

**FDI Guide**  
**South Africa**

**Contact**

Erza Davids  
*Bowmans, Johannesburg*  
[erza.davids@bowmanslaw.com](mailto:erza.davids@bowmanslaw.com)

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**Foreword:** South Africa welcomes foreign investment. The government has emphasised policies and programmes to further encourage foreign investment. To this end, the Department of Trade, Industry and Competition (DTIC) offers a wide range of incentive schemes to encourage the growth of competitive new enterprises and the creation of sustainable industries. The government/National Treasury are also increasingly looking for even more ways to encourage investment into South Africa and streamline possible areas that may have caused delays or created a barrier to investment in the past.

Recent amendments to the Competition Act 89 of 1998 (the ‘Competition Act’) introduced national security provisions in terms of which authorisation must be sought for notifiable mergers involving a ‘foreign acquiring firm’ and impacting a designated list of national security interests. This provision is, however, not yet in force and the scope of the application, requirements, processes and mechanisms under this provision have not yet been outlined. In addition, the executive committee tasked with reviewing such transactions is yet to be established. While it is anticipated that this provision will be implemented shortly, there is no confirmation from authorities as to when this may take place.

	<b>Topic</b>	<b>Explanation/Description of what is expected</b>	<b>South Africa</b>
1.	<b>Principle</b>	Describe if the FDI regime is built by exception to a principle of freedom of investment or whether restrictions to transferring funds to and from your country apply generally.	<p>General restriction on remitting funds from South Africa: shift to become a regime by exception in progress.</p> <ul style="list-style-type: none"> <li>• South Africa welcomes foreign investment, offering multiple protections (in the Protection of Investment Act, 2015, the Constitution, and numerous treaties and cooperation agreements). It is also party to numerous treaties and cooperation agreements (ie, the African Continental Free Trade Area).</li> <li>• In terms of the Currency and Exchanges Act, 1933 and Exchange Control Regulations, 1961 (‘Exchange Controls’), the approval of the South African Reserve Bank (SARB) usually through authorised dealers is required for most movements of capital/funds in and out of South African borders. This should not, however, be seen as a restriction because all that is required is obtaining the relevant approval up front by showing that the transaction is for fair value and on arm’s length terms. The government/National Treasury are further relaxing requirements as they look for ways to encourage investment, moving away from the ‘general’ approach that disallowed any capital flows without permission to an ‘exceptions’ approach, with a pro-investment allowance of all capital flows, save for a limited list of risk-based capital flow measures.</li> <li>• Certain sector-specific regulations place restrictions on foreign ownership subject to sector-specific approvals (see item 4 below): energy, mining, banking, insurance and defence (‘Sector Requirements’).</li> </ul>

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			<ul style="list-style-type: none"> <li>Recent amendments to the Competition Act 1998, introduce a national security consideration that will allow an executive committee to intervene in relation to merger-type transactions involving a foreign acquiring firm, and which transactions impact a national security interest ('Screening Rules'). <i>This provision in the Competition Act is, however, not yet in force.</i></li> <li>Although not specific to foreign investment, it is pertinent to any party wanting to invest into South Africa to be aware of customs and excise requirements (to import goods); broad-based economic empowerment legislation (which provides for inclusive participation of historically disadvantaged South Africans in the economy); and takeover regulations (which regulate certain affected transactions).</li> </ul>
2.	<b>Legal regime</b>  <b>Authority(ies) in charge</b>	Describe source(s).  Name of authority in charge of applying the FDI rules (Minister/Agency/...).	Foreign direct investment (FDI) Screening Rules are set out in section 18A of the Competition Act (but this section is not yet in effect). The executive committee responsible for applying the FDI Screening Rules (the 'Committee') is to be constituted by the President of the Republic of South Africa (the 'President'). This Committee is to consist of cabinet members (serving in the South African Government) and public officials as may be determined and appointed by the President. The Committee has yet to be established and is yet to be formally named.  Exchange Controls are set out in the Currency and Exchanges Act, 1933 and Exchange Control Regulations, 1961. The SARB and its authorised dealers are responsible for applying them.  Sector Requirements are set out in sector-specific legislation, applied by sector-specific regulators.
3.	<b>Transactions that may be subject to FDI</b> <ul style="list-style-type: none"> <li>Type</li> <li>Materiality thresholds</li> <li>Rights of evocation</li> </ul>	Describe the nature of the transactions that may be subject to FDI rules.  In the case of share acquisition, specify if the FDI regime is triggered only beyond a certain threshold and, if so, describe such a threshold.	The FDI Screening Rules under section 18A will apply only to (1) 'notifiable mergers' (2) involving a 'foreign acquiring firm' and (3) impacting 'national security interests'.  <b>Notifiable mergers</b> <ul style="list-style-type: none"> <li>Merger transactions are only notifiable to the Competition Commission (the 'Commission') where the transaction has an effect in South Africa. In order to satisfy the <i>effects test</i>, the target firms (ie, firms that are the subject matter of the acquisition) ought to have derived revenue from the sale of goods or the provision of services in, into or from South Africa, or own assets in South Africa during the preceding financial year.</li> </ul>

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			<ul style="list-style-type: none"> <li>• The transaction must also satisfy the definition of a <i>merger</i>, as contemplated in section 12 of the Competition Act. A merger is said to occur when one or more firms directly or indirectly acquire or establish direct or indirect <i>control</i> over the whole or part of the business of another firm. <i>Control</i> in turn may be established in a number of ways, including for example, via: <ul style="list-style-type: none"> <li>- the beneficial ownership of more than 50 per cent of the issued shares in a firm;</li> <li>- the entitlement to vote for the majority of the votes that may be cast at an annual general meeting;</li> <li>- the ability to appoint or remove the majority of the directors of a firm; or</li> <li>- the ability to materially influence the strategic business policy of a firm, in a manner comparable to control.</li> </ul> </li> <li>• A merger is notifiable only where: <ul style="list-style-type: none"> <li>- the total annual revenue in, into or from South Africa or the gross asset value in South Africa (whichever is the higher) of the target firms (ie, the firms subject to acquisition) during the preceding financial year, equals or exceeds ZAR 100m; <i>and</i></li> <li>- the total annual revenue in, into or from South Africa, and the gross asset value in South Africa, of the target firms and the broader acquiring group (ie, the primary acquiring firm, its controllers up to the ultimate controller and all firms controlled by them), or any combination thereof, during the preceding financial year, equals or exceeds ZAR 600m.</li> </ul> </li> </ul> <p><b>Foreign acquiring firm</b></p> <p>Foreign acquiring firm is also defined in the Competition Act, and refers to an acquiring firm that was incorporated, established or formed under the laws of a country other than the Republic of South Africa (the ‘Republic’) or whose place of effective management is outside the Republic. This defined term, however, is also not yet in effect.</p>

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			<p><b>National security interests</b></p> <p>In terms of the Competition Act, the President must identify and publish a list of ‘national security interests’ that are to include the markets, industries, goods or services, sectors or regions. This list has yet to be published.</p> <p>Exchange Controls apply to the flow of money in and out of South Africa and affect every transaction, regardless of the amount transferred.</p> <p>Sector Requirements differ but are generally triggered by a change in control or sector-specific local ownership thresholds. For example, the Banks Act 1990 restricts foreign entities from holding more than 15 per cent of the shares or voting rights without having obtained necessary consent. There are similar requirements in the Electronic Communication Act 2005 regarding commercial broadcasting licences, with a 20 per cent threshold.</p>
		<p>Are indirect acquisitions of assets or shares in the jurisdiction subject to the relevant FDI rules (acquisitions in a parent company outside the jurisdiction)?</p> <p>Are share transfers involving a group company internal restructuring covered?</p> <p>Are greenfield investments covered?</p>	<p>Given that the FDI Screening Rules are inextricably linked to the merger control provisions in the Competition Act, the FDI rules will also capture indirect acquisitions of control.</p> <p>There is some debate on whether internal restructures are notifiable events under the merger control regime, with the outcome depending on the facts of each matter. It follows that if an internal restructure is being notified as a merger to the competition regulator, a notification to the Committee will also be required, provided that the remaining FDI rules are also satisfied.</p> <p>Greenfield investments are typically not notifiable under the merger control regime, but similar to internal restructures, the outcome on notifiability will depend on the facts of each matter.</p> <p>Exchange Controls are triggered at the point of flow of funds into or out of the country.</p> <p>Sector Requirements differ per sector. As an example, the bank restrictions mentioned above apply equally to indirect acquisitions in controlling companies.</p>
		<p>Does the FDI authority (or another type of governmental authority) have a power of evocation/ex officio/call-in powers? If so, please describe.</p>	<p>The Commission, being the investigating arm and sometimes decision-maker in relation to mergers, has the power to call for the notification of mergers falling below the financial thresholds described above where the Commission is of the opinion that the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. It would appear that where the Commission calls for notification, and the merger involves a foreign</p>

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			acquiring firm and impacts a national security interest, the Committee is also empowered to review that merger.
4.	<b>Sectors falling under the FDI scope</b>	<p>Describe the economic sectors for which the FDI regime will apply. If relevant, explain for each sector the level of flexibility that the authority may apply (or not) in evaluating whether FDI rules should apply.</p> <p>Are there sector-specific stricter limits on foreign investment that will apply such as a lower threshold of investment by foreign interests or sectors for which no foreign investment is possible? If yes, which sectors (eg, nuclear energy/agriculture)?</p>	<p>Under the FDI Screening Rules, the President is required to publish a list of national security interests of the Republic that are to include the markets, industries, goods or services, sectors or regions. This list is yet to be published and the applicable sectors are therefore not yet known.</p> <p>There are, however, certain Sector Requirements triggered by sector-specific regulations. For example, the Banks Act 1990 prohibits any local or foreign entity from holding more than 15 per cent of the shares or voting rights in a bank (or its controlling company) without having obtained the necessary consent. The Electronic Communication Act 2005 prohibits foreigners from directly or indirectly exercising control over a commercial broadcasting licence or having a financial interest in the voting shares or paid-up capital exceeding 20 per cent in a commercial broadcasting licensee, unless exempted by the Independent Communications authority of South Africa. Sector-specific advice should be obtained prior to an investment.</p>
5.	<b>Qualified investors</b>	Describe the main characteristics of investors that fall under the FDI regime and if there are nuances depending on their origin (eg, EU v not EU).	<p>The FDI Screening Rules capture a ‘foreign acquiring firm’, which is, in turn, defined in the Competition Act as ‘an acquiring firm which was incorporated, established under the laws of a country other than the Republic; or whose place of effective management is outside the Republic’. Although, this provision in the Competition Act is also not yet in force. No further guidance on a ‘foreign acquiring firm’ is provided.</p> <p>For Exchange Control purposes, a ‘non-resident’ means a person (ie, a natural person or legal entity) ‘whose normal place of residence, domicile or registration is outside the Common Monetary Area consisting of Lesotho, Namibia, South Africa and eSwatini’. While exchange controls do not apply to non-residents, non-residents may be impacted indirectly as acquisitions of South African assets and transactions with residents may require exchange control approval.</p>

	<b>Topic</b>	<b>Explanation/Description of what is expected</b>	<b>South Africa</b>
<b>6.</b>	<b>Procedure</b> 6.1 Before or post-closing filing		<p>South Africa's merger control regime is suspensory and competition authority approval for notifiable mergers is required prior to closing. Given that the FDI Screening Rules contemplate that the Committee will review mergers (falling within the scope of the FDI rules) in parallel with the Commission, clearance from both the Committee and competition regulator will be required prior to closing.</p> <p>For Exchange Control purposes, approval is typically obtained prior to closing, although, in most instances, it is only actually required in advance of the repatriation of funds.</p> <p>Sector Requirement approvals must typically be obtained before closing. Different regulators have different processes and legal advice would be required in respect of the specific sector. We have therefore not detailed Sector Requirements for the remainder of question 6.</p>
<b>7.</b>	6.2 In the case of pre-closing filing	Mandatory/optional filing	<p>It will be mandatory to file a notice with the Committee if the merger falls within the scope of the FDI Screening Rules. Foreign investment clearance will therefore need to be a closing condition precedent to the completion of the transaction.</p> <p>For Exchange Controls, this is also typically included as a closing condition precedent to the completion of the transaction because approval is mandatory before the repatriation of funds.</p>
<b>8.</b>	6.3 In the case of post-closing, what are the powers of the authority?		Not applicable (pre-filing is mandatory).
<b>9.</b>	6.4 Advance ruling	Explain if it is possible to obtain a pre-ruling from the authority as to whether the transaction falls under the FDI rules and, as the case may be, describe the process to be followed.	<p>Current FDI Screening Rules legislation is silent on pre-rulings by the Committee.</p> <p>For Exchange Control, it is advisable in the circumstances of a complicated deal structure to file a written preliminary request to the authorised dealer to get a non-binding indication of approval.</p>
<b>10.</b>	6.5 Timing of various steps	How much lead time is required?	Once the transaction falls within the scope of the FDI Screening Rules, the merging parties will need to file a notice with the Committee (in parallel with its merger filing to the Commission).

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	(i) Filing		<p>In terms of the Competition Act, within <i>60 business days</i> from the date of receipt of the notice by the Committee, or a further period that the President may agree to on good cause shown, the Committee must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa.</p> <p>For Exchange Controls, approvals typically take a few days if decided by the authorised dealer or several weeks if escalated to the SARB.</p>
11.	(ii) Review by the authority	Specify the timing available to the authority; indicate if the timeframe is mandatory or not and describe what other flexibility may exist <i>de facto</i> or <i>de jure</i> .	<p>Although the Competition Act prescribes that the transaction be reviewed by the Committee within 60 business days from the date of receipt of the notice/application, the President may agree to and extend the review period on good cause shown. There is therefore no finite review period.</p> <p>For Exchange Control approvals, there is no finite review period and timing is dependent on the nature and complexity of the approval being sought.</p>
12.	(iii) Negotiation with the authority	Describe how to handle the relationship with the authority, including when approval is subject to commitments from, or conditions imposed on, the investor.	<p>For Screening Rules, it is as yet unclear how interactive the process with the Committee will be.</p> <p>For Exchange Controls, there is scope for engagement with authorities.</p>
		Are there any guidelines issued by the authority?	<p>There are currently no guidelines in place.</p> <p>For Exchange Controls, there are rules and manuals.</p>
13.	(iv) Filing fees	Is there a filing fee?	There is no filing fee for Screening Rules or Exchange Control approvals that go to authorised dealers. If elevated to the SARB, there is a nominal charge of ZAR 3,000 – 12,000.
14.	(v) Information needed for filing	What information about the investor is required? Are there any thresholds for the identity and nationality of minority passive shareholders?	<p>The scope of application, requirements, processes and mechanisms have not yet been clearly outlined.</p> <p>Typical Exchange Control approvals require sharing transaction details, evidence that the deal is on arm's length terms and related documentation.</p>



	<b>Topic</b>	<b>Explanation/Description of what is expected</b>	<b>South Africa</b>
		Information on other FDI approvals by other authorities?	
15.	(vi) Final decision	Indicate if the final decision is to be issued within a set timeframe and what are the consequences if the authority does not issue a decision within the set timeframe.	There is no finite period for decision-making.
16.	<b>Conditionality of approval</b>  (i) Type of conditions or commitments	Describe the type of conditions or commitments to which FDI approval may be subject. Specify their usual duration. Specify what powers the authority may exercise to control/monitor the satisfaction of such conditions/commitments.	For Screening Rules, only once the relevant provision in the Competition Act is in force, and the Committee operational and reviewing notices/applications will there be clarity on the types of conditions or commitments that could be imposed.  Regarding Exchange Controls, there are very rarely conditions attached to share acquisitions. Regarding other FDI, typical conditions might involve annual filings of compliance documents and so on.
17.	(ii) Level of discretionary power of the authority	Indicate if it exists and, if so, describe exceptional circumstances that have led to the use of such discretionary power.	This is as yet unclear for Screening Rules. Regarding Exchange Controls, there is an element of discretionary power in terms of regularisation and enforcement.
18.	(iii) Risk of veto	Describe a topical case.  Statistics	This is as yet unclear for Screening Rules. Not relevant for Exchange Controls.
19.	<b>Role of other national authorities</b>	Indicate if other authorities or administrations (eg, Army or Defence Minister) can get involved and, if so, how (by the authority or otherwise) and how much influence it may exercise.	During its consideration of the notified merger, the Committee may consult and seek the advice of the Commission and any other relevant regulatory authority or public institution, but the level of influence that these bodies may exert is not yet clear.

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20.	Sanctions	<p>Describe the type of sanctions that may be imposed by the authority in the case of:</p> <ul style="list-style-type: none"> <li>breach of conditions and/or commitments attached to the approval; and</li> </ul>	<p>Under the Screening Rules, the Committee may revoke its approval of a transaction, or in respect of a conditional approval, make an appropriate decision regarding any condition relating to the merger, if:</p> <ul style="list-style-type: none"> <li>the approval was based on incorrect information for which a party to the merger was responsible;</li> <li>the approval was obtained by deceit; or</li> </ul> <p>a firm concerned has breached an obligation attached to the approval.</p>
		<ul style="list-style-type: none"> <li>investment carried out without prior approval.</li> </ul>	<p>Under Exchange Controls, if approval is not obtained, it can affect the ability to repatriate earnings and the investment.</p> <p>Different regulators have different processes for Sector Requirements and legal advice would be required in respect of the specific sector.</p> <p>Failure to notify the Committee of a transaction that ought to have been notified jeopardises the approval of the transaction by the competition regulator.</p> <p>The foreign acquiring firm also becomes eligible for an administrative penalty of up to ten per cent of the annual turnover in the preceding financial year.</p> <p>For Exchange Controls, it might be possible to regularise the defect by making an application to the SARB, which requires a detailed motivation on why prior approval was not sought.</p> <p>Different regulators have different processes for Sector Requirements, and legal advice would be required in respect of the specific sector.</p>
21.	Covid – special regime	<p>Please describe specific rules applicable as a result of the Covid-19 pandemic.</p>	<p>Following the declaration of Covid-19 as a national disaster in South Africa on 15 March 2020, the Minister of Trade, Industry and Competition promulgated various regulations to restrict, for example, price gouging, and to allow competitors in designated sectors to cooperate by way of agreements or practices that would ordinarily have been prohibited in terms of the Competition Act. South Africa’s Covid-19 state of disaster was terminated on 5 April 2022, and all regulations pertaining to competition law and promulgated under the state of disaster were repealed with immediate effect.</p>

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