International
Comparative
Legal Guides

Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

2023

Fourth Edition

Contributing Editors:
Bernadine Adkins and Samuel Beighton
Gowling WLG

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Japan


Hiroaki Takahashi


Koji Kawamura

Anderson Mōri & Tomotsune

1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The Foreign Exchange and Foreign Trade Act (the "FX Act") was enacted in 1949 with the principal aim of regulating foreign investments in Japan. Since its enactment, however, and as the Japanese business and legal environment has developed, the FX Act has been amended several times, particularly for the purpose of deregulating cross-border transactions, including inward direct investments into Japan. For example, amendments to the FX Act in 1980 rendered cross-border transactions "free in principle" as opposed to "restricted in principle". This was followed by further amendments to the FX Act in 1998 that abolished the principle of "cross-border transactions via foreign-exchange banks", under which cross-border transactions are required in principle to be conducted via foreign-exchange banks.

The 1998 amendment of the FX Act, which enabled the free conduct of cross-border transactions without interference from the authorities or banks, served to emphasise the treatment of inward direct investment as "free in principle". This resulted in the liberalisation of the vast majority of industries in Japan. As a result of these developments, the submission of an *ex post* report to the Minister of Finance and the ministers with authority over a particular industry is now sufficient in principle for the purposes of foreign investments in Japan.

However, given the recent global trend towards more stringent screening of foreign direct investments ("FDI") for reasons of national security, such as the adoption of the Foreign Investment Risk Review Modernisation Act by the U.S. in August 2018, and the adoption of new EU regulations in March 2019 to strengthen national security, amendments to the FX Act were enacted in Japan in November 2019 (the "2019 Amendments") with the aim of further promoting FDI that is conducive to sound economic growth as well as to ensure sufficient review of FDI that could potentially undermine national security. The 2019 Amendments subsequently came into effect in June 2020.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

The relevant ministries will review a proposed investment based on the information contained in a prior notification to determine whether such investment is likely to impair national security, impede public order, undermine public safety or result in significant adverse effects on the Japanese economy. The government will request transactions that are deemed problematic from these standpoints to be amended in terms of their structure or, in some cases, to be suspended.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Since the coming into force of the 2019 Amendments in June 2020, there have been no material proposals for amendments to the foreign investment review policy of Japan or laws relating thereto, except for minor amendments to the list of "designated business sectors subject to prior-notification" (the "Designated Business Sectors") or "core business sectors" (the "Core Business Sectors"), as discussed below.

Among other things, responding to the recent COVID-19 pandemic, (i) manufacturing of pharmaceuticals for infectious diseases (including pharmaceutical intermediates), and (ii) manufacturing of sophisticatedly controlled medical devices (including accessories and parts) have been included in the Core Business Sectors.

In addition, businesses regarding 34 certain kinds of minerals such as rare earths, cobalt, titanium, etc., have been added to the Core Business Sectors, subject to the prior notification requirement stated in section 2.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

The main law is the FX Act, supplemented by procedural regulations such as the Cabinet Order on Inward Direct Investment (the "Cabinet Order") and related Ordinances.

Furthermore, the following laws regulate (i) investments by foreign nationals, or (ii) the ratio of voting rights that foreign nationals may hold in Japanese companies:

- the Broadcasting Act;
- the Radio Act;
- the Civil Aeronautics Act;
- the Consigned Freight Forwarding Business Act;
- the Mining Act;
- the Ships Act; and
- the Act on Nippon Telegraph and Telephone Corporation, etc.

The FX Act does not apply to domestic-to-domestic transactions in principle. Other laws generally regulate domestic-to-domestic transactions.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

Except in certain exempt cases, "Foreign Investors" who make "Inward Direct Investments" into Japan (hereinafter, "Foreign Investments") are required to file (i) an *ex post* report, or (ii) a prior notification with the relevant government authorities via the Bank of Japan.

(1) Foreign Investors

Foreign Investors are defined under the FX Act as:

(i) individuals who are not resident in Japan;

(ii) corporations or other organisations established under foreign laws (including Japanese branches of foreign companies) and having their principal office outside Japan, excluding those listed in item (iv) below;

(iii) corporations in which the ratio of aggregate voting rights directly held by those under items (i) and (ii) and the ratio of voting rights indirectly held by those under items (i) and (ii) (through at least 50% ownership of intermediate entities) is 50% or more;

(iv) partnerships conducting investment business or limited partnerships for investment (including foreign partnerships) in which the ratio of contribution from non-residents to the total amount of contribution of all partners is 50% or more, or in which the majority of managing partners are non-residents ("Specified Partnerships"); or

(v) a juridical entity or other organisation in Japan, the majority of whose officers or officers with representative authority are non-resident individuals.

Moreover, individuals or companies that are themselves not Foreign Investors within the scope of items (i) through (v), but that intend to make foreign direct investments on behalf of Foreign Investors (whether or not under the names of such Foreign Investors) will be deemed Foreign Investors.

(2) Foreign Investments

"Foreign Investments" are defined under the FX Act as:

(i) acquisition of 1% or more shares of companies listed in Japan;

(ii) acquisition of shares of unlisted companies in Japan from persons who are not Foreign Investors;

(iii) transfer of shares from an individual who is not resident in Japan to a Foreign Investor, if such non-resident had acquired those shares after December 1, 1980, at a time when he was resident in Japan;

(iv) the giving of consent to (a) a substantial change in the business purpose of a company (provided, in the case of a listed company, that such consent is limited to cases where ⅓ or more of the voting rights are held by Foreign Investors), (b) the appointment of a director or a statutory auditor, or (c) the transfer of the whole of the businesses, or certain fundamental reorganisation, of a company (provided, in the case of items (b) or (c), that such consent is limited to cases where 1% or more of the voting rights of the company are held by Foreign Investors);

(v) establishment of a branch, factory or other business office (other than a representative office) in Japan, or substantially changing the business type or objectives of such branch, factory or business office, excluding banks, foreign insurance companies, securities companies, investment managers, foreign trust companies, gas and electricity utilities companies, etc. specified in the Cabinet Order;

(vi) lending of amounts exceeding JPY100 million to domestic corporations for loan terms exceeding one year, where the total loan principal and the amount of bonds issued by the borrower to the lending Foreign Investor(s) exceed 50% of the total debt of such borrower;

(vii) acquisition of businesses from resident corporations or succession to businesses by way of an absorption-type company split or merger (other than in the case of item (i) through (iii) above);

(viii) acquisition of privately placed bonds issued by a Japanese corporation exceeding certain thresholds;

(ix) acquisition of certain equity certificates issued by the Bank of Japan or certain other entities;

(x) discretionary investments in the shares of a listed company, where the equity ratio on a real equity basis or the ratio of voting rights based on actual voting rights held, following the investment, is 1% or more;

(xi) acceptance of an appointment to represent a person in exercising the voting rights directly held by such person in a domestic company ("acceptance of appointment to exercise voting rights by proxy"), where such acceptance of appointment falls under the following items (a) or (b) below, provided that such acceptance is limited to the cases under items (x), (y) or (z) below:

(a) acceptance of appointment to exercise voting rights by proxy pertaining to the voting rights in a listed company, where the ratio of the relevant voting rights (including voting rights held by Foreign Investors closely related to the person accepting such appointment), based on actual holding voting held, is 10% or more; or

(b) acceptance of appointment to exercise voting rights by proxy pertaining to the voting rights of a non-listed company, which is entrusted by persons other than Foreign Investors who directly hold the voting rights;

(x) where the appointee is a person other than said company or an officer thereof;

(y) where the proposal on which the appointee intends to exercise voting rights through acceptance of appointment to exercise voting rights by proxy, relates to the "election or removal of directors", "shortening the term of office of directors", "amendment of articles of association/by-laws", "assignment of businesses", "dissolution of the company" or "company's entry into a merger agreement"; and/or

(z) where solicitation by the appointee for having itself exercise voting rights by proxy is accompanied;

(xii) acquisition of the right to exercise voting rights where the acquirer's ratio of voting rights based on actual voting rights held (including voting rights held by Foreign Investors who are closely related to that acquirer) after such acquisition is 1% or more;

(xiii) delegation of the authority to exercise voting rights in a non-listed company in Japan acquired by an individual when such individual was a Japan resident, to

a foreign investor when the aforementioned individual has become a non-resident in Japan ("Proxy Voting"), provided that application of this item (xiii) is only applicable where items (xi)(x) and (y) above apply; and/or

(xiv) obtaining the consent of another non-resident individual or corporation that holds actual voting rights in a listed company to jointly exercise the actual voting rights held in the listed company ("Acquisition of Consent to Exercise of Joint Voting Rights"), where the aggregate ratio of voting rights based on the actual voting rights held by the acquirer of the consent and those held by the other party is 10% or more. The voting rights ratio includes the actual voting rights held by a foreign investor who is a closely related party to the acquirer of the agreement and a foreign investor who is a closely related party to the other party.

It is important to note, as stated in item (i) above, that the acquisition of a minority interest in a listed company in Japan is generally deemed a Foreign Investment, unless such minority interests constitute less than 1% of the shares in the company. In addition, as stated in item (ii) above, the acquisition of any number of shares in an unlisted company in Japan is generally deemed a Foreign Investment.

Categories of Foreign Investments listed in items (iv), (v), (xi), (xii), (xiii) and (xiv) may include internal reorganisation within the company or the group. Categories of Foreign Investments listed in items (i), (ii), (iii), (vii), (viii) and (ix) may involve asset purchases.

(3) *Ex Post* Report or Prior Notification

A Foreign Investor that makes a Foreign Investment will, unless certain exceptions (as set forth below in paragraph (4)) apply, be required to file either (i) a prior notification before that Foreign Investment has been commenced, or (ii) an *ex post* report after that Foreign Investment has been made.

Prior notification of a Foreign Investment by a Foreign Investor is required if any of the following applies:

(i) the nationality or the country where the Foreign Investor is located is not in Japan or certain other listed countries/geographical areas. It should be noted in this regard that the "listed countries" are found in the annex of the Ordinance on Inward Direct Investment (the "Ordinance"). The current number of listed countries is 163;

(ii) the businesses conducted by those entities in which Foreign Investments have been made include businesses categorised as Designated Business Sectors, as set forth in the Ordinance and the relevant governmental notice; or

(iii) the entities in which Foreign Investments have been made are involved in certain activities by the Iranian government, Iranian individuals and Iranian corporations and groups.

In addition to the foregoing, the FX Act, following amendments in 2017, subjects transfers of shares in unlisted Japanese companies between Foreign Investors to the prior notification requirement if the investee company falls within the scope of Designated Business Sectors.

An *ex post* report of a Foreign Investment is required to be filed by a Foreign Investor if any of the following applies:

(i) the nationality or the country where the Foreign Investor is located is Japan or certain other countries/geographical areas listed in the Ordinance;

(ii) the businesses conducted by those entities in which Foreign Investments (the "Businesses") have been made do not fall within the scope of the Designated Business Sectors or, where the Businesses fall within the scope of the Designated Business Sectors, the Foreign Investor is exempt from the prior notification requirement, as discussed below; or

(iii) the entity in which the Foreign Investments have been made is not involved in certain activities conducted by the Iranian government, and certain Iranian individuals, corporations or groups.

It would be advisable for a Foreign Investor to check in advance whether the *ex post* report requirement or prior notification requirement applies to a contemplated Foreign Investment. This is because the prior notice requirement involves substantive investigations by the relevant governmental agency during the relevant waiting period (as further discussed under question 3.7).

For clarification purposes, the Ministry of Finance has announced a list of listed companies in the Designated Business Sectors and Core Business Sectors (with respect to Core Business Sectors, please see sub-paragraph (4) below). This list will be updated from time-to-time.

(4) Exemptions from Prior Notification Requirement

As stated under question 1.1, since the purpose of the 2019 Amendments is to promote FDI conducive to sound economic growth as well as to ensure sufficient review of FDI that could pose risks to national security, the 2019 Amendments have expanded the scope of Foreign Investments subject to prior notification while introducing a new "exemption from prior notification" system.

(i) Exemption in respect of Foreign Investments in Listed Companies

There are two types of exemptions: "Blanket Exemptions"; and "Regular Exemptions". The features of each type are described in the following table.

	Blanket Exemptions	**Regular Exemptions**
Applicable Investor Type	Foreign financial institutions only	Foreign Investors other than foreign financial institutions
Subject of Exemptions	Any business sector	Any business sector (provided, with respect to Core Business Sectors, that the equity ratio and ratio of voting rights is less than 10%)
Ex Post Report	When the contemplated transaction is completed after the equity ratio and ratio of voting rights becomes 10% or more	Required each time: (i) when the equity ratio and ratio of voting rights becomes 1% or more after the contemplated transaction; (ii) when the equity ratio and ratio of voting rights becomes 3% or more after the contemplated transaction; and (iii) when the contemplated transaction is completed after the equity ratio and ratio of voting rights becomes 10% or more

	Blanket Exemptions	Regular Exemptions
Conditions (see below)	Conditions (a) through (c) below must be complied with	Conditions (a) through (c) below must be complied with in respect of Business Sectors other than Core Business Sectors. Conditions (a) through (e) must be complied with in respect of Core Business Sectors

Conditions to be complied with for exemptions:

(a) the Foreign Investor or its related parties must not be appointed directors or auditors of the subject company;

(b) the Foreign Investor must not, by itself or through other shareholders, make at a shareholders' meeting of the subject company proposals for the transfer or abolishment of any business that falls within the scope of Designated Business Sectors; and

(c) the Foreign Investor must not access any non-public technical information regarding businesses that fall within the scope of Designated Business Sectors.

Additionally, the following conditions apply in respect of Core Business Sectors:

(i) the Foreign Investor must not attend or cause its designated person to attend any meeting of the investee's board of directors or any committee with the authority to make decisions in respect of businesses falling within the scope of Core Business Sectors; and

(ii) the Foreign Investor must not, by itself or through a designated person, make any written proposal requiring any response or action by a certain deadline to the board of directors or any committee with the authority to make decisions in respect of businesses falling within the scope of Core Business Sectors.

It is critically reported by Nikkei newspaper that in March 2021 a subsidiary of Tencent, a Chinese company, made investments to Rakuten Group Inc., the Japanese listed e-commerce giant expanding its business to telecommunication which is a Core Business Sector, without filing a prior notice taking advantage of this exemption.

(ii) Exemptions on Foreign Investments in Non-listed Companies

Only Regular Exemptions with respect to Designated Business Sectors (other than Core Business Sectors) are applicable to Foreign Investments in non-listed companies. When a Foreign Investor invokes a Regular Exemption, it must file an *ex post* report when it actually makes the relevant investment, regardless of its equity ratio or ratio of voting rights in the investee company.

(5) Foreign Investments for which no prior notification or *ex post* report is required

Notwithstanding paragraphs (1) through (4) above, certain types of investments, as summarised below, will be exempt from both the prior notification and *ex post* report requirements:

(i) acquisition of shares, equities, voting rights, bonds, agreements to obtain consent to the joint exercise of voting rights and the like, by way of inheritance of testamentary gift;

(ii) acquisition of unlisted shares, equities or voting rights held by another company pursuant to a merger with such company;

(iii) acquisition of shares, equities or voting rights in an unlisted company that does not conduct business within the scope of Designated Business Sectors ("Specified Unlisted Company") by another company through a business split, pursuant to a split of the company holding such shares, equities or voting rights, or succession to proxy rights pursuant to a split of the company accepting Proxy Voting;

(iv) acquisition of unlisted shares, equities or voting rights of or acquisition of Proxy Voting in a company for which only an *ex post* report is required, where the ratio of voting rights, together with the voting rights of close-related persons, constitutes less than 10% of the company's total voting rights, such that satisfaction of the *ex post* report requirement would suffice;

(v) acquisition of new shares, equities, voting rights, Proxy Voting or Consent to Exercise of Joint Voting Rights by way of allotment of new shares due to the subdivision or consolidation of shares and the like;

(vi) acquisition of unlisted shares, equities, voting rights, consent to change of business purposes, appointment of director/auditors, or business transfer, moneylending, subscription for bonds, or Consent to Exercise of Joint Voting Rights resulting in an ownership ratio and ratio of voting rights, together with those of close-related persons, of less than 10%;

(vii) acquisition of shares or equity interests in a non-listed company by partners of the partnership, or acquisition of shares, equity interests, voting rights, consent to change of business purpose of a company, appointment of officers or consent to business transfer, acquisition of bonds or equity securities, discretionary investment in shares, Proxy Voting, acquisition of authorisation to exercise voting rights, Consent to Exercise of Joint Voting Rights in a listed company, conducted in association with an inward direct investment by the partnership; and

(viii) other cases specified in the Cabinet Order.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

As noted under question 2.2 (3), the prior notification requirement, which involves substantive scrutiny by the relevant governmental agency to determine whether an investment should be approved, applies to investments in certain business sectors and to investors from certain geographical areas or countries.

For the purposes of enforcement of the 2019 Amendments, the Ministry of Finance and other related governmental agencies have announced the "Factors to be considered in authorities' screening of foreign direct investments" (https://www.mof.go.jp/english/international_policy/fdi/gaitamehou_20200508.htm) such as the following:

1. The degree of the impact of the investment on maintaining the basis of production and technologies in business sectors that relate to the protection of national security, maintenance of public order and safeguarding of public safety.
2. The possibility of:
   - leakage of technologies or information that relate to the protection of national security, maintenance of public order and safeguarding of public safety; or
   - use of these technologies or information against the objectives of ensuring national security, maintenance of public order or safeguarding of public safety.
3. The degree of impact of the investment on the: (i) terms and conditions of supply; (ii) stable supply; or (iii) quality,

of goods or services that relate to the protection of national security, maintenance of public order or safeguarding of public safety, in ordinary and emergency situations.

4. The degree of the impact of the investment on ensuring a stable supply or stockpiling of goods and services, conservation of national land, and maintenance of the continuity of domestic service providers' manufacturing activities in terms of business sectors on which Japan has registered reservation pursuant to Article 2-b of the Code of Liberalisation of Capital Movements of the Organisation for Economic Cooperation and Development.
5. The degree of the impact of the investment on the investee company or the borrowing company in view of:
   - the number and ratio of shares, equities, voting rights, subscription certificates or corporate bonds that have been acquired or are to be acquired by the foreign investor (including the number or share of stocks to be acquired and managed, or voting rights to be owned and exercised, by the foreign investor and its closely related persons who are subject to aggregation); or
   - the amount and terms and conditions of the outstanding loan by the foreign investor.
6. Attributes of the foreign investor, including its capital structure, beneficial ownership and business relationships, and the foreign investor's plan and behaviour track record in respect of the investment (including the degree of potential direct or indirect influence by foreign governments and other related parties on the foreign investor).
7. The degree of the impact on the protection of national security, maintenance of public order, safeguarding of public safety and smooth functioning of the Japanese economy ("protection of national security and other domains"), in view of the international treaties and domestic laws and regulations with which the foreign investor is required to comply.
8. The track record of the foreign investor's compliance with the FX Act or equivalent thereof, or similar legislation, in other jurisdictions.
9. The other four factors listed in such announcement.

2.4 How are terms such as 'foreign investor' and 'foreign investment' defined in the law?

Please refer to our response under question 2.2.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

Yes. Under the 2019 Amendments, foreign governments, foreign governmental agencies, foreign political parties, and certain SOEs are categorised as Foreign Investors not entitled to exemptions from the prior notification referred to under question 2.2. However, they will be permitted to invoke Regular Exemptions if authorisation to do so is specifically obtained from the Ministry of Finance.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

Certain types of local nexus have been factored into the definition of Foreign Investments, such as acquisition of listed or unlisted shares in domestic companies and the establishment of a branch or factory in Japan.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Please refer to our response on the definition of "Foreign Investors" under question 2.2 (1).

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

Please refer to our response under question 2.2.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

Yes. The relevant governmental agency has discretion to review the appropriateness of transactions during the waiting period, as further described under question 3.9.

3.3 Is there a mandatory notification requirement and is there a specific notification form? Are there any filing fees?

Filing is mandatory. Forms of notification are available on the website of the Bank of Japan. No filing fees are payable.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

No Foreign Investor is permitted to complete its Foreign Investment (where the prior notification requirement applies) during the 30-day waiting period, as further described under question 3.9. For the sanctions for breach of the prohibition, please see question 3.8, and for the enforcement action, please see question 4.8.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

Foreign Investors are responsible for filing *ex post* reports and prior notifications. The practical implication of this is that where prior notification is required, completion of the relevant investment should be conditional upon the completion of review by the relevant authorities during or after the lapse of the relevant waiting period that follows the filing of a prior notification (on which please refer to question 3.8 for more details).

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance as to whether the authorities would object to the transaction?

Yes, such advance consultations are permissible and are in fact generally advisable. It should be noted, however, that only informal guidance will be provided during such consultations.

3.7 What type of information do parties to a transaction have to provide as part of their filing?

The *ex post* report and prior notification come in prescribed forms that are required to be completed by a Foreign Investor. Such forms require provision of information such as the nationality/country of the Foreign Investor and certain information in relation to the Foreign Investment.

3.8 Are there any sanctions for not filing (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

Yes. Failure to file an *ex post* report is punishable by imprisonment for up to six months and/or a fine of up to JPY500,000. Failure to file a prior notification will be punishable by imprisonment for up to three years and/or a fine of up to JPY1 million.

Furthermore, a Foreign Investor who is subject to the prior notification requirement, and whose proposed investment potentially gives rise to national security concerns, may be ordered to dispose of all or part of the shares it has acquired through the relevant transaction or to take such other necessary measures, if such investor (i) fails to file a prior notification, (ii) completes the relevant transaction during the waiting period, (iii) files a prior notification containing false information, (iv) fails to comply with the recommendations of the relevant authorities for the amendment of the structure of the transaction or the suspension thereof, or (v) fails to follow any order of the relevant authorities to take measures for compliance with the conditions issued to the Foreign Investor that had completed the relevant transaction using the exemption from the prior notification.

Although there have been no publicly reported cases involving the imposition of criminal sanctions or administrative orders other than a 2008 case in which The Children's Investment Fund ("TCI Fund") was ordered to cease its proposed acquisition of 20% shares in J-Power (as stated in more detail under question 4.8), it is generally understood that the Japanese government is in the process of strengthening the regulations and sanctions under the FX Act.

3.9 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

Under the FX Act, no Foreign Investor is permitted to complete its Foreign Investment (where the prior notification requirement applies) during the 30-day waiting period (during which the relevant ministries having jurisdiction over the proposed investment will review the appropriateness of the transaction) after pre-notification of the proposed investment has been accepted by the Bank of Japan. However, if the proposed transaction does not pose national security concerns, such waiting period may be shortened, in accordance with the Ordinance, depending on the contents of the relevant notification. Furthermore, with a view to promoting inward direct investments in Japan, the Ministry of Finance in April 2009 proposed a new "fast-track" procedure for certain types of investments, including "green field investments" involving the establishment of new companies, injection of capital into existing companies, change of a company's business purposes, lending of funds to a wholly owned subsidiary in Japan, "roll-over investments" involving re-acquisition of shares within six months or for the same purpose as a previous investment, and "passive investments". Under the "fast-track" system, the government will endeavour to shorten the waiting period of two weeks *to* four business days.

Although there is no two-stage investigation process, it should also be noted that the waiting periods of investments that potentially pose national security concerns, as prescribed by the FX Act, can be extended by up to five months.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

As described under question 3.9, if the proposed transaction described in the notification is not a type of transaction posing a national security concerns, without a separate filing, application or request, the waiting period may be shortened. In our experience, for most of the prior notification, the shortened waiting period, e.g. two weeks, is applied.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

No third party may be involved in the review process. Moreover, no competitor or customer of the relevant Foreign Investor is permitted to participate in (and the FX Act contains no provisions giving any such person standing to participate in) any review process in respect of a Foreign Investor to voice any complaints they may have against such investor. Therefore, complainants have no opportunity to express their opinion in the review process.

However, before the relevant ministries issue an order for the imposition of criminal or administrative sanctions on a Foreign Investor or for the negation of a transaction (as discussed under question 3.6), they are required to consider the opinion of the Council on "Customs, Tariff, Foreign Exchange and Other Transactions".

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

There is no publicity of the review process or the final decision of the relevant authorities. A Foreign Investment application contains confidential information about the relevant Foreign Investor. To prevent leakage of such confidential information, the National Public Services Act prohibits government officials from disseminating information to which they have access in the course of performing their duties. A breach of this prohibition is punishable by imprisonment of up to a year or a fine of up to JPY500,000. Furthermore, a person who has incurred damage as a result of such breach may claim damages against the government as long as certain conditions under the State Redress Act are met.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

No administrative approvals are required other than those discussed above.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The Minister of Finance and the minister having jurisdiction

over the targeted business industries are the competent authorities. For instance:

- the Prime Minister has jurisdiction over banks, trusts, insurance companies, lending institutions and other financial institutions;
- the Minister of Finance has jurisdiction over the importation and exportation of precious metals and alcohol;
- the Minister of Agriculture, Forestry and Fisheries together with the Ministry of Economy, Trade and Industry have jurisdiction over the sale and purchase, as well as the importation and exportation of agricultural and marine products;
- the Minister of Agriculture, Forestry and Fisheries has jurisdiction over the manufacturing, sale and purchase, and (together with the Ministry of Economy, Trade and Industry) importation and exportation of foods;
- the Minister of Land, Infrastructure, Transport and Tourism has jurisdiction over transportation, construction, development of real estate and the like; and
- the Minister of Economy, Trade and Industry ("METI") has jurisdiction over the manufacturing, wholesale and importation and exportation of aircraft and cars.

4.2 What is the applicable test and what is the burden of proof and who bears it?

The Minister of Finance and the minister having jurisdiction over the relevant industry are required to examine whether a proposed investment is likely to impair national security, disrupt public order, hinder public safety or have a significant adverse effect on the smooth management of the Japanese economy.

The burden of proof is a general rule on proof of facts in litigation proceedings. If a party in litigation proceedings owing the burden of proof regarding certain fact cannot demonstrate the fact with evidence, it is considered by the court that such fact does not exist.

While there is no established court precedents on this issue, in practice, once the relevant ministries determine that the proposed investment gives rise to concerns, the Foreign Investor needs to rebut with evidence.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

As noted under question 2.3, for the purposes of enforcement of the 2019 Amendments, the Ministry of Finance and other relevant ministries have announced the "Factors to be considered in authorities' screening of foreign direct investments" (https://www.mof.go.jp/english/international_policy/fdi/gaitamehou_20200508.htm) (the "Factors To Be Considered"). In addition, those relevant ministries are generally available for pre-filing consultations. Such inquiries and consultations are highly recommended as a practical matter.

The authorities do not publish their decisions of approval or prohibition.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

No, the activities of such subsidiaries are not taken into consideration. However, the aforesaid Factors To Be Considered contains "attributes of the foreign investor, including its capital structure, beneficial ownership and business relationships, and the foreign investor's plan and behaviour track record in respect of the investment (including the degree of potential direct or indirect influence by foreign governments and other related parties on the foreign investor)".

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

The relevant ministries have sole discretion to determine whether a proposed investment is likely to impair national security, impede public order, undermine public safety or result in significant adverse effects on the Japanese economy, except that they have to consider the opinion of the Council before issuing their decision (as discussed under question 3.11).

The authorities may order certain Foreign Investors to dispose of all or part of the shares they have acquired through the relevant transaction or to take other necessary measures (as stated in more detail under question 3.8).

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

There is no way of avoiding the authorities' recommendation and orders within the review process under the FX Act. However, an investor who objects to the authorities' orders can appeal such order under the FX Law by requesting the authorities to re-examine its application (as discussed under question 4.6). Upon the authorities' acceptance of such petition, a public hearing of opinions will be conducted. Reasonable advanced notice of such hearing will be provided to the investor.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

A negative decision can be challenged. According to the FX Act, a person who is dissatisfied with a government order for the amendment of the structure of a transaction or the suspension thereof can file a petition with the government objecting to such order or requesting for a re-examination of its application. Additionally, a person who is still dissatisfied with the decision by the government following its petition can bring an action in court.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

The first case involving regulations against foreign investments under the FX Act arose in 2008, when the government ordered a foreign investor to cease its investment in a Japanese company on the ground of public order concerns.

In that case, TCI Fund, a UK fund, tried to acquire up to 20% of the shares in J-Power, an electricity supplier in Japan. Upon review of TCI Fund's application for approval of the proposed investment, however, the Minister of Finance and the METI

recommended that TCI Fund cease its acquisition of more than 10% of the shares in J-Power. The basis for this recommendation was that the acquisition threatened public order. Although TCI Fund objected to this recommendation, it was ultimately ordered to cease its acquisition of more than 10% of the shares in J-Power.

As part of the government's review process in this case, six hearings on the application were held. At these hearings, TCI Fund was asked to explain its past investments, its management plan for J-Power and its views on the nuclear power plant that J-Power was constructing. The government also held a special hearing at the Custom and Foreign Exchange Advisory Panel to seek the Panel's opinion on this case. In the recommendation that it ultimately issued, the government provided the following reasons for why TCI Fund's proposed investment would threaten public order:

- J-Power plays an important role in the electricity supply and nuclear policy in Japan;
- if TCI Fund acquired 20% of the shares in J-Power, TCI Fund would have a certain effect on the management of J-Power;
- TCI Fund, as a shareholder of J-Power, had already demanded for J-Power to achieve certain numerical targets such as Return on Equity or Return on Assets, and had also requested for J-Power to be accountable to TCI Fund; however, TCI Fund did not provide any detailed suggestion on how such targets could be achieved; and
- TCI Fund pledged that it would, after the proposed investment, abstain from voting on a shareholders' resolution that may influence J-Power's plans for the construction of a nuclear power plant or electricity facilities. However, the government was unconvinced of the practicality of this pledge, given that its holding of up to 20% of the shares in J-Power by TCI Fund would potentially threaten the provision of affordable electricity and, by extension, the implementation of Japan's nuclear policy by J-Power. In particular, the government was wary of the possibility that TCI Fund would cause a halt in the construction of the nuclear power plant that J-Power was building.

Ultimately, TCI Fund did not appeal the government's decision in court. However, this case is an important precedent for future applicants under the FX Act. This is because there is no other case in which the government had rejected an application for a foreign investment on the basis of the grounds set forth in the FX Act.

Another issue involving regulations against foreign investments under the FX Act had arisen more recently, in 2020.

It was stated in a report* prepared by investigators appointed at Toshiba's shareholders' meeting that, in 2020, certain foreign shareholders of Toshiba Corporation, a listed company with businesses in the Core Business Sectors (including businesses related to nuclear power generation and national defence), had threatened to exercise their rights to make proposals on the election of directors. In response, Toshiba sought assistance in countering these activist investors from the competent authority, the METI. As a result, the METI reached out to the relevant investors and pressured them to either refrain from exercising their voting rights or exercise their voting rights in accordance with the recommendations of Toshiba's management. The METI had pressured the Foreign Investors by exercising its authority to collect reports from Foreign Investors and by threatening to apply the FX Act.

Although the METI's actions have not been judicially reviewed or investigated, it was stated in the report that the METI had unjustifiably restricted the relevant shareholders from exercising their rights for purposes that deviated from the legislative intent of the FX Act.

*The investigation report, dated June 10, 2021, was prepared by investigators appointed at a shareholders' meeting of Toshiba, pursuant to the Companies Act. The investigators were appointed to investigate whether the meeting had been fairly and properly conducted.

Hiroaki Takahashi is a partner at Anderson Mōri & Tomotsune. He represents and advises clients in cross-border M&A, corporate and finance, real estate investment, securitisation and structured finance, project finance and PPP/PFI transactions. He has also handled numerous M&A and joint ventures relating to the development of resources and energy in and outside Japan.

Anderson Mōri & Tomotsune
Otemachi Park Building
1-1-1 Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1032
Email: hiroaki.takahashi@amt-law.com
URL: www.amt-law.com/en

Koji Kawamura handles structured finance transactions, including securitisation of real estate and receivables, and project finance transactions. He also regularly represents clients in M&A, joint ventures and other corporate matters.

Anderson Mōri & Tomotsune
Otemachi Park Building
1-1-1 Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1127
Email: koji.kawamura@amt-law.com
URL: www.amt-law.com/en

Anderson Mōri & Tomotsune (AMT) is among the largest and most diversified law firms in Japan offering full corporate services. The firm's flexible operational structure enables it to provide clients with effective and time-sensitive solutions to legal issues of any kind. AMT has one of the longest track records among law firms in Japan representing and advising international companies on their business ventures and investments in Japan, including supporting foreign clients in establishing a business presence in Japan. AMT also provides the full range of post-establishment services for compliance with the corporate regulatory regime in Japan.

www.amt-law.com/en

ANDERSON MŌRI & TOMOTSUNE

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group