

U.S. Outbound
Investment Executive
Order focuses
on next generation
technologies

Trends and tensions:
navigating
Canada's foreign
investment regime

European Commission
reports on FDI Screening:
more FDI regimes,
fewer cases, more
Phase II proceedings
and prohibitions

Developments in
FDI regimes in Belgium,
the Netherlands
and Spain

Foreign investment
regimes in
APAC at a glance

Foreign investment monitor

Issue 7

November 2023



Freshfields

Welcome to our seventh Foreign investment monitor

In this edition, we delve into changing FDI regimes across multiple continents.

Amid ongoing global instability, FDI regulatory regimes continue to change, taking account of post-COVID changes to economies and the developing global political situation, focusing on different types of investors and target sectors.

A recent U.S. Executive Order, when implemented, will impose notification requirements on, and in some cases entirely prohibit, U.S. investments in Chinese companies in sensitive technologies, particularly in the semiconductor and quantum/supercomputing sectors. However, it may not bring about the sweeping “reverse CFIUS” that some policymakers have sought and many in industry have feared.

Canada’s stable economy, natural resources and predictable legal framework make for a desirable destination for foreign investors. However, foreign investments are subject to stringent regulatory oversight, as contributors from our StrongerTogether network explain.

Almost exactly three years after the European Commission’s EU Foreign Direct Investment Screening Regulation entered into force, the Commission has published its Third Annual Report, finding more FDI regimes, fewer cases, and more Phase II proceedings and prohibitions.

Governments in Europe are opting for stricter investment review policies, looking to protect national interests. Belgium and the Netherlands recently introduced a general FDI regime, while Spain has made a number of changes to its existing FDI regime. These developments have potentially

significant implications, as we explain with contributions from the authors of the latest Foreign Investment Regulation Review.

In the APAC region, more developed economies have been tightening scrutiny of foreign investments on national security grounds, while economies that are developing have been relaxing restrictions to accelerate economic growth. As our graphic shows, the result is a very broad and sometimes eclectic range of rules, informed by local economic, political and regulatory considerations.

We hope these insights will help provide the knowledge necessary to navigate this complex landscape. But if you would like to discuss any FDI issue in more detail, we would be delighted to arrange a meeting. And let us know if there’s something you’d like to see us cover in the next monitor.

U.S. Outbound Investment Executive Order focuses on next generation technologies

On August 9, 2023, President Biden issued Executive Order 14105, [Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern](#), (the Order), which imposes controls on investments by U.S. persons in Chinese companies involved in certain sensitive technologies. Simultaneously, the Department of the Treasury published an [advance notice of proposed rulemaking](#) (ANPRM) to seek public comment on future regulations to operationalize the Order.

Executive summary

Narrow scope: The program contemplated by the Order and the ANPRM is not the sweeping “reverse CFIUS” that some policymakers have sought and many in industry have feared. The program is not a screening mechanism and is not retroactive. The Order focuses on technologies that are critical to China’s military, intelligence, and surveillance capabilities. Further, the Order does

not capture many forms of purely passive investment, ordinary course commercial transactions, and intra-company transfers from U.S. parents to their Chinese subsidiaries. Investments are either subject to a prohibition or notification, with notification being only informational.

Numerous types of investors affected: Investors most likely to feel effects of the Order are U.S. venture capital firms, private equity firms, venture capital arms of strategic companies, and strategic companies contemplating a joint venture in China. However, it also applies to any U.S. person, and so will impact U.S. citizens and permanent residents that have material roles in many non-U.S. investor firms.

Deep impact on investments in semiconductors and quantum: The semiconductor and quantum/supercomputing sectors will feel the greatest impact from the Order. In particular, the Order amounts to a near shutdown of U.S. investment in Chinese firms creating semiconductor design software and manufacturing equipment, as well as Chinese firms fabricating and packaging advanced semiconductors. U.S. investments in

“
the ANPRM is not the sweeping “reverse CFIUS” that some policymakers have sought and many in industry have feared.

other Chinese IC design, fabrication, and packaging entities will be notifiable, which is also likely to chill investment. Similarly, quantum and supercomputer investments are also now nearly entirely prohibited.

Less impact on investments in AI:

Perhaps most surprisingly, the Order may have only limited impact in the artificial intelligence space. Here the prohibition is focused on military, intelligence, and mass-surveillance end uses. Treasury is considering whether covered AI technologies would need to be used “exclusively” or “primarily” for such sensitive purposes; the latter would likely have some degree of chilling effect on some commercial applications as well. Even the areas where notification is proposed are relatively limited.

Story still developing in the United States and elsewhere: As the Treasury will publish draft regulations which will be subject to public comment, the rules likely would not take effect before early next year, possibly well into the year. During that time, some contemplated elements could fall away, and additional limitations could be added. The narrow nature of the program is likely intended in part to increase the chances of broader international adoption of parallel restrictions. This is on the G7 agenda, and the EU has also confirmed that it is examining outbound investment controls.

Background and Context – U.S. outbound investment policy with respect to China

Over the years, concern has been growing in the United States that both private investments by U.S. investors in China and the rendering of certain services to Chinese companies is enabling China to advance its capabilities in a way that would undermine U.S. national and economic security interests. This issue remained unaddressed following enactment of

the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). Focus initially was on using export controls and sanctions to begin to address this risk, and the Biden Administration issued new export controls on certain semiconductors and related manufacturing equipment in October 2022 and October 2023. Nevertheless, government stakeholders also agreed that more effort was necessary to directly address outbound investment.

A bill introduced in Congress in 2021 would have established a true “reverse CFIUS” screening mechanism covering investment in a broad range of technologies and activities in China. Though it may have addressed all the top issues – technology transfer, supply integrity, and U.S. domestic critical capability concerns – the legislation met opposition within Congress, the Biden Administration and the private sector, stalling its progress. More recently, the Senate passed a broader bill that contemplates only notification, not prohibition, of certain outbound investments. Neither of these bills has been enacted.

The Biden Administration [publicly previewed an EO regarding narrowly-scoped restrictions on U.S. investments in China](#) for over a year. Throughout a lengthy process, the Administration described the forthcoming order as narrowly tailored to protect emerging and foundational technologies critical to U.S. national security, using what Administration officials call a “small yard and high fence” approach. The Order indeed is far narrower than other recent proposals. Although many in Washington and beyond are relieved at the tailored approach, others are disappointed that the Order and regulations do not go far enough, and the issue will likely remain a potential subject of legislation.

Scope of the Order

The Order itself speaks in broad terms about how to deal with the threat

presented by the advancement of countries of concern (i.e., China) in certain technological areas, but the program envisioned is relatively narrow. It specifies that transactions involving any “covered national security technologies or products” are subject to notification or prohibition when “critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern.” The Order delegates to Treasury the decision of which transaction types should be prohibited.

Under the Order, going forward, outbound transactions can be categorized as one of three types:

1. Prohibited transactions:

These are “covered transactions” that will be prohibited on the basis of the target company involvement in specified covered technologies. The Order does not provide for any generally applicable licensing or mitigation authority to allow these transactions to proceed.

2. Notifiable transactions:

- a. These are covered transactions where the target company is involved in certain other covered technologies.
- b. There is no case-by-case review for these transactions; assuming the investor has correctly categorized the transaction as notifiable rather than prohibited, Treasury would have no authority to take any action or mitigate any risk with respect to the transaction.

3. All other transactions:

If a transaction does not involve “covered national security technologies” or does not involve China or is not performed by a U.S. person or with a covered foreign person, there is no notification requirement and no prohibition.

The Order also specifies that the only “country of concern” is China (including Hong Kong and Macau), though this is subject to change by future executive order.

Contours of the ANPRM

[Our blog on the Order and ANPRM](#)

explores Treasury’s ANPRM in detail. Below are some of the key provisions of the ANPRM, which previews how Treasury plans to put the Order into practice:

1. **Transaction forms:** The ANPRM’s definition of “covered transaction” captures a range of transactions similar to those covered by the U.S. government’s inbound investment body, the Committee on Foreign Investment in the United States (CFIUS), except that greenfield investments would be covered.

Notable exceptions to the coverage definition include: (i) purchases of publicly traded securities and publicly traded funds; (ii) intra-company transfers; (iii) acquisitions of a covered foreign person’s entire interest in an entity or assets outside China; and (iv) acquisitions of purely passive and de minimis LP interests in a private equity or venture capital fund.

2. **Covered foreign persons** include any entity organized or with principal place of business in a country of concern, an entity whose equity securities are principally traded

in a country of concern, and any entity (regardless of location) more than 50 percent owned by either of the foregoing.

Though there is some ambiguous language in the ANPRM, this definition would not appear to apply to a non-Chinese company with a Chinese subsidiary or office, unless its Chinese operations account for a majority of consolidated revenue, net income, capital expenditures or operating expenses.

3. Definitions of **covered national security technologies** are elaborated in the ANPRM as follows:

| Covered technology | Prohibited | Notifiable |
|--|---|--|
| Advanced semiconductors and microelectronics | <ul style="list-style-type: none"> (i) The development of electronic design automation software for integrated circuit design or semiconductor manufacturing equipment; (ii) the design, fabrication, or packaging of certain advanced integrated circuits; and (iii) the installation or sale of certain supercomputers. | The design, fabrication and packaging of less advanced integrated circuits. |
| Artificial intelligence systems | There is no specific prohibition contemplated in the ANPRM, but they are contemplating a prohibition where it is primarily or exclusively for military, intelligence or surveillance end use. | Activities related to software that incorporates an artificial intelligence system and is (exclusively or primarily) designed for cybersecurity applications, digital forensics tools and penetration testing tools; the control of robotic systems; surreptitious listening devices that can intercept live conversations without the consent of the parties involved; non-cooperative location tracking (including international mobile subscriber identity (IMSI) catchers and automatic license plate readers); or facial recognition. |
| Quantum information science and technology | <ul style="list-style-type: none"> (i) The production of quantum computers and certain components; (ii) the development of certain quantum sensors; and (iii) the development of quantum networking and quantum communication systems <p>Here, Treasury is most concerned with quantum technologies “that enable capabilities that could compromise encryption and other cybersecurity controls and jeopardize military communications, among other things”.</p> | There is no separate set of quantum technologies being considered for notification only, which indicates high sensitivity. |



The ANPRM is ambiguous as to whether a transaction that has been signed but not closed before the effective date of the regulations would be prohibited.

4. U.S. persons include U.S. citizens, legal permanent residents, and entities organized in the United States, as well as their foreign branches. A U.S. company would also be responsible for notifying transaction of its more than 50 percent foreign subsidiaries if they would have been notifiable if undertaken by a U.S. person. It would also be responsible for taking steps to prevent such subsidiaries for engaging in any transaction that would be prohibited if undertaken by a U.S. person.

Next steps for companies

Though official draft rules have not been published and a final rule will not be in place until next year, companies should take care to understand any impact of the Order on their business today.

- Companies should size up any investments that may not be closed until 2024 against the potential rules. The ANPRM is ambiguous as to whether a transaction that has been signed but not closed before the effective date of the regulations would be prohibited.

- Transactions completed as of August 9, 2023, could be subject in the future to a notification requirement, even if not prohibited. Therefore, investors should consider now whether future government scrutiny of current transactions would affect their interest in the transaction.
- Companies making investments now that may involve follow-on investments in the future should evaluate the potential for the rules to apply to those follow-on investments. If follow-on investments and capital calls can be declined without penalty, the investor may be obligated not to make the follow-on investment.
- U.S. investors in non-U.S. funds should consider whether they should include language that allows them to be excused from future fund investments in China that could conflict with the prohibitions under the rules. The ANPRM does not specify the de minimis threshold above which an investment as an LP would no longer be viewed as an exempt investment.

With thanks to Freshfields Aimen Mir, Christine Laciak, Colin Costello, Mark Appleton and Tim Swartz for contributing this update.

Trends and tensions: navigating Canada's foreign investment regime

With thanks to by [Jason Gudofsky](#) and [Michael Caldecott](#) at McCarthy Tétrault, which is part of the Freshfields StrongerTogether network.

With a stable economy, abundant natural resources and a predictable legal framework, Canada is a desirable destination for foreign investors. However, investing in Canada is not without its complexities. Foreign investments in the country are subject to comprehensive regulatory oversight to ensure that investments contribute to Canada's economic and social well-being and national security interests.

The Investment Canada Act (ICA), which is federal legislation of general application, serves as the cornerstone for the review of foreign investments in Canada. The ICA enables the government to review foreign investments both for: (i) their "net benefit" to Canada; and (ii) their potential injury to national security.

The "net benefit" regime, which focuses on socio-economic matters,

establishes mandatory filing requirements. These apply to every acquisition of control of a Canadian business (as defined in the ICA) and to the establishment of a new Canadian business, in each case by a non-Canadian. Non-controlling investments in an entity with operations in Canada may be notified voluntarily. Where an acquisition of control of a Canadian business is made directly and prescribed financial thresholds are exceeded, the investment is subject to net benefit review, which is suspensory and must complete before the transaction can close. All other filings can be made either before or within 30 days after closing and do not generate any formal, substantive review process.

The national security regime applies to a wider category of investments by non-Canadians, including non-controlling investments into businesses conducting all or part of their operations in Canada. Currently, national security review commences using the government's call-in powers. This intervention is subject to prescribed limitation periods, which vary depending on the extent to which an investment is notifiable.



New government guidance and policy statements evidence the recent shift in enforcement, especially for state-owned enterprises.

Net benefit reviews

Due to the nature of the ICA's financial thresholds, only a small minority of investments (5 out of 1,010 notified transactions in fiscal year 2023) require net benefit review and approval prior to closing. The government assesses the likely net benefit of these investments to Canada under several socio-economic factors, including:

1. employment impact, including job creation and retention;
2. effects on Canada's economic activity;
3. degree and significance of participation by Canadians in the Canadian business;
4. utilization of Canadian resources and impact on exports from Canada;
5. impact on competition and the competitiveness of Canadian firms on the global stage; and
6. contribution to Canadian productivity, industrial efficiency, technological development and product innovation and variety.

In almost all cases, the foreign investor must negotiate binding undertakings to obtain approval. A net benefit review typically takes 45–90 days, and potentially longer in complex cases. The reviewing minister may refer transactions undergoing net benefit review that potentially pose national security concerns for national security review, pausing the net benefit review pending completion of the national security process.

National security reviews

National security reviews assess whether an investment will be injurious to Canadian national security and focus primarily on the nature of the business to be acquired and the parties involved, including the potential for the investor to be influenced by foreign states. Government guidelines identify target activities and investor profiles raising potential concerns. State-owned enterprises (SOEs) and private investors connected to or influenced by non-allied jurisdictions present a higher risk of intervention.

Targets with operations in sectors such as defense, dual-use technology, critical minerals, critical infrastructure and supply chains, or which have access to sensitive personal data regarding Canadians, tend to attract greater scrutiny.

National security reviews are commenced via government intervention. Where a transaction is subject to mandatory notification or review under the net benefit regime, the responsible minister has 45 days from filing to commence a national security review, which is suspensory if intervention takes place prior to closing. If the transaction is not notified mandatorily or voluntarily, the government may call it in for review within five years after closing. Including all possible review periods and a window for final Cabinet action, the process can exceed 200 days in total. During the fiscal year 2023, the average duration of review for the 22 investments subject to a full national security review was 174 days, which is shorter than historical norms.

Evolving geopolitical concerns

Recent geopolitical developments have led to stricter national security reviews, particularly for sensitive industries (e.g. critical minerals) and foreign investors with ties to non-allied governments. New government guidance and policy statements evidence the recent shift in enforcement, especially for SOEs.

Traditionally, the government considered an SOE to be a firm directly owned or significantly influenced by a foreign state, but this definition has been expanded to cover private enterprises operating in countries where governments can exert extra judicial influence.

While inbound Russian investment into Canada has been relatively rare, the Russian invasion of Ukraine amplified scrutiny on investors with direct or indirect ties to the Russian state. Such investments are now presumptively considered to be injurious to national security.

Similarly, Canada's more strained relations with China in recent years have led to [increased scrutiny of Chinese investments](#), a phenomenon not unique to Canada. In November 2022, the Canadian government ordered the divestiture of investments by three Chinese firms in Canadian-headquartered companies with critical minerals operations. These investments were likely minority investments of relatively low value by Chinese firms with no apparent state ownership. They likely did not trigger mandatory notification under the ICA, and it is probable none were notified to the government, given that they occurred before the new voluntary notification regime took effect. These steps confirm the expansive approach to national security enforcement for investors considered to have connections with non-allied governments.

Government data from fiscal year 2023 illustrates this heightened regulatory focus. While the rate of national security intervention remains low relative to the total number of foreign investments notified (32 interventions versus 1,010 notified transactions), last year's 32 interventions represents a significant increase versus 2021–22's total of 24 and more than three times the number in 2019–20.

Of the 32 investments subject to national security intervention, well over half (22 in total) were subject to extended review. Of these 22 extended reviews, investors from non-allied jurisdiction accounted for a large majority: 16 investors were from China, a clear sign of the prevailing geopolitical conditions. Importantly, the other six extended reviews related to investors from countries such as the United States, France and Czech Republic, demonstrating that the investor's country of origin is not the only factor in a national security risk assessment. The final outcomes of these 22 extended national security reviews were similar in scope to recent trends: ten were cleared unconditionally, eight resulted in investor withdrawal (i.e., abandoning the transaction), three investments resulted in a divestiture order and one review was ongoing.



The enactment and implementation of these amendments, anticipated to occur in 2024, would usher in a new era of intensified enforcement...

Reforms focus on national security

In response to the dynamic geopolitical landscape and increased national security concerns, the Canadian government has [proposed amendments to the ICA](#) to complement its hardening enforcement stance and empower the Minister in safeguarding Canada's national security interests.

The enactment and implementation of these amendments, anticipated to occur in 2024, would usher in a new era of intensified enforcement, targeting specific classes of non-Canadian investors and transactions, particularly within sensitive sectors, aiming to identify and enforce against perceived national security threats earlier in the transaction process.

1. Pre-implementation notification: To fix a perceived enforcement gap in respect of transactions that can generate national security harms immediately upon closing, the amendments would mandate pre-implementation notification for all transactions involving “prescribed businesses” (currently undefined) where investors could gain access to “material, non-public technical information or material assets” (also undefined). These investments would be prohibited from closing

until 45 days after filing, affording the government ample time to assess and potentially intervene on national security grounds (extending the suspension of closing for the duration of that review).

- 2. Increased fines:** To incentivize compliance with the pre-implementation notification regime, the proposed amendments introduce new fines, starting at a minimum of C\$500,000 for failing to make a mandatory filing before implementation. Fines for ICA violations (such as filing late) would increase from C\$10,000 to C\$25,000 per day, underscoring the government's commitment to compliance.
- 3. Ministerial power for further review:** The Minister would gain the unilateral authority to order a “further review” of investments, eliminating the need for Cabinet approval to take this step, thereby expediting the review process. This change highlights the government's determination to act swiftly in response to evolving threats.
- 4. Interim measures:** The Minister would be granted the ability to impose interim conditions on investments undergoing national security reviews (such as requiring

information and assets to be held separate from the investor), providing greater flexibility to protect national security interests while a review is ongoing. This departs from the current system, where investors can freely integrate target Canadian businesses during the review process if closing has occurred prior to government intervention.

- 5. Conditional approval by the Minister:** The proposed amendments empower the Minister to negotiate binding undertakings with investors, potentially clearing investments based on these undertakings – a role previously reserved for Cabinet. This shift reflects the government's intention to take a more active role in shaping investment outcomes and raises the possibility that the ICA will feature more conditional approval decisions akin to the U.S. CFIUS regime in the future.
- 6. Judicial review and confidentiality:** The amendments introduce a mechanism allowing the Minister to assert privilege more easily over sensitive documents during a judicial review of a national security decision without disclosing them to the applicants or their counsel, thereby enhancing confidentiality in the process.



Early engagement is crucial to determine whether a mandatory filing may be required...

These proposed amendments will enable earlier detection of potentially harmful transactions than current legislation, where a remedy may not be in place until 200 days or more after closing. Additional amendments are being considered during the legislative process, including by enabling the government to commence net benefit review for investments by SOEs even where they do not meet the prescribed financial thresholds.

How investors respond

Foreign investors eyeing the Canadian market, especially in sensitive sectors, should seek counsel proactively from experts well-versed in the intricacies of the ICA. Early engagement is crucial to determine whether a mandatory filing may be required, whether there is any risk of national security intervention and, if so, how to integrate those scenarios into transaction

documentation. This assessment will become more complex once the proposed amendments are enacted.

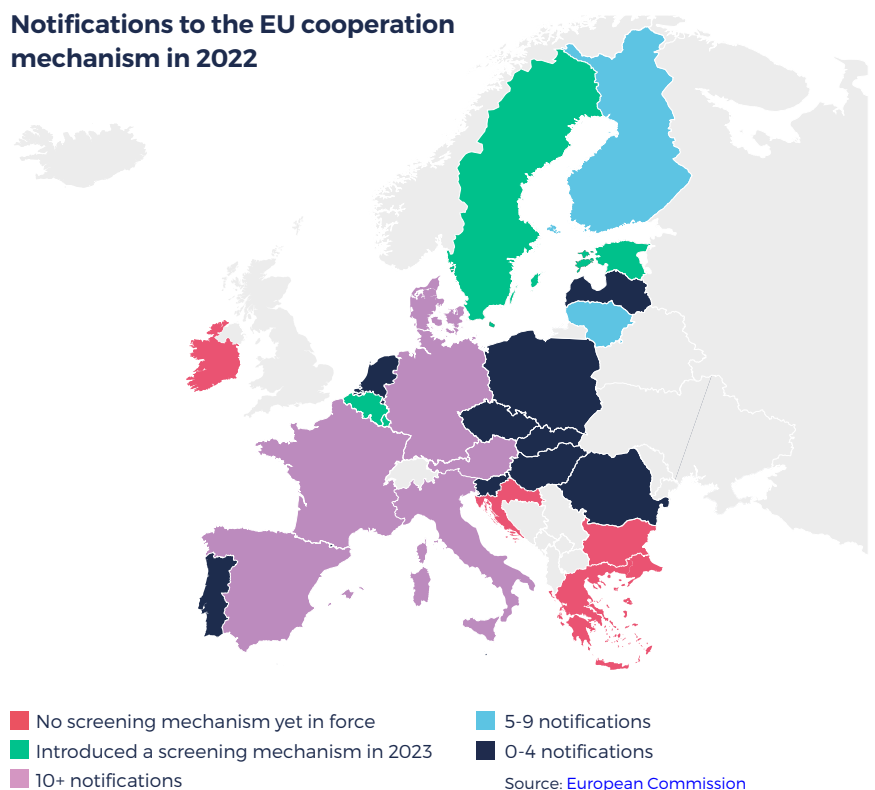
Foreign investors considering investments in sensitive sectors should be prepared to face interim measures requiring the target to be held separate until the national security review concludes. This possibility will likely adjust some investors' filing strategies, as the benefits of making a filing post-closing may be outweighed by the inconvenience of navigating a national security review with onerous hold separate measures imposed.

With global geopolitical conditions likely to remain unpredictable in the short- to medium-term, Canada's active enforcement posture and increasing collaboration with peer agencies in allied countries should ensure the ICA remains at the forefront of the foreign investment landscape.

European Commission reports on FDI Screening: more FDI regimes, fewer cases, more Phase II proceedings and prohibitions

The European Commission's (the Commission) EU Foreign Direct Investment Screening Regulation (the Regulation) entered into force on 11 October 2020, creating an FDI cooperation framework between the Commission and EU Member States (see more details [here](#)). Almost exactly three years later, the Commission has published its [Third Annual Report](#) on the Regulation covering the FDI regimes of 18/27 of the EU Member States in 2022 (though 90 percent of the 423 notifications submitted to the Commission in 2022 were from just six countries: Austria, Denmark, France, Germany, Italy and Spain).

Notifications to the EU cooperation mechanism in 2022



The EU: an attractive FDI destination?

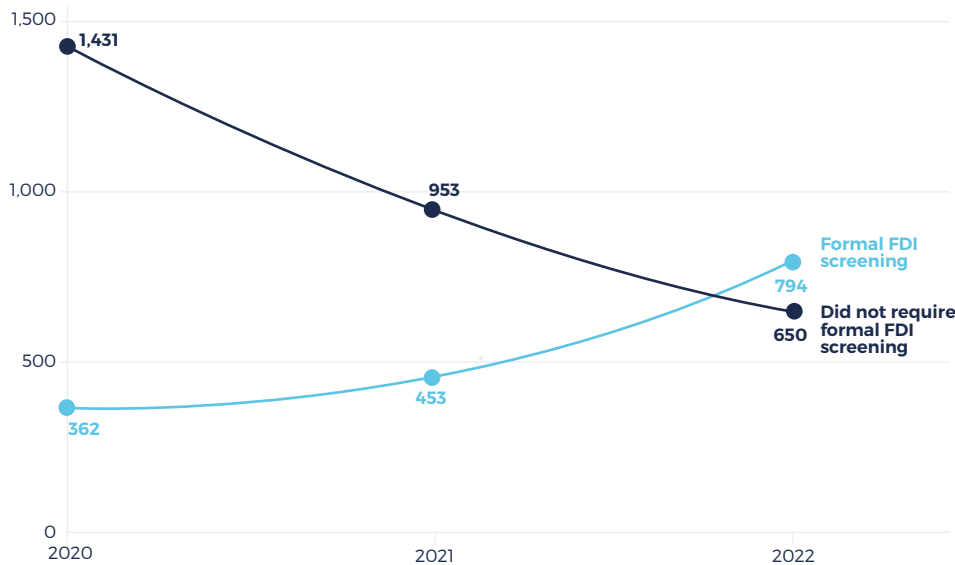
In 2022, €1,216bn of FDI flowed into the EU, a 14.3 percent decrease compared to the previous year. This fall in FDI is broadly reflective of a global dampening of dealmaking (especially in the second half of 2022), resulting from the economic slowdown and the rising cost of financing due to higher interest rates. It was also reflected in the overall number of national procedures initiated decreasing from 1,563 to 1,444. The EU suggests that the region remains open to investment. However, inverse to the amount of FDI entering the EU and the volume of transactions reviewed, the number of cases which underwent formal FDI rose from 29 percent to 55 percent between 2021 and 2022 (and from 20 percent in 2020). It is worth noting that the Commission puts a significant disclaimer on these reported numbers

as the considerable differences in FDI procedures in the Member States mean that the basis on which they report their cases is likely very different. For example, what it means for a case to be “formally screened” is defined differently in the different Member States.

What has driven this increase in formal screening? The Commission would argue that the proliferation in EU FDI regimes and national capabilities, combined with a renewed focus on security on national and supranational levels, together with the geopolitical climate are primarily responsible. However, EU Member States’ FDI regimes are broadly drafted, often viewed as catching transactions unnecessarily or unintentionally—such as internal restructurings—due to innate textual ambiguities. The fact that only 45 percent of notified transactions were not formally screened underlines this point.

“
EU Member States’ FDI regimes are broadly drafted, often viewed as catching transactions...”

Number of FDI cases reported by EU Member States



Source: [European Commission, FDI Intelligence](#)

Formal screenings are unlikely to result in remedies or a block but more Phase II investigations and prohibition in absolute terms

Perhaps somewhat unsurprisingly given the increased amount of formal screening, the proportion of cases with an intervention by authorities has decreased sharply. While in 2021, 23 percent of cases were approved conditionally, in 2022 this figure fell by over half to only 9 percent (many of which likely stemmed from France which imposed conditions in 54 percent of its cases). In absolute terms, the number of conditional clearances also decreased, though less drastically.

The percentage of investments that were blocked by the authorities (1 percent in both 2022 and 2021) or that were voluntarily abandoned by the parties (4 percent in 2022, 3 percent in 2021) remained roughly the same (though in absolute terms, the number increased). The fact that the figure remains so low implies that cases are only blocked when the FDI authorities consider that they posed an insurmountable threat to national security.

Commission's review of cases remains steady – Manufacturing and ICT in the spotlight

According to the report, 423 cases were notified under the Regulation's cooperation mechanism giving the Commission an opportunity to assess the transaction and issue an opinion (the Member State must give due consideration to a Commission opinion when reaching their final decision). As in the previous year, the Commission opened a Phase II investigation in around 11 percent of cases and only issued an opinion in about 3 percent (where deemed necessary due to the risk profile presented by the investor and/or the criticality of the target).

The Phase II referral statistics give an indication of the most sensitive defined sectors from a Commission perspective, namely: Manufacturing (59 percent despite only being 27 percent of

notified cases), Information and Communication Technologies (ICT) (23 percent as compared to 24 percent of notified cases), and Transport and storage (8 percent as compared to 7 percent of notified cases).

How should investors adjust their strategies?

Many of the report's conclusions are predictable for investors but they stress the importance, now more than ever, of factoring in: (i) the inherent cost – in terms of information gathering, management time and third party costs – of investing in the EU if a FDI filing is required; and (ii) potential delays/timing uncertainty particularly for deals with a high EU FDI risk profile (e.g. in certain sub-segments of Manufacturing and ICT). For instance, in the Phase II cases mentioned above (and in the absence of any formal timeline) Member States' responses to the Commission varied considerably (from one to 126 calendar days), suspending the review timeline until full information was received. The delay can be particularly long if the Member State does not already possess the information requested by the Commission.

Looking ahead

- **Potential reform of the Regulation** – first announced in June 2023, the Commission is planning to propose revisions to the Regulation by the end of 2023. The Commission is likely to argue that these revisions – expected to be significant if a stakeholder questionnaire distributed earlier this year is anything to go by – are necessary to reflect the evolving geopolitical landscape and governments' changing approaches to protecting national security and other national interests. The Commission's proposals may cover the introduction of universal approaches to timelines, procedures and/or sensitive sectors.
- **Potential tension between the Commission and Member States** – the mooted amendments are likely

to focus on the Commission's ability to unify the approach of Member States' FDI regimes. To date, the Commission has not shied away from criticizing the inconsistencies and often perceived ineffectiveness of Member States' FDI regimes in its reports and communications. However, it is unclear whether Member States will agree to far-reaching reforms (including giving the Commission a greater role) which may be perceived as encroaching on their sovereignty, as well as how any tensions might impact the EU elections in 2024.

- **Continuing close scrutiny of investments made by hostile actors**, particularly those by entities connected to the Russian and Belarussian governments in EU critical assets.
- **Increased coverage of national FDI regimes among EU Member States** – by the end of the year, 22/27 Member States are expected to have active FDI regimes in place. In Belgium, Estonia and Luxembourg, FDI regimes have entered into force this year (for the Belgian regime see [our article on developments in FDI regimes in Belgium, the Netherlands and Spain](#) in this issue) while the Swedish regime is due to become effective on 1 December 2023. Bulgaria, Croatia, Cyprus, Greece and Ireland are currently working on draft legislation.
- **A potential EU outbound investment screening mechanism** – the Commission is due to publish proposals aimed at addressing security risks relating to outbound investments by the end of this year. This development reflects increasing concern regarding outbound investment as shown by the U.S. developments covered in our article [U.S. Outbound Investment Executive Order focuses on next generation technologies](#) in this issue.

With thanks to Freshfields Alastair Mordaunt, Uwe Salaschek, Iona Crawford and Matthias Wahls for contributing this update.

Developments in FDI regimes in Belgium, the Netherlands and Spain

Governments in Europe are opting for stricter investment review policies, looking to protect national interests with stricter reviews and/or additional FDI screening mechanisms.

At a recent conference, Damien Levie, Head of the Technology and Security Unit for FDI Screening in the Directorate-General for Trade, noted that he expects 23 of 27 EU Member States to have national FDI regimes by the end of 2023. The four remaining Member States are currently working on legislation, albeit at different speeds.

Against a backdrop of heightened protectionism, particularly in the wake of the COVID-19 pandemic and geopolitical developments, Belgium and the Netherlands have recently introduced a general FDI regime, while Spain has made a number of changes to its existing FDI regime. These developments have potentially significant implications as we explain.

Belgium

Until recently, Belgium was one of the few remaining EU Member States without a general, country-wide foreign investment screening mechanism. However, on July 1, 2023, a new mandatory general and suspensory regime came into force. All transactions signed on or after July 1, 2023 meeting the new regime's materiality thresholds will need to be notified to a newly established Interfederal Screening Commission (ISC).

The new rules aim to safeguard Belgium's national security, public order and strategic interests; ensuring the continuity of vital processes, avoiding strategic or sensitive information being accessed by foreign actors, and ensuring strategic independence. Transactions involving direct or indirect acquisitions in Belgian entities above certain thresholds by investors established

outside the EU across a broad range of industry sectors could be affected. In contrast to the regimes in other EU Member States, the Belgian regime does not capture investments by EU-established investors. However, the new regime does apply to investors established in the UK, Switzerland and other non-EU countries.

The Belgian legislator has opted for a broad scope of application, especially in respect of sectors considered to be strategic. Although the ISC has published a first set of draft guidelines, which respond to a number of interpretation questions, uncertainty remains around several aspects of the new regime, in particular about the broadly defined industry sectors captured by the law. The ISC has stated that it expects investors to notify transactions when they are in doubt about their notifiability. Therefore, it is expected that a large number of investments will be notified to the ISC in its first year of operation.

“The new Belgian regime has now been in force for three months and it still remains to be seen how the broadly defined sectors that are captured by the regime and the remaining grey zones in the interpretation of the newly applicable rules will impact the investment climate in Belgium,” says [Tone Oeyen](#), Freshfields antitrust and foreign investment partner. “Given its potentially broad application, investors should keep the new Belgian FDI regime on their radar and cater for a potential notification in their deal documentation and timetable.”

With thanks to Freshfields Tone Oeyen and Marie de Crane d’Heyselaer for contributing this update.

The Netherlands

The Netherlands’ historic liberal stance towards foreign investments has recently become somewhat more stringent, with the introduction of the National Security Investment Act (the Vifo Act), which entered into force on 1 June 2023.

The Vifo Act introduces a broader national security investment screening policy covering investments in vital suppliers (energy, transport hubs and financial institutions), sensitive technology (military and dual-use goods, but also other technology such as semiconductors and photonics) and managers of corporate campuses. Importantly, the Vifo Act can apply retrospectively, as the Minister can

review transactions taking effect after 8 September 2020 and before the entry into force of the Vifo Act. By way of example, the Minister announced that it is investigating the acquisition of the Dutch semiconductor developer Nowi by Nexperia (owned by Wingtech Technology from China) with retroactive effect.

Appraisal criteria for investments differ under the country’s various legislative instruments, but the Government’s FDI assessments are based on the principles of protection of national security and public interest only (not economic interest or competition), but which may in practice include a wide range of policy considerations. Notification requirements apply regardless of the nationality of the acquirer(s) without exemptions for domestic or EU-based investors. The Dutch Government aims to minimize the impact on the investment climate and has drafted the relevant legislation accordingly (for instance by having a clear and narrow scope of application and refraining from including a catch-all provision) as opposed to other countries, where the scope of the relevant FDI legislation is broader and more difficult to gauge.

Information about investment approvals, reviews or conditional approvals are limited, as the Minister’s decisions are not public. However, the Minister has published information on how it makes decisions, providing that its substantive review focuses on

the identity, nationality and track record of the investor, including all shareholders that own at least 5 percent of the shares in the acquirer. In cases of acquisitions by private equity funds, the Ministry has asked for information on all limited partners accounting for at least 5 percent of the committed capital in the acquiring funds. In addition, acquirers will be asked to specify which jurisdictions (based on identity of the limited partners) account for at least 2.5 percent of the total committed capital in the private equity fund. The Minister will also investigate the control and information rights of the limited partners and may request copies of limited partnership agreements.

“Private equity funds with investors from sensitive jurisdictions are increasingly scrutinized from a national security perspective,” says Freshfields antitrust and foreign investment partner [Paul van den Berg](#). “Private equity firms should make sure they have a complete overview of their investors, their nationality and track record in order to identify potential national security and public interest concerns early in a deal process. It is important to think beyond the legal parameters in considering why an investment may be politically contested.”

With thanks to Freshfields Paul van den Berg, Felix Roscam Abbing and Max Immerzeel for contributing this update.

Spain

In contrast to Belgium and the Netherlands, Spain has already had a foreign investment regime for some time. Like many European countries, and despite the fact that Spain has traditionally been a country open to foreign investment, Spain issued a number of royal decree-laws around the COVID-19 pandemic to implement (and refine) its existing FDI screening mechanism. In line with regional and international trends, Spain's approach to FDI has become more restrictive since March 2020, seeking to protect key strategic sectors of the Spanish economy and the "crown jewels" of the Spanish stock market (the so-called "anti-takeover shield"). Transactions with possible implications for public order, public safety and public health require prior approval.

In this context, Spain has adopted a long-awaited implementing regulation to develop and refine the existing regime, which entered into force as of 1 September 2023, as well as an extension of the temporary regime applicable to EU/EFTA residents (for the third time since its implementation) until 31 December 2024. The legislation concerning FDI in Spain, as of 1 September 2023, consists of: Law 19/2003; Regulation 571/2023, of 4 July, on Foreign Investments (the Implementing Regulation) repealing Royal Decree 664/1999, of 23 April, on Foreign Investments; and Ministerial Order of 28 May 2001, which regulates the procedures for authorisation and for declaring the investment (the Ministerial Order).

The Directorate General for International Trade and Investment (which is part of the Ministry of Industry, Trade and Tourism) reviews reportable transactions, together with the Foreign Investment Board at a later stage. However, the final decision rests with the Council of Ministers (together with the Authority), which approves – conditionally or unconditionally – or blocks a transaction following a report from the Foreign Investment Board. Exceptionally, where investment value

is below €5m, the decision is issued by the head of the Directorate General for International Trade and Investment.

Although the *ex-ante* screening mechanism has increased red tape for investors, public sources indicate most of the transactions reviewed during 2022 were cleared unconditionally: of 98 formal requests, 73 transactions ultimately required prior authorization. Of these, 63 were unconditionally cleared, nine transactions were cleared subject to remedies (i.e., 12.3 percent). According to public sources, only one was prohibited (the proposed acquisition of 29.9 percent of PRISA's share capital by Vivendi in 2022) as it was not possible to impose any suitable mitigation measures to clear identified concerns. Remaining requests for approval were determined to be out-of-scope of review and dismissed.

In practice, there is a high level of discretion in Spanish transaction reviews. The legislation's definitions are very broad, particularly with respect to the scope of the strategic sectors triggering a filing requirement and with the meanings of "public order", "public safety" and "public health" not expressly defined. Although Spain's regime tends to mirror the EU FDI Regulation and the clarification provided by the new implementing regulation is a major development, a number of practical questions remain unanswered. Experience shows that these rules are ultimately enforced following a combination of technical and political criteria.

Potential FDI legislative developments are now on hold following the dissolution of the Spanish Parliament and are largely subject to the final outcome of the general elections held in July 2023, as each political party may adopt a different approach. The temporary regime for EU/EFTA investors will remain in place until 31 December 2024, and further extensions cannot be excluded. (The regime has already been extended three times.) In addition, many scenarios remain untested and there is uncertainty about the Authority's

application of certain provisions of the new Implementing Regulation. State-owned companies or sovereign wealth funds investing in Spain are increasingly subject to intense scrutiny, and even non-controlling investments are being carefully reviewed.

"The Spanish FDI regime is here to stay. Interesting times are ahead," says [Enrique Carrera](#), Freshfields antitrust and foreign investment counsel. The new implementing regulation "is really welcome," he says, as "it clarifies and settles current unwritten practice."

However, he cautions that uncertainties will remain given the broad scope of the regime: "Close cooperation with the authorities will be key to navigate the regulatory process. All sectors of the economy are potentially under scrutiny. Well-planned assessment will remain key for deal certainty, especially deals involving high-profile Spanish targets."

With thanks to Freshfields Enrique Carrera and Alvaro Puig for contributing this update.

Outlook on European FDI

In this climate, due to the increasing complexity of the rules, foreign companies that envisage transactions involving any of these countries should seek FDI advice at an early stage of planning the proposed investment, especially in strategic sectors that have already been subject to scrutiny and that will presumably continue to attract the attention of authorities going forward.

Further specifics on Belgium, the Netherlands and Spain authored by Freshfields lawyers are available (along with a number of other countries) in [Foreign Investment Regulation Review](#). With a new Irish FDI Bill expected to be signed into law any moment and come into force in Q2 2024, regimes in the EU and elsewhere are evolving rapidly. You can find the latest insights on these regulatory changes and more at our [Risk & Compliance Blog](#).

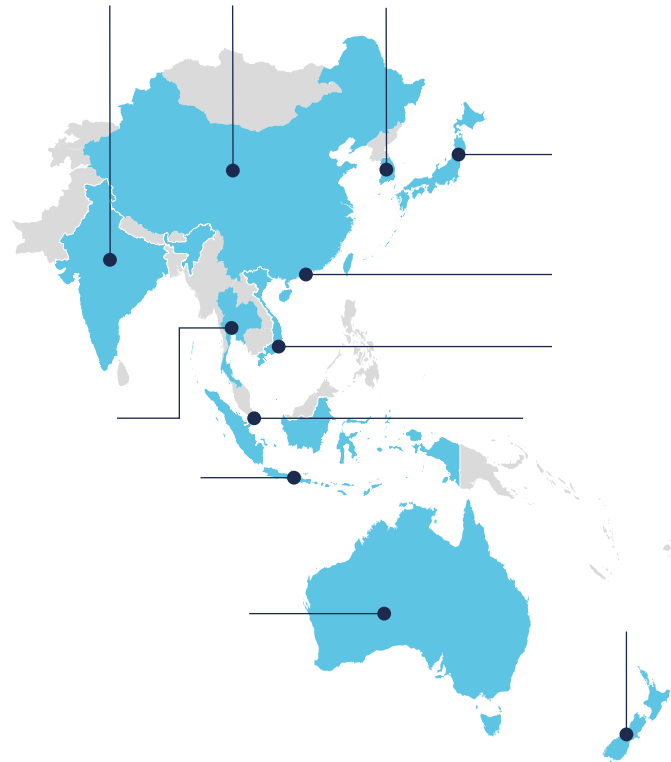
Foreign investment regimes in APAC at a glance

There has been a significant evolution in the approach to foreign investment in the APAC region in recent years. Several jurisdictions that previously restricted or completely closed off certain sectors to foreign investment have now started to open them up, subject to prior screening. Other jurisdictions have strengthened their screening regimes to guard against perceived risks to national or supply chain security. The result is a very broad and diverse set of rules for foreign investment, shaped by local economic, political and regulatory considerations.

At a high level, the more developed economies in the region have been tightening their scrutiny of foreign investments on national security grounds, with a view to protect sensitive assets, critical technologies and other vital interests. In contrast, developing economies have been relaxing their restrictions on foreign investment to accelerate economic growth. Notably, China and India have to some extent combined both trends. Meanwhile, business hubs like Hong Kong and Singapore continue to maintain their open economy status, with minimal screening of foreign investment.

Foreign investment regimes in APAC at a glance

This interactive map offers an overview of the foreign investment regimes in key APAC jurisdictions, including: (i) a summary of the current state of affairs; and (ii) a list of things to look out for if considering a direct or indirect investment into the jurisdiction. Please click the map for more details.



Acknowledgment. We wish to thank our StrongerTogether network in the Asia Pacific region for contributing to this section: Kirsten Webb at Clayton Utz (Australia); Gustaaf Reerink at ABNR Counsellors at Law (Indonesia); Sameeksha Chowla and Karam Daulet-Singh at Touchstone Partners (India); Glenn Shewan at Bell Gully (New Zealand); Scott Clements at Allen & Gledhill LLP (Singapore); Youngjin Jung and Jung Won Hyun at Kim & Chang (South Korea); Nitiroj Matra and Bancha Wudhiprecha at Siam Premier (Thailand).

1. Australia – Among the most developed screening regimes in the region.

Current state of affairs

Australia has a consolidated foreign investment screening regime that applies across sectors, under which a wide variety of direct or indirect foreign investments may be subjected to prior approval requirement, following mandatory or voluntary notifications.

The Treasurer is the ultimate decision maker and is advised by the Foreign Investment Review Board to assess whether a proposed foreign investment would be contrary to **national interest or national security** on a case-by-case basis.

Things to look out for

- Foreign investors should decide whether to make a **voluntary notification** strategically where a mandatory notification is not required, striking a balance between:
 - (i) pre-empting the Treasurer's call-in power after completion; and
 - (ii) minimizing the impact of its suspensory effect on the transaction's timeline.
- Transactions with **personal or government data** security concerns will be subject to particular scrutiny.
- The Treasurer has an exceptional **last-resort power** to review approved transactions where new factors arise presenting national security concerns.
- Following the prohibition decisions blocking two foreign investments (from the United States and China respectively) in the critical mineral sector in 2023, the Australian government announced its **critical minerals strategy** outlining how it will work with foreign investors to build a critical minerals processing industry.
- The Register of Foreign Ownership of Australian Assets came into force on July 1, 2023 requiring foreign investors to **report a wide range of interests** in Australian assets. Such information will be shared across government agencies.

2. Mainland China – More sectors open to investment, subject to screening.

Current state of affairs

China continues to relax its restrictions on FDI, in particular by shortening the negative list for foreign investments. At the same time, however, it is strengthening screening mechanisms under the national security review (NSR) regime. The NSR regime – which catches both direct and indirect acquisitions of Chinese businesses – is expected to play a more prominent role in

the future. Its scope is broad, covering any investments in military-related businesses and control-conferring investments in a long list of sectors deemed critical. The lack of clarity of the filing thresholds and transparency of the review process adds an additional layer of uncertainty.

Things to look out for

- Due to the **breadth of sectors** that may be captured by the NSR regime, including sectors that have been attracting foreign investment, such as **technology, internet and financial services**, it is advisable for foreign investors to conduct a comprehensive national security screening assessment at an initial stage of the transaction.
- While not explicit in the NSR regime itself, tightened regulation on **data protection** in China has led to regulators' increased interest in transactions involving target businesses having access to substantial amount of personal data or important data.

- The National Development and Reform Commission's **willingness to consult** on the filing thresholds, in particular, has proven to be helpful in addressing some of the uncertainties of the regime.

For more details, please see our latest article [here](#).

3. Hong Kong – No general foreign investment screening regimes.

Current state of affairs

Hong Kong does not have a generally applicable foreign investment screening regime and most local businesses are open to foreign investments, except for certain prior notification obligations or restrictions in the **broadcasting industry**.

4. India – Limited regime but greater scrutiny on investors from neighboring countries.

Current state of affairs

Prior government approval is only required for foreign investments in a few sensitive sectors under the so-called “government route”, and in such cases only if the investment exceeds certain ownership thresholds.

Foreign investment is not permitted in several sectors, such as gambling, real estate and atomic energy.

Overall, India is going through a series of policy reforms towards attracting foreign investments, including adding foreign investment up to 100 percent in the telecommunication sector to the “automatic route”

(i.e., not requiring prior approval), as well as relaxing the ownership caps in sectors such as defense and insurance to qualify for the “automatic route”. In a contrary direction, following the onset of the COVID-19 pandemic, the Indian government adopted the “**Press Note 3 regime**”, requiring prior approval for direct and indirect equity investments from those countries sharing a land border with India, i.e., **China (including Hong Kong), Pakistan, Bangladesh, Nepal, Myanmar, Bhutan and Afghanistan.**

Things to look out for

- Press Note 3 regime also affects **investors that have beneficial owners** based in the countries that share a land border with India.
- **Timelines of Press Note 3 reviews** remain unpredictable. It is advisable to factor in at least 9-12 months for a Press Note 3 application, but it is not uncommon for notifications to go unanswered for even longer.

Rejections are not uncommon either. However, recent developments suggest that the government may be open to considering applications from Press Note 3-impacted entities where they provide essential components towards **electronic supply chains** and/or are engaged in the **electric vehicles sector**, both of which are sectors that India is keen to develop, albeit subject to such entities tying up with local Indian partners.

5. Indonesia – More sectors open for investment.

Current state of affairs

While the Indonesian law governing foreign direct investment does not feature a generally applicable screening regime, **several sectoral** regulations impose restrictions or prior approval requirements on foreign investors in specific sectors, such as financial services, insurance, mining, oil and gas and shipping.

The Indonesian government is also authorized to determine which business sectors are open, open with certain restrictions or closed for foreign investment, as set out in the “**investment list**”. Lawmakers and the Indonesian government have been making efforts to improve the ease of doing business in Indonesia, by opening more business sectors to foreign investment, streamlining business licensing processes across sectors, etc., to attract foreign investors.

Things to look out for

- Foreign investors should ensure that any restrictions and obligations under applicable laws or sectoral regulations continue to be observed after closing of a transaction, as the Ministry of Investment/Investment

Coordinating Board and other authorities may perform **post-closing monitoring** of the foreign investment activities by reviewing the required periodic reports submitted by foreign investment companies.

6. Japan – More expansive notification obligations.

Current state of affairs

Since 2019, Japan has tightened its regulations over foreign investment activities, especially from a national security perspective, through:

- (i) a series of amendments to the notification regime under the Foreign Exchange and Foreign Trade Act (the Forex Act), which captures a wide range of sectors such as aerospace, broadcasting, telecommunications and semiconductors;
- (ii) introducing regulations over the use of land of strategic importance;
- (iii) strengthening restrictions in specific sectors such as broadcasting; and
- (iv) enacting the Economic Security Promotion Act, which will apply from the first half of 2024.

The Economic Security Promotion Act aims to:

- (i) ensure the stable supply of critical goods, such as fertilizers, permanent magnets, machine tools and industrial robots, semiconductors, storage batteries by strengthening supply chains;

- (ii) screen foreign investments in core infrastructure services in 14 sectors including electricity, gas, oil, telecommunication, broadcasting, finance and credit cards etc.;
- (iii) support the development of cutting-edge critical technologies such as space, quantum and AI; and
- (iv) close off patent applications for security-sensitive inventions.

At the same time, amendments to the Forex Act have expanded the scope of prior screening of direct foreign investments in “designated businesses” deemed to be critical to national security, lowering notification thresholds.

Indirect acquisitions of business in Japan are not captured by the notification regime under the Forex Act, nor does the new Economic Security Promotion Act appear to apply to indirect acquisitions

Things to look out for

- The **threshold for prior notification** for acquisitions of shares in listed companies in certain “designated businesses” has been reduced from 10 percent to 1 percent subject to certain exemptions.
- Prior notification obligations are imposed on foreign investments in more businesses, including those related to **infectious diseases medicine manufacturing, cybersecurity, critical minerals, real estate** and designated “critical goods”.
- The Economic Security Promotion Act establishes an ex-ante examination framework targeting foreign investments in critical facilities commissioned by designated **core infrastructure providers** in 14 core infrastructure sectors.
- Where a transaction benefits from certain exemptions from the prior notification obligations, **compliance with the terms of the exemptions** must be ensured as the Japanese government may continue to monitor an investor’s conduct post completion, especially where the investor is high-profile.

For more details, please see our latest article [here](#).

7. New Zealand – Complex regime with longer review timelines.

Current state of affairs

New Zealand’s Overseas Investment Office (OIO) reviews foreign investments into sensitive assets, including sensitive land and “significant business assets”, that require prior consent under the Overseas Investment Act 2005. It has call-in powers under the National Security and Public Order regime to review foreign investments in “strategically important businesses” that do not otherwise

require prior OIO consent (although investments in some categories of strategically important businesses trigger a mandatory and suspensory notification to the OIO). The OIO regime has become increasingly complex in recent years, particularly in the application of jurisdictional thresholds.

Things to look out for

- Timeframes for obtaining approvals tend to be **longer than equivalent regimes** in other jurisdictions and will vary significantly depending on the complexity of a transaction (with the statutory timeframe up to 100 working days for some types of sensitive land).

There is **no legal recourse** for investors where the statutory review periods are exceeded, although the OIO has recently maintained a good record of meeting these deadlines.

8. Singapore – Open for investment, with potential screening regime in the works.

Current state of affairs

Singapore continues to be an open economy that welcomes and encourages foreign investments. It does not have any generally applicable foreign investment screening regime. It maintains only minimal control over foreign investments through certain sector-specific regulations,

either by imposing restrictions on foreign ownership (e.g., certain types of residential property, domestic media, broadcasting) or through sectorial authorisation regimes that apply to both foreign and domestic investors.

Things to look out for

- Under the mandatory “two-class” shareholding structure of **newspaper companies**, foreign investors are only allowed to invest in the “ordinary shares” unless otherwise approved, while holders of “management shares” control matters such as appointments of senior management.
- The **nationality of an investor** could be a relevant factor from a public or national interest perspective in the authorization of investments in certain regulated sectors without explicit restrictions on foreign investments, such as banking, telecommunications and media services.
- In recognition of the evolving economic and geopolitical landscape, it is reported that Singapore is exploring options to manage **significant** foreign investments into critical Singaporean entities to safeguard **economic resilience** and **national security**.

9. South Korea – Sensitive technologies in the spotlight.

Current state of affairs

Korea has been increasing the level of scrutiny over foreign investments due to growing concerns over national security and transfer of sensitive technologies.

Specifically, in Korea, foreign investments that meet any of the following criteria are subject to a security review and will be approved only subsequent to the review process:

- the target company is a defense material producer;
- the target company is in possession of strategic items and/or technologies;
- the target company has contracts classified as state secrets;
- the target company is in possession of national core technologies (NCT), (the list of which is updated almost every year); or
- the foreign investment is likely to cause a material impediment to the maintenance of international peace and security (catch-all provision).

Indirect acquisitions are typically not subject to the security review, but a case-by-case assessment is nevertheless warranted and will depend on the risk profile of the transaction.

Any application subject to a foreign investment security review is required to indicate its potential impact on national security.

Korea continues to maintain a relatively open approach to foreign investments that do not involve any of the above five types of investments captured.

Things to look out for

- While the list of designated defense materials and protected NCTs are publicly available, it may not always be clear whether the products or technologies held by the target companies fall within the applicable lists. Foreign investors are thus advised to **confirm with their relevant Korean counterparties** whether the domestic target companies produce designated defense material or hold NCTs.
- The increased focus on NCTs has already dampened recent attempts by foreign investors viewed as adversely impacting Korea’s national security from investing in the Korean **semiconductor, battery, display and biotechnology sectors**.

10. Thailand – Several sectors still shielded from foreign investment.

Current state of affairs

Thailand has a generally applicable foreign investment screening regime which restricts, prohibits or imposes prior notification requirements on foreign investments in a broad range of more than 40 categories of business, including:

- (i) those prohibited for special reasons (e.g., agriculture, newspaper publication, television, etc.);
- (ii) those affecting national safety or security or arts and culture, environment, etc.; and

- (iii) those where Thai nationals are deemed to not yet be ready to compete internationally (e.g., retail, wholesale, advertising, sale of food and beverages, etc.).

The foreign investment regime applies to both direct acquisitions and indirect acquisitions as long as they result in foreigners directly or indirectly owning 50 percent or more of the shares and/or registered capital of a company incorporated under Thai laws.

Things to look out for

- The relevant Thai authority has **considerable discretion** in reviewing transactions and typically establishes internal policies to dictate how responsible officials should exercise such discretion on a case-by-case basis.
- In most sectors, **U.S. investors** are allowed to maintain a majority shareholding or wholly own a company incorporated under Thai or U.S. laws and thereby engage in businesses on the same basis as would a Thai company.
- The authority is considering **relaxations** in certain sectors such as digital platform business, aircraft maintenance, software business, digital content business, and insurance brokerage.

11. Vietnam – Screening mostly applicable to direct foreign investments into Vietnam, with some exceptions.

Current state of affairs

Foreign investors looking to invest in Vietnam should pay attention to a broad range of generally applicable foreign investment legislation imposing either an **application for prior approval**, or a registration obligation for their investments if relevant conditions are met. Indirect and offshore acquisitions of businesses in Vietnam are

typically not captured if the acquisitions do not result in any change of owner of record in the local companies owning the businesses. In addition, certain foreign investments are regulated separately, for example, investments in Vietnamese listed companies, or transactions in the banking or insurance sectors.

Things to look out for

- In practice, authorities have **wide discretion** to determine whether a foreign investment has satisfied the statutory requirements for notification and approval. Both public interest and national security considerations tend to underlie their decision-making.

With thanks to Freshfields Alastair Mordaunt, Laurent Bougard, Ziqi Zhou and Shuke Wen for contributing this update.

Latest edition of Foreign Investment Regulation Review published

Highlighting the essential practical and strategic considerations for foreign investors contemplating international or cross-border deals, Foreign Investment Regulation Review focuses on the latest enforcement trends and developments arising from the increased scope of foreign investment regulation worldwide, as well as the growth in intensity of interventions. In partnership with Law Business Research and Lexology, we are once again proud to be co-editor of this in-depth publication through our antitrust and foreign investment partner [Alex Potter](#), and to be the main contributor with chapters covering 12 jurisdictions and the preface authored by Freshfields lawyers.

With a growing number of reviewable transactions being subject to remedies ranging from specific corrective orders to outright prohibitions, and the broadening of the concept of national security, which forms the heart of many foreign investment reviews, staying on top of this dynamic and increasingly complex regulatory landscape remains critical to investment success. The combination of our expertise in foreign investment regulation and our world-leading merger control practice means we are uniquely positioned to provide the necessary co-ordinated approach to obtaining global, regulatory approvals. We are very pleased to be able to offer you access to this [interactive digital version of the Foreign Investment Regulation Review handbook](#).

freshfields.com

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the laws of England and Wales authorised and regulated by the Solicitors Regulation Authority (SRA no. 484861)) and associated entities and undertakings carrying on business under, or including, the name Freshfields Bruckhaus Deringer in a number of jurisdictions, together referred to in the material as 'Freshfields'. For further regulatory information please refer to www.freshfields.com/support/legal-notice. Freshfields Bruckhaus Deringer has offices in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Singapore, Spain, the United Arab Emirates, the United States of America and Vietnam.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP, November 2023, 425332