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Foreign Investment Rules: what has changed?

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Matt Evans, DLA Piper
Elisabeth Eklund, Delphi
Dr. Marius Boewe, Herbert Smith Freehills
Michel Ponsard, UGGC



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UK: FDI Regime

Matt Evans, Partner, DLA Piper

Overview of UK regime

Mandatory or voluntary?	Currently voluntary but hybrid mandatory and voluntary regime coming into force later in 2021
Type of deal caught under new regime	<ul style="list-style-type: none"> • Mandatory: Acquisition of >25%; >50%; >75% of shares or voting rights or of voting rights enabling a veto over any class of resolution governing the affairs of the entity • Voluntary: other forms of control including acquisition of “material influence” and asset deals • Target need not have a subsidiary or branch in UK. Merely exporting goods or services to UK customers suffices • No deal is too small to be caught and the law applies equally to UK investors
Sectors	17 sectors under the mandatory regime
Timing under new regime	30 working days (initial review); and, if needed 45 working days (additional period). Can be extended Deals can be reviewed up to six months after Secretary of State became aware of “trigger event”, capped at five years after the trigger event occurred
Remedies and sanctions	<ul style="list-style-type: none"> • Criminal offence for gun jumping – up to five years in prison, fines (5% of total global turnover of the business or, if higher, GBP10 million). Fines on individuals up to GBP10 million; director disqualifications • Extensive powers to address national security concerns including unwinding deals, extra-territorial application and interim orders pending outcome of FDI review • Existing law can address wider “public interest” concerns, such as economic ones
Practical advice before new regime is in force	<ul style="list-style-type: none"> • New regime will have retrospective effect on deals not closed before 12 November 2020 • Consider briefing note to UK Investment Security Unit to seek non-binding comfort letter

Sectors caught by mandatory regime

Advanced materials	Data infrastructure
Advanced robotics	Defence
Artificial intelligence	Energy
Civil nuclear	Military and dual use
Communications	Quantum technologies
Computing hardware	Satellite and space technologies
Critical suppliers to government	Synthetic biology
Critical suppliers to the emergency services	Transport
Cryptographic authentication	



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France: FDI Regime

Michel Ponsard, UGGC

1. Overview of France regime

Mandatory or voluntary?	Obligation to notify all relevant transactions in sensitive sectors (see below).
Type of deal caught	<p><u>Since 2020 (from “Loi Pacte” reform of 22 May 2019)</u>, a direct investment is subject to control when a foreign investor :</p> <ul style="list-style-type: none">• to acquire control, within the meaning of Article L.233-3 of the French Commercial Code, of an entity governed by French law; or• acquire all or part of a branch of activity of an entity governed by French law; or• to cross, directly or indirectly, alone or in concert, the threshold of 25% of the voting rights of an entity governed by French law (replaced the original threshold of 33.33%). <p><i>To take account of the current crisis arising from the COVID-19 pandemic, the Decree n°2020-892 of 22 July 2020 and Order of 22 July 2020 have reduced the <u>25% threshold to 10%</u> of the capital or voting rights of a company whose registered office is in France and whose shares are admitted to trading on a regulated market (excluding European investors) until</i></p> <p>31 December 2020.</p> <p><i>This measure was extended by Decree n°2020-1729 of 28 December 2020, until 31 December 2021.</i></p>
Sectors	Activities likely to undermine public order, public security, the interests of national defence or relating to the research, production or marketing of arms, ammunition, powder, and explosive substances (see below).

1. Overview of France regime

Timing	<p>Since 2020 (from “Loi Pacte” reform of 22 May 2019),</p> <ul style="list-style-type: none">• 30 working days from the date of receipt (initial review); and, if needed• 45 working days (additional period). <p>If there is no response within these periods (30 days or 45 days), the application will be deemed to be rejected.</p> <p>In addition, a prior request for review of an activity may be requested to the Minister of Economy and Finance whether the proposed operation is subject to the control procedure, he has two months to respond.</p>
Remedies and sanctions	<ul style="list-style-type: none">▪ Injunctions, possibly accompanied by a penalty payment ;▪ Since 2020 (from “Loi Pacte” reform of 22 May 2019), precautionary measures (<i>suspension of voting rights, prohibition or limitation of the distribution of dividends, temporary restrictions on the free disposal of all or part of the assets linked to sensitive activities, appointment of a trustee to ensure the protection of national interests within the target</i>)▪ Withdrawal of authorization ;▪ Since 2020 (from “Loi Pacte” reform of 22 May 2019), the amount of fine has increased and may now be up to the higher of the following amounts: twice the amount of the irregular investment, 10% of the target's annual turnover before tax, EUR 5 million for legal persons and EUR 1 million for natural persons.▪ Criminal sanctions

2. SECTORS caught by mandatory regime

- Weapons, ammunition and explosive substances
- Dual-use goods and technologies
- Activities carried out by entities holding national defence secrets
- Security of information systems
- Interception of communications, capture of computer data
- Activities carried out by entities that have concluded a contract for the benefit of the Ministry of Defence to produce goods or services relating to a sensitive activity
- Cryptology
- Gambling - except casinos
- Activities designed to deal with the illicit use of pathogens or toxic agents
- Processing, transmission or storage of data, the compromise or disclosure of which is likely to affect the exercise of sensitive activities
- R&D activities involving critical technologies (*cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors*)
 - ⇒ **Since 2020 (from “Loi Pacte” reform of 22 May 2019)**, energy storage and quantum technologies have been added and as well as, **since Order of 27 April 2020**, biotechnology (**due to the covid crisis**)
- Activities relating to infrastructures, goods or services essential to guarantee : *energy or water supply; operation of transport networks and services; operation of electronic communications networks and services; space operations ; the exercise of the missions of the national police, the gendarmerie, the civil security services, as well as the exercise of the public security missions of the customs and those of approved private security companies ; the operation of establishments, installations and works of vital importance (and their information systems); protection of public health.*
 - ⇒ **Since 2020 (from “Loi Pacte” reform of 22 May 2019)**, food safety ; publishing, printing or distribution of political and general information press publications have been added.





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Germany: FDI Regime

Marius Boewe, Herbert Smith Freehills

Overview of German regime

Mandatory or voluntary?	Mandatory for specific sectors and case groups, voluntary below specific thresholds
Type of deal caught under new regime	<ul style="list-style-type: none"> • Mandatory: Acquisition of ≥ 10 resp. 20 percent of direct or indirect voting rights • Voluntary: Acquisition of < 10 percent of direct or indirect voting rights • Government may open ex officio proceedings in case of acquisition of ≥ 25 percent (irrespective of the sector) of direct or indirect voting rights • Filing obligation lies with non-EU/EFTA (direct or indirect) investor in cross-sectoral group and with non-German (direct or indirect) investor in sector specific group
Sectors	<ul style="list-style-type: none"> • Sector specific: defence/military and IT security • Cross-sectoral group: critical infrastructures (triggered by specific thresholds), related IT services and another 25 sectors
Timing under new regime	<p>2 months (initial review); and, if needed 4 months (additional period). Can be extended (3 plus 1). Deals can be reviewed up to 2 months after Federal Ministry of the Economics became aware of transaction, capped at five years</p>
Remedies and sanctions	<ul style="list-style-type: none"> • Criminal offence for gun jumping – up to five years in prison, fines • Standstill obligation forbids: <ul style="list-style-type: none"> • to enable the acquirer to exercise voting rights • to grant the acquirer the right to receive any dividends, • to provide or otherwise disclose to the acquirer any company-related information of FDI relevance • Transactions subject to filing obligation are considered as provisionally invalid until governmental approval
Practical advice	<ul style="list-style-type: none"> • The German FDI regime has been amended three times over the last twelve months. IT is therefore recommendable to monitor the development very closely to avoid any infringement of new stipulation.

Sectors caught by cross-sectoral group

Critical Infrastructure:	Other Sectors (samples only):
Energy	AI
Water	Medical products and components
Food	Autonomous driving/flying
IT and Telecoms	Airlines
Healthcare	Satellite and space technologies
Banking and Finance	Synthetic biology
Transportation/Infrastructure	Nano electronics
+ related IT services	Specific raw material extraction



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Sweden: FDI Regime

Elisabeth Eklund, Advokatfirman Delphi

Overview of the Swedish regime

Mandatory or voluntary?	<ul style="list-style-type: none"> - Mandatory notification/consultation as of 1 January 2021 (under the Protective Security Act). - Further FDI-legislation subject to investigation (until November 2021).
Type of deal caught under new regime	<ul style="list-style-type: none"> - No control threshold – applies also to activities by public authorities. - No turnover threshold – but listed companies exempted. - The legislation applies equally to Swedish investors (but not to real estate transfers). - All Swedish related business transactions that involve the transfer of security sensitive activities must be notified to the Swedish Security Service or the Swedish Armed Forces (after prior internal assessment whether transfer is appropriate).
Sectors	<p>Sectors for which the Protective Security Act applies (not clearly defined).</p>
Timing	<ul style="list-style-type: none"> - Stand-still obligation. - No handling times specified in the legislation. - The Government refers to general rule in the Administrative Act – “quick and cost-efficient handling –balancing legal certainty”.
Remedies and sanctions	<ul style="list-style-type: none"> - Extensive powers to address national security concerns including remedies, prohibitions and unwinding deals (under penalty of a fine). - A transaction that has been prohibited becomes automatically null and void. Appeal to the Government. - Governmental Bill proposes sanction fees of up to 5 MEUR from 1 December 2021.
Practical advice	<ul style="list-style-type: none"> - The target’s and the seller’s assessment must include the consideration of whether the acquirer could represent the interests of a foreign power or other antagonistic interests. - Consider the confidentiality issues. - Make sure to bring arguments regarding proportionality, non-discrimination etc. (ECHR, EU Charter etc.) - The Inspectorate for strategic products (“ISP”) is the contact point for FDIs. Cf arms and dual use products.

Potential sectors caught by Swedish regime

<ul style="list-style-type: none"> - The legislation does not offer a definition of security-sensitive activities. - May be on a national, regional or local basis. - Preventive measures taken to protect the security-sensitive activities of public agencies and companies against espionage, sabotage, terrorist offences and other crimes that might threaten their operations. 	<ul style="list-style-type: none"> - Security-sensitive activities are activities that are of importance to Sweden's security or are covered by an international protective security commitment that is binding for Sweden. - Also includes the protection of information relating to security-sensitive activities (classified information).
Examples: water	transport infrastructure,
electricity and heating plants	surveillance of important buildings, etc.
electronic communication infrastructure	importance for another country's security etc.
healthcare infrastructure	



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QUESTIONS