



**Tougher controls
for foreign investment:
the new normal?**



Changes in the foreign investment (FI) review space in response to COVID-19 have occurred at a rapid pace in recent weeks.

This follows a recent period of unprecedented international focus on FI issues and geopolitical change, leading to major legislative changes or proposals in most major economies.

As a result, governments were already sensitised to the risks (security risks, industrial policy risks and economic risks more generally) related to FI, making it easier for them to enhance FI controls quickly in response to COVID-19.

COVID-19 has had an effect in three general areas



1

Changes in the timing of FI review

Most jurisdictions are still processing FI applications, though delays are expected and may be substantial in some instances. Governments have an incentive to process applications, to the extent that FI may be helpful in supporting some struggling companies and, in other instances, they may want to intervene in transactions deemed undesirable. In any event, authorities will face some of the same operational challenges as other businesses due to working-from-home requirements and other health-related precautions, making process delays inevitable.

2

Expansion of jurisdiction to review

Expansion of jurisdiction to deal with FI has been most necessary in jurisdictions where the scope of government authority is defined by positive lists of industries or by monetary thresholds, or indeed in countries where no or minimal FI controls were in place. For example, as set out in the table below, Australia has reduced monetary thresholds to zero and Italy has extended its 'Golden Powers' regime to include healthcare, food and financial services sectors. By contrast, the United States, where the CFIUS process does not have industry or monetary requirements for the historical 'control' jurisdiction, formal process changes are less likely to be required.

3

Increases in scrutiny

It can be expected that most jurisdictions will increase scrutiny of certain types of transactions. For example:

- First, transactions involving companies that have relevance to battling the COVID-19 pandemic, for example companies that make personal protective equipment or companies developing vaccines.
- Second, in the healthcare and health technology sectors more generally, as governments come to a new realisation that they need to protect indigenous capabilities.
- Finally, more generally of investment in companies in other critical industries that have been financially battered by the effects of the pandemic. See, for example, recent EU guidance encouraging member states without screening mechanisms to implement them and emergency measures in Spain to deal with unwanted FI chasing companies affected by the economic downturn.

Some of these changes are intended to be and may be temporary (eg those currently adopted in Italy), but many are likely to persist (eg in France, Germany or Spain, where the temporary FI law was made permanent within a few days). Like so many areas of business, government and social order, the COVID-19 pandemic is likely to have repercussions that will long outlast this particular crisis.

Dealmakers should closely monitor ongoing regime changes as even 'in-flight' deals can be affected. Updates from our leading global FI practice, including our *StrongerTogether* partner firms*, are set out below. For ongoing updates, please visit our [Coronavirus Hub](#) or speak to your antitrust and FI contacts.

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01

Australia



02

Canada



03

China



04

France



05

Germany



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India



07

Italy



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Japan



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Mexico



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The Netherlands



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New Zealand



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Russia



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Spain



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United Kingdom



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United States



01 | Australia

Timing (statutory)

30 calendar days, although the review period has been increased to up to six months in light of COVID-19.

We understand that the Foreign Investment Review Board (FIRB) is, at present, routinely requesting a six-month extension to avoid seeking multiple extensions throughout the process (but the full six-month extension is not always used).

Timing/process changes?

Yes.

FIRB is still accepting filings but requires e-filings rather than in hard copy. However, FIRB has indicated that the review of existing and new applications may be delayed, potentially extending the total review period from the statutory 30 days (unless an extension is applied) to up to six months.

Change in law?

Yes.

All relevant monetary filing thresholds have been reduced to zero. Existing exemptions will continue to apply.

Change in policy?

As a result of the change, there is expected to be an increase in the number of filings. FIRB has indicated that it will prioritise urgent applications for investments that protect and support Australian business and jobs and assist with economic recovery in Australia.

02 | Canada

Timing (statutory)

Post-closing notification: the vast majority of investments subject to the Investment Canada Act (ICA) only require a short-form notice, which can be made before, or within 30 calendar days of, closing.

Reviewable transactions (ie those that trigger a pre-closing review): have an initial review period of 45 calendar days, which may be extended up to 75 calendar days (and may further be extended with investor consent).

National security reviews have a review period of 200 days, or longer with investor consent.

Timing/process changes?

No formal changes to the current statutory time frames, but extensions possible.

Both the Investment Review Division (IRD) and the Cultural Sector Investment Review Division (CSIRD) are still accepting filings and continue to operate during the COVID-19 pandemic. However, as a result of IRD's policy statement issued on 18 April 2020, the government strongly encourages foreign investors to consider the ICA's review process in the early stages of their investment planning (including engaging with the IRD before implementation of the investment). To obtain regulatory certainty, foreign investors should file a notification under the ICA at least 45 days before closing.

Change in law?

None so far.

Enhanced scrutiny of foreign investments under the ICA (which is the only change relating to Covid-19) will apply until the Canadian economy recovers from the effects of the pandemic.

Change in policy?

Pursuant to IRD's policy statement, the government will closely scrutinise foreign direct investments of any value (controlling or non-controlling) in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the government, and will subject all FIs by state-owned enterprises to enhanced scrutiny under the ICA, which may involve additional information requests or extensions of timelines for review. This enhanced scrutiny will apply until the economy recovers from the effects of the COVID-19 pandemic.

03 | China

Timing (statutory)

For FI that are **not on the Foreign Investment Negative List**, only a short online notification is needed (it can be completed within one to two business days).

For **restricted sectors** included on the Foreign Investment Negative List, any FI in these restricted sectors is subject to foreign direct investment approval from the respective industry/sector regulator. The review process and timing varies by specific regulator.

Prohibited sectors are not open to any FI – there is no review process.

Timing/process changes?

No.

NDRC and MOFCOM are trying to simplify and accelerate the register and approval procedures for new FIs, including but not limited to putting in place an online-register system, allowing companies to apply for FI approvals and other permits in parallel unless otherwise provided by law, and accepting later submission of supporting documents that cannot be obtained from the relevant authorities due to the pandemic.

Change in law?

Yes.

The overall direction of travel continues to be one of opening up markets for FI. On 19 March 2020, NDRC and MOFCOM jointly launched the ninth amendment of the Catalogue of Encouraged Industries for Foreign Investment (2019 Edition), which is meant to expand the number of industries in which FI is encouraged and has been interpreted as a measure to provide a boost to the economy as it emerges from the pandemic.

The authorities have not released a draft amendment.

Change in policy?

Yes.

Both NDRC and MOFCOM have published a series of guidelines in order to stabilise FIs and speed up the economic recovery of foreign-invested companies, including but not limited to closely tracking the status of existing and new major FIs, allocating more resources to push forward major FIs, and prohibiting setting special entry restrictions for FIs not falling into the Foreign Investment Negative List.

04 | France

Timing (statutory)

Phase 1 review: 30 working days from the submission of the complete notification for the Minister of the Economy to:

- clear the transaction unconditionally;
- declare that the transaction falls outside the scope of the foreign direct investment regime; or
- open an in-depth Phase 2 review.

Phase 2 review: if the Ministry decides to open an in-depth review, it has another 45 working days to clear the transaction, with or without conditions, or to prohibit the transaction.

This means that the review process can last between one and a half and five months.

Timing/process changes?

Yes.

An ordinance adopted on 27 March 2020 allows the French Treasury to suspend its review process until one month after the end of the state of health emergency – currently this would be 23 June 2020. The French Treasury still attempts to deliver decisions within the legal timeframe, but delays are expected for transactions in the health sector and the transport sector.

Change in law?

Yes.

Legislative changes introduced last December, which came into force for filings submitted as of 1 April 2020 are permanent.

In the context of the pandemic crisis, the French government decided to add biotechnologies to the list of strategic sectors. In addition, the government has lowered the review threshold for minority acquisitions to 10 per cent (from 25 per cent) for non-European investors only.

Change in policy?

Yes.

Transactions relating to the health sector are being reviewed with particular scrutiny.

05 | Germany

Timing (statutory)

Review periods vary by sector, but:

- Phase I reviews will be either two or three months; and
- Phase II reviews will be either three or four months.

Review periods can be expanded, or suspended through stop the clock.

Timing/process changes?

None so far.

Change in law?

Yes.

On 8 April 2020, the government passed a draft law that will:

- lead to more transactions being caught by German FI law; and
- set a stricter standard of review.

It also contains a standstill obligation for many transactions. A first update of the implementing regulation relating to the healthcare entered into force on 2 June 2020. A further update of the regulation is expected in H2 2020.

Change in policy?

Yes.

Transactions relating to the health sector are being reviewed with particular scrutiny.

06 | India

Timing (statutory)

Typically, eight to 12 weeks to process government FI approvals. Note that specific guidance on the timing of the approval process under the new regime has not yet been issued.

Timing/process changes?

Yes.

Given the nationwide lockdown that is currently in place in India and implementation of work-from-home policies, delays in the processing of applications should be expected. But the Foreign Investment Facilitation Portal is accepting filings.

Change in law?

Yes, but not yet in effect.

The government announced that investments from an entity based in a country that shares a land border with India, or where the beneficial owner of the investment in India is situated in a country that shares a land border with India, will require prior approval. This requirement would also apply to secondary transfers of existing FI in an Indian entity to an acquirer that meets this condition.

The announcement would cover Chinese investment, which has been active in a number of sectors in India including technology, pharmaceuticals and financial services.

Change in policy?

None.

07 | Italy

Timing (statutory)

45-calendar-day standard review period; plus up to a further 30-day extension for information requests (ie up to a total of 75 days; may be extended further through stop the clock).

Timing/process changes?

Difficult to assess (noting that the timeline for review was already extended in 2019 and has not been further amended).

Change in law?

Yes.

Most importantly, a broadening of sectors subject to FI review, including insurance, financial, banking, foodstuff, critical data and health. Moreover, a temporary extension of FI (for 2020) in all covered sectors to:

- acquisitions by EU purchasers; and
- minority non-controlling investments by non-EU parties.

Change in policy?

Yes.

Wider scope of industries, transactions and acquirers potentially subject to review. Overall, these changes (some of which are envisaged to only last until the end of 2020, ie an ‘emergency’ intervention), including:

- the express indication of the PMO’s power to begin investigations *ex officio*; and
- the fact that the influence of a foreign government over an acquirer can be expressly considered even if it involves another EU state,

signal a likely greater focus on, and arguably an even stricter approach in, Golden Power proceedings.

08 | Japan

Timing (statutory)

Suspensory prior notifications must be filed within the six months prior to closing and the statutory waiting period is 30 days (unless extended by the authority).

In practice, the review period is commonly significantly shorter (around 90 per cent of reviews are completed within five days).

Investments likely to impact national security can be extended by up to five months.

Timing/process changes?

None so far.

Change in law?

No changes due to COVID-19 impact.

But the Foreign Exchange and Foreign Trade Act has been amended to lower the shareholding threshold for mandatory filings from 10 per cent to 1 per cent.

The new regime was introduced independently of Covid-19 and is permanent.

Change in policy?

Due to COVID-19 impact, drug medicines and medicinal equipment have also been added to designated sectors requiring pre-screening notification for foreign investments.

09 | Mexico

Timing (statutory)

45-business-day review period.

Timing/process changes?

Temporary changes only.

The authority is still accepting most filings with certain exceptions, but only through online platforms.

Change in law?

None.

Change in policy?

None.

10 | The Netherlands

Timing (statutory)

The Netherlands has no general public interest or FI regime.

However, some specific rules apply in relation to FI into the energy, healthcare and telecoms sectors, and those investments can be subject to industry/sector regulator review.

Timing/process changes?

None so far.

Change in law?

Pending legislative proposal introducing a mandatory pre-investment screening mechanism for the telecommunications sector, applicable to both EU and non-EU investors.

The Dutch government is currently working on implementing the legal basis for requesting, collecting, processing and sharing information obtained in accordance with the EU FDI Regulation.

Later in 2020, a draft bill introducing a broader FDI screening mechanism for investments with a nexus to national security is expected (with legislative implementation expected in the course of 2021).

Change in policy?

Although the Netherlands continues to advocate free trade, it has recently indicated that it intends to present a legislative proposal introducing a general pre-transaction screening mechanism for vital infrastructure and high-tech businesses, linked to multilateral export control regimes for dual-use goods and strategic goods. The Minister of Economic Affairs would have the power to block investments where these pose a threat to national security. The legislative proposal is expected later in 2020.

11 | New Zealand

Timing (statutory)

10 working days for an initial assessment by the Overseas Investment Office (OIO). 30 working days for detailed assessments, which may be extended by a further 30 working days.

The New Zealand government expects most transactions to receive a 'no-action' notification.

Timing/process changes?

No.

The physical offices of the authority are closed as of 25 March. However, the authority and the decision makers are operating remotely. The authority is accessible via phone calls, emails or videoconference. The authority has put in place temporary alternative arrangements for aspects of the approval process where original documents or declarations are required to ensure that the COVID-19 outbreak and associated shutdown does not impact on the approval process.

Change in law?

No changes due to COVID-19 impact.

But the Overseas Investment Amendment Bill (No. 2) 2020 was introduced to parliament on 19 March 2020 with the aim of implementing a second wave of reform to New Zealand's Overseas Investment Act 2005 to ensure effective management of the FI risks while better supporting productive overseas investment by removing red tape from the screening process. The COVID-19 outbreak and associated shutdown will extend the timeframe for the legislation to be passed.

The Overseas Investment Act (OIA), which will apply to all transactions entered into on or after 16 June 2020, requires all foreign investments which result in a greater than 25 per cent ownership interest in a New Zealand business or business asset (or increase an existing interest up to, or beyond, the 50, 75, or 100 per cent thresholds) to be screened. Such transactions shall be subject to a national interest test, irrespective of value. Measures introduced under the OIA are temporary and will be reviewed every 90 days.

Change in policy?

None so far.

The New Zealand government still welcomes and encourages high-quality inbound FI that will be beneficial to New Zealand while recognising that it is a privilege for overseas persons to own or control sensitive New Zealand assets.

12 | Russia

Timing (statutory)

There is no fixed statutory deadline for foreign direct investment review; Government Commission foreign direct investment review meetings are scheduled on an 'as necessary' basis.

In our experience, average review periods are:

- around one month where the Russian target is not a strategic entity; and
- four to five months where the target is a strategic entity.

In all cases extensions are possible.

Timing/process changes?

Yes.

The review process may now take longer than usual because FAS employees are working remotely and because the Commission's members may have other priorities at the moment. Also, decisions are currently sent by regular post.

That may add another week or so to the overall timeline.

Change in law?

No, but amendments to FIR are pending.

It is not clear what they will ultimately look like and whether they will be enacted within the upcoming six months or not, but to the extent relevant to our clients, the amendments are expected to permit a government-controlled foreign investor to acquire control of a 'strategic' entity where its 'strategic' status stems from some technical, rather than substantive, grounds.

Change in policy?

None.

13 | Spain

Timing (statutory)

Review period ranges from 30 days to six months, depending on the sector.

30-working-day reviews for transactions qualifying for the simplified procedure; all other transactions are reviewed within a six-month period (and failure to obtain clearance within the six-month period implies prohibition).

Timing/process changes?

Changes to the foreign direct investment regime in Spain have set a general decision deadline of six months (30 days if the transaction benefits from the simplified procedure). This deadline is consistent with the prior regime.

Change in law?

Yes.

Broadening of sectors subject to FI review in line with the EU regulation on FI screening: mostly aimed at critical infrastructure, critical technology/dual-use items, the supply of fundamental supplies, sectors with access to sensitive information and communication media.

Change in policy?

Yes.

Wider scope of industries potentially subject to review and relevant consequences in case of non-compliance (eg the transaction is considered null and void until approval is obtained).

14 | United Kingdom

Timing (statutory)

The UK currently does not have a legislative framework that specifically governs inbound foreign direct investment, but the government can intervene in certain transactions on public interest grounds by issuing an intervention notice (which may capture FI). These grounds include:

- national security;
- media plurality, accurate presentation of the news and free expression of opinion;
- the stability of the UK financial system; and
- (newly introduced) maintaining the capability to combat public health emergencies.

The issuance of a public intervention notice has important timing implications and certain parts of the process are not subject to statutory deadlines.

Timing/process changes?

No timing delays; none expected.

Change in law?

Yes; further changes pending.

Legislative change on 23 June 2020 to allow government scope to intervene in deals involving businesses critical to the UK's ability to combat / mitigate the effects of public health emergencies. The government has discretion to determine which businesses are vital to the UK's ability to deal with a pandemic / its effects.

Measures to extend government's power to intervene on grounds of national security into additional sectors to be introduced (lower turnover thresholds of £1m apply). Comprehensive UK legislation creating a new national security regime is expected shortly. This is expected to catch a wide range of acquisitions and recent speculation suggests this could possibly require mandatory notification of deals.

Change in policy?

No specific policy change to date however additional government interventions should be expected, particularly given the addition of the public health emergency ground and the additional sectors to be brought into scope of the low national security thresholds.

Ongoing inquiry is being conducted into the role of the UK's Foreign and Commonwealth Office (FCO) in blocking foreign asset stripping of UK companies to ensure the FCO has a full role in future decisions to intervene.

15 | United States

Timing (statutory)

Declaration: 30-calendar-day statutory review period.

Notice: 45-calendar-day Phase 1 review period, plus the potential for a 45-day Phase 2 investigation period (which can be extended by 15 days in extraordinary circumstances). If, following the investigation period, CFIUS refers the transaction to the president for review, the president will make a decision within 15 days.

In addition, parties need to anticipate a pre-notification period with CFIUS prior to formal notification.

Timing/process changes?

No.

There is no formal suspension of the process, but CFIUS may delay starting the clock on filings where it can legally do so and may take steps to delay or defer decisions to the extent possible (eg not granting clearances in response to short-form declarations, advancing long-form notices from Phase 1 review to Phase 2 investigation, or encouraging parties to withdraw and refile their applications).

Change in law?

Not formally, as CFIUS already has the authority to consider the national security implications of FI in any sector if the investment results in foreign control, including any with COVID-19 implications.

Change in policy?

As a practical matter, we might expect greater scrutiny of transactions involving critical infrastructure sectors (including healthcare) designated by the Department of Homeland Security as essential during the COVID-19 crisis. There may also be additional scrutiny of transactions involving companies in the technology sector or that are in defence supply chains, to the extent that economic weakness makes them targets for investment.

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