHAT ARE THE CONSEQUENCES IN BELGIUM IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

The procedure is compulsory and suspensive, so that the transaction can only be completed once the Interfederal Screening Commission has given its approval. The transaction documentation should include a condition precedent in case of deferred signing and closing, and a series of other clauses concerning, for example, information sharing.

Foreign investors who fail to comply with their obligation may be subject to an administrative fine of up to 10%, and sometimes 30%, of the investment amount.

Belgium decided to follow in the footsteps of its neighbours by setting up a cooperation agreement.

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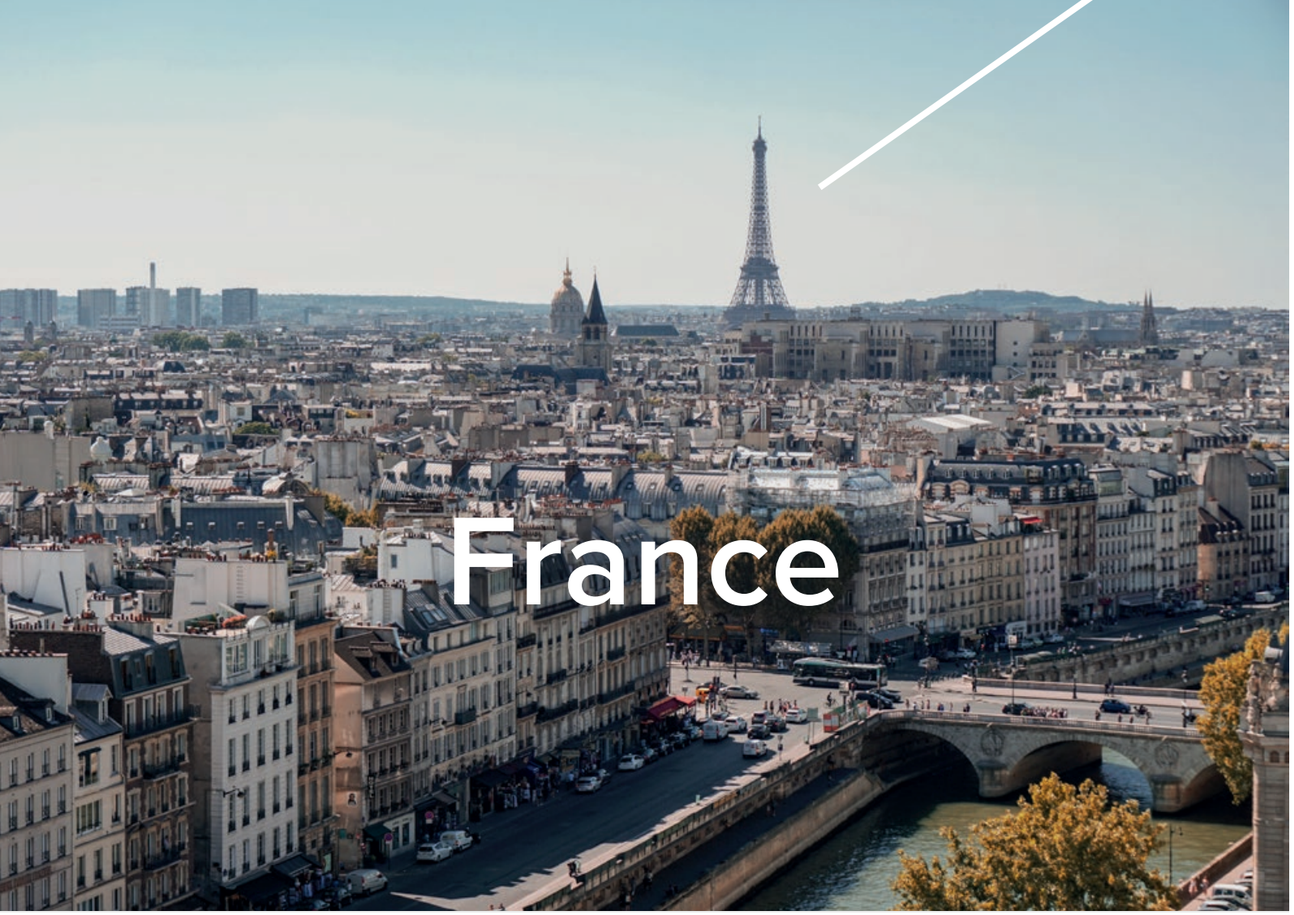

France

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN FRANCE?

The control of foreign investment in France concerns financial relations between France and a foreign investor. In general, these relations are unrestricted, but there are exceptions. In certain specific sectors involving national defence, public order, and activities essential to safeguarding the country's interests, foreign investments are subject to prior authorisation.

The application for authorisation must be submitted by the foreign investor to the Ministry of Economy and, in particular, to the Treasury Department.

The procedure takes place within a maximum period of 75 working days.

In addition, since 1 January 2024, foreign investment controls have been strengthened. Takeovers of branches of foreign entities engaged in sensitive activities will now be subject to scrutiny, in order to safeguard against potential circumvention strategies of the foreign investment regulations.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN FRANCE?

The control of foreign investments in France is a procedure that subjects foreign investments to prior authorisation by the Ministry of Economy and Finance. This measure aims to protect public safety, public order, and national defence interests. It applies to activities in France that participate in the exercise of public authority or that could harm national interests.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN FRANCE?

The authorisation is required when:

- The investment transaction consists of:
  - **The acquisition of control of an entity governed by French Law;**
  - **The acquisition of all or part of a branch of activity of an entity governed by French Law;**
  - **If the investor is not from the EU or the European Economic Area and its participation exceeds the threshold of 25% of the voting rights of an entity governed by French law or the 10% threshold in a French company listed on a regulated market.**
- It is made by:
  - **A non-French individual or French individual not domiciled as tax residents in France or,**
  - **Any legal entity governed by foreign law or any French legal entity controlled by individuals or legal entities governed by foreign law.**
- In the presence of sensitive activities such as:
  - **Inherently sensitive activities in the defence and security sectors;**
  - **Activities relating to infrastructure, goods or services that are essential to guarantee public safety and public order, and in particular the integrity, safety or continuity of energy and water supplies, the operation of transport networks and services, the protection of public health, or food safety;**
  - **Research and development activities relating to critical technologies and dual-use goods and technologies and intended for use in one of the activities mentioned above.**

4 WHAT ARE THE CONSEQUENCES IN FRANCE IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

In the event of non-compliance with the procedure or breach of the terms of the authorisation, **the Ministry of Economy has extensive powers of sanction, including in particular (i) an injunction to restore the previous situation at the expense of the investor, (ii) precautionary measures including the deprivation of the political and economic rights attached to the shares, and (iii) a fine of the highest of the following amounts:**

- **Twice the amount of the irregular investment;**
- **10% of the target entity's sales;**
- **1 million EUR for an individual or 5 million EUR for a legal entity.**

In any event, any commitment implementing a foreign investment in activities likely to undermine public order, public safety, or national defence interests and in the research, production or marketing of arms, munitions, explosive powders and substances without having been previously authorised is deemed null and void.

Lastly, criminal measures may be inflicted upon complaint by the Minister.

FDI in France subjects foreign investments to prior authorisation by the Ministry of Economy and Finance.

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Germany

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN GERMANY?

In the Federal Republic of Germany, **FDIs are regulated under the Foreign Trade Act** (*Außenwirtschaftsgesetz*, "AWG") **and the Foreign Trade and Payments Ordinance** (*Außenwirtschaftsverordnung*, "AWV"). The relevant legal rules had already been in place prior to the EU Regulation 2019/452, but have been and are constantly being amended and adapted.

The AWG and AWV differentiate, both as regards to personal and material scope of application, between two types of FDIs, the so-called cross-sectoral assessment (*sektorüber-greifende Prüfung*) **and the sector-specific assessment** (*sektorspezifische Prüfung*). The relevant assessments can be briefly summarised as follows:

- **Cross-sectoral assessment. In the cross-sectoral assessment, the German Federal Ministry for Economic Affairs and Climate Action** (Bundesministerium für Wirtschaft und Klimaschutz, "BMWK") **can scrutinise the direct or indirect acquisition of or participation in a domestic company by a non-EU or non-EFTA resident.** In case of indication for abusive arrangements to bypass this assessment, the personal scope of application can be extended to cover EU-residents as well.

The cross-sectoral assessments generally apply to any kind of acquisition of (i) shares or voting rights in the relevant company, i.e. share deals, and (ii) operations or operating equipment, i.e. assets deals.

The relevant thresholds which trigger a cross-sectoral assessment depend on the business activity of the domestic target company:

- In general, the intervention threshold is 25% of the shares or voting rights.
- However, the AWV provides for a rather extensive catalogue of business activities (e.g., critical infrastructure, telecommunications, cloud-computing, robotics) where the intervention threshold is lower (depending on the specific business activity either 10% or, respectively, 20%).

The relevant test in the BMWK's assessment is if such acquisition will likely affect the public order or security of the Federal Republic of Germany, of another EU Member State or on projects or programmes of Union interest (e.g., Galileo, EGNOS, Copernicus and Horizon 2020).

- **Sector-specific assessment. In general, the legal situation is similar for the sector-specific assessment, which is only triggered if the domestic company operates in certain business areas that are regarded as highly critical,** e.g. producers of weapons, ammunition, and armaments, of defence technique, and of products with IT security functions for processing classified government information.

The personal ambit of the sector-specific assessment is wider. The BMWK can scrutinise the direct or indirect acquisition of, or participation in, a domestic company not only by a non-EU or non-EFTA resident but by any foreigner. Furthermore, the intervention threshold for sector-specific assessments is lower and in each case fixed at 10%.

In its sector-specific assessment the BMWK will scrutinise if the acquisition is likely to impair essential security interests of the Federal Republic of Germany.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN GERMANY?

The definition of an FDI in Germany is generally comparable to the definition in the general introduction of this guide. For further details and differences, please refer to the responses to the other questions.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN GERMANY?

The AWV provides for a mandatory obligation of an acquiror to notify the conclusion of a legally binding agreement regarding the FDI to the BMWK without undue delay after signing:

- **In cross-sectoral assessment cases if the domestic target companies carry out one of the business activities where the intervention threshold is lower than the general intervention threshold** (e.g., critical infrastructure, telecommunications, cloud-computing, robotics), see more under question 1 above; and
- **In all sector-specific assessment cases.**

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4 WHAT ARE THE CONSEQUENCES IN GERMANY IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

With respect to the legal consequences for the investment, German law distinguishes between transactions which are subject to the mandatory notification requirement and other FDIs:

- **For legal transactions which are subject to the mandatory notification requirement** (see question 3 above for further details), **the AWG and AWV differentiate between the legal effects under the laws of obligations** (e.g. the agreement on the sale of shares in the domestic target) **and the legal effects on the transaction in rem** (e.g. the agreement on the transfer of legal title to the shares in the domestic target):
  - The relevant transaction under the laws of obligations is in full force and effect but subject to the condition subsequent that the BMWK prohibits the transaction within the applicable statutory review periods.
  - The transaction which intends to consummate the relevant transaction with in rem effect is, however, provisionally void and will only become legally effective if the BMWK clears the transaction or does not prohibit it within the applicable statutory review periods. German SPAs therefore typically provide for a respective closing condition. In this regard, the situation is comparable to the legal situation of a transaction which requires merger control clearance, including the aspects of so-called gun-jumping.
- **The situation is different for FDIs which are not subject to the mandatory notification requirement.** While the relevant transaction under the laws of obligations is also subject to the condition subsequent set out above (as the BMWK still has the authority to assess the transaction), the transaction which intends to consummate the relevant transaction with in rem effect is legally valid, i.e. the transaction may be closed at any time.

Furthermore, a person carrying out the transaction without the required authorisation, prior to obtaining it or in breach of the conditions set forth in the authorisation, is liable to prosecution.

Italy

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN ITALY?

With reference to the Italian discipline, the first control instrument was introduced by Article 2 of Decree-Law No. 332 of 1994, which regulated the intervention of the Italian State through the so-called "Golden Share". Subsequently, with the entry into force of Decree-Law No. 21 of 2012, the "Golden Share" was replaced by the "Golden Power" institution, which, like its predecessor but with a substantial regulatory evolution, attributed special powers to the Italian government (e.g., specific conditions to the acquisition of shareholdings; veto to the adoption of certain resolutions; opposition to the acquisition of shareholdings) **to be exercised for the protection of companies active in certain sectors considered strategic and of national interest.**

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN ITALY?

For an FDI to be subject to governmental control in Italy, **it must entail the threat of serious prejudice to essential defence and national security interests, if the purchaser comes to hold, directly or indirectly, including through successive acquisitions, through intermediaries or through otherwise connected persons, a level of shareholding in the voting stock capable of endangering defence and national security interests in the specific case.**

The areas that constitute a source of national defence and security interest, for the purposes of exercising the Golden Power under the said regulation, **are the following:**

- **Broadband electronic communication services with 5G technology, cloud-based and other assets;**
- **Energy, transport and communications;**
- **The additional areas of strategic importance to national interest referred to in Article 4(1) of EU Regulation 2019/452**. Precisely in relation to the latter normative reference, Decree of the President of the Council of Ministers no. 179 of 2020 identified the goods and relations of national interest to be protected such as, but not limited to, goods and relations in the areas of (i) energy, (ii) water, (iii) health, (iv) processing, storage and in the area of access and control of data and sensitive information, (v) financial, including credit and insurance, and financial market infrastructure, and (vi) supply of productive factors and in the agri-food sector (including the steel sector).

The Regulation applies in the case of acquisition by either an EU entity and an entity outside the EU. In the event the acquisition is made by an entity outside the EU, in order to grant the authorisation, the Italian government may also consider the following:

- **That the purchaser is directly or indirectly controlled by the government, including state bodies or armed forces, of a country outside the EU, including through ownership or substantial financing;**
- **That the purchaser has already been involved in activities affecting security or public order in a Member State of the EU;**
- **That there is a serious risk that the purchaser will engage in illegal or criminal activities.**

The "Golden Share" was replaced by the "Golden Power" institution.

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3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN ITALY?

In the event that the acquisition concerns shares of a company admitted to trading on regulated markets, the notification must be made if the purchaser comes to hold, as a result of the acquisition, a participation exceeding the threshold of 3%, and additional acquisitions that result in the thresholds of 5%, 10%, 15%, 20%, 25% and 50% being exceeded are subsequently notified.

Where the acquisition relates to shares or quotas of a company not admitted to trading on regulated markets, notification must also be given if the acquirer comes to hold, as a result of the acquisition, a shareholding exceeding the above thresholds.

Also subject to the notification requirement, if made by entities outside the EU, are acquisitions of shareholdings (in companies considered strategic in the energy, transport and communications sectors) **which give rise to a share of voting rights or capital of at least 10%, taking into account the shares or quotas already directly or indirectly held, where the total value of the investment is equal to or greater than 1 million EUR, and acquisitions that result in the thresholds of 15%, 20%, 25% and 50% of the capital being exceeded are also notified.**

From a procedural point of view, in the event that a transaction falls within the scope of the special powers regulation, the company will be required to notify the government of the transaction before execution.

4 WHAT ARE THE CONSEQUENCES IN ITALY IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

If the transaction is made without previous authorisation by the Italian government, any resolution or agreement adopted or executed by the parties is null and void. Moreover, the Italian government may request the parties to restore the previous situation at their own cost.

If the obligation to notify is not complied with, an administrative fine of up to twice the value of the transaction, and in any event not less than 1% of the aggregate turnover achieved by the undertakings involved in the last financial year for which financial statements have been approved, is provided for, unless the act constitutes a criminal offence.

Latvia

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN LATVIA?

Latvia has an FDI screening mechanism in place, mainly regulated by the National Security Law, which was amended on 20 October 2022 to ensure compliance with Regulation (EU) 2019/452.

It is important to note that Russia, Belarus and citizens of these countries, and legal persons registered in these countries cannot obtain a qualifying holding or decisive influence in a capital company of significance to national security or become members of a partnership of significance to national security, or be the beneficial owners of commercial companies of significance to national security (paragraph 2 of Section 38 of the National Security Law).

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN LATVIA?

The FDI screening mechanism is applicable to activities listed in paragraph 1 of section 38 of the National Security Law:

- In relation to capital companies:
  - **Obtaining of qualifying holding;**
  - **Obtaining of decisive influence;**
  - **Transfer of an undertaking;**
  - **Preservation of the status of a stockholder or shareholder or preservation of the right to exercise indirect holding if the beneficial owner or indirect influence beneficiary changes;**
  - **Receipt of a loan.**

- In relation to partnerships and associations:
  - **Joining of a new member;**
  - **Preservation of the status of a member if the beneficial owner or indirect influence beneficiary changes;**
  - **Receipt of a loan.**
- In relation to foundations:
  - **Receipt of a loan.**

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN LATVIA?

An FDI must be submitted for authorisation in Latvia if the undertaking in which the FDI is planned, a commercial company, association or foundation registered in Latvia, either has ownership or possession of critical infrastructure or conforms to at least one of the thirteen conditions set out in section 37 of the National Security Law (e.g. an electronic communications supplier with significant market power that has had liabilities imposed for tariff regulation and cost accounting in accordance with the procedures provided for in the Electronic Communications Law).

Latvia has an FDI screening mechanism in place, mainly regulated by the National Security Law.

4 WHAT ARE THE CONSEQUENCES IN LATVIA IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

Section 45 of the National Security Law sets out the consequences of making FDIs without the required authorisation. The consequences depend on the specific non-conforming activity, but the main result is the invalidity of the activity.

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Netherlands

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN THE NETHERLANDS?

On 17 May 2022 the Investments, Mergers and Acquisitions (Security Screening) **Act was adopted by the Dutch Parliament and entered into force on 1 June 2023. In short, the Security Screening Act envisages to protect three aspects of the Dutch national security being; (i) the continuity of critical processes, (ii) maintaining the integrity and information of critical or strategic importance for the Netherlands, and (iii) preventing unwanted strategic dependence on other countries.**

The Security Screening Act will apply to all mergers and demergers, acquisitions, and other investments, whether by foreign or domestic investors, that result in a change of control of any company established in the Netherlands that are (i) involved in vital processes, (ii) active with sensitive technologies, or (iii) a manager of a business campus[1]. Asset deals can also be subject to the Security Screening Act if those assets are essential for the respective company or regarding a significant part of the company's activities in the Netherlands.

Besides the Security Screening Act, sector-specific screening legislation applies to telecommunication companies, the gas and electricity sector and the mining sector.

The Security Screening Act will apply to all mergers and demergers, acquisitions, and other investments.

1. A business campus is an area with public private partnerships for working on technologies and applications that are of economic and strategic importance to the Netherlands.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN THE NETHERLANDS?

In the case of highly sensitive technologies, an acquisition or increase of significant influence over such a relevant company is subject to the Security Screening Act. Furthermore, the companies acquired are divided into three groups:

- **Vital processes –** namely heating network operators, activities in relation to storage, production and processing of nuclear materials, KLM, Schiphol Airport (including all activities related to air traffic management, passenger and luggage handling), the Rotterdam Port Authority, banks, financial market infrastructure and companies active with natural gas exploration, transport and storage;
- **Sensitive technology –** military and dual-use technologies as defined in the European Union Dual-Use Regulation (EU 2021/821) and the EU Military Goods List (2020/C 85/01) are regarded as sensitive technology. Furthermore, the following four technologies have been added to the scope of the Security Screening Act: quantum technology, photonics technology, semiconductor technology and High-Assurance products; and
- **Managers of a business campus –** this last category was added last-minute to the Act. This regards a company or business which owns or controls an area on which multiple companies form a public-private partnership working on technologies and applications which are of economic and strategic importance for the Netherlands.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN THE NETHERLANDS?

As mentioned above, an acquisition, (de)merger or other investment that result in a change of control of one of the aforementioned companies must be notified to the Dutch Investment Review Agency (Bureau Toetsing Investeringen (BTI)). A change of control is defined as the possibility of exercising decisive influence on the activities of an enterprise based on factual or legal circumstances. Any change in decisive influence regarding companies active in the field of sensitive technology must be reported to the BTI. Acquiring at least 10%, 20% or 25% of the votes in the target's shareholders meeting is regarded as significant influence. An acquisition resulting a change from 12% to 21% must be reported, but a change from 12% to 19% not.

Both the investor and target company are responsible for the notification of the transaction to the BTI.

4 WHAT ARE THE CONSEQUENCES IN NETHERLANDS IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

Consequences pre-closing:

Prior to closing, the investing company and the target company must comply with a standstill obligation. If the parties do not comply with the standstill obligation a fine can be imposed equal to:

- A maximum of the 6th category of the Dutch Penal Code, being as of 1-1-2024: 1.03 million EUR; or
- 10% of the yearly turnover of the respective company (Investor or Target).

Consequences post closing:

If an investment without authorisation has taken place, the Dutch Ministry can:

- **Impose an order to undo the transaction;**
- **If the transaction is not undone, the Ministry has the power to sell and transfer the shares held by the acquirer to comply with the order imposed earlier;**
- **The rights received (such as voting rights, dividends) can be suspended.**

Furthermore, the Ministry has the power to appoint one or more persons to ensure that the aforementioned actions are fulfilled.

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Portugal

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN PORTUGAL?

Since 2014, Portugal has a mechanism for analysing foreign investments. In this regard, the Decree-Law no. 138/2014 of 15 September establishes a system for safeguarding strategic assets essential to guaranteeing national defence and the security of the country's supplies in services that are fundamental to national interest in the sectors of energy, transportation and telecommunications.

The Government may oppose the execution of operations which result, directly or indirectly, in the acquisition of direct or indirect control by a person or persons from countries outside the EU, over strategic assets, regardless of their legal form, in cases where it is determined that they may jeopardise, in a real and sufficiently significant manner, national defence and security or the security of the country's supply of services that are fundamental to national interest.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN PORTUGAL?

The relevant definitions for the applicability of the Decree-Law mentioned above regarding FDIs are the following:

- Control – **means the possibility of exercising decisive influence over the strategic asset, under the terms of article 36 number 3 of the Law no. 19/2012 of 8 May, which implies the possibility of exercising, on a lasting basis, alone or jointly, and taking into account the circumstances of fact or law, a decisive influence over the activity of a company, namely:**
  - **The acquisition of all or part of the share capital;**
  - **The acquisition of ownership, use or enjoyment rights over all or part of a company's assets;**
  - **The acquisition of rights or conclusion of contracts that confer a decisive influence on the composition or deliberations or decisions of the bodies of a company.**
- Person/legal entity from a country outside the EU – **means any individual or legal entity whose domicile, registered office or principal and effective place of management is not located in a Member State of the EU or the European Economic Area.**
- Strategic assets – **means the main infrastructures and assets allocated to national defence and security or to the provision of essential services in the areas of energy, transport, and communications.**

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN PORTUGAL?

The mentioned applicable Portuguese law does not require any mandatory notification of any potential transaction.

Nonetheless, prior to the transaction, there is the possibility of the prospective purchaser to, on a voluntary basis, request a prior confirmation that an opposition decision will not be issued regarding said transaction. If the Government does not initiate an assessment procedure within 30 business days counting from the date of the request, a non-opposition decision is deemed to have been issued.

After the transaction or when it becomes publicly known, the Government has the possibility to review it and oppose it within 30 business days from the conclusion of the transaction or from the date it becomes publicly known.

After the transaction the Government has the possibility to review it and oppose it within 30 business days.

4 WHAT ARE THE CONSEQUENCES IN PORTUGAL IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

If the Government issues an objection decision to a certain operation, all legal acts and transactions relating to said operation are null and ineffective, including those concerning the economic exploitation or the exercise of rights over assets or the entities that control them.

It should be noted that the Government's decision may be appealed under the terms of the Procedure Code of the Administrative Courts.

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Romania

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN ROMANIA?

In Romania, the legislative act which established the regulatory framework necessary for the application of Regulation (EU) 2019/452 of the European Parliament and of the Council is Emergency Ordinance no. 46/2022.

From April 2022 and until December 2023 there was a formal obligation to notify foreign investments only for investors from outside the EU.

A turning point in examining foreign investments in Romania was at the end of 2023 when, the Government of Romania extended this framework of analysis also to European investors, through the Ordinance emergency no. 108/2023, that amended the former Emergency Ordinance no. 46/2022.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN ROMANIA?

FDIs (regardless of the investor's nationality) **are defined as any type of investments made with the aim of establishing or maintaining sustainable and direct links between the investor and the entrepreneur or enterprise to which the funds are intended for carrying out economic activities in Romania, including investments that allow the investor to participate in the management or control of the enterprise.**

An FDI is also considered as such when there is a change in the ownership structure of an investor - foreign legal entity, if this change with regard to the legal entity makes it possible to exercise control, directly or indirectly, by:

- A natural person who is not a citizen of a member state of the EU;
- A legal person whose registered office is not in a member state of the EU; or
- Another legal entity, without legal personality, organised under the laws of a state that is not a member of the EU.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN ROMANIA?

The FDI regime is applicable:

- **To investments made by foreign investors in key activity sectors for the Romanian state such as (i) citizen and community security, (ii) border security, (iii) energy security, (iv) transport security, (v) security of supply systems with vital resources, (vi) security of critical infrastructure, (vii) security of systems IT and communications, (viii) security of financial, fiscal, banking and insurance activities, (ix) security of production and circulation of weapons, ammunition, explosives, toxic substances, (x) security of industry, (xi) protection against disasters, (xii) protection of agriculture and the environment, and (xiii) protection of privatisation operations of state-owned enterprises or their management**; and,
- **If the value of investment exceeds a 2 million EUR threshold. There may be exceptions to this rule in the case of investments likely to affect national security or public order.**

4 WHAT ARE THE CONSEQUENCES IN ROMANIA IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

The sanctions applied in case of non-compliance with the FDI regime are like those applied for the violation of competition rules. Thus, the implementation of an FDI without obtaining prior approval from the competent authority, as well as non-compliance or violation of the commitments assumed in the case of conditional authorisation are sanctioned with fines of up to 10% of the total worldwide turnover of the financial year preceding the sanction.

The same penalty is also applied if, during the procedure, the investor provides inaccurate, incomplete, or misleading information to the authority.

Moreover, if the investment has not been notified and affects the security or public order of Romania or is likely to affect projects or programmes of interest to the EU, the investment may even be cancelled.

Romania no longer considers the investor's nationality.

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Slovak Republic

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN THE SLOVAK REPUBLIC?

The legislative package regulating the screening of foreign investments in the Slovak Republic entered into force on 1 March 2023. Since then, the domestic regulation is based on Act No. 497/2022 Coll. on the Screening of Foreign Investments which introduces a comprehensive legal mechanism for the control of foreign investments in order to protect the security and public order of the Slovak Republic and the EU, together with the Regulation of the Government of the Slovak Republic No. 61/2023 Coll. establishing critical foreign investments.

Act No. 497/2022 Coll. on the Screening of Foreign Investments also regulates certain aspects of cooperation of the Slovak Republic with other member states of the EU and with the European Commission (as outlined in Regulation (EU) 2019/452).

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN THE SLOVAK REPUBLIC?

Act No. 497/2022 Coll. on the Screening of Foreign Investments distinguishes between two types of foreign investments with different rules on notification requirements, acquisition thresholds, control procedures and possible sanctions:

- **Critical foreign investments – as an investment of a foreign investor in relation to a Slovak target operating in at least one of the strategic sectors defined by Government Regulation (e.g. production of military technology and materials, production of dual use items, digital services, data encryption, press agency, biotechnology sector etc.).**
- **Non-critical foreign investments – as any other investment of a foreign investor in relation to a Slovak target that does not operate its business in the above-mentioned sectors** (e.g. acquisition of a logistics centre).

The Screening of Foreign Investments distinguishes between two types of foreign investments.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN THE SLOVAK REPUBLIC?

The scope of FDI scrutiny is limited to investments that meet the following thresholds:

Critical foreign investment:

- **Acquisition of a business or part of a business** (asset deal);
- **Acquisition of a shareholding of at least 10%;**
- **Increase of a shareholding to 20%, 33% or 50%;**
- **Acquisition of control** (e.g. by controlling the management);
- **Acquisition of substantial assets, which are key for carrying out the activities of critical infrastructure.**

Non-critical foreign investment:

- **Acquisition of a business or part of a business** (asset deal);
- **Acquisition of a shareholding of at least 25%;**
- **Increase of a shareholding to 50%;**
- **Acquisition of control** (e.g. by controlling the management).

4 WHAT ARE THE CONSEQUENCES IN SLOVAK REPUBLIC IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

Foreign investors who fail to comply with their legal obligations may face sanctions.

Failure to request approval for a critical foreign investment can result in a fine of up to the value of the investment or 2% of the aggregate net turnover achieved by the investor's group in the previous financial year, whichever is higher.

If a foreign investment is completed without the required approval and carries an increased risk of negatively impacting security or public order, the Slovak Ministry of Economy is authorised to order the foreign investor to reverse the transaction.

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Spain

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN SPAIN?

Since 2003, foreign investments in Spain have been liberalised with some exceptions in specific sectors. However, following the entry into force of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, for the control of FDIs in the EU and the legal amendments approved in Spain, this general liberalisation regime has been modified and certain "Foreign Direct Investments" are now subject to prior authorisation by RD-Law 8/2020, corrected and extended by the subsequent RD-Law 11/2020, introduced in new article 7 bis in Law 19/2003.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN SPAIN?

These two circumstances must be met:

- Made by a non-resident in the EU or EFTA countries or by an EU/EFTA resident whose beneficial ownership belongs to a non-resident.
- When the investor holds 10% or more of the capital of a Spanish company or acquires control of all or part of it in accordance with the criteria established in Article 7 of the Competition Law (*Ley del Derecho de Competencia*).

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN SPAIN?

FDI is subject to authorisation in either of these two scenarios:

- **The investment affects one of Spain's "main strategic sectors" (art. 7 bis Law 19/2003).**
- **The investor, irrespective of the sector in which the investment is being made:**
  - **Is controlled by the government of a third country;**
  - **Is involved in sectors affecting public order, public security or public health of another EU Member State, or;**
  - **There is a serious risk that the investor engages in criminal or illegal activities affecting public safety, public order or public health in Spain.**

4 WHAT ARE THE CONSEQUENCES IN SPAIN IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

The transaction will lack validity and legal effects as long as it is not legalised, and the exercise of the economic and political rights of the foreign investor in the Spanish company that is the object of the investment will not be possible until the necessary authorisation is obtained.

In addition, carrying out the transaction (i) without the required authorisation, (ii) prior to obtaining it, or (iii) in breach of the conditions set forth in the authorisation is considered a very serious infringement, punishable simultaneously by:

- A fine, which may be up to the amount of the economic content of the operation, but may not be less than 30,000 EUR; and
- A public or private reprimand.

The transaction will lack validity and legal effects as long as it is not legalised.

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Switzerland

1 WHAT IS THE CURRENT SITUATION REGARDING FDIS IN SWITZERLAND?

Based on the development in the EU, the Swiss parliament has mandated the Swiss Federal Council to propose an Investment Screening Act for Switzerland. The Swiss Federal Council passed the draft on an Investment Screening Act on 15 December 2023 (ISA). Investment screening will focus on state-controlled investors and domestic companies operating in particularly critical sectors.

The Federal Council nevertheless remains of the opinion that investment screening should not be introduced. In its view, the cost-benefit ratio of investment screening is unfavourable, and the existing regulatory framework is sufficient. There are no known cases of a past company takeover that has jeopardised public order or security in Switzerland.

2 WHAT IS THE SPECIFIC DEFINITION OF AN FDI IN SWITZERLAND?

In Switzerland the draft act foresees that an FDI is deemed to exist as soon as a foreign investor acquires at least 10% of the voting capital of a company. Investment screening is intended to prevent takeovers of Swiss companies by foreign investors if the takeover would jeopardise Switzerland's public order or security. The draft act implements this in the form of an approval requirement for the takeover of domestic companies. This requirement would apply in cases where a foreign state-controlled investor takes over a domestic company operating in a particularly critical sector.

The focus lies on state-controlled investors, as potential threats come from these investors in particular. The 'state control' criterion also applies to private companies that are under direct or indirect state control. Particularly critical sectors include defence equipment, dual use goods, electricity transmission and production, water supply, or health, telecommunication, and transport infrastructures.

3 WHEN MUST AN FDI BE SUBMITTED FOR AUTHORISATION IN SWITZERLAND?

Based on the draft ICA, the authorisation requirement applies to the following types of companies:

- **In the 2 financial years prior to submission of the application, the company to be acquired had an average of at least 50 full-time employees worldwide or generated annual worldwide sales of at least 10 million CHF; and**
- **In the two financial years prior to submission of the application, the company to be acquired had an average annual worldwide turnover or - in the case of banks a gross income - of at least 100 million CHF.**

In addition to the above, the target company must operate in a particular critical sector or exercise control in those areas. The Federal Council may add further categories to the list with the authorisation requirements for a maximum of 12 months if this is necessary to ensure public order or security and extend the period by a maximum of 12 further months. The authorisation may be subject to further conditions or requirements.

4 WHAT ARE THE CONSEQUENCES IN SWITZERLAND IF AN INVESTMENT IS MADE WITHOUT THE REQUIRED AUTHORISATION?

Based on the draft ICA, the Federal Council impose measures to restore the due circumstances (in particular divestment). Penal fines may be imposed:

- **10% of the average annual worldwide turnover achieved by the domestic company in the two financial years prior to the takeover; and**
- **Foreign state investors or domestic companies can be charged an amount of up to 100,000 CHF if they do not fulfil their obligation to provide information.**

However, it should be noted that such offences expire five years after the takeover has been completed or after the respective application has been received.

In Switzerland the draft act foresees that an FDI is deemed to exist as soon as a foreign investor acquires at least 10% of the voting capital of a company.

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