The Foreign Investment Regulation Review

Ninth Edition

Editors
Calvin Goldman QC, Michael Koch and Alex Potter

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THE FOREIGN INVESTMENT REGULATION REVIEW

NINTH EDITION

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PREFACE

This ninth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions. This year, in keeping with the considerable increase in prominence of foreign investment review, we are delighted to include new chapters on Austria, Belgium, India, Israel, Japan and the Netherlands, along with several new contributors for countries covered in previous editions. We have also revised the format to focus on the aspects of foreign investment rules that are most critical for dealmakers.

Unprecedented challenges have arisen in 2020–2021 not only to the health and well-being of persons around the globe, but also to globalisation itself and, with it, the flow of capital. Whereas foreign investment has for a number of years been attracting increased attention, this trend has accelerated throughout the past 18 months. Prior to the covid-19 pandemic, the global economy was continuing its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions was increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, now in its early post-implementation stages, as well as increased tensions over trade and related policies, as we have seen between the United States and China. These increased tensions have heightened concerns over national interest considerations such as the export of jobs, essential supply chains and industrial policies, as well as heightened national security concerns over cybersecurity, new technologies, communications and other strategic areas.

These and other developments discussed below have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations, on the one hand, and national- and public-interest considerations on the other hand, the latter sometimes weighing heavily against the former. An example of the kind of differing regulatory decisions between the competition authorities and the Ministerial decision making in relation to concurrent foreign investment reviews occurred when BHP Billiton, the global leader in mining based in Australia, which has already engaged in previous significant mining investments in Canada, proposed to acquire the Potash Corporation of Saskatchewan, at an amount of approximately US$40 billion. Both Australia and Canada are members of the Five Eyes with respect to national security matters. That regulatory review process became a highly publicised matter of public interest through much of 2010. In the end, while the Canadian

Competition Bureau cleared the proposed merger, the federal Minister of Industry, following his review under the Investment Canada Act and consultation with his Cabinet colleagues, issued an interim negative decision, in November 2010, on national interest grounds that were never really articulated. Rather than trying to then make further submissions, BHPB decided to withdraw the proposed acquisition. Some commentators at that time suggested that the reasons for the Ministerial position had more to do with the pending elections at the provincial level in Saskatchewan and at the federal level than any significant national interest issue (Potash Corp had a long standing perception among people in Saskatchewan as a historical corporate leader in that province).

A similar split in such regulatory decision making subsequently occurred in November 2013 in relation to the proposed acquisition of Grain Corp of Australia by Archer Daniels Midland Company of the United States. That also was cleared by the competition authority (the Australian Competition and Consumer Commission) following its competition review; however, following subsequent concerns raised by the Foreign Investment Review Board, the Treasurer of Australia, one of the most senior Cabinet members, decided to block the proposed acquisition. Farmer concerns and distribution networks were apparently factors in that decision. Again, some commentators suggested real-world political considerations had some bearing on that negative decision.

As a result of cases such as these and other evolving considerations discussed below, more cross-border mergers have been scrutinised more intensely, with the process delayed or in some cases thwarted, by foreign investment reviews that are increasingly broader in scope.

Since the pandemic has taken hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have both been accelerating and increasing in scope. Concerns about the benefits of globalisation have been on the rise in an environment where nations have found themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises (SOEs) that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical to the pandemic response, such as public health and supply chains. As the impacts of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing-out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds that trigger foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, which saw the introduction of a mandatory notification regime and expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018, greater resources are now being allocated to monitoring and enforcement activities. This is making the voluntary filing calculus even more complex as there is no statute of limitations on CFIUS's jurisdiction if it has not cleared a transaction. As the policy focus has shifted to supply chain security across the globe, CFIUS is being used in conjunction with other US government authorities to wean critical US supply chains off their reliance on Chinese inputs; for example, by either blocking or subjecting to review even ordinary course transactions with blacklisted Chinese companies. Heightened CFIUS interest and commentary pertaining to certain China-related transactions, such as occurred in relation to TikTok, is a reflection of some of these evolving developments.

In turn, there is greater focus on foreign investment in Europe, where the European Union's foreign investment screening regulation, which became fully operational in October 2020, gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States and obliges Member States to notify other Member States and the European Commission of foreign investments that they are screening under their national regimes. Furthermore, Member States have themselves introduced new foreign investment regimes (e.g., the Czech Republic and Denmark), are planning to do so (e.g., the Netherlands and Slovakia) or have further updated or tightened their existing foreign investment laws (e.g., Germany by introducing a variety of new sectors that it considers to be sensitive such as artificial intelligence, robotics and nanotechnology). Currently, 18 EU countries have an FDI screening mechanism in place and a senior EU trade official has confirmed that dozens of foreign-investment vetting requests have been notified to the European Commission through the new EU screening mechanism since it came into force.

The United Kingdom has now aligned itself more closely with other countries by significantly strengthening its powers to intervene in deals that may threaten national security. The National Security and Investment Act 2021 marks a step change in the UK government's power to screen, impose conditions on and block deals that pose unacceptable risks. Once the new regime comes into force on 4 January 2022, it will require mandatory notification of investments in 17 strategically sensitive sectors that cross certain share or voting rights thresholds – a significant change in light of the UK's (continuing) voluntary merger filing regime. Transactions in all other sectors will be susceptible to 'call in' by the government should there be concerns.

The United States and Europe are not alone in elevating concerns over foreign investment during the pandemic and in response to increasing concerns over China's global influence. In Canada, during 2020–2021, timelines for national security reviews were temporarily extended and investments by SOEs as well as in Canadian businesses related to public health or the supply of critical goods and services were subjected to heightened scrutiny in response to the pandemic. The Canadian government has issued more detailed guidelines for the review of foreign investments, among other things, to include national security concerns relating to the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including personal data concerning government officials, such as members of the military or intelligence community. In Australia, on 1 January 2021, the Foreign Investment Reform Act came into effect, ushering in sweeping changes to that country's foreign investment review law. The temporary A$0 monetary screening thresholds for all investments that had been introduced in response to covid-19 were removed; however, this threshold was continued through provisions for the mandatory review of investments in sensitive national security businesses. New Australian regulations list businesses in critical infrastructure, telecommunications, military goods or defence or intelligence technology, the provision of service to defence or intelligence forces, the storage or access to classified security information and the storage, collection, or maintenance of personal information of defence and intelligence personnel. The symmetry between the Canadian guidelines and the Australian regulations should not be considered coincidental. Both countries are members of the Five Eyes together with the United States, the United Kingdom and New Zealand. The

Australian Treasurer has also been given new, stronger enforcement and review powers under the legislation, including a new 'last resort' power, under which the Treasurer may review previously approved transactions where national security risks have emerged after approval by the Foreign Investment Review Board.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant 'chilling' effect on investment decisions and economic activity. Foreign investment regimes are increasingly challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there may be a sizeable number of distressed industries and failing firms in sectors that have been most significantly impacted by the pandemic. The number of failing firm cases is likely to increase the longer the pandemic continues to substantially affect the timeline for economic recovery from the effects of the pandemic.

In this exceptional environment, there may be failing firm cases where the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the acquiree cannot be sustained during that period. That may lead to an anticompetitive acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant impact on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews, including, in some cases, as they may relate to or interface with, normative competition reviews, the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019. In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In addition, the ABA ALS Task Force on the Future of Competition Law Standards has delivered a further report in early August 2021 to the Council of the ABA ALS that, among other subjects, has considered recent developments pertaining to national interests and national champions in competition reviews. These evolving considerations in competition reviews cannot be viewed in isolation from the increasing scope of national interest factors in foreign investment reviews.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 21 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism as well as geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

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Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients, or the editors or publisher.

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Chapter 3

BULGARIA

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I INTRODUCTION

After the collapse of the Soviet bloc, Bulgaria underwent substantial socio-economic restructuring and opened its market to global capital, while integrating into European and worldwide production networks. A critical element of the reform was to build a sound business environment in which companies can start, invest, expand and exit. All this was achieved with the support of the European Union (EU), which Bulgaria joined in 2007.

The attractiveness of Bulgaria as an investment destination lies in the combination of three main factors: the committed and skilled workforce, the low costs for doing business (including labour),[2] and the full openness to trade and investment. The Bulgarian government seeks to attract foreign investors by offering them state financing, favourable tax treatment (including a 10 per cent flat tax rate), options for preferential purchases of land and many other types of assistance and advantages. The generally sound economic performance, gradual convergence with the EU common market, political stability and fiscal prudence have provided stability and enabled Bulgaria to attract leading foreign investors.

Bulgaria has a long, rich tradition in the information technology sector and is still known as the Silicon Valley of Southeast Europe.[3] Many world-renowned companies such as SAP, Cisco, Atos, VMware, Johnson Controls, Microsoft, IBM and Oracle have already set up operations here. Bulgaria ranks 17th globally for 2021 and has traditionally been placed among the top 20 destinations for outsourcing in the world by AT Kearney Global Services Location Index.[4] Among the foreign investors attracted by the outsourcing opportunities in Bulgaria are Coca-Cola, Concentrix, Experian, HP and Sutherland. The Bulgarian automotive industry has also received significant attention from foreign investors. It produces components and automotive parts for brands such as Lamborghini, Bentley, Porsche, Mercedes-Benz, BMW, Audi and Tesla. The rapid advancement of the industry over the past few years has resulted in the expansion of the sector to the extent that it is currently estimated to generate 11 per cent of the country's gross domestic product, prompting many investors

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1 Trayan Targov is an associate and Atanas Grigorov is a junior associate at Boyanov & Co.

2 The average gross wage in Bulgaria is about €746 according to the National Statistical Institute, Average Monthly Wages and Salaries of the Employees under Labour Contract in 2021, available at: http://www.nsi.bg/en/content/6410/total (accessed on 25 June 2021).

3 US International Trade Administration (export.gov), Bulgaria Country Commercial Guide, Bulgaria – Information and Communications Technologies, available at: https://www.export.gov/apex/article2?id=Bulgaria-Information-and-Communications-Technologies (accessed on 25 June 2021).

4 Kearney, The 2021 Global Services Location Index Top 25, available at: https://www.kearney.com/digital/article/?/a/the-2021-kearney-global-services-location-index (accessed on 25 June 2021).

to consider opening second or even third factories.[5] Other best prospect industry sectors for Bulgaria include: environmental technology (including waste treatment and waste-to-energy technologies); power generation (including biomass, gas and nuclear energy); travel and tourism (which plays a critical role in the country's economy); agriculture (including the beverage and food industry, as well as agricultural equipment and machinery); safety and security; pharmaceuticals; and the healthcare and medical sector.[6]

As a rule, Bulgaria affords national treatment to foreign investors and there are no general limits on foreign ownership or control of companies, nor is there screening[7] or restricting of foreign investment in Bulgaria. By way of exception, the 2014 Offshore Companies Act[8] lists 27 activities banned for business by companies registered in tax havens and the entities under their control but the Act also provides a number of exceptions.[9] There also are specific restrictions on foreign investments in the gambling industry under the 2012 Gambling Act[10] and in respect of the acquisition of farmland under the 1991 Agricultural Land Ownership and Use Act.[11] However, these restrictions basically apply to countries that are not members of the European Economic Area (EEA) or the EU. Regulatory restrictions on business activities such as licensing, registration and permission requirements sometimes imply corporate registration under the laws of Bulgaria or another EU or EEA Member State, but this is not in itself an obstacle to investment because foreign investors are free to incorporate or participate in Bulgarian companies.

II FOREIGN INVESTMENT REGIME

There are no general restrictions upon foreign investors wishing to invest in Bulgaria either by acquiring an existing business or establishing a new business. No prior government approval of the foreign investment is needed. The few exceptions to this rule are addressed below.[12]

5 Colliers International, Automotive Industry in Bulgaria 2019, available at: http://colliers.bg/newsletter/e-newsletters/Automotive-2019/Automotive%20Report-2019-EN.pdf (accessed on 25 June 2021).

6 US International Trade Administration (export.gov), Bulgaria Country Commercial Guide, Bulgaria – Information and Communications Technologies, Overview, available at: https://www.export.gov/apex/article2?id=Bulgaria-Information-and-Communications-Technologies (accessed on 25 June 2021).

7 On 19 March 2019 the EU adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU to create a system to cooperate and exchange information on investments from non-EU countries that may affect security or public order.

8 See Section II.i.

9 See Section IV.i.

10 See Section II.ii.

11 See Section II.iii.

12 The investment certification regime introduced by the Investments Promotion Act and discussed in Sections II.iv and IV.ii aims only at providing eligible investors with additional benefits and incentives and does not in any way limit the possibilities for investment in the country. Nonetheless, it forms an integral part of the overall foreign investment regime in Bulgaria.

i Restrictions on investments by offshore companies and entities under their control

The Law on the Economic and Financial Relations with Companies Registered in Jurisdictions with Preferential Tax Regime, Entities Controlled by Them and Their Beneficial Owners (referred to as the Offshore Companies Act) was enacted in 2014 and amended several times since. It prohibits companies registered in jurisdictions with preferential tax regimes (also called tax havens) and the entities under their control from directly or indirectly engaging in 27 different types of economic activities in Bulgaria.

Countries considered offshore jurisdictions

The scope of the restrictions imposed by the Offshore Companies Act is determined by the legal definition of the term 'jurisdictions with preferential tax regimes' (i.e., offshore jurisdictions). The Corporate Income Tax Act lays down the offshore criteria and entrusts the Minister of Finance with the task of adopting a list of the offshore jurisdictions. The current list approved by the Minister of Finance[13] indicates 26 countries or territories: Antigua and Barbuda; Brunei Darussalam; Virgin Islands (United States); Grenada; Guam Island (United States); Dominican Republic; Guyana; Labuan; Macao; New Caledonia; UAE; Bahamas; Oman; Christmas Island; Cook Islands (New Zealand); Pitcairn; Vanuatu; Liberia; Maldives; Marshall Islands; Palau; Panama; Fiji; Sark; Saint Lucia; Hong Kong (China). Companies and other forms of business, corporate or unincorporated, registered there (referred to as offshore companies) and the entities under their control are subject to the prohibitions against carrying on business in Bulgaria introduced by the Offshore Companies Act. The definition of 'control' includes, in general, holding of more than 50 per cent of the voting rights in the general shareholders' meeting or in the management bodies of the other entity, as well as the right to exercise decisive influence on another legal entity (e.g., based on a contract).

Prohibited activities

Offshore companies and the entities under their control are prohibited from directly or indirectly:

a obtaining a licence for a credit institution or possessing a qualifying holding in it;
b obtaining a licence for an insurance or reinsurance undertaking or possessing a qualifying holding in it;
c obtaining a licence for a supplementary social security company or holding 10 per cent or more in it;
d obtaining a licence to carry out a service or activity under the Law on the Markets in Financial Instruments or possessing a qualifying holding in a licensed company;
e obtaining a licence, permit or registration under the Law on the Activities of Collective Investment Schemes and Other Collective Investment Undertakings or possessing a qualifying holding in such an undertaking;
f obtaining a licence for a payment institution or possessing a qualifying holding in a licensed payment institution;

13 The list is adopted by Order No. ZMF-1303 dated 12 December 2016 of the Minister of Finance, promulgated in State Gazette, issue No. 103 as of 27 December 2016, Unofficial Section.

g participating in a procedure for selection of a concessionaire or an award of a concession for extraction of underground natural resources or for granting an authorisation for prospection and exploration or only for exploration of underground natural resources;
h participating in a public procurement procedure irrespective of the nature or the value of the public procurement;
i participating in privatisation transactions;
j acquiring state or municipal property through sale or exchange;
k obtaining a licence under the Excise Duties and Tax Warehouses Act;
l incorporating or acquiring shareholdings in licensed professional sports clubs where that participation provides entitlement to 10 per cent or more of the voting rights in the general shareholders' meeting of the club;
m applying for certificates for Class A, B or C investment or priority investment projects under the Investments Promotion Act;
n obtaining a licence under the Energy Act;
o obtaining a licence under the Gambling Act;
p obtaining a licence for trade in dual-use goods;
q obtaining a licence for a provider of public electronic communications networks or services or acquisition of 10 per cent or more of the voting rights in it;
r obtaining contracts awarded for the supply of water or removal of waste water;
s obtaining contracts awarded for waste collection and disposal, waste treatment in waste disposal plants or other facilities, or for cleaning of public spaces;
t incorporating or acquiring 10 per cent or more of the voting rights in the general shareholders' meeting of entities that are applying for or have obtained a licence for a radio and television operator or in companies measuring radio and television ratings;
u incorporating or acquiring 10 per cent or more of the voting rights in the general shareholders' meeting of entities publishing periodicals;
v incorporating or acquiring 10 per cent or more of the voting rights in the general shareholders' meeting of social research agencies or entities conducting general public opinion surveys;
w incorporating or participating in entities engaged in activities under the Independent Financial Audit Act;
x incorporating or participating in entities engaged in activities under the Independent Evaluators Act;
y incorporating or participating in entities engaged in activities under the Energy from Renewable Sources Act;
z participating in commercial companies with state or municipal ownership provided that the state or municipal shareholding in the company is at least 33 per cent; and
aa acquiring ownership of land and forests from the state forests fund.

The Offshore Companies Act provides several exceptions to these prohibitions, which, together with the procedure for their application, are addressed in Section IV.i. From another perspective, the above list provides a brief overview of some of the most heavily regulated sectors of the Bulgarian economy. Investors in these sectors, irrespective of whether they are foreign or domestic, may face specific licensing, registration and permission requirements.

ii Restrictions on foreign investments in the gambling industry

The 2012 Gambling Act stipulates that gambling operations may be performed in Bulgaria only after the issuance of a game-specific licence. In the general case, companies registered under the laws of Bulgaria, another EEA Member State or Switzerland are deemed eligible to apply for such licences. In early 2020, however, by way of amendments to the Gambling Act, the Bulgarian Parliament granted the state-owned enterprise Bulgarian Sports Totalisator a legal monopoly over lottery products and restricted all private lottery operations in the country, with the exception of raffle, bingo and keno games.

Furthermore, pursuant to the Gambling Act, foreign persons (i.e., persons other than companies or individuals registered in or citizens of an EEA Member State or Switzerland) may not have any interest in a locally licensed company unless they have invested at least €10 million in other activities in Bulgaria and have created more than 500 jobs or unless they own a hotel of four stars or more and operate a casino in it. This provision is controversial as worded to the extent that it may prohibit large European operators with international shareholding bases (particularly listed companies) to apply directly for a local licence because any non-EEA (or Swiss) shareholding in a licensed company is prohibited.

iii Restrictions on foreign investments in farmland

Bulgarian law and in particular the Agricultural Land Ownership and Use Act, enacted in 1991 and substantially amended in 2014, provides for restrictions on foreign ownership of agricultural land. Foreign (non-EEA) nationals and legal entities as well as commercial companies held by them are generally prohibited from acquiring farmland in the country, unless expressly permitted by an international treaty to which Bulgaria is a party. Companies that are directly or indirectly held by offshore companies,[14] joint-stock companies that have issued bearer shares, political organisations and foreign states are also prohibited from acquiring agricultural land in Bulgaria.

Pursuant to the terms of accession of Bulgaria to the EU, from 2014 onwards the EU or EEA citizens must enjoy national treatment in respect of the acquisition of agricultural land in Bulgaria. In the face of this commitment (and despite of it), in 2014 Bulgaria modified its national regime by introducing long-term residence requirements for Bulgarian nationals and legal entities wishing to acquire farmland, thus creating acquisition barriers also for the EEA companies and citizens. In particular, the Agricultural Land Ownership and Use Act stipulates that ownership rights over agricultural land may be acquired by individuals or legal entities that have been residing or established in Bulgaria for more than five years. The legal entities that have been registered under the laws of Bulgaria for less than five years are allowed to acquire farmland provided that their shareholders are natural persons who have resided in Bulgaria for more than five years. As a reaction to these restrictions, in 2015, the European Commission opened infringement proceedings against Bulgaria.[15] In November 2019, the Bulgarian government opened public consultations on a new draft law on agricultural land, which, among other things, should abolish the restrictions for EEA citizens and companies. As of June 2021, however, this draft law has not yet been submitted to the Parliament.

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14 See Section II.i about the term 'offshore companies'.

15 European Commission press release, 'Commission opens infringement procedures against Bulgaria, Hungary, Lithuania and Slovakia on investor restrictions for agricultural land', available at: https://ec.europa.eu/commission/presscorner/detail/EN/IP_15_4673 (accessed on 25 June 2021).

iv Certification of foreign investments under the Investments Promotion Act

The legal framework for promotion and certification of foreign investments is provided for mainly in the Investments Promotion Act (IPA) enacted in 1997 and the Regulation for the Implementation of the IPA adopted in 2007 (the IPA Regulation). The Minister of Economy, with the support of the Invest Bulgaria Agency, is directly responsible for implementing the government policy towards foreign investments. IPA supports the foreign investments by introducing a system of incentives for certified investments in tangible and intangible assets and the creation of new jobs related thereto in accordance with the General Block Exemption Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market.

Bulgarian law implements an investment certification approach. Depending on the size of the investment, the economic sector and the region of the country in which the investment is made, the investor may obtain a certificate for class of investment (Class A or Class B)[16] or for priority investment projects. On the basis of this, the investor may benefit from a wide range of government incentives such as:

a purchase of, or acquisition against consideration of, limited rights *in rem* in immovable private state or municipal property located near the investment site without participating in a public tender procedure;

b state financing for the construction of elements of the technical infrastructure such as roads, drainage networks and facilities;

c state financing for the professional training of employees hired in relation to the investment;

d state financing in the form of partial reimbursement of the statutory social security contributions and health insurance contributions paid by the investor for newly hired employees;

e reimbursement of up to 100 per cent of the paid corporate income tax on taxable profits from manufacturing activities in municipalities with an unemployment rate higher than Bulgaria's average (60 per cent of the municipalities qualify for 2020);

f value added tax (VAT) advantages for large investment projects (a simplified reverse-charge mechanism and monthly rather than quarterly VAT refunds); and

g provision of fast-track and individual administrative services.

The certification of the investments under the IPA depends on the fulfilment of a number of requirements discussed in more detail in Section IV.ii.

III TYPICAL TRANSACTIONAL STRUCTURES

Investments in Bulgaria are usually carried out either through establishment of a local subsidiary or branch office or through entering into a joint venture with a local or another foreign partner. These points are covered in more detail below.

16 Certain municipalities such as Sofia and Varna have implemented investment Class C schemes for investment initiatives of municipal importance.

i Establishment of a local subsidiary

Foreign investors may freely set up a local company through which they would be able to conduct business in Bulgaria. Bulgarian law allows for the incorporation of several different types of companies but the most frequently used are the limited liability company (OOD) and the joint-stock company (AD).

A limited liability company may be formed by one or more shareholders who, subject to limited exceptions, are not liable for the company's liabilities. The minimum registered capital of a limited liability company is 2 Bulgarian levs. The capital contributions may be monetary or in-kind. In-kind contributions must be evaluated by three independent experts appointed by the Commercial Register. The company's affairs are administered by its manager or managers and by the general meeting of the shareholders. The managers do not need to be shareholders. There are no restrictions on the participation of foreigners in the management of the company or as shareholders. A transfer of shares in a limited liability company requires a sale and purchase agreement in notarised form. The transfer has to be registered in the Commercial Register to become effective with regard to third parties. If the transferee is a non-shareholder, the transfer has to be approved by at least three-quarters of the shareholders in the company. Because of the existence of potentially serious risks for expulsion by the other shareholders, it is advisable that foreign investors avoid using limited liability companies when they do not hold 100 per cent of their share capital.

Joint-stock companies are generally preferred by foreign investors because of their greater flexibility in management and decision-taking. The company may be formed either by a public offering of its shares in accordance with the Public Offering of Securities Act (very rare in practice) or, alternatively, without such a public offering in accordance with the provisions of the Commerce Act (the usual case). The minimum registered share capital of a joint-stock company is 50,000 levs. Shares of a joint-stock company may be physical (evidenced by transferrable share certificates) or non-physical (book-entry form) shares existing in the form of entries in a registry maintained by the Central Depository, which is the institution responsible for maintaining the share registries of all companies with non-physical shares. The Commerce Act no longer allows for issuance of bearer shares (i.e., shares that do not indicate the name of the shareholder). There are two systems of management: the one-tier system (with board of directors); and the two-tier system (with supervisory board and management board, appointed by the supervisory board). The ultimate managing body for both systems is the general shareholders' meeting, which approves certain decisions of the utmost importance for the company. In the two-tier system, no person may sit on both boards of the same company. In practice, the two-tier system is preferred for companies with a large number of shareholders and complicated activities. Physical shares are transferred by endorsement on the back of the share certificates, which, to be binding on the company, must be recorded in its shareholders' book. The statutes may provide for other conditions or restrictions for the transfer of shares. Non-physical shares are transferred by way of registration of the transfer with the Central Depository. Joint-stock companies are widely used by foreign investors because of the straightforward process of share transfers, flexible majorities for decision-making, flexibility in management and impossibility for expelling shareholders (which exists in limited liability companies). Joint-stock companies are particularly suitable in the case of joint ventures.

ii Setting up a branch office

Foreign companies may open a branch office in Bulgaria. A branch office must be registered with the Commercial Register on the basis of application, indicating the seat and purposes of the branch, the person who manages the branch and the scope of his or her representation powers. The rules applicable to Bulgarian companies would apply accordingly to branches of foreign companies. Branches, including those of foreign companies, are not independent legal entities. All contracts to which a branch is a party are in fact contracts with their principal. Therefore, the decision as to whether to open a branch office or a company (independent legal entity) is also an element of the risk management policy of the foreign principal.

iii Joint venture with a local or foreign partner

A foreign investor may choose to establish a joint venture with a local or foreign partner or partners to carry on business in Bulgaria and there are no specific statutory requirements in respect of arrangements of this kind. Usually, the joint venture is established and governed by a joint venture agreement (or a shareholders' agreement, when the joint venture is in the form of a jointly owned company). This agreement sets out the main terms and conditions for establishment and operation of the partnership.

Joint venture projects are usually implemented through the incorporation of a local company (typically a joint-stock company) in which the joint venture partners hold shares. The relations between the parties in respect of the running of the business are normally governed by special agreement (joint venture or shareholders' agreement). Another option is to have the joint venture established in the form of a contractual general partnership (not being a separate legal entity), which is usually established by general partnership agreement for completion of special projects (e.g., infrastructure construction projects or concession award procedures). In the latter case, the partners are responsible for the obligations of the partnership with regard to third parties.

IV REVIEW PROCEDURE

i Application of exceptions for offshore companies and entities under their control

There are eight groups of exceptions to the prohibitions introduced by the Offshore Companies Act,[17] which could be applied by the offshore companies or the entities under their control to be allowed to carry on the otherwise prohibited activities listed in Section II.i. These exceptions are subject in any case to disclosure of the individuals who are the ultimate beneficial owners (UBOs)[18] of the company. The Offshore Companies Act provides for the following exceptions:

a the shares of the company in which the offshore company participates (directly or indirectly) are admitted to trading on an EU or EEA regulated market or equivalent regulated market;

17 See Section II.i.

18 The Bulgarian anti-money laundering legislation imposes additional requirements for disclosure of the UBOs of almost all commercial companies established in Bulgaria, irrespective of their ownership, by registration of the UBO at the Commercial Register.

b the offshore company is part of an economic group the parent company of which is a tax resident of a state with which Bulgaria has concluded a treaty for the avoidance of double taxation or information exchange agreement;

c the offshore company is part of an economic group the parent company or a subsidiary company of which is a Bulgarian resident entity and its UBOs are announced in the Commercial Register or its shares are admitted to trading on an EU or EEA regulated market;

d the company in which the offshore company directly or indirectly participates is a publisher of periodicals;

e the offshore company is a tax resident of a state party to the Agreement on Government Procurement under the auspices of the World Trade Organization (WTO) or state with which the EU has concluded a bilateral treaty guaranteeing access to the EU's public procurement market (in respect of the activities to which the relevant treaty applies);

f the offshore company is a tax resident of an overseas country or territory under Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the EU (in respect of the activities to which this decision applies);

g the offshore company is a tax resident of a state with which Bulgaria has concluded international trade or economic agreement, including obligations under the WTO's General Agreement on Trade in Services; or

h the offshore company is part of an economic group the parent company of which is tax resident of a state with which Bulgaria has concluded international trade or economic agreement, including obligations under the WTO's General Agreement on Trade in Services.

The details about the offshore company that will directly or indirectly participate in some of the 27 restricted activities, the particular exception that is relied upon and the information about its UBOs are subject to registration in the Commercial Register. The entries are to be made in the company file of the Bulgarian company controlled by the offshore company. If the offshore company performs the restricted activity directly or through a subsidiary that is not registered in Bulgaria, the application of the corresponding exception serves as a basis for its registration in the Commercial Register.

The registration of the exception in the Commercial Register normally takes three to five business days and the refusals for registration are subject to judicial appeal. The registration of the exception in the Commercial Register needs to be completed prior to taking part in the procedure for carrying out the prohibited activity concerned. The competent authority leading the procedure is responsible for overseeing the fulfilment of the requirements imposed by the Offshore Companies Act.

ii Certification of investments under the IPA

To be eligible for certification under the IPA, the investments should be related to the setting up of a new enterprise, the expansion of an existing enterprise or business activity, the output diversification into new products or a fundamental change in the overall production process of an existing enterprise.

The Class A or Class B certification requires that the investments are pertinent to one or more of the following business activities specified in the IPA Regulation: manufacturing; software publishing; computer programming, consultancy and related activities; information service activities; accounting, bookkeeping and auditing activities or tax consultancy; activities of head offices; architectural and engineering activities, technical testing and analysis; scientific research and development; education; human health activities and residential care activities; warehousing and storage; office administrative and support activities; activities of call centres; business support service activities. These sector qualification requirements apply only to Class A or Class B certification and not to investments certified as priority investment projects that can be implemented in all sectors of the economy.

Among the other certification requirements, the investors have to implement the investment within three years, maintain the investment and the newly created jobs for an additional three to five years, acquire fixed assets that are new and are purchased from third parties not related to the investor under market conditions, finance at least 40 per cent of the investment with their own or borrowed funds, excluding state aid.

The IPA Regulation stipulates minimum thresholds for certification of investments on the basis of which investments are classified into Classes A or B. Depending on the economic sector, the Class A certification requires an investment of between 2 million and 10 million levs. The Class B thresholds are half the size of the Class A thresholds. The creation of a significant number of new jobs (100 for Class B and 150 for Class A) may result in a substantial reduction of the minimum threshold values.

The priority investment projects are investment projects that are particularly important for the national or regional economic development of Bulgaria. In the general case, the issuance of a certificate for a priority investment project requires an investment of 100 million levs and the creation of 150 new jobs. The IPA Regulation, however, stipulates certain exceptions where reduced requirements apply.[19]

Before starting work on the investment project, the investor wishing to obtain an investment certificate needs to submit an application to the Invest Bulgaria Agency (IBA) accompanied by, among other things, the investment project. The IBA appoints a working group for each applicant and issues a document obliging the Bulgarian administration to provide full cooperation to the investor in the process of obtaining the documents necessary for the investment certification. On the basis of the opinion of the working group, the IBA prepares a reasoned proposal for a decision on the application and submits it to the Ministry of Economy within 30 calendar days. The Minister of Economy would then have 14 calendar days to issue the Class A or Class B investment certificates or to reject certification. For priority investment projects, within 30 business days the Minister of Economy submits a proposal to the Bulgarian government for approval of a memorandum of understanding between the government and the investor. On the basis of the government's decision, the Minister issues or refuses to issue the certificate for priority investment project. The certification refusals are subject to judicial appeal.

V FOREIGN INVESTOR PROTECTION

At the international level, Bulgaria is a party to the Incorporation Act of the International Financial Corporation (member of the World Bank Group), the Convention on the Settlement of Investment Disputes between State and Nationals of Other States, the

19 For example, in the case of development of industrial zones or high-tech parks, the minimum threshold value for priority investment projects is reduced to 15 million levs and the number of minimum newly created jobs to 50 for high-tech parks and 15 for industrial zones.

Convention establishing the Multilateral Investment Guarantee Agency and the Agreement establishing the WTO, as well as to more than 130 agreements on mutual encouragement and protection of investments[20] or avoidance of double taxation. Domestically, the principle of protection of foreign investment and economic activity is enshrined in the Constitution of 1991 and forms part of the substantive foundation of fundamental principles underpinning the Bulgarian legal order.

Foreign investors are guaranteed the full and unconditional protection of their rights and interests in Bulgaria. Only where a public need cannot be met by other means, the Bulgarian government, the regional governor or the municipality mayor, as the case may be, may expropriate land provided that the owner is compensated at fair market value and always subject to judicial appeal.

Bulgarian law offers foreign investors protection from unfavourable changes in the national legislation. Pursuant to the IPA, any foreign investment made prior to the adoption of legislative changes imposing legal restrictions solely on foreign investments is to be governed by the legal provisions that were effective at the moment of implementation of the investment.

VI OTHER STRATEGIC CONSIDERATIONS

Investors contemplating a foreign investment in Bulgaria may be faced with some challenges, some common to any foreign investment, others peculiar to the country. Regulatory and bureaucratic setbacks are possible. That is why it is important to have good local knowledge to set your business up for success in Bulgaria.

In the 2020 Doing Business Report,[21] the World Bank ranked Bulgaria 61st globally for ease of doing business. This report highlights certain shortcomings in areas such as getting electricity for newly constructed facilities because of the lengthy and complicated procedures for connecting to the network, dealing with construction permits and resolving insolvency. Foreign investors intending to enter into commercial relations with Bulgarian companies should be aware that the resolving of insolvency is a lengthy process that could take more than three years and end up with a low recovery rate.

Bulgarian merger control legislation is basically in line with EU merger control regime and applies equally to foreign and domestic mergers. The Commission for Protection of Competition has general powers to assess notifiable mergers under the Bulgarian merger control regime, but additional regulatory clearance may be required in the strongly regulated sectors such as banking, energy, financial services and insurance.

20 On 5 May 2020, 23 Member States of the EU, among them Bulgaria, entered into an agreement for the termination of bilateral investment treaties between the Member States of the European Union (published in the Official Journal of the European Union, L 169/1, 29 May 2020). The bilateral investment treaties affected by this agreement are listed in Annexes A and B to the agreement.

21 World Bank Group flagship publication, Doing Business 2020: Economy Profile Bulgaria, available at: https://www.doingbusiness.org/content/dam/doingBusiness/country/b/bulgaria/BGR.pdf (accessed on 25 June 2021).

VII CURRENT DEVELOPMENTS

In July 2021, the Minister of Economy announced that the German electric car manufacturer Next E.Go Mobile SE will invest €143 million in a car production plant in Bulgaria with a capacity of up to 30,000 vehicles per year.22 The aluminium structure of the electric cars, the software and the cables will be supplied by local companies as well. The presence of an already established industry for the production of automotive parts and components within the country is certainly an advantage for any potential investor. Full-scale assembly of vehicles is also not without precedent, as showcased by the recent example of the Chinese-based brand Great Wall, which established operations in Bulgaria back in 2012.

Outside the automotive industry, the Ministry of Transport has already finalised the €37 million concession procedure for the civil airport in the capital city of Sofia. The 35-year concession was awarded to the international consortium 'SOF Connect' comprised of French investment fund Meridian, Austrian construction company Strabag and Munich airport as the designated airport operator. Further plans for concession procedures from the Ministry of Transport for public transport of national importance include the Plovdiv Airport, Sofia Central Railway Station and Port of Varna.

For some time now, Bulgaria has been trying to attract new greenfield investments, among others, by stimulating the development of industrial parks. An important step towards this was the adoption of special legislation regulating the status and laying down the terms and conditions for the establishment, construction, operation and development of industrial parks, which came into force in March 2021. The new Industrial Parks Act aims at establishing clear, predictable and reliable legal environment for the purpose of facilitating foreign investment in industrial parks across the country.

In relation to the covid-19 pandemic and with the intention of curtailing the projected economic downturn, the government has also adopted a number of measures to stimulate economic activity and to preserve the current business climate. Key among these is state financial aid for employers, amounting to compensation of 60 per cent of employees' remuneration and social security payments. Further legislative amendments have also resulted in the reduction of VAT from 20 per cent to 9 per cent for certain industry sectors, namely restaurants and catering services, baby foods and nappies, printed books and accommodation in hotels, campsites and similar establishments. In addition, small and microenterprises are entitled to apply for non-refundable state financial aid through various government incentive programs. In some cases, the allocation of the state financial aid is dependent on certain pre-pandemic economic parameters implemented by enterprises.

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