Ashurst

Foreign investment in Europe

A world of opportunity

Outpacing change

Investment Regimes

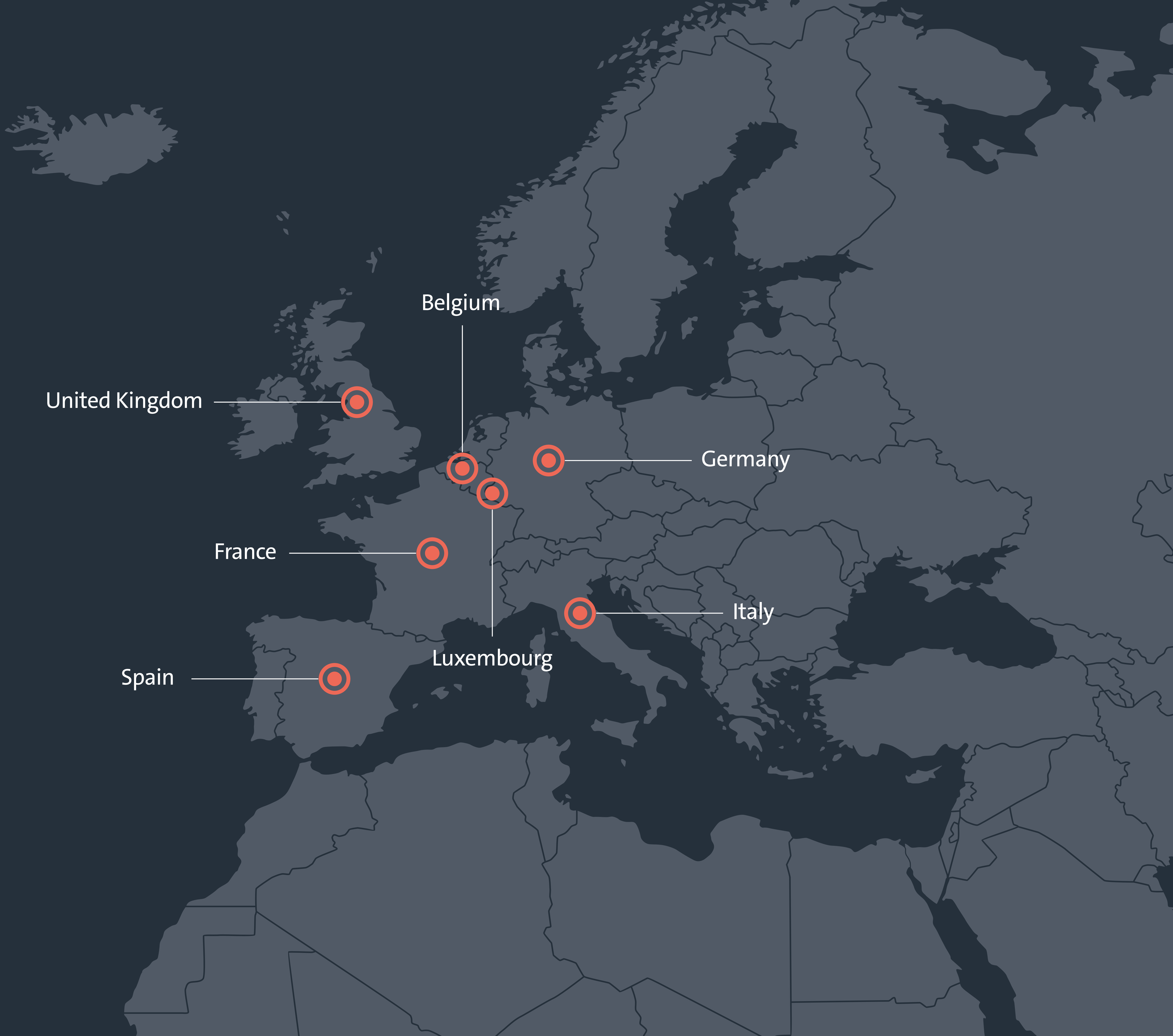
The investment regimes in Europe are among the most open in the world. But a growing concern about the impact of foreign investment on security and public order has led to increased regulation.

This guide will help you navigate the foreign investment control regimes in the major European jurisdictions.

Use the interactive map to explore a jurisdiction of interest or the links below to our other pages.

FDI regimes in the European Union >

Ashurst key contacts >



FDI regimes in the EU

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In recent years, there has been a proliferation of foreign direct investment (FDI) regimes worldwide, including in the EU. It is therefore increasingly important to consider what FDI approvals may be required early on in any investment / M&A activity and to ensure that the deal timetable factors in the relevant review periods. Our team is very experienced in coordinating FDI filings alongside merger control and other filings.

European Commission Mechanism

In March 2019, the EU enacted the EU Screening Regulation, which provides for a cooperation mechanism for screening foreign direct investments in EU Member States. The Regulation came into effect on 11 October 2020 and it gives EU Member States and the European Commission the ability to exchange information, provide comments and issue opinions on foreign direct investment. However, Member States retain decision-making power in relation to FDI in their jurisdictions.

In March 2020, the European Commission issued guidance to Member States on foreign direct investment and the protection of Europe's strategic assets. The guidance was issued ahead of the EU Screening Regulation entering into force and as a reaction to the economic effects of the Covid-19 pandemic. In the guidance, the European Commission urged Member States without a (fully-fledged) screening mechanism to implement one and in the meantime to use all other available options to address cases where a foreign acquisition would create a risk to security or public order in the EU.

As of 2 September 2022, the European Commission had screened over 740 FDI transactions. In its second annual report (published in September 2022) the European Commission stated that 86% were assessed in 15 calendar days and less than 3% of transactions resulted in a European Commission opinion (reserved for cases raising more complex issues).

Existing Member State Regimes

As of August 2023, 19 Member States have FDI screening mechanisms in place. In addition to the jurisdictions covered in this note, the following countries have FDI regimes in place: Austria, Czech Republic, Denmark, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia and the Slovak Republic.

There are also proposals for new / expanded regimes in Croatia, Estonia, Greece, Ireland, Luxembourg and Sweden. Of the Member States, only Bulgaria and Cyprus have no publicly reported initiative underway to introduce an FDI screening mechanism.

Belgium

A new screening regime for Foreign Direct Investment (FDI) by non-EU investors into Belgium entered into force on 1 July 2023.

Sectors affected

Investments in a Belgian entity active in:

(i) critical infrastructure for energy, transport, water, health, electronic communications, media, data processing or storage, air or space traffic, defence, financial infrastructure or infrastructure used for elections and sensitive installations; technologies and raw materials of essential importance to public health, defence, public security, public order; military equipment, dual-use products; supply of critical inputs; access to and ability to control sensitive information including personal data; private security; freedom and pluralism of the media and strategic technologies in the biotech sector; or

(ii) defence; energy; cyber security; electronic communications; and digital infrastructure.

Trigger events

Investments by non-EU investors (ultimate beneficial owner) that result in:

- for Belgian entities active in (i) under Sectors Affected, (direct or indirect) acquiring control or ≥ 25% of the voting rights in those entities. For investments in biotech, a filing is only required if in addition the target's turnover exceeded EUR 25m in the previous financial year.
- for Belgian entities active in (ii) under Sectors Affected, a foreign investor (directly or indirectly) acquiring control or ≥ 10% of the voting rights in those entities, provided the target's turnover exceeded EUR 100m in the previous financial year.
- for Belgian entities active in any of the above sectors, the Draft Guidelines indicate that any further increase in ownership rights above the 10% or 25% threshold.

Filing/authorisation requirement

- Filing is mandatory and authorisation must be granted before the investment in the Belgian entity can be completed.

Review period

"Verification Procedure": an initial review period of 30 calendar days applies; the clock will be stopped if the Interfederal Screening Committee (ISC) requests additional information.

"Screening Procedure": if the transaction requires further investigation, there will be a further review period of at least 28 calendar days.

- this will be extended where the ISC raises preliminary concerns to allow time to prepare a written reply (10 additional days) and an oral hearing (10 additional days).
- the screening period may also be extended by up to 25 days (not including suspensions) where the European Commission or other Member States announce that they will request additional information or provide comments.
- further extensions are possible: up to 3 months for complex cases or extensions of 1 month at a time (by agreement) to negotiate remedies.

Assessment criteria

Whether the investment could have an impact on national security, public order, or the strategic interests of the Belgian federated entities, taking into account whether:

- the continuity of vital processes is guaranteed;
- certain strategic or sensitive knowledge would fall into foreign hands; and
- strategic independence is ensured.

Sanctions

Fines of up to 30% of the investment value in relation to the Belgian entity for:

- failure to notify;
- providing incorrect or misleading information;
- gun-jumping; and
- failing to comply with remedies.

Where a previously unnotified investment is notified within 12 months of completion, the fine will be limited to 10% of the investment value.

Fines of up to 10% of the investment value for:

- providing incomplete data in response to a request for information; and
- failing to provide additional information in time.

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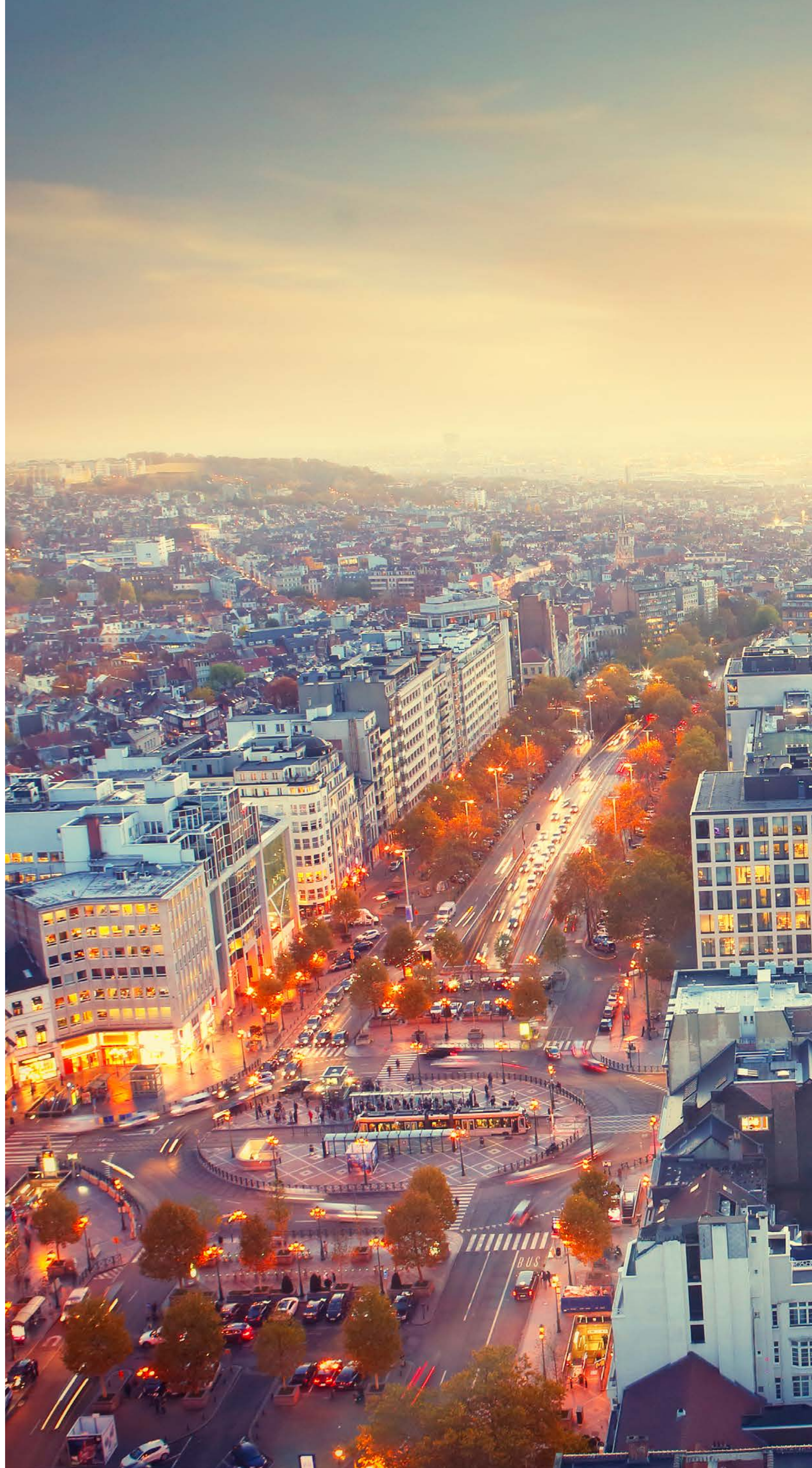

France

Generally, foreign investments in France only require declarations to be made to the Banque de France after completion. However, prior consent must be sought for investments in certain sensitive or strategic sectors.

Sectors affected

Any activity involving the exercise of public authority or which relates to activities:

- likely to jeopardise public order, public safety or national defence; or
- in relation to research, production or marketing of weapons, ammunition and powders or other explosive substances.

The French Monetary and Financial Code sets out a list of business sectors that are considered “strategic” (including defence, transport, energy, water, health, R&D activities relating to critical technologies etc.).

Trigger events

- Acquisition of control over a French-based entity by a non-French investor;
- Acquisition of all or part of a line of business of a French-based entity by a non-French investor;
- Acquisition, whether direct or indirect, alone or in cooperation, of ≥ 25% of the voting rights of a French-based entity (≥ 10% for listed companies until 31 December 2023), by a non-EU/EEA investor.

Filing/authorisation requirement

Filing is mandatory and authorisation must be granted before the investment can be completed.

Review period

30 business day screening period to assess whether the transaction is in scope or is authorised without conditions.

A further 45 business day period if a more in-depth review is needed, including if conditions need to be imposed.

Assessment criteria

Whether the investment affects French national interests. The authorisation can also be refused if French authorities consider that the investor:

- has connections with a foreign government or public body;
- is likely to commit or has been sentenced in the last 5 years for certain criminal offences; or
- has been subject to a sanction based on non-compliance with foreign investment regulations.

Sanctions

For making an investment without required prior authorisation or non-compliance with conditions:

- an order requiring the investor to file an authorisation request, unwind or modify the transaction, or comply with conditions. Failure to comply with such an order may lead to a fine of up to €50,000 per day;
- the transaction will be deemed null and void;
- fines may be imposed, not exceeding the greater of twice the amount of the investment at stake, 10% of the annual turnover of the target, €5m for companies or €1m for individuals; and
- criminal sanctions may also be imposed on individuals, including imprisonment for up to 5 years.

Proposed reforms

Currently no significant reforms are planned.

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Germany

Germany has an established foreign direct investment review mechanism which allows the Federal Ministry of the Economy to review investments for national security concerns.

There are two regimes: the cross-sectoral review and the sector-specific review.

Sectors affected

Cross-sector review: transactions in any sector may be called in. However, 27 sectors have been specified as potentially giving rise to security concerns (including energy, IT, telecommunications, finance, transport, health, water supply and critical or emerging technology sectors such as AI, robotics etc.).

Sector-specific review: certain defence and IT security companies (including manufacturers/developers of weapons and certain other military technology and companies with IT security features used for processing classified government information).

Trigger events

- Acquisition of ≥10% of voting rights in companies operating in the defence and IT security sectors and in certain other specified sectors, such as energy, IT, media, telecommunications, finance, transport, health and water.
- Acquisition of 20% of voting rights in companies operating in certain sectors.
- Acquisition of ≥25% in any other German company.
- Asset deals, resulting in the (direct or indirect) acquisition of a separable business unit or all essential operating resources of a German company.
- Add-on acquisitions of further voting rights above certain thresholds which depend on the field of activity of the target.
- Acquisition of effective control by any other means.

Filing/authorisation requirement

Cross-sector review: for acquisitions by non-EU resident investors relating to 27 specified activities notification is mandatory. For any other acquisition, filing is voluntary.

The acquirer may also seek a certificate of non-objection for non-notifiable transactions.

Sector-specific review: filing is mandatory for acquisitions by non-German investors.

Review period

Cross-sector review and sector-specific review: 2 months to initiate a review and, if a review is initiated, up to 4 months to review the proposed investment. In certain circumstances, the review period may be extended by up to 4 months..

Assessment criteria

Cross-sector review: whether the acquisition poses a threat to the public order or security of Germany, another EU Member State or certain projects of EU interest. Particular factors which may suggest a threat to public order or security include:

- the target company operating in one of the 27 specified sectors;
- the acquirer being controlled, directly or indirectly, by a government of a third country;
- if the acquirer has already been involved in activities which have had an adverse effect on public order or security; or
- if there is a considerable risk that the acquirer has been involved in certain criminal or administrative offences (including money laundering, terrorist financing etc.).

Sector-specific review: whether the acquisition poses a potential threat to the essential security interests of Germany.

Sanctions

Failure to comply with notification obligations, prohibitions or orders issued by the Ministry of Economy or with gun-jumping provisions may be sanctioned as a criminal offence, as well as incur administrative fines of up to €500,000.

Proposed reforms

Currently no significant reforms are planned.

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Italy

Generally, Italy does not distinguish between domestic, European and foreign investors. However, with respect to specific strategic sectors, the Italian Government has the power to veto certain transactions in order to protect the national interest.

Sectors affected

Any activity involving:

- owning strategic assets in the energy, transportation, communication sectors and certain other sectors (including financial services, healthcare, cybersecurity);
- national defence and national security (this applies to Italian, EEA and non-EEA investors); and
- the 5G communication sector.

Trigger events

All sectors: any resolution, arrangement or transaction executed by companies owning strategic assets in Italy which results in a change in the assets' ownership structure or purpose.

Defence and national security: any acquisition by Italian, EEA and non-EEA investors which exceeds the following thresholds:

- 3%, 5%, 10%, 15%, 20%, 25% and 50% of shares.

Other sectors: acquisition by EU/EEA investors (including Italian investors) of control of an Italian company active in the communications, energy, transport, healthcare, agri-food or financial sectors.

Any acquisition by non-EEA investors which results in control or exceeds (including any shares already directly or indirectly owned) the following thresholds:

- 10% of shares or voting rights, with a value of over EUR 1m; or
- 15%, 20%, 25% and 50% of shares.

5G, cybersecurity and cloud services: any purchase of goods or services relating to the design, implementation, maintenance and operation of these services in Italy, or of technology-intensive components required for such implementation or operation.

Filing/authorisation requirement

Filing is mandatory and the Government has the power to intervene if no filling is made.

Review period

Prenotifcation procedure: 30 days, after which the parties will be informed whether a notification is required.

Review period: up to 45 business days from filing (which may be extended to a maximum of 75 business days where further information is requested).

5G services: review period of up to 30 business days for 5G networks, but this may be extended by 40 business days depending on the complexity of the case.

Assessment criteria

The Italian government will assess whether the resulting situation entails a risk to Italy's essential interests, public order or public security, considering (i) the transaction structure; (ii) continuity of supply; (iii) the acquirer's activities; and (iv) the acquirer's links to states that do not recognise democracy or to criminal organisations.

It will also take into account the position of the EU (if any) and the existence of sector regulations.

Sanctions

For failing to notify a transaction, fines may be imposed amounting to:

- up to twice the value of the investment and at least 1% of the parties' aggregated turnover;
- in relation to 5G networks, up to 3% of the applicant's turnover.

The transaction will also be void.

Proposed reforms

Currently no significant reforms are planned.

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Luxembourg

A new screening regime for Foreign Direct Investment by non-EU/EEA investors into Luxembourg will enter into force on 1 September 2023.

Sectors affected

Investments in an entity active in a critical activity in Luxembourg, including activities in the energy, transport, water, healthcare, telecommunications, airspace and defence sectors, as well as certain key financial sector activities such as activities of the central bank or relating to Luxembourg's financial infrastructure (including payment and settlement systems).

Trigger events

Investments by non-EU / EEA investors that result in the acquisition of direct or indirect control of a Luxembourg entity operating in one of the affected sectors.

An investment results in the acquisition of control if the investor obtains:

- a majority of the voting rights in the Luxembourg entity;
- more than 25% of the voting rights in the Luxembourg entity;
- the right to appoint or to revoke the majority of the members of the relevant administrative, management or supervisory body of the Luxembourg entity (provided the investor is a shareholder); or
- the ability to control the majority of voting rights based on an agreement with other shareholders.

However, acquisitions of securities which do not grant the investor any direct or indirect control over the target and which are being made with the intention to effect a financial placement (portfolio investments) are explicitly excluded from the notification requirement.

Filing/authorisation requirement

Filing is mandatory and approval must be granted before the investment can be completed.

Review period

The notification will trigger a pre-assessment phase of up to two months during which the Ministry of Economy will decide whether to launch an in-depth screening procedure. The in-depth screening procedure may last up to sixty calendar days.

During the pre-assessment phase and the screening procedure, the foreign investor may continue to take preparatory steps with a view to finalising the investment at the investor's own risk. However, the investment must not be completed until the Ministry of Economy has issued a positive screening decision.

Assessment criteria

Whether the investment is likely to affect the security of or public order in Luxembourg in accordance with the following five factors:

- the integrity, security and continuity of the functioning of Luxembourg's critical infrastructure;
- the continuity of activities related to critical activities and dual-use items within the meaning of Regulation (EC) 428/2009;
- the supply of essential materials including main resources for food security;
- the access to, or the possibility to control, sensitive data; and
- the freedom of media and the existence of media pluralism.

Sanctions

Failing to notify a transaction or completing a transaction without approval may result in an order requiring the investor to modify the terms of the investment or to unwind it entirely.

Failure to comply with specific orders and injunctions may result in fines.

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Spain

Foreign investment in Spain is subject to certain authorisation and/or declaration requirements. Traditionally, foreign investments within the defence sector have been subject to prior authorisation by the Council of Ministers which also has the power to require prior authorisation for foreign investment on an ad hoc basis. In March 2020, the Spanish Government enacted a new regime applicable to non-EU/EFTA investors in the context of the ongoing Covid-19 crisis and extended it in November 2020 to EU/EFTA investors in certain cases (“New FDI Control”). As the former regime was not repealed, there are currently two parallel regimes in force in Spain.

Sectors affected

Ex-post declarations: all sectors.

Prior authorisation: defence activities and under the New FDI Control:

- certain strategic sectors: (i) critical (physical and virtual) infrastructure, (ii) critical technologies and dual-use items, (iii) supply of fundamental inputs, (iv) sectors with access to sensitive information, (v) the media; and
- any sector for investments by “risky investors” (defined as: non-EU/EFTA investors directly/indirectly controlled by a third party government investor; who have previously made investments in sectors affecting security, public order or public health in another EU Member State or if there is a serious risk that the investor carried out criminal or illegal activities affecting those areas).

Prior declaration: all sectors if the investor is from a country identified as a tax haven and the investment is 50% or more, unless the investment is made in a listed company or regulated fund.

Other sectors: there are additional regulations for acquisitions in the audio-visual, energy and air transport sectors.

Trigger events

Ex-post declarations are required for the following investments by foreign investors:

- acquisition of a stake in a Spanish company;
- incorporating a branch in Spain or increasing its capital;
- subscribing or acquiring loan securities issued by Spanish residents;
- acquiring participation in investment funds registered with the relevant Spanish registry;
- acquiring property/property assets in Spain at a price exceeding €3m;
- incorporating/participating in a joint venture where the investment exceeds €3m (unless the investor is from a tax haven).

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Investment in a listed company carrying out activities related to national defence will require authorisation where the investment represents more than 5% of the target’s share capital or allows the investor to participate in the target’s managing body.

Prior authorisation is required for:

- acquisitions of a ≥10% stake or control of a Spanish target, where the investment is carried out by non-EU / EFTA residents or EU / EFTA residents which are ≥ 25% owned or otherwise controlled by non-EU / EFTA residents;
- investments in national defence entities (≥5% in a listed company or if the investment allows the foreign investor to participate in management); and
- until 31 December 2024, acquisitions by non-Spanish EU / EFTA investors in certain sectors, in listed companies or unlisted companies if the investment value exceeds €500m.

Filing/authorisation requirement

Both declarations and prior authorisations (if required) are mandatory.

An investor may carry out an investment immediately after submitting a declaration, but must wait for prior authorisation where that is required.

Transactions of less than €1m in value are exempt from the requirement for prior authorisation (except for national defence).

Timing

Maximum 6 month review period. If approval is not granted within the 6 month review period then the transaction is deemed to have been prohibited.

Under the New FDI Control, a fast-track procedure with a review period of 30 days is available for transactions whose value is less than €5m.

Assessment criteria

Assessment will generally be based on the Spanish public interest. Under the New FDI Control, transactions will be assessed to determine whether they may jeopardise security, public order or public health in Spain.

Sanctions

The transaction may be rendered void.

Failure to obtain authorisation prior to investment (where required) may result in a fine of between €30,000 and the total amount of the investment and a public or private warning.

United Kingdom

In November 2020, the UK government announced a new national security and investment regime for the UK. The regime entered into force on 4 January 2022 and applies to domestic and foreign investors.

Sectors affected

Mandatory regime: the government has identified 17 key sectors as potentially raising particular national security concerns (including civil nuclear, communications, data infrastructure, defence, energy, transport, military and dual-use, critical suppliers to the government and various technology sectors such as artificial intelligence, cryptographic authentication, advanced robotics, computing hardware, quantum technology and advanced materials). Specific activities in these sectors are subject to mandatory prior approval.

Voluntary regime: all other activities or sectors. Government guidance indicates a voluntary filing may be more advisable when the target carries on activities which are closely linked to specified activities in the key sectors.

The Secretary of State also has the power to call in transactions in any sector.

Trigger events

Mandatory regime: acquisitions of control over a qualifying entity which carries on specified activities within the 17 key sectors are subject to mandatory notification.

Control is generally defined as acquiring more than 25% of the shares/voting rights. Acquisitions which result in an investor holding more than 50% or 75% will be treated as new trigger events.

A qualifying entity:

- is any entity that is not an individual and covers all forms of companies and partnerships;
- does not need to be a UK entity;
- does not need to have a minimum level of activity in the UK – it is sufficient if the entity carries on activities in the UK or supplies good/services to persons in the UK.

However, in order to be subject to mandatory notification, the qualifying entity must generally carry on the relevant specified activities in the UK.

Voluntary regime: In addition to the trigger events applying to the mandatory regime, the acquisition of "material influence" is a trigger event for the voluntary regime.

Asset deals (including land and IP) may also be caught by the voluntary regime. Acquisition of a right or interest will be a trigger event if the person is able to: use the asset (to a greater extent than before); or direct/control how the asset is used (to a greater extent than before).

Filing/authorisation requirement

Transactions which fall within the mandatory notification regime must be notified and approved before completion.

Parties may choose to make a voluntary filing for transactions which do not fall within the mandatory regime. The Secretary of State has the power to call in a transaction for up to five years after the event, but this is reduced to six months from when the Secretary of State is made aware of the trigger event.

Timing

Initial 30 working day review period.

If the transaction is called in for a more detailed review, the Secretary of State has an additional period of 30 working days following the call-in notice, extendable by a further 45 working days. Further extensions may be agreed.

Assessment criteria

When deciding whether to issue a call-in notice, the Secretary of State expects to primarily consider whether:

- the target could be used in a way that poses a risk to national security. This is most likely for targets falling within the mandatory regime or active in closely linked areas;
- the acquirer has characteristics (including its activities, ultimate controller, any links to criminal or illicit activities related to national security) that suggest there is or may be a national security concern; and
- the amount of control being acquired poses a risk to national security. A higher level of control may increase the national security risk.

If a transaction is called in, the Secretary of State will then determine whether it gives rise to a national security risk and if so, what remedies should be imposed.

Sanctions

If a transaction which falls within the mandatory regime is closed prior to approval, it will be void. Other sanctions include:

- penalties of up to (the greater of) 5% of worldwide turnover or GBP 10m; and
- potential imprisonment of relevant individuals for up to five years.

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Ashurst key contacts

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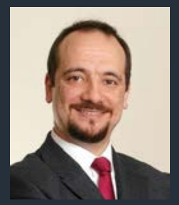
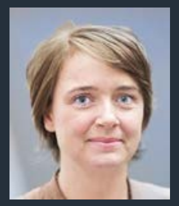
Gabriele Accardo
Partner, Milan
T +39 02 8542 3430
M +39 3387 305 376
gabriele.accardo@ashurst.com



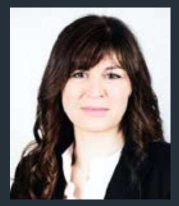
Rafael Baena
Partner, Madrid
T +34 91 364 9895
M +34 676 623 682
rafael.baena@ashurst.com

Neil Cuninghame
Partner, London/Dublin
T +44 20 7859 1147
M +44 7917 064 750
neil.cuninghame@ashurst.com

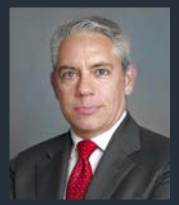


Annick Vroninks
Partner, Brussels
T +32 2 641 9971
M +32 477 523 782
annick.vroninks@ashurst.com

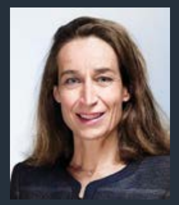
Denis Fosselard
Partner, Brussels
T +32 2 641 9976
M +32 476 474 564
denis.fosselard@ashurst.com



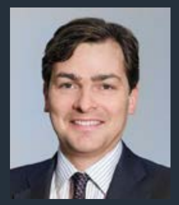
Isabelle Lentz
Partner Avocat à la Cour, Luxembourg
T +352 28 133 222
\ +352 621 798 357
isabelle.lentz@ashurst.com



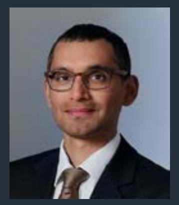
Fabio Niccoli
Partner, Milan
T +39 02 85423440
M +39 3494 344 939
fabio.niccoli@ashurst.com



Anne Reffay
Avocat à la Cour – Partner, Paris
T +33 1 53 53 54 99
M +33 6 11 49 04 71
anne.reffay@ashurst.com



Maximilian Uibeleisen
Partner, Frankfurt
T +49 69 97 11 27 74
M +49 173 6586 351
maximilian.uibeleisen@ashurst.com



Steven Vaz
Partner, London/Dublin
T +44 20 7859 2350
M +44 7879 497 862
steven.vaz@ashurst.com

Jorge Vázquez
Partner, Division Co-Head, Corporate and Office Managing Partner, Madrid
T +34 91 364 9899
M +34 676 622 948
jorge.vazquez@ashurst.com

ashurst.com