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# FOCUS ON FDI - THE NEW RULES ON EU AND NATIONAL LEVEL

2020年中国境外投资欧洲与并购论坛

2020 China Outbound EU Investment and M&A Forum

30 June 2020 / 2020年6月30日



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# EU



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# EU FRAMEWORK

## 欧盟的法律框架

Speaker / 演讲嘉宾:

Lelu Li (BB) / 李乐璐 (百达)



# SCOPE

## 审查的范围

### What does Brussels add to national investment screening?

欧盟在国家投资审查的基础上又增加了什么？

- **For the first time a formal framework which allows European Commission and other Member States to get involved in ongoing screening**  
首次正式通过官方法律框架允许欧委会以及其他成员国介入审查过程
- **And a formal framework to push hesitant EU countries to screen investments**  
通过官方的法律规定来促使在犹豫中的欧盟国家实行投资审查
- **Plus to safeguard EU interest if projects or programmes of Union interests are at stake**  
当代表欧盟利益的项目或规划受到威胁时保障欧盟利益

But / 但是:

EU Member States retain discretion because they are free to screen or *not* foreign investment

欧盟成员国保留自行决定是否对外商投资进行审查的自主权



## PROCEDURAL ASPECTS (1)

### 审查程序 (1)

Regulation mandates for the first time the cooperation between EU countries and European Commission

法规首次授权欧盟成员国与欧盟委员会之间的合作

If screening  
is ongoing

如在审查过程中

- Screening country must inform other EU countries and European Commission  
审查国必须通知欧盟委员会及其他成员国
- If a country considers that the investment is likely to affect its security or public order, it can send comments to the screening country  
若一成员国认为该投资有可能影响自身国家安全或公共秩序，它可向审查国发表意见
- Separately, the European Commission can intervene with comments (“opinion“)  
与此独立的，欧盟委员会可通过发表意见（“意见书”）干预审查



## PROCEDURAL ASPECTS (2)

### 审查程序 (2)

#### Regulation allows pushing for a review

If screening has  
not been started

如果审查还未启动

- Novel feature may force an EU country to start an investigation in a situation where it wanted to avoid doing so  
新法可在一欧盟成员国想避免审查时促使其开启审查程序
- The novelty applies not only to planned, but also to completed foreign investments  
新法不仅适用于计划中的外商投资，也同样适用于已交割完成投资项目



# FUTURE OUTLOOK

## 未来展望

### White Paper on Foreign Subsidies

#### 就外国补助的白皮书

Acquirer received  
subsidies

收购方获得了补助

- Notification requirement for acquisitions facilitated by foreign subsidies  
对于获得外国补助的收购必须进行申报
- EU may impose remedies or to block the acquisition  
欧盟可能对交易进行限制或禁止收购



# Q&A

## 问与答



### 2020 China Outbound Investment



该二维码7天内(7月1日前)有效, 重新进入将更新





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# GERMANY



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# REGULATORY ASPECTS UNDER GERMAN FOREIGN INVESTMENT LAW

## 德国外商投资法下的监管要求

Speaker / 演讲嘉宾:

Dr. Christian von Wistinghausen / 冯蔚豪 博士

Lelu Li (BB) / 李乐璐 (百达)



# SCOPE OF INVESTMENT REVIEW

# 德国外商投资审查的范围

## Federal Ministry of Economic Affairs and Energy (BMWi) 联邦经济事务和能源部

The German legal framework for foreign investment review consists of two different procedures:  
Sector-specific investment review and cross-sectoral investment review.

德国外商投资审查框架包含两套不同的程序：特定行业的投资审查和跨行业的投资审查。

- Both procedures aim to safeguard public order and security;  
两套程序都旨在保障公共秩序与安全；
- Industrial policy is not a matter of public order or security.  
不能因为产业政策或类似原因禁止投资。



### Sector-Specific Investment Review 特定行业的投资审查

Security-Sensitive Sectors  
涉及安全隐患的产业部门

Acquisition **must be notified**  
此类收购**必须申报**



### Cross-Sectoral Investment Review 跨行业投资审查

Listed Business  
被列出的业务

Acquisition **must be notified**  
此类收购**必须申报**

General Security Concern  
一般安全考量

Notification of acquisition  
optional  
可选择就此类进行备案



# SCOPE OF APPLICATION – SECTOR-SPECIFIC PROCEDURES

## 申报范围 - 特定行业的投资审查

### Sector-specific Investment Review

- Every foreign acquisition (i.e. applies to EU /EFTA)
- At least 10% of the voting rights
- In particular war weapons, military technology and products with IT security functions
- Essential security interests

General reporting obligation



**Clearance decision**  
BMW*i* in agreement with AA +  
BMVg (+ BMI)

**Prohibition/  
instructions**  
BMW*i* in agreement with AA +  
BMVg (+ BMI)

QUELLE: BMW*i*

### 特定行业投资审查 (《对外经济条例》第60–62条)

- 所有外商收购(含欧盟境及欧洲自贸区成员国)
- 至少10%的表决权
- 特别是武器、军用技术以及涉及信息技术-国防工业的产品
- 核心的安全利益受威胁

普遍的申报义务

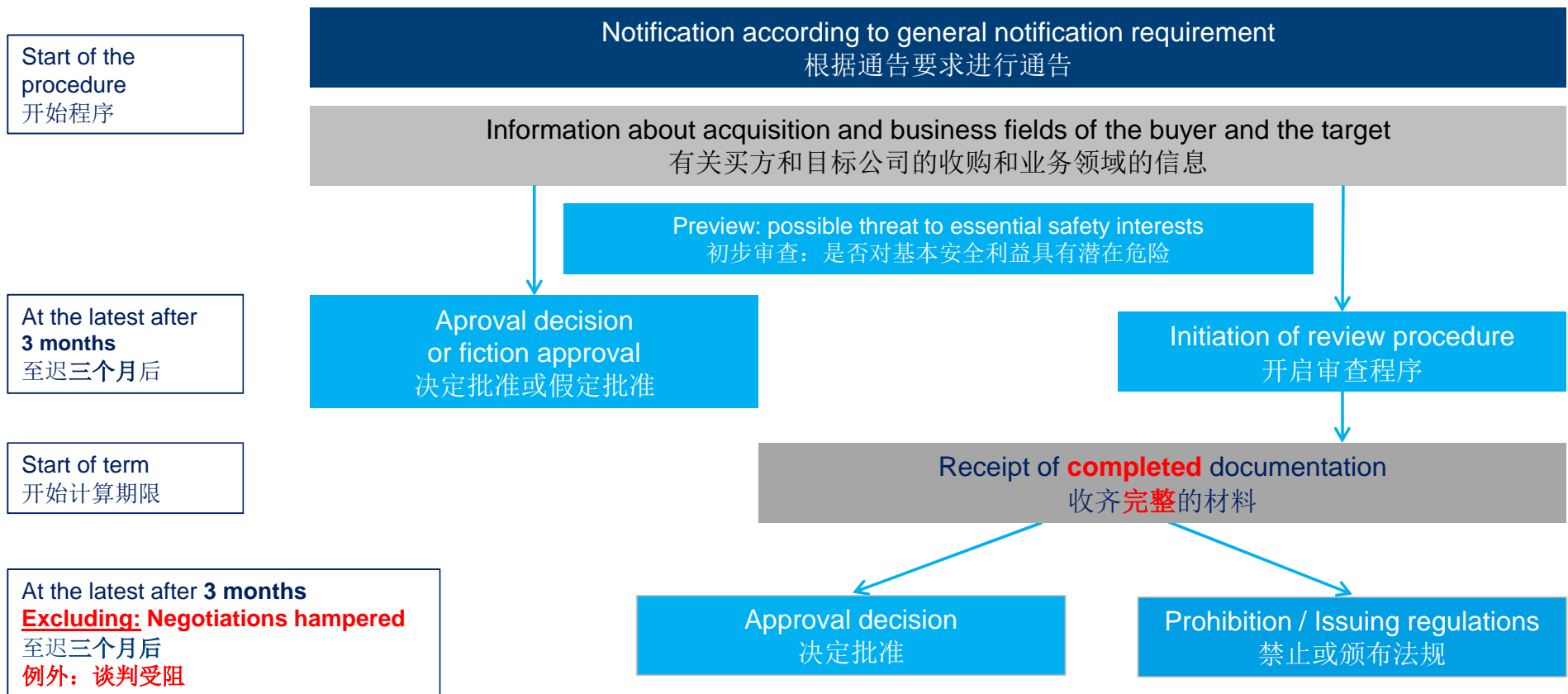


联邦经济能源部 批准决定 与外交  
部+国防部 (+内政部) 协商

联邦经济能源部 否决/指示  
与外交部+国防部 (+内政部) 协商



# PROCESS OF SECTOR SPECIFIC PROCEDURE 特定行业审查流程



# SCOPE OF APPLICATION – CROSS-SECTORAL PROCEDURES

## 申报范围 - 特定行业和跨行业的投资审查

### Cross-sectoral Investment Review (Sec. 55–59 AWV)

- Every acquisition by Non-EU / Non-EFTA-foreigners
- At least 10% of critical infrastructure or public health
- At least 25 % of any other business
- Public order or security

Reporting obligation if target company is an operator of a critical infrastructure or public health

Acquirer requests clearance certificate

Proactive by BMWi

Clearance certificate  
BmWi

Prohibition/  
instructions  
BmWi with consent of BReg

QUELLE: BMWI

### 跨行业投资审查 (《对外经济条例》第55–59条)

- 所有来自非欧盟或非欧洲自由贸易联盟成员国的投资者
- 在关键性的基础设施或公共健康领域至少10%的表决权
- 其他业务领域中至少25%的表决权
- 公共秩序和安全

若标的企业是关键基础设施或公共健康的运营商，申报义务

收购者申请无异议证明

联邦经济部依职权主动调查

无异议证明  
联邦经济能源部

否决/指示  
联邦经济能源部取得联邦政府同意



# REQUIREMENTS 要求

## Cross-sectoral (Sec. 55 – 59 AWV)

Regular examples for subjects of the business activity which could endanger public security or order

- Critical infrastructure (e.g. energy supply)
- Industry-specific software in the sectors
  - Energy
  - Water
  - IT
  - Finance and insurance industries
  - Health
  - Transport
  - Nutrition
- Organizational measures pursuant to Sec. 110 TKG
- Cloud computing services
- Certain components of the telematics infrastructure pursuant to SGBV
- Media
- Public Health

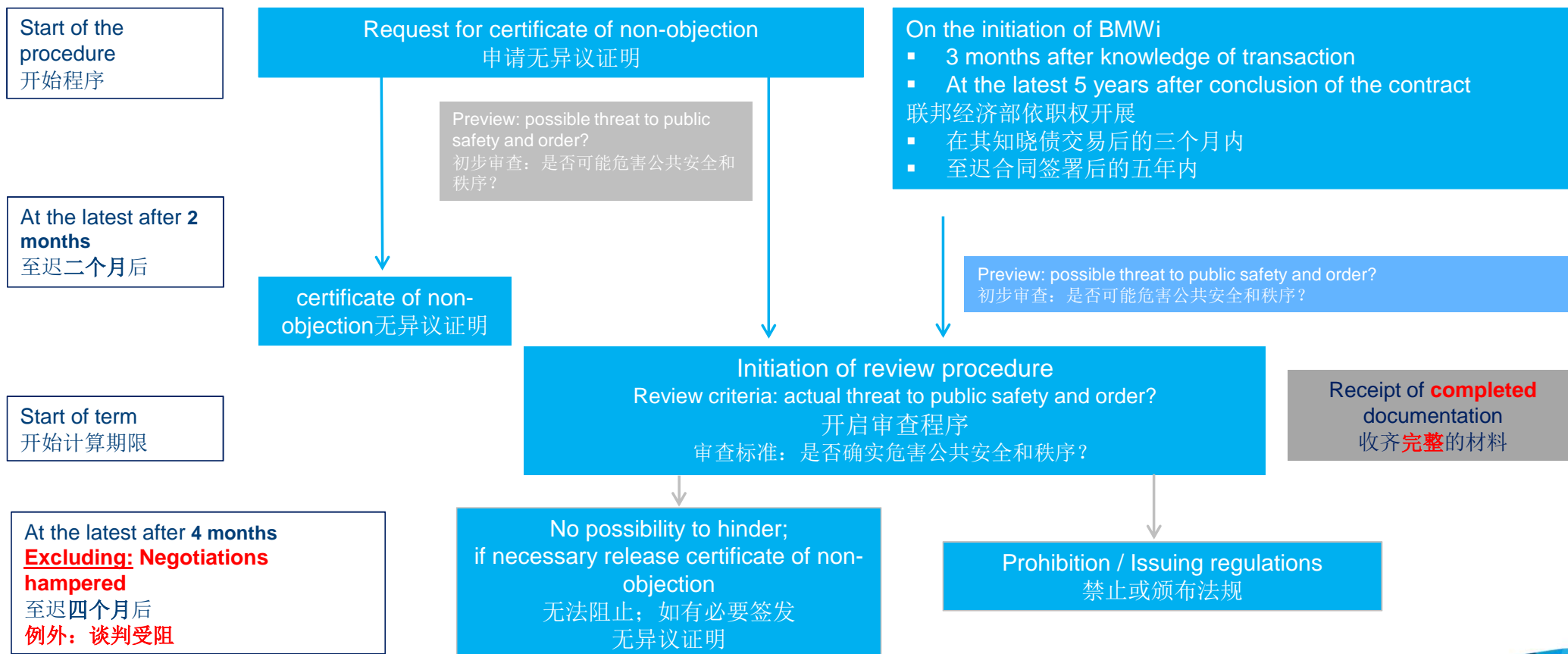
## 跨行业投资审查 (《对外经济条例》第55–59条)

可能危及公共安全或公共秩序的商业项目其典型示例:

- 关键性的基础设施 (例如能源供应)
- 特定行业内的软件
  - 能源
  - 水利
  - 信息技术
  - 金融保险领域
  - 健康
  - 运输
  - 食品
- 根据《电信法》第110条的组织措施
- 云计算服务
- 根据《社会法典》第五部规定的远程基础设施的特定组件
- 媒体行业
- 公共健康



# PROCESS OF CROSS-SECTORAL PROCEDURE 跨行业审查流程





## WHAT INFORMATION MUST BE SUBMITTED WHEN THE MINISTRY OPENS THE REVIEW PROCEDURE? 必须递交哪些审查信息?

### Documents about the acquisition 收购相关的材料

- Company and registered location  
公司名和注册地
- Percentage of share  
收购股份份额
- Business operation  
公司运营范围
- Classified information (indication whether the acquiring company is required to protect classified information)  
收购标的公司是否有保护国家机密的义务
- Business contacts with state and local authorities  
与国家及地方政府是否有业务往来
- Corporate structure  
公司结构
- Shareholdings  
股东构成
- Acquisition contract  
收购合同
- Consortium contract  
承保合同
- Business strategy  
公司经营策略
- Commercial register extract  
工商登记
- Annual financial statements and group management reports  
年报及集团管理报表
- Representation  
公司代理人



# NON-OBJECTION CERTIFICATE 无异议证明

- **Advantages of obtaining a non-objection certificate:**

获得无异议证明的优点：

- **Speed up transaction: Avoid disadvantage especially at auction.**

加速交易：避免尤其在竞价过程中的劣势。

- **Legal certainty: The Ministry has 3 months upon knowledge of the transaction to pick up the case whereby such investigation ex officio may occur within 5 years after signing of the transaction.**

法律确定性：经济部在知晓相关交易后有三个月的时间进行立案并且可以在签署交易后的五年内依职权对此类进行调查。

- **Cooperation bonus: Ex officio administrative proceedings are often less cooperative than administrative proceedings in addition to an application.**

合作加分：依职权开展的行政程序相较依申请开展的行政程序通常情况下配合度较差。



## SANCTIONS 处罚

- **Section-Specific Investment Review (acquisition must be notified)**  
特定行业投资审查（收购必须申报）
  - **Closing is prohibited prior to approval**  
在审查通过前无法交割
- **Cross-Section Investment Review**  
跨行业投资审查
  - **Prior to Closing: Government can prohibit transaction**  
交割前：政府有权阻止交易
  - **After Closing: If prohibited, transaction becomes void and must be unwound**  
交割后：如果审查未通过，则交易本身无效须恢复原状
  - **Alternatively: Restrictions can be imposed on transactions or target must enter into contractual obligations vis-à-vis the government**  
其他可能：交易本身可被限制或标的必须与政府签订合同承诺
- **A violation may trigger fines up to EUR 500,000**  
违规可被处以最高50万欧元的处罚



## OUTLOOK 展望

- Extension of criteria for **Cross-Sectional Investment Review**:

针对跨行业投资审查范围的扩大:

- „Likely to affect“ (instead of „actual threat of“) public order or security of Germany, a EU member state or projects of European interest

对德国或欧盟成员国的公共秩序和安全或符合欧洲利益的项目由原本的“实际威胁”改为“可能造成影响”

- Further extension of critical businesses (e.g. critical technologies, raw materials)

进一步扩大了重点行业的范围（例如：重要科技、原材料）

- No closing of transaction prior to approval (if acquisition requires notification) and prohibition of certain actions (i.e. transfer of significant information)

在获得批准前不允许交易交割（如收购须申报）以及禁止特定行为（例如重要信息的转移）

- Information exchange between EU member states and European Commission

欧盟成员国和欧盟委员会之间的信息交流

- Introduction of criminal liability for (willful) violation of prohibitions or restrictions

针对故意违反禁令和限制的行为引入刑事责任



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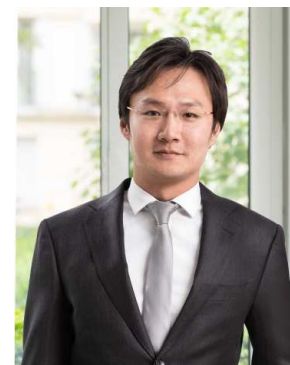
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# ITALY





Milano - Roma - Londra - Bruxelles -  
Shanghai



意大利安启建律师事务所  
Nctm

意大利  
外商投资筛选制度

2020.06.30

# NCTM律所

## 律所简介





**Nctm**是意大利业内领先的律师事务所，专注于为公司及金融机构提供专业的法律服务。**Nctm**连续五年被金融时报评为世界范围内最具创新意识的律所之一。

我们拥有超过**250**人的专业团队，其中包括**57**位权益合伙人。**Nctm**在米兰，罗马，伦敦，布鲁塞尔和上海都设有办事处。

**Nctm**以为客户提供创新的问题解决方式，精准的业务咨询，以及优质的法律服务而著称。



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## 投资筛选制度 – 意大利

## Investment screening - Italy

### 产业 (1)

### Industries (1)

- 能源，交通，水，卫生等关键基础设施
- critical infrastructures in energy, transport, water, health
- 医疗设备和个人防护设备的生产、进口、批发分销
- production, import and wholesale distribution of medical equipment and personal protection devices
- 通信，媒体，数据处理和存储、航空航天，国防，选举、金融、银行和保险
- communications, media, data processing and storage, aerospace, defence, electoral or financial, banking and insurance



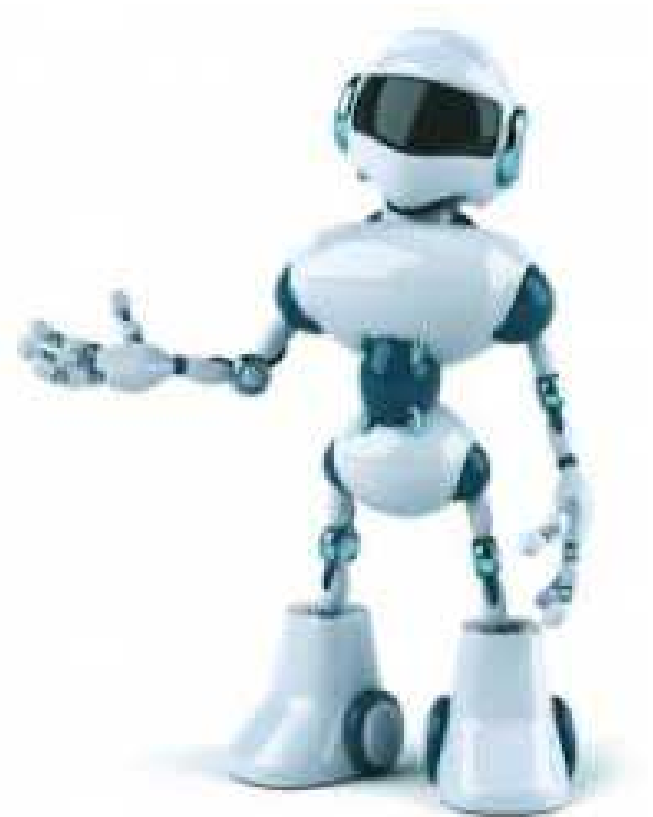
## 投资筛选制度 – 意大利

## Investment screening - Italy

### 产业（2）

### Industries (2)

- 关键技术或军民两用产品，包括人工智能，机器人技术，网络安全
- critical technologies or dual-use products, including artificial intelligence, robotics, cybersecurity
- 关键生产要素的供应安全，包括能源，原材料，粮食安全
- security of supply of critical production factors, including energy, raw materials, food security
- 获得敏感信息，媒体自由和多元化
- access to sensitive information, media freedom and pluralism



## 投资筛选制度 – 意大利

## Investment screening - Italy

下列交易必须通知总理办公厅：

The following transactions must be notified:

- 直接或间接收购
- Direct or indirect acquisitions
- 股权变更（门槛为2%、3%、5%、10%、20%和25%）
- Share changes (thresholds of 2, 3, 5, 10, 20 and 25%)
- 改变公司的经营范围
- Change in the business scope
- 清算清算
- Liquidation and dissolution
- 其他交易
- Other transactions



## 投资筛选制度 – 意大利

## Investment screening - Italy

总理办公厅有下列权力：

The prime minister office has the following powers:

- 禁止交易
- To forbid the transaction
- 强加条件
- To impose conditions



事实上，到目前为止没有交易被禁止

No transaction has ever been forbidden

## 投资筛选制度 – 意大利

## Investment screening - Italy

程序:

Process:

- 公司应当在**10**天内通知总理办公厅
- The company must notify the prime minister office within 10 day
- 通知需要包括所欲有关信息
- The notification must contain all relevant information
- 总理办公厅应当在**45**天内回答，如否视为无异议
- The prime minister office must reply within 45 days, otherwise it will be deemed to have no objections



有关公司的外国股东必须监管董事决议以检查是否需要通知。

Foreign investors of relevant companies must supervise their board resolutions and determine whether they have to be notified.



## 投资筛选制度 – 意大利

## Investment screening - Italy

法律后果：

Legal consequences:

- 罚款：交易金额两倍或目标公司经营额的1%，以较高者为准
- fine of twice the transaction amount or 1% of the turnover of the target company, whichever is higher
- 交易无效
- The transaction is void





## HERMES PAZZAGLINI, 授薪合伙人, 收购&并购, 反垄断法&反竞争法, 公司法&商法

**Hermes Pazzaglini**, Nctm驻上海代表处总负责人。他擅长为国内外客户解决有关跨境并购、公司法及商法等方面的问题。他是上海国际仲裁中心和深圳国际仲裁院中为数不多的意大利籍仲裁员之一。**Pazzaglini** 毕业于米兰天主教大学民法专业, 于1999年和2000年分别取得香港和英国的律师执业资格。他为多家在意大利的中国大陆公司提供法律咨询, 包括: 长虹、景成、中国国际航空、中国东方航空等。他连续五年被著名法律杂志《钱伯斯环球》(Chambers Global) 评选为中国-意大利双边关系方面的领军人物。

**Pazzaglini**先生自1991年起定居于大中华区, 办公语言为普通话、粤语、意大利语、法语和西班牙语。



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# THE NETHERLANDS



# **FOREIGN DIRECT INVESTMENTS – THE NETHERLANDS**

**Queenie Li & Jeroen Pop 30 June 2020**

## SCOPE OF REGULATIONS (I/III) 范围

**In general:** no restrictions on foreign direct investments. The Netherlands have an open economy, highly depending on international business.

原则上荷兰对外商直接投资没有限制。荷兰的经济十分开放，高度依赖国际贸易。

**Exceptions:** sector specific restrictions (restrictions on certain sectors which are vital for the functioning of Dutch society). Purpose: protection of public safety and order.

例外：行业特殊限制（某些对荷兰社会运作起至关重要作用的行业或部门进行限制）。目的是保护荷兰公共安全和秩序。

**Telecommunications** 通讯系统

**Other vital sectors such as transport, distribution and chemistry** 其他重要部门如交通化工和分配部门

**Legislative proposal:** law on undesired control telecommunications. 不良控制通讯系统的立法提案

**Envisage have a draft legislative proposal d to by the end of 2020** 计划在2020年底前提出相关立法提案的草案。

**To enter into force with retroactive effect on 2 June 2020** 自2020年6月20日起追溯生效



## SCOPE OF REGULATIONS (II/III)

### Telecommunications 通信系统

**Legislative proposal:** law on undesired control telecommunications.

The Minister of Economic Affairs can prohibit the (envisaged) acquisition of an interest in a telecommunication provider if such acquisition is a threat to the public interest.

如果这种收购对公共利益造成威胁，经济事务部可以禁止收购电信供应商的权益。

#### **Threat to public interest:**

A threat to public interest exists if:

- (i) a party acquires a controlling interest;
- (ii) which results in having relevant influence; and
- (iii) if it is known (or it is expected) that such party has the intention to influence the telecommunications provider in such a way to accommodate abuse or deliberate loss of its services.

对公共利益造成威胁的情况：

- 1) 一方要求一种控制的权利；
- 2) 造成一种相关影响的结果；
- 3) 如果已知或预期该方以滥用供应服务或故意丢失服务的方式有意影响电信服务商。



## SCOPE OF REGULATIONS (II/III)

**Telecommunications 通信系统**  
**Legislative proposal: law on undesired control telecommunications.**

### **Controlling interest is defined as (amongst others):**

- the right to exercise, directly or indirectly, at least 30 percent (30%) of the voting power at general meetings; or
- the legal power to appoint and to dismiss a majority of the managing directors and/or supervisory directors.

### **关于控制权益的定义**

- 在股东大会上可以直接或间接行使至少30%的投票权。
- 拥有任命或罢免大多数执行董事和/或监事的法律权利。

### **Relevant influence:**

- if (i) abuse or (ii) deliberate loss of the telecommunications provider can result in (amongst others):
  - (a) an infringement of the reliability of the telecommunication in the Netherlands; or
  - (b) interruption of telecommunication services for a large number of end users.

### **什么情况是相关影响?**

如果I) 滥用; 或 II) 通信运营商故意造成损失可能会导致:

- A) 有损荷兰电子通信系统的可靠性;
- B) 干扰或中断终端用户的电子通信服务



## SCOPE OF REGULATIONS (III/III)

### Other vital sectors such as transport, distribution and chemistry

- Contents of the (future) legislative proposal are not yet known.
- 立法提案的具体内容还未知
- It will probably be to some extent similar to the law on undesired control telecommunications (i.e. it is envisaged that the Minister of Economic Affairs can forbid the (envisaged) acquisition of an interest in the relevant sectors if such acquisition is considered to be a threat to the public interest)
- 某种程度上会类似于禁止不良控制电子通信系统的立法。（即，如果经济事务部认为（设想的）收购可能会威胁到公共利益，则可以禁止收购获得有关部门的利益。）



## PROCESS (I/II) 程序

### Telecommunications

**Legislative proposal:** law on undesired control telecommunications.

- The party considering to acquire a controlling interest which may result in relevant influence must notify the Minister thereof ultimately eight (8) weeks prior to the execution of such acquisition.
- 考虑获取可能会导致相关影响的控股权一方必须在实行该收购前8周内最终通知经济事务部门。
- The Minister decides within 8 weeks following receipt of such notification whether the acquiring party shall be prohibited to effectuate the envisaged investment.
- 部长将在收到此类通知8周内决定是否应禁止收购方进行所设想的投资。
- If the Minister has decided not to forbid the investment, the Minister may still at a later stage forbid the investment if (e.g.) the notifying party has provided incorrect and/or incomplete information.
- 如果部长决定不禁止该项投资，部长也可能在稍晚的阶段禁止投资如果投资方提供虚假或不完整的信息。
- If the Minister decides to forbid the envisaged transaction it shall inform the relevant part publish such decision online.
- 如果部门决定禁止该项交易，那么应该通知相关方并在网上公开此项决定。





## PROCESS (III/II) 程序

### Telecommunications

**Legislative proposal:** law on undesired control telecommunications.

- If a party is already holding a controlling interest which the Minister deems to be a threat to the public interest, the Minister can prohibit such party to continue holding its controlling interest.
  - 如果一方已经持有部门认为会威胁到公共利益的控股权，那么经济事务部可以禁止该方继续拥有控股权
- Following the Minister's decision to prohibit the controlling interest, it shall grant the relevant party a period during which it should (i) decrease its interest to such an extent that it no longer qualifies as a controlling interest or (ii) sell its entire interest.
  - 部门作出禁止继续持有控制权决定后，需要给予相关方一段时间用于1) 减少股权使之不再符合控股权，或2) 出售所有股权
- Such party is not free in deciding to whom it shall transfer its interest (e.g. it cannot transfer its interest to a party closely related to the relevant party).
  - 该方不能自由决定转股的一方，（具体来说，就是不能转股给与该方关系密切的一方）
- Failure to comply with the Minister's decision within said term results in the Minister having the power to decrease or transfer such party's (entire) interest by himself.
  - 在相关时间内不遵守部门决定做出相应的行动，部门将亲自拥有或转让该方的（所有）股权。



# SANCTIONS 制裁

## Telecommunications

**Legislative proposal:** law on undesired control telecommunications.

- Pre-completion: prohibition of the transaction.  
• 未完成状态：禁止交易
- Following completion: termination or decrease of the controlling interest.  
• 完成后状态：终止或减少控股权



# FOREIGN DIRECT INVESTMENTS - BELGIUM

Queenie Li & Timothy Speelman 30 June 2020

## GENERAL 概况

- The current Belgian Federal legal landscape can be described as permissive to foreign investment into Belgium that has an open economy, highly depending on export and foreign investments. Other than certain specific regulated industries and a notification requirement for acquisitions of more than one third of the shares of companies carrying on a business in Belgium and with a net worth of at least EUR 2.5 million (for which there are no sanctions for non-compliance), there are no notification or screening requirements for foreign investment in place. 目前比利时联邦法律现状是允许外国直接投资的，比利时的开放经济很大程度上依靠出口和外国投资。除特殊规定的行业，收购超过三分之一比利时公司股权且净价值至少250万欧元需要提交通知（不遵守也没有制裁措施）。除此之外也没有对外国直接投资需要通知或审查的要求
- Belgium is divided into three Regions, i.e. the Flemish Region, the Walloon Region and the Brussels' Region, each having certain separate regional legislative powers and autonomy. In the Flemish Region, a Decree was recently adopted introducing a control mechanism (screening procedure) and providing for a veto right for the Flemish Government in case of foreign investment in certain strategic sectors in the Flemish Region, as further described below. 比利时被划分为三大区弗莱芒大区、瓦隆大区和布鲁塞尔大区：每个区有分别的地方行政规章。在弗莱芒大区近日就通过了一项法令引入控制机制（审查程序）为弗莱芒地区政府对外国直接投资战略行业提供否决权。
- The Decree is in line with the efforts being done within the European Union and by some of its member states, but no similar initiative has so far been taken at a Belgian Federal level or by the other Belgian Regions. 法令是与欧盟及其成员国作出的努力是一致的，但是目前为止比利时联邦层面或其他大区没有采取任何类似措施。



## FLEMISH DECREE (I/III) 弗莱芒法令

### General概述

The Decree sets out that legal acts involving certain Flemish public or semi-public entities and resulting in foreign persons acquiring control over such instances can be declared null and void or inapplicable by the Flemish Government if such acquisition poses a threat to the strategic interests of the Flemish Community or Flemish Region. The Decree applies not only to investors outside the EU but also to European investors. There is no threshold for when the mechanism applies. 该法令规定涉及到弗莱芒区公共和半公共实体的法律行为并导致外国投资者获得该实体的控制权，如果这种收购并购威胁到弗莱芒区社会或地区的战略性利益，该行为可以由弗莱芒政府宣布无效或不适用。法令的适用对象不仅是欧盟外的投资者，同样适用其他欧盟国家的投资者。

### Entities in scope:法令规范的实体

The control mechanism and screening procedure applies to legal acts involving: 控制机制及审查程序涉及以下方面的法律行为。

- the Flemish administration (including e.g. public external autonomous agencies and the Flemish investment companies), 弗莱芒行政机构（包括如公共外部自治机构和投资公司）
- any local authority on the Flemish territory (including e.g. autonomous agencies), and 弗莱芒区任何地方机关（包括自治机构）
- any other institution with legal personality established specifically for catering to needs of general interest and for which an institution falling within the scope of the Decree 任何其他因公共利益而设立的法人机构
  - provides for more than 50% of its financing; 提供50%的融资
  - has more than 50% of the votes at its board of directors; or 拥有董事会超50%的投票权
  - exercises control over its management 对其进行控制管理



## FLEMISH DECREE (II/III) 弗莱芒法令

### Transactions in scope: 受规范的交易

A screening procedure can be triggered if an entity as described above performs a legal action resulting in

如果以上实体的法律行为导致如下结果，政府将开展审查程序：

- a foreign legal or natural person acquiring control over such entity, and 一个外国法人或自然人获得该实体的控制权
- a threat to the strategic interests of the Flemish Community or Flemish Region. 威胁到弗莱芒社群或地区的战略利益

A “legal action” is a broad concept covering *inter alia* the acquisition of shares in the entity, capital increases but also, for instance, the entering into of certain commercial contracts or financing arrangements between the entity and a foreign person. The legal action should result in the foreign party acquiring control over the entity. 这个“法律行为”是一个广义的概念，尤其是指收购股权，增资但也包括例如签订某些商业合同或外国投资方和该实体的融资协议。法律行为应会导致外国投资者获得控制权。



## FLEMISH DECREE (III/III) 弗莱芒法令

### **Potential ex post screening by the Flemish Government**: 可能的事后审查

The screening by the Flemish Government should not be seen as an *ex ante* procedure to be complied with prior to the relevant transaction becoming effective: the Flemish Government is only entitled to look into such transactions after they have occurred and may request the advice of Belgium's Federal Service for National Security on a particular transaction (or the Federal Service for National Security may provide its advice to the Flemish Government on its own account). 弗莱芒政府的审查不应被视为相关交易生效前必须遵守的事前审查：弗莱芒政府只有权在事后审查并请求比利时关于国家安全的联邦服务局对特定的交易给予意见。

### **Consequences**: 后果

Provided that the Flemish Government establishes that there is indeed a threat to the strategic interests of the Flemish Community or Flemish Region discussions will be initiated with the foreign party and the relevant entity in order to attempt to agree on certain mitigating measures which may for instance include amendments to the structure of the transaction or certain compensatory payments. 弗莱芒政府确定有威胁弗莱芒社群或地区的战略利益，才会主动与外资方或实体进行交涉并努力达成缓解措施，诸如修改公司结构或一定的补偿金。

Only if no mutual agreement can be reached and as a final remedy, the Flemish Government can (but is not obliged to) issue a decree declaring the legal action null and void or inapplicable.

只有当双方无法达成最终救济的协议时，弗莱芒政府才可以（并不必定）颁布无效或不适用的法令。



# FOREIGN DIRECT INVESTMENTS - LUXEMBOURG

Basile Fémelat & Harrisson Nkrumah | 30 June 2020



## SCOPE OF REGULATIONS (I/II) 范围

- ❑ There are currently no restrictions on foreign investments in Luxembourg. 目前没有任何限制。
- ❑ However, in 2019 the European Union (EU) provided Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments (the **FDI Screening Regulation**). 但是在欧盟提供的由欧洲议会和理事会于2019年3月19日通过的第452号规章确立了审查外国直接投资的框架。（以下称外国直接投资审查规章）
- ❑ The FDI Screening Regulation provides a framework for the screening by the member states of the EU (**Member States**) of foreign direct investments (**FDI**) into the EU on the grounds of security or public order, already entered into force but applying as from 11 October 2020. 外国直接投资规章基于安全或公共秩序为成员国提供一个外国直接投资的框架。已经生效但将于2020年10月11日起实行。
- ❑ According to the screening's list notified by Member States, national FDI screening mechanisms are in place in 14 Member States (i.e. excluding Luxembourg which has not yet established such a system). 根据成员国通知欧盟的审查清单，已有14个成员国建立了内国化的外国直接投资审查制度（卢森堡目前还没有建立该审查系统）



## SCOPE OF REGULATION (II/II) 范围

- In the context of the COVID-19 crisis, the European Commission (the **Commission**) published a communication on 25 March 2020, on guidance to the Member States concerning FDI, in which the Commission calls upon Member States to make of use of tools available to them or set-up a fully fledged screening mechanism in accordance with the FDI Screening Regulation (the **Communication**). 在新馆病毒危机的背景下，欧盟委员会于2020年3月25日发布了一则指导欧盟成员国关注外国直接投资的通告（以下简称通告）。欧盟委员会号召成员国利用现有工具或根据外国直接投资审查规章建立一个成熟的审查制度。
- Currently, Luxembourg Parliament is examining the proposal of Bill No 7578 of 7 May 2020 (the **Luxembourg FDI Screening Bill**) under the impulsion of the Communication, which will establish a legal basis for a screening mechanism of foreign investments in Luxembourg in accordance with the FDI Screening Regulation. 目前，在欧盟通告的敦促下，卢森堡议会正在审议2020年5月7日提出的第7578号法案的提案。这项提案将会根据欧盟外国直接投资审查规章为审查卢森堡境内外国直接投资制度提供法律基础。
- The purpose of the Luxembourg FDI Screening Bill is to set-up screening of foreign investments which undermine or have a harmful impact on the security and public order or essential national or European interests. 卢森堡外国直接投资审查法案的立法目的旨在建立一个审查外国投资是否损害安全、公共秩序或对国家利益或欧盟利益造成有害影响的制度。



## PROCESS 程序

- The Luxembourg FDI Screening Bill applies to investors being either (i) any natural person who is a national of a country that is not a member of the EU or the European Economic Area (EEA), (ii) any undertaking established outside the territory of the EU or the 卢森堡外国直接投资审查法案将对以下投资者适用：1)国籍不是欧盟成员国或欧洲经济区国家的自然人；2)任何在欧盟国家或欧洲经济区境外设立的企业
- The Luxembourg FDI Screening Bill covers foreign investments, being the acquisition by an investor of a significant influence (i.e. holding directly or indirectly 10% of the shares or voting rights) in a company, part of a company or a group of companies established in Luxembourg. 卢森堡国外直接投资审查法案审查外国直接投资涵盖范围：在卢森堡设立的公司，公司的一部分或者集团被投资者收购达到重要影响的结果（具体来说，将直接或间接持有10%的股票或投票权）。



## PROCESS 程序

- The screening mechanism consists in (i) the obligation of prior notification (based on a non-exhaustive list of information) by the investor who wishes to make a foreign investment (ii) a pre-evaluation procedure (i.e. where comments received from other Member States or the Commission are made) and (iii) an autorisation/refusal delivered by the Minister of Economy (**Minister**). 这个审查机制包括1) 外国投资者（基于非详尽信息清单）提前通知义务；2) 预先评估程序（从其他成员国或委员会得到的评价）；3) 由经济部长授权 / 拒绝的批复。
- Criteria taken into account on the pre-evaluation phase (i.e. non-exhaustive) may be relating to (i) objective criteria being critical infrastucture (whether physical or virtual), critical technologies, access to sensitive information or (ii) subjective criteria being a foreign investor directly or indirectly controlled by the government or which engages in illegal or criminal **activites**. 在预先评估阶段考量的标准有：1) 客观标准其涉及关键基础设施（不管实际存在的或虚拟的），重要技术，获得敏感信息；2) 主观标准是外国投资者直接或间接被外国政府控制或从事违法犯罪行为。



## SANCTION (I/II) 制裁

- ❑ If a foreign investment has been made without having been notified or without having the required authorisation, the Minister may order the investor to: 如果未事先通知或未获得所需授权进行的外国直接投资，经济部长可命令投资者：
  - ✓ file an authorisation request; 提出授权请求
  - ✓ restore the previous situation at its own expense; 自费恢复收购之前状态
  - ✓ modify the foreign investment. 变更外国投资
- ❑ The Minister may impose penalty payments on orders to encourage investor to comply: 为鼓励投资者遵守命令，部长可以处以罚款
  - ✓ cannot be higher than EUR 1,250, without the total amount imposed to exceed EUR 25,000. 不能超过1250欧元，且总额不能超过25000欧元
- ❑ The Minister may also: 部长还可以
  - ✓ pronounce the suspension of the voting rights 宣布中止投票权
  - ✓ prohibit or limit the distribution of dividends or compensation; or 禁止或限制分配股息或赔偿金
  - ✓ temporarily suspend, restrict or prohibit the free disposal of all or part of the assets. 暂时停止、限制或禁止自由处置所有或部分资产。



## SANCTION (III/II) 制裁

- If the Minister considers that the conditions attached to its authorisation are not met, the Minister can :如果部长认为先前准许的条件不再符合，可以
  - ✓ withdraw the authorisation;撤回授权准许的决定
  - ✓ order the investor to respect the conditions appearing in authorisation;命令投资者尊重授权时的条件
  - ✓ order the investor to execute sets prescriptions in substitution of the obligation not fulfilled.命令投资者执行指令来代替未履行的义务
  
- Is punished with a prison sentence of five to ten years and a fine the amount of which cannot exceed:会判处五年至十年有期徒刑并处以罚款但不应超出：
  - ✓ double of the amount of the foreign investment;投资额的两倍
  - ✓ 10% of the annual turnover;10%的年收益额
  - ✓ five million euros by an investor, legal person, 对投资者或法人5百万欧
  - ✓ or one of these sentences only, 只可择一



**akad**

