

Foreign Investment Review 2020

Contributing editor
Oliver Borgers



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

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Contributing editor

Oliver Borgers
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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



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Laos

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LAW AND POLICY

Policies and practices

1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The general rule is that a 100 per cent foreign-owned investment is accepted under Lao law. There are no restrictions on foreign investment in Laos, except as otherwise specified. The Law on Enterprise No. 46/NA, dated 26 December 2013 (Law on Enterprise and the Law on Investment Promotion No. 14/NA, dated 17 November 2016 (Law on Investment Promotion), does not set out general prohibitions for foreigners that prevent them from holding 100 per cent of the share equity in a company in Laos. However, there may be specific regulations that apply to specific industries, and which may be imposed on foreign investors, such as, for example, a requirement to partner with a Lao national.

The investment regulatory framework of Laos has suffered from a lack of predictability and transparency regarding requirements for foreign investments to be granted the appropriate licence, and in recent years, the issuance of legislation or regulations has brought welcome clarity to the foreign investment framework. However, there remains closer scrutiny from the authorities on many activities related to foreign investment, and local administration still makes a number of decisions on a discretionary basis, although there has been a real commitment from the local authorities to reduce these types of discretionary decisions.

The amended Law on Investment Promotion, which was published on 4 April 2017 in the electronic official gazette (www.laoofficialgazette.gov.la/), is the main piece of legislation providing the core general rules that apply to foreign investment and domestic investment. However, this does not preclude the local authorities from adding additional requirements to foreign investment by means of specific regulations relating to investment in specific industries or sectors.

The Law on Investment Promotion organises activities in Laos into three different categories:

- general business activities;
- concession activities; and
- activities to be operated within a Special Economic Zone (SEZ).

The Law on Investment Promotion separates general business activities into two categories: (i) activities that are included in the controlled business list; and (ii) activities that are not included in the list. The Law on Investment Promotion provides that business activities under the Controlled Business List are businesses that are sensitive to national security, public order and national cultural traditions, and have a socio-environmental impact. Therefore, this legitimises further screening by the relevant authorities, which may be required before a foreign investor can be granted the proper licences. This list may also be considered a means to maintain the competitiveness of Lao operators in certain

business activities. Requests – especially from foreigners – to conduct these activities in Laos will be thoroughly appraised, and authorisation thereof will require assessment and approval by every authority and government agency related to the proposed activity.

Activities not deemed to be controlled activities are more open and incur less scrutiny in respect to business registration and the incorporation process is supposedly faster. This differentiation is also important as it determines the administration that will be in charge of handling the registration of the enterprise. While for controlled activities the registration should be handled by the Ministry of Planning and Investment (MPI), registration of activities that are not included in the controlled activity list will be handled by the Ministry of Industry and Commerce (MOIC), and the registration process is governed by the Law on Enterprise.

Earlier this year, the local authorities issued the Decree on the Endorsement of the Business Activities under the Controlled Business List and the Concession List of Laos No. 3/PM, dated 1 January 2019 (Decree on Controlled and Concession Activities). This decree lists the activities that are to be considered as controlled activities and provides some requirements and conditions for these activities to be carried out in Laos.

A concession activity is an activity for which the local government has granted land to a project developer to conduct certain activities in a specified area, such as managing an electricity-generating facility (eg, a hydropower plant), an SEZ, an airline or a telecommunications operation. The list of concession activities is non-exhaustive, and the government may change it from time to time. Concessions are granted for a maximum of 50 years, although extensions are permitted with approval from the government, the national assembly, or the provincial assembly, depending on the type of investment.

Currency control and management from local authorities may also be another factor for foreign investors to consider prior to investing in Laos. Local authorities in Laos closely scrutinise foreign exchange transactions. These types of transactions are currently regulated under the Law on the Management of Foreign Currency No. 55/NA, dated 22 December 2014 (Law on Foreign Currency), along with the Presidential Decree on the Management of Foreign Currency and Precious Metal No. 1/P, dated 17 March 2008 (Decree on Foreign Currency), and the Guideline on the Implementation of the Decree on Foreign Currency no. 1/BOL (Guideline on Foreign Currency). These regulations will circumscribe the use of foreign currency within the country for limited objectives only, such as payment for goods imported from abroad; repayment of foreign loans and other commercial credit; repatriation or transfer of profits, dividends, principal, interest, and other service charges of foreign investors and wages of foreigners to their home country or a third country; the transfer of funds for investment in a foreign country; and others.

Additionally, the Law on Foreign Currency provides a general prohibition for legal entities to receive and make payment for goods, services, repaying debts, paying salaries and fulfilling tax obligations to the state in a foreign currency.

Main laws

2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

- The Law on Investment Promotion;
- the Decree on Controlled Business List and Concession Activities;
- the Law on Enterprise;
- the Regulation on Management of Foreign Investor regarding the Sale and Purchase of Securities in Laos No. 005/LSX, dated 8 December 2015;
- the Land Law No. 04/NA, dated 21 October 2003;
- the Law on Business Competition No. 60/NA, dated 14 July 2015 (Law on Business Competition); and
- the Notification of the Ministry of Industry and Commerce on Reserved Business Category List for Lao People No. 1328 of 2015 (Notification on Reserved Business for Lao People).

Scope of application

3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The type of activity to be carried out by a foreign investor will determine the relevant authority handling the registration process. If the activity falls under general business, outside of the scope of the Decree on Controlled and Concession Activities, the investor will have to submit its application to incorporate a legal entity with the MOIC or its related department. This registration process is mostly set out in the Law on Enterprise. On the other hand, if the contemplated activity is contained in the Decree on Controlled and Concession Activities, the MPI will be the single window authority for the incorporation of the legal entity. These types of activities have their registration process set out in the Law on Investment Promotion.

The MOIC and the MPI will review the incorporation process of every application. Accordingly, they have the role to review and ensure that applicants abide by regulations with regard to (i) foreign share equity restrictions; and (ii) additional business operating licences that may be required for the contemplated activities. On a side note, discretionary decisions can be still be made, although this becomes less and less the case, and applications may have already been rejected because of national interests, although the rejection may not have been officially based on these grounds.

Law on Investment Promotion

The Law on Investment Promotion expressly recognises the possibility of having a 100 per cent foreign-owned entity including a wholly domestic or foreign-owned investment. Accordingly, companies owned by foreign investors are formally recognised under Lao law. This same law also refers to activities that now fall under the Decree on Controlled and Concession Activities, which may set specific restrictions to foreign investment, and also see the authorisation to operate in Laos thoroughly examined and approved by the Investment Promotion and Management Committee (the Committee).

The Committee will be the pivotal authority for consideration and approval of investments, and will include representatives from the MOIC, the MPI and other relevant government agencies. Two different levels of the Committee may be involved in the approval process – the central committee or provincial committees, depending on the nature and amount of the investment. Consideration and approval for controlled activities and concession activities that may have an adverse

impact, as well as approval for the development of an SEZ, is overseen by the central committee only.

The Committee's role does not end once investment approval has been granted, and subsequent approvals will be required during the course of the investment and throughout the life of the legal entity engaged in business activity in Laos if modifications to the initial investment or project are contemplated, such as transfer of shares, changes to the objectives of the company or the use of the concession or investment rights as a guarantee. The Committee can also suspend or cancel previously granted licences if investors do not meet requirements. Though this committee and the list of controlled and concession activities are not targeting foreign investments specifically, it aims to regulate the registration and approval process for activities that attract significant numbers of foreign investors.

The Law on Investment Promotion provides further requirements regarding specific investments, although this does not target foreign investment specifically. For instance, approval from the national assembly is required for investments that include state equity participation exceeding 20 billion kip in a public-private partnership; construction projects involving a nuclear power plant; investment in a casino business; businesses having a serious impact on the environment, nature and society, and especially relating to the diversion of natural water flow; resettlement of 500 families or more and concession of land totalling 10,000 hectares or more; and other projects as required under relevant laws. Therefore, for these activities, a high degree of discretion in the approval or rejection of a project can be expected.

For concession activities, concession agreements must be negotiated with the local government. Accordingly, although not required by law, requirements to have participation from the government may be requested. This is often the case for hydropower plant projects, and electricity generation projects in general, where the government directly or through state-owned entities may be required to be part of the shareholding structure. Similar conditions apply to sectors such as mining. These two sectors remain particularly important in the Lao investment landscape.

The Law on Enterprises

The Law on Enterprises is a set of rules relating to corporate governance, and the internal organisation of a legal entity in Laos, regardless of their activities. This law is also the one that is referred to for the registration process of general businesses that are out of the scope of the Decree on Controlled and Concession Activities. However, it is important to bear in mind that the Law on Enterprises does not guarantee that these general businesses will not be subject to any restrictions. A general business outside the scope of the Decree on Controlled and Concession Activities may be subject to restrictions on foreign investment if this is stipulated in a specific regulation. Below is example of general businesses that are displayed in the Decree on Controlled and Concession Activities and are subject to restrictions on foreign investment:

- The establishment of a wholesale and retail business is open to both domestic and foreign investors. However, local regulations set out specific requirements for foreign investors. Foreign investors must have registered capital of more than 4 billion kip, while there is no such high capital requirement imposed on local investors. If a foreign investor wants to hold 100 per cent of the capital of a legal entity, registered capital of more than 20 billion kip is required. The amount of registered capital will determine how much share equity a foreign investor may hold in a retail or wholesale business. For registered capital from 10 billion kip to less than 20 billion kip, foreign equity participation can be up to 70 per cent. For registered capital from 4 billion kip to less than 10 billion kip, foreign equity participation can be up to 50 per cent.

- While domestic transportation of goods was open to foreign investors – up to 100 per cent foreign equity – prior to August 2018, the Ministry of Public Works and Transport issued Decision No. 17582/MOPWT, dated 8 August 2018, which provides that the local government will open investment to foreign investors according to their obligation toward the World Trade Organization (WTO) and ASEAN, which may prevent a foreign investor from becoming a majority shareholder. Given its strategic location within ASEAN (common borders with five countries and serving as a great hub between the ASEAN region and China), transport business is viewed as a very promising industry for Laos. Preventing wholly owned foreign businesses in this sector can be seen as a way to protect this market for Lao nationals only, although there is a lack of competition locally, and heavy investment may be necessary.

The Regulation on Management of Foreign Investors regarding the Sale and Purchase of Securities

According to this regulation, the number of shares held by foreign investors in public companies may be limited by:

- resolution of the public company;
- regulation of relating sectors; and
- consideration from time to time of the Lao Stock Exchange Committee.

For instance, a decision issued by the Lao Stock Exchange Committee in August 2015 restricted foreign individuals from holding 1 per cent of shares, and foreign legal entities from holding 5 per cent of shares, in the public company Électricité du Laos. In addition, the total shares held by foreign parties may not exceed 25 per cent of the total shares issued.

Land law

Land in Laos is under the ownership of the national community and is centrally managed by the state. Lao nationals can be granted land use rights, which include (i) the right to protect land; (ii) the right to use land; (iii) the right of usufruct; (iv) the right to transfer land use rights; and (v) rights relating to inheritance of land use rights. Foreigners can lease land for a limited period and own buildings on that land. However, when the lease term expires, usually the buildings are given over to state ownership along with the land. As such, the purchase of land by foreign nationals is not possible. A lease agreement can be subject to an agreement with foreign investors; similarly, a concession activity may be granted a land concession for a period of up to 50 years, which may be renewed.

Law on Business Competition

The Law on Business Competition regulates abuse of market dominance as well as mergers whereby two or more enterprises agree to transfer all of their legitimate assets, rights, obligations and interests; and acquisition of enterprises whereby an enterprise agrees to buy a part or all of the assets of another enterprise to be under its ownership and administration.

Approval may be required when:

- holding the market share in the relevant market over the threshold as defined by the Business Competition Commission;
- causing any impact on the access to the market and the restraint of technological development; and
- causing any impact on consumers, other business operators and the national socio-economic development.

Additionally, the Law on Business Competition has created the Business Competition Commission (BCC). Generally, the BCC acts as an adviser to the government on issues relating to business competition. The BCC has also the express duty to examine the merger of businesses in regard to every type of business activity in Laos.

Notification on Reserved Business for Lao People

There covers activities that would usually require only a small investment capital, such as hairdresser, for instance. Investment in these types of business may be difficult for foreigners.

Definitions

4 How is a foreign investor or foreign investment defined in the applicable law?

The local framework is very scarce in respect to this topic. The Law on Investment Promotion defines a 'foreign investor', but it does not provide a definition for 'foreign investment'. A foreign investor is defined as a foreign individual or legal entity that is investing in Laos. For foreign entities, this is usually marked by the presence of foreign shareholders, which will, in the eyes of the authorities, determine whether a company should be considered foreign or not. In this vein, there is no threshold set out in the local laws. As such, a legal entity that is locally incorporated, and which has a foreign individual or a legal entity, holding so much as one share, may be considered a foreign legal entity by the local authorities.

Special rules for SOEs and SWFs

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Generally, there are no special rules relating to investments made by foreign SOEs and SWFs. Therefore, these investments may follow the common rules related to investment.

Similarly, there are no express definitions provided in respect to SOEs and SWFs.

Relevant authorities

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

Under the Law on Investment Promotion, activities relating to concession activities or on the controlled business list may require a green light from the Investment Promotion and Management Committee. The Investment Promotion and Management Committee's role consists mainly of approving investments in the activities in the controlled business list. However, its role does not end here, since it also examines and considers applications relating to (i) the transfer of shares; (ii) changes to the objectives of the company; and (iii) the use of the concession or investment rights as a guarantee. The committee also has the authority to suspend or cancel licences that have been granted to investors, if the requirements are not met.

According to the Law on Business Competition, the following acts may fall under the supervision of the BCC in regard to merger controls: (i) holding market shares in the relevant market in an amount that exceeds the threshold defined by the BCC; (ii) causing any impact on access to the market or restraints on technological development; and (iii) causing any impact on consumers, other business operators or national socio-economic development. The Law on Business Competition further provides a duty of notification, specifically to 'large enterprises'. This notification must be made to the BCC for consideration. However, a business merger of small and medium-sized enterprises is exempted from this notification requirement.

However, it is difficult to assess correctly the full ambit of the Law on Business Competition in practice. Indeed, while the law provides that the BCC is responsible for providing supervision so that a merger may not result in a holding of market share in excess of the threshold defined by the BCC, there is, to date, no threshold that has been determined, or made available for public knowledge. We understand that to date,

without further guidance from the authorities, the fact that a merger may impact consumers, other business operators or national socio-economic development may be construed as a review under the prism of national interest grounds.

Although the Law on Business Competition has now been in effect for almost five years, the BCC was only officially appointed and began operating following the Decision on the Appointment of the Business Competition Commission No. 67/PM, dated 4 October 2018. Therefore, the experience of the BCC remains, to date, relatively limited in respect to these types of transactions, and there has not been any information disclosed about the type of deals that have been reviewed thus far by the BCC.

National interest

7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Under Lao law, there remains room for discretionary decisions, especially if national interest grounds are raised, and the discretion of the authorities is broad in approving or rejecting a project.

PROCEDURE

Jurisdictional thresholds

8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

In the event of a company carrying out an activity on the controlled business list, or a concession activity, to complete the transaction, the investment will need a request to be filed with the one-stop service of the MPI, and it will be submitted to the IPMC for its consideration. Similarly, for general businesses, although no specific approval may be required, the transaction should be duly registered with the MOIC.

With regard to competition clearance, the Law on Business Competition provides that merger control may be defined as holding a market share that exceeds the threshold set by the BCC. However, this threshold has not yet been defined. According to the Law on Business Competition, a business merger comprising large enterprises must proceed with a filing to the BCC for consideration.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Generally, for the incorporation of a legal entity in any of the three categories (ie, general business, controlled business and a concession activity), a specific application may be required, depending on the type of investment at stake and the industry concerned. In any case, the Ministry of Public Security (police) will screen the identity of the shareholders and the directors of the company. In general, police officers will ensure that these persons are not listed on any blacklist that has been provided by their own internal intelligence or an international organisation.

Other than that, the authorities have the discretion to require additional documents as they see fit. The usual list of documents indicated under laws and regulations required by the local authorities is non-exhaustive.

Regarding competition clearance, a series of documents will first be required by the BCC at the time of the filing:

- application form from the BCC;
- copy of the Enterprise Registration Certificate of each enterprise involved in the merger;

- financial statement of the last two consecutive years of each enterprise involved in the merger, certified by an auditing organisation; and
- contract or agreement relating to the merger.

The BCC will review the documents of the business merger within seven days after receiving the documents. In the case of incomplete or incorrect documents, the applicant will be asked to provide additional documents or improve the content so that the application is complete and correct.

After receiving the complete and correct documentation, the BCC will review the application and consider the issuance of the clearance within 30 days. In the case of disapproval, the legal entities involved in the merger will be notified in written form and will be provided with an explanation. The time frame may be extended to another period of 30 days, upon the approval of the MOIC. There is no indication as to whether or not a specific reason for such extension should be provided.

Securing approval

10 | Which party is responsible for securing approval?

The responsibility for securing the approval falls on the investor. Accordingly, the investor will be the party to submit the application and any necessary documents to the BCC.

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

With regard to competition clearance, it takes seven days after receiving the documents for the BCC to review the filed application. If the application is incomplete or incorrect, the applicant will be asked in writing to provide additional documents or improve the content, and 30 days will be necessary to issuance the clearance. In case of disapproval, the legal entities involved in the merger will be notified in written form and will be provided with an explanation. The time frame may be extended to another period of 30 days, upon the approval of the MOIC. There is no indication as to whether a specific reason for such extension should be provided; the Law on Business Competition only provides that this may be possible 'in case of necessity'.

Clearance penalties

12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

According to the Law on Business Competition, only mergers involving SMEs may be able to file with or notify the BCC once the transaction is complete. Large companies, however, are required to file prior to completing the transaction.

Involvement of authorities

13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

It is not unusual that Lao officers provide informal guidance, either prior to filing documents with any relevant authorities or at the time of the filing. However, we recommend engaging in such guidance with officers from a certain ranking, to prevent being provided with inaccurate advice.

Facilitating clearance

- 14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

There are no such specialists in Laos.

Post-closing powers

- 15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The local regulations do not provide specific information in this respect.

SUBSTANTIVE ASSESSMENT

Substantive test

- 16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

By law, there is no substantive test for reviewing the applications with respect to national security or national interests. There is also no particular policy guidance. The basic test consists of ensuring that the transaction will not lead to (i) holding a market share in the relevant market that exceeds the threshold set by the BCC; (ii) causing any impact on the access to the market and the restraint of technological development; and (iii) causing any impact on consumers, other business operators or national socio-economic development. The Law on Business Competition also provides exemptions if (i) one or more enterprises involved in the merger to restrain business competition is in the bankruptcy process; or (ii) the merger will encourage the growth of exports or foster technological and technical progress.

Consulting other countries

- 17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The current regulations do not provide information in this regard.

Other relevant parties

- 18 | What other parties may become involved in the review process? What rights and standing do complainants have?

The local regulations do not provide information in this regard.

Prohibition and objections to transaction

- 19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The authorities may reject the transaction.

Mitigating arrangements

- 20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

The local regulations do not provide specific information in this regard.

Tilleke & Gibbins

Dino Santaniello

dino.s@tilleke.com

No. 302/1B, 3rd Floor, Vieng Vang Tower

Unit 15 Boulouchan Road

Dongpalan Thong Village

Sisattanak District

Vientiane

Laos

Tel: +856 21 262 355

Fax: +856 21 262 356

www.tilleke.com

Challenge and appeal

- 21 | Can a negative decision be challenged or appealed?

The local regulations do not provide information in this regard. Accordingly, we understand that, upon rejection of the filing, a new filing may be possible.

Confidential information

- 22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The Law on Electronic Data Protection No.25/NA, dated 12 December 2017 (Law on Electronic Data), provides that sensitive information may not be disclosed without the consent of the information owner. The Instruction No. 2126/MOPTC on the Implementation of the Law on Electronic Data Protection provides a non-exhaustive list of examples of sensitive information, which includes information about legal entities in regard to customers, financial statement, confidential records, business plans and so on. Accordingly, the information filed with the BCC, or any other relevant authorities in Laos, should be protected by the Law on Electronic Data Protection.

Prohibitions on government officers to disclose confidential information are further set out in the Law on Investment Promotion. Similarly, the Law on Business Competition also provides an express prohibition for officers from the BCC to disclose the confidential information of individuals or legal entities that are under their responsibility. The communication of confidential information is also prohibited under the Penal Code, which prohibits officers from disclosing information for personal gain; violations of this are subject to one to three years of imprisonment and a fine from 2 million kip to 10 million kip. Sanctions may be heavier if the disclosure is made on a regular basis, with punishments including three to seven years of imprisonment and a fine ranging from 10 million kip to 50 million kip.

RECENT CASES**Relevant recent case law**

- 23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

We are not aware of any rejection cases in Laos.

UPDATE AND TRENDS**Key developments of the past year**

- 24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction?
Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

We are not aware of any upcoming policy in this regard.

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