



# INVESTMENT POLICY MONITOR



UNITED NATIONS  
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## NATIONAL SECURITY-RELATED SCREENING MECHANISMS FOR FOREIGN INVESTMENT

### *AN ANALYSIS OF RECENT POLICY DEVELOPMENTS*

#### H I G H L I G H T S

- As part of their sovereign right to regulate the entry of foreign investment, countries may block it for national security reasons or subject its admission to certain conditions. Cases where foreign investment was rejected by governments or where it did otherwise not materialize for national security reasons have gained prominence in recent years. UNCTAD identified at least twenty instances of planned foreign takeovers with a value exceeding \$50 million that were blocked or withdrawn for national security reasons in the period from 2016 to September 2019. The aggregated value of these transactions amounts to more than \$162,5 billion. For example, in 2018 the value stood at \$150,6 billion – which represents 11.6 percent of global FDI flows in that year. These figures only reflect those cases and transactions for which information is publicly available.
- Apart from their general regulatory framework for the entry of foreign investment, numerous countries have introduced new or reinforced existing mechanisms and procedures specifically dedicated to national security-related investment screening, reflecting rising political concerns in this area. From January 2011 to September 2019, at least 13 countries introduced new regulatory frameworks. In addition, at least 45 significant amendments to existing screening systems were recorded in 15 jurisdictions in this period.
- Legislative changes concerning these distinct investment screening mechanisms mainly focus on widening the screening scope, expanding the disclosure obligations of foreign investors during screening procedures or extending the statutory timelines for the length of screening procedures.
- Significant country-specific differences in these systems remain. They relate to the type of investment screening mechanisms, the screening criteria and thresholds, the institutional set-up, the treatment of SOEs in screening procedures and the type of investment authorizations after screening.
- Intergovernmental dialogue could address concerns that tighter investment screening for national security reasons might create new investment barriers. It could also aim at identifying international good practices, thus strengthening the transparency and predictability of existing screening mechanisms.

#### ***Acknowledgements***

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## 1. Introduction

Host countries have various policy instruments at their disposal to exercise their sovereign right to regulate the entry and establishment of foreign investment on their territory. They include business registration and approval requirements, as well as the full or partial prohibition of foreign investment in certain sectors of the economy. These restrictions may, *inter alia*, reflect national security concerns of host countries.

In recent years, yet another regulatory tool has gained prominence –distinct screening mechanisms for individual foreign investment that may pose a risk for national security or other public concerns.<sup>1</sup> Originally perceived as an instrument to control inward investment in the military and defence sectors, its use has evolved significantly over the years, resulting in a progressive extension of the scope and content of this type of investment screening procedures.

Thereafter, screening was extended to foreign investment in domestic strategic industries and critical infrastructure, such as energy production and supply, water supply, transport, telecommunication, mineral resources or media. Nowadays, investment screening increasingly extends to the acquisition by foreigners of domestic technology and knowhow, such as artificial intelligence, robotics, semiconductors, cloud computing, 5G, quantum technology, computing hardware, nanotechnologies, biotechnologies or satellites and aerospace. Most recently, security-related screening procedures have also been applied or are under consideration to control the access of foreign investors to sensitive data of domestic citizens.

Several reasons may explain these developments: First, cutting edge technologies and know-how have become a key factor for the international competitiveness of countries. States in possession of such assets may therefore have a strong interest in ensuring that they remain in domestic hands. Second, many countries may find it necessary or desirable that other companies of strategic importance and critical infrastructure are not foreign controlled. Third, governments may consider FDI screening as a necessary counterweight to earlier privatizations of State-owned companies and infrastructure facilities. Fourth, extending the scope of screening is in part also a reaction to the increasing investment activities of foreign State-owned or -controlled enterprises and sovereign wealth funds. There are concerns that these activities might result in foreign state control over key companies or critical infrastructure.

The remainder of this note documents and analyses in more detail recent developments concerning national security-related screening of foreign investment. In the first section, it presents cases from recent years in which individual investment projects have been blocked or were withdrawn for these reasons. The subsequent section reports on recent legislative changes relating to distinct investment screening mechanisms to safeguard national security. Thereafter, the note examines the remaining main differences in these systems. The concluding part makes some suggestions on how to address foreign investment screening concerning national security at the international level.

## 2. Cases where FDI is blocked for national security reasons gain prominence

In recent years, there have been numerous cases where foreign investment has been rejected by targeted host countries for national security reasons and related public concerns. UNCTAD identified at least 20 instances of planned foreign takeovers with a value exceeding \$50 million that were blocked or withdrawn for national security reasons in the period from 2016 to September 2019, with 12 of them dating from 2018. They are listed in Annex I. The aggregated value of these deals amounts to more than \$162,5 billion. For example, in 2018 the value stood at \$150,6 billion – which represents 11.6 percent of global FDI flows in that year. These figures only reflect those cases and transactions for which information is publicly available.

Furthermore, in some cases, host-country governments have found other means apart from a formal interdiction to prevent a foreign takeover or have allowed it only under the condition that the foreign ownership share be reduced. For example, in 2017, Shanghai Fosun Pharmaceutical Group decided to scale down its acquisition of Hyderabad-based Gland Pharma to only a 74 per cent stake as India's Cabinet Committee on Economic Affairs raised national security concerns. In a similar vein, the Government of Germany succeeded, in 2018, in preventing the acquisition of a 20 per cent minority share of "50Hertz" – a German grid operator with 18 million connected users – by the State-

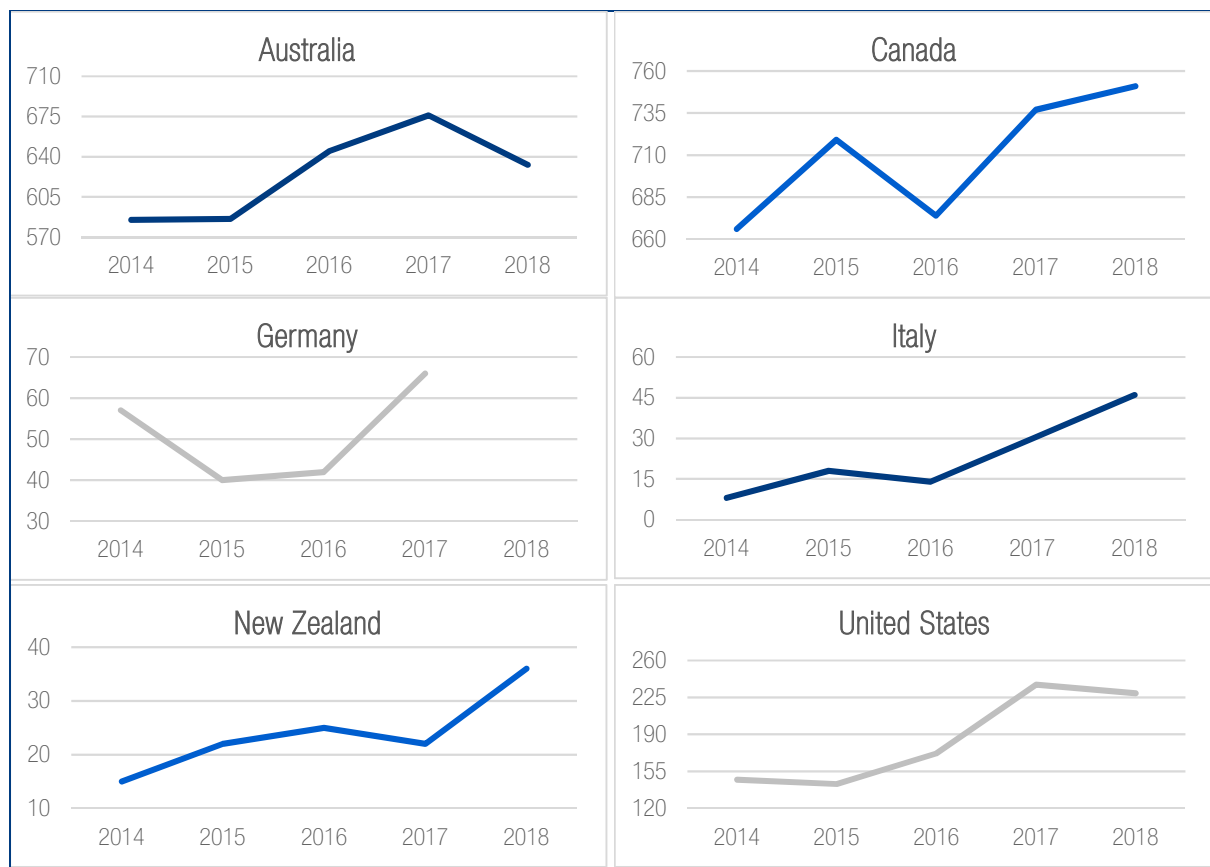
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<sup>1</sup> The main characteristics of these dedicated FDI screening mechanisms are: i) they target only foreign investment; ii) they are instruments of general application introduced mostly by complex statutory acts; and iii) these mechanisms focus on national security, public order, national interest or related standards of evaluation.

owned State Grid Corporation of China, although the planned transaction did not meet the screening threshold. It initiated a purchase of the stake by the State-owned “Kreditanstalt für Wiederaufbau”.

Available data also indicate that the number of cases, where foreign investments were being screened for national security and public interest reasons is rising. In Italy, for example, the number of such proceedings in 2018 was 255% higher in comparison to 2015; in the United States, the number of cases screened in 2018 was 160% higher than in 2015 (see Figure 1; Annex II). Notwithstanding these developments, the total number of transactions blocked or withdrawn represent only a minority compared with the total number of FDI screening proceedings; however, considerable country-specific differences exist. (see Annex II).

**Figure 1: FDI screening cases concerning national security, selected countries**  
(Number of cases per year<sup>2</sup>)



Source: ©UNCTAD.

### 3. Numerous developed countries and emerging economies have introduced distinct FDI screening mechanisms concerning national security or reinforced them

Distinct FDI screening procedures for national security reasons are predominantly used in advanced countries and emerging economies. UNCTAD has identified 28 jurisdictions that have such a mechanism. These countries are: Australia, Austria, Belgium, Canada, China, Denmark, Finland, France, Germany, Hungary, Iceland, India, Italy, Japan, Latvia, Lithuania, Mexico, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Spain, South Africa, the United Kingdom and the United States. In addition to these 28 countries, an FDI screening cooperation mechanism was also established by the European Union.

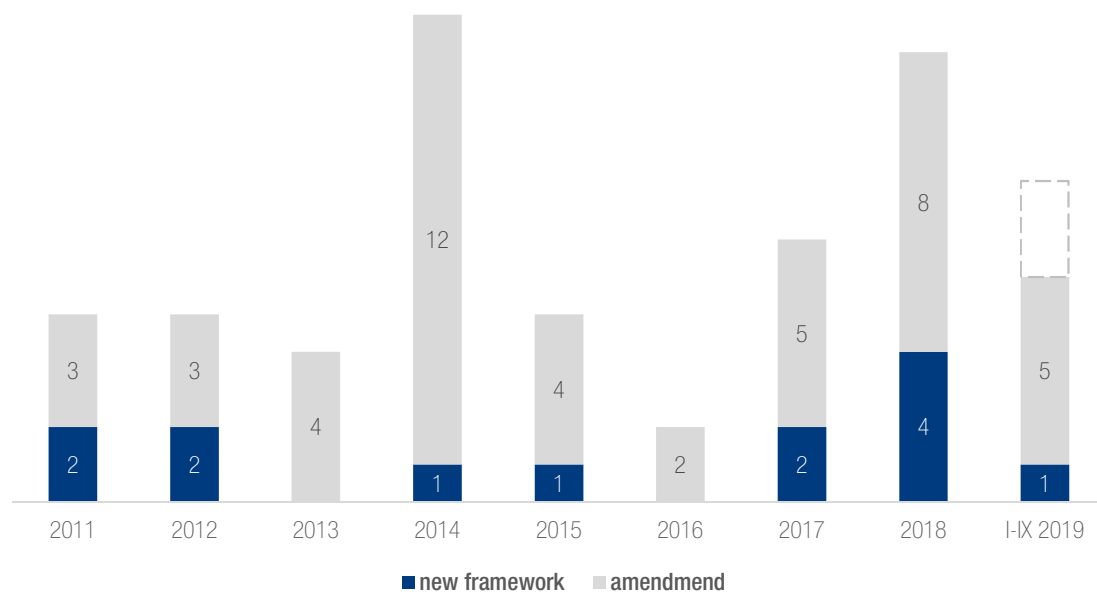
<sup>2</sup> For Australia and Canada, reference is made to the fiscal year. Please refer to Annex II for detailed information.

Countries that have not established dedicated FDI screening mechanism for national security reasons may control inward investment through other means. Some countries impose restrictions on foreign land ownership, particularly in border areas. Others set sectoral restrictions for foreign investors through negative lists or stipulate additional conditions to be met in licencing procedures. Furthermore, numerous countries provide in their investment laws for general safeguard clauses relating to national security and public order. According to UNCTAD Investment Law Navigator, there are at least 27 of such jurisdictions<sup>3</sup>. This regulatory approach is not part of this IPM.

The concentration of distinct FDI screening mechanisms in advanced countries and emerging economies may be explained by the fact that they are the main global destinations for foreign investment, making them therefore more exposed to foreign takeovers in sensitive sectors and activities. In addition, many of these economies show a relatively high degree of openness towards foreign investment, including in key economic sectors and infrastructure. FDI screening for national security reasons may thus serve as a safety valve for regulating the entry of foreign investment in critical cases.

From January 2011 to September 2019, at least 13 countries introduced new regulatory frameworks for dedicated national security-related screening mechanisms for foreign investment. They are Austria, Belgium (the Flanders region), China, Hungary, Italy, Latvia, Norway, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation and South Africa. In addition, at least 45 significant amendments to existing screening systems were recorded in 15 jurisdictions in this period. Most of them occurred in 2014 and 2018 (Figure 2). Data for the first nine months of 2019 suggest that the trend from 2018 continues. Most regulatory changes resulted in a tightening of screening procedures - only 9 measures (in five economies) temporarily eased existing rules.

**Figure 2: Distinct FDI screening mechanisms related to national security, legislative changes by type of enactment, 2011- September 2019**



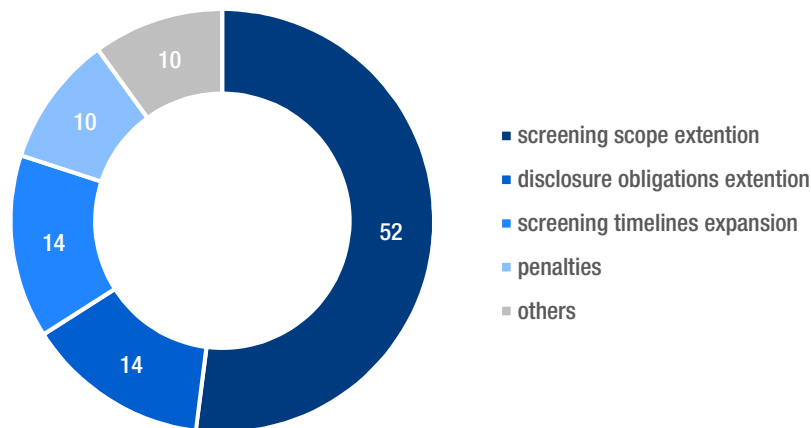
Source: ©UNCTAD.

Legislative changes focus on four main aspects of FDI screening procedures concerning national security. Firstly, they widen the screening scope by adding new sectors or activities subject to review, lowering the thresholds that trigger investment screening, or broadening the definitions of foreign investment subject to screening. Secondly, some new policies expand the disclosure obligations of foreign investors during screening procedures. Thirdly, statutory timelines are being extended in order to provide screening authorities with more time for considering complex, cross-border foreign mergers and acquisitions. Finally, new civil, criminal or administrative penalties for not fulfilling or

<sup>3</sup> The UNCTAD Investment Laws Navigator is available online at the Investment Policy Hub: <https://investmentpolicy.unctad.org/>.

circumventing notification and screening obligations have been introduced (Figure 3 and Box 1). Additional regulatory changes, such as adding or clarifying screening criteria or other procedural matters, are categorized as “Others”.

**Figure 3: Main aspects of national security-related FDI screening systems in new legislation, by category, 2011 - September 2019**  
(per cent)



Source: ©UNCTAD.

### Box. 1 Changes to FDI screening legislation related to national security (Policy examples)

#### Adding new sectors and activities:

- In the Republic of Korea, an amendment in 2011 provided for FDI screening when targeted companies are in possession of national core technologies defined as having high technological and economic value in the Korean and overseas markets or bringing high growth potential to their related industries.
- In 2014, France extended its list of sectors in which foreign takeovers require screening to include water, electricity, gas, oil and energy supply, transport network operation, electronic communication, public health, and the operation of critical plants and facilities.
- In 2018, Germany broadened the definition of critical infrastructure in its screening process to include news and media companies critical for the formation of public opinion.
- At the end of 2018, the United States launched the Critical Technologies Pilot Program, aimed at extending and clarifying the scope of foreign investment screening in relation to mergers and acquisitions of companies engaged in emerging and foundational technologies.
- The US Foreign Investment Risk Review Modernization Act of 2018 requires screening of any investment, not only those that acquire a controlling stake, in any American entity maintaining or collecting sensitive personal data of citizens that may be exploited.
- An EU Regulation that entered into force in April 2019 recommends Member States to consider effects of a foreign investor’s access to sensitive information, including personal data, or the ability to control such information during their FDI screening process.
- In May 2019, the Government of Japan extended the list of sectors covered by the FDI screening mechanism to include: manufacturing of integrated circuits, computers, wireless communication equipment and mobile phones; software development; telecommunications and information processing services.

#### Lowering screening thresholds:

- In 2012, Finland adopted a new law on foreign corporate acquisitions, lowering the threshold for control over entities subject to review from 33 per cent to 10 per cent.
- In 2018, the United Kingdom lowered the thresholds that trigger investment screening from £70 million to £1 million in high-tech industries, specifically computing hardware design and production, and quantum technology development and production.

- At the end of 2018, the German government amended the Foreign Trade and Payments Ordinance to lower the foreign ownership threshold from 25% to 10% in the following sectors: military equipment, crypto-technology and IT security, critical infrastructure and software operating the latter.

#### Broadening the definition of investment or control that triggers FDI screening:

- Starting in 2017, Japan began reviewing foreign acquisitions of shares and equity in all corporations in selected sectors, not only listed ones.
- In the United States, the Foreign Investment Risk Review Modernization Act of 2018 adds new types of transactions covered by FDI screening, such as those that result in affording a foreign person: a) access to any material non-public technical information, b) membership or observer rights on the board of directors or equivalent governing body or the right to nominate an individual to a position on the board of directors or equivalent governing body; or c) any involvement, other than through voting of shares, in substantive decision-making in regard to critical infrastructure and technologies as well as sensitive personal data of United States citizens.

#### Expansion of screening timelines:

- In 2015, Canada extended certain deadlines provided in the National Security Review of Investments Regulations to enable the Government to take a more flexible approach. For example, the relevant minister is entitled to prolong the examination of a foreign takeover for an additional 45 days upon sending a notification.
- In 2017, Germany prolonged the maximum time frame for screening procedures from two to four months.
- In 2019, Italy extended the maximum period for its investment screening procedures from 15 to 45 days.

#### Extension of disclosure obligations:

- In 2011, China specified the documents to be disclosed in the screening procedure in its “Provisions for the Implementation of the Security Review System”. The documents include a list of board members, general managers, partners and other senior managerial personnel to be appointed in the post-merger enterprise.
- In 2014, Italy specified the information to be disclosed in the FDI screening process (e.g. a financial plan, a general description of a takeover project and its effects, detailed information on the purchaser and on its scope of operation).

#### Penalties related to FDI screening:

- In 2015, Australia introduced third-party liability for assisting in contravening FDI screening requirements.
- Starting in 2017, any foreign investor in the Russian Federation acquiring 5 per cent or more of share capital in a company without having gone through a required screening has had its voting rights in the company suspended.
- By Decree-Law No. 64 of 11 July 2019, Italy introduced administrative sanctions for circumventing the FDI screening process up to the double value of a transaction. Its provisions lapsed on 10 September 2019.

Source: ©UNCTAD.

In addition, legislative initiatives are currently under way in several countries. For example, in July 2018, the Government of the United Kingdom published a white paper on national security and investment that presented plans for legislative reform of the FDI screening mechanism. This was later elaborated in background briefing notes to the Queen's Speech 2019.<sup>4</sup> They aim at introducing a comprehensive national security review process that will cover approximately 200 transactions a year. The Austrian Parliament is considering an amendment to the Foreign Trade Act of 2011 (*Außenwirtschaftsgesetz 2011*) submitted by the government that, once adopted, would lower the thresholds triggering FDI screening from 25% to 10% of share capital in media and technology sectors.<sup>5</sup> In Japan, the Cabinet approved in October 2019 a draft bill strengthening the FDI screening regime and presented it to the Diet for consideration. Its main goal is to lower certain thresholds triggering the review.<sup>6</sup> Recently, the German Federal Ministry for Economy and Energy presented a proposal to expand the scope of the existing FDI screening regime by including

<sup>4</sup> <https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms>, <https://www.gov.uk/government/publications/queens-speech-2019-background-briefing-notes>.

<sup>5</sup> [https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME\\_00149/index.shtml#tab-Uebersicht](https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00149/index.shtml#tab-Uebersicht).

<sup>6</sup> [https://www.mof.go.jp/english/international\\_policy/fdi/20191021.html](https://www.mof.go.jp/english/international_policy/fdi/20191021.html).

additional areas (artificial intelligence, robots, semiconductors, biotechnology, quantum technologies) and to allow the blocking of an investment already if public order or security is likely to be endangered.<sup>7</sup>

Finally, tighter control of foreign mergers and acquisitions due to national security and public interest concerns is also becoming a regional concern. On 10 April 2019, the regulation establishing a framework for the screening of FDI into the EU entered into force, after being approved by the Council of the EU and the EU Parliament. This regulation introduces the first statutory definition of FDI screening,<sup>8</sup> and aims at setting common FDI screening standards between Members States and establishing a mechanism for cooperation between different national authorities. It also provides for the inclusion of the European Commission in the process when a foreign investment is likely to “affect projects or programmes of Union interest on grounds of security or public order”. These projects of EU interest include the European GNSS programmes (Galileo & EGNOS), Copernicus, Horizon 2020, Trans-European Networks for Transport, Trans-European Networks for Energy, Trans-European Networks for Telecommunications, European Defence Industrial Development Programme and Permanent structured cooperation.<sup>9</sup>

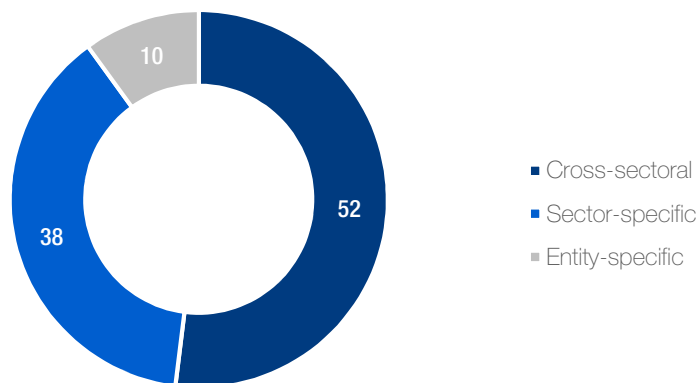
#### 4. Significant country-specific differences in national-security related FDI screening mechanisms remain

Changes in dedicated foreign investment screening legislation concerning national security have not resulted in a harmonization of national procedures. Considerable country-specific differences continue to exist and impact on the degree to which foreign investment is subject to screening for national security reasons.

##### A. Different types of FDI screening mechanisms for national security

Foreign investment screening mechanisms related to national security can be categorized in three main groups, depending on their depth and scope (Figure 4).

**Figure 4: FDI screening mechanisms by category (Per cent)**



Source: ©UNCTAD.

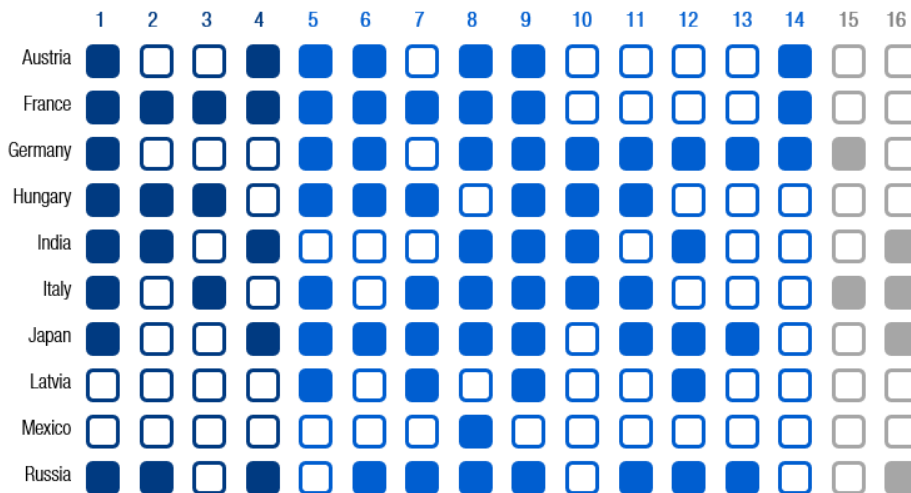
First, a significant number of countries apply sector-specific investment screening. National legislation enumerates sectors or activities that are considered sensitive to national interests, thus requiring screening of inward investment. The examples of these sectors are available in Figure 5. This approach provides more predictability for foreign investors, as an engagement in a sector not listed in the legislation will not be subject to a review.

<sup>7</sup> <https://www.reuters.com/article/deutschland-schl-sseltechnologien-idDEKBN1Y21BY>

<sup>8</sup> Art. 2(4): ‘screening mechanism’ means an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order.

<sup>9</sup> The list may be amended by the European Commission.



**Figure 5: Sector-specific FDI screening related to national security (country examples)**

**Selected sectors**

defence industries		strategic industries and critical infrastructure		technological competitiveness	
1	defense and military manufacturing and technology	5	energy production and distribution	15	foundational or high technologies*
2	intelligence cryptology, and cryptology services	6	water supply	16	space activities, satellites, aerospace
3	dual use products and technologies	7	gas or petroleum production, storage and distribution		
4	security services	8	transport and aviation		
		9	telecommunication and electronic communication		
		10	financial services and infrastructure		
		11	governmental or infrastructure IT systems and software development/management		
		12	media: broadcasting, cable, print		
		13	agriculture, food supply, livestock, fishery		
		14	health services		

\* e.g.: AI, robotics, semiconductors, cloud computing, 5G, quantum, or computing

Source: ©UNCTAD.

Other countries have implemented cross-sectoral screening with broadly defined review criteria that focus on specific risks rather than industries. These criteria differ significantly between countries (see sub-section B below). Nevertheless, even in jurisdictions with typical, all-embracing cross-sectoral reviews, certain sectors or activities may be particularly targeted, e.g. by lowering relevant thresholds, adding specific screening criteria or indicating such an approach in regulatory guidelines.

A few countries have adopted entity-specific screening mechanism – the least restrictive approach. They designate individual domestic companies, mostly operating in sensitive sectors, and only review planned foreign participation in or acquisitions of these entities. A few countries apply a blend of the first two types of FDI screening.

In addition, some jurisdictions provide for a pre-screening clearance procedure. It provides potential investors with the possibility of requesting an ex ante official confirmation whether an anticipated transaction falls within the scope of the investment screening mechanism. This approach allows governments to deal with straightforward cases quickly and gives foreign investor legal clarity already at an early stage.



## B. The scope of national security-related FDI screening mechanisms

Each legislation provides certain FDI screening criteria, against which the governments assess potential risks associated with foreign mergers and acquisitions (Table 2). The majority of these criteria pertains to “national security”, “public order”, “defence”, or “public safety”. Some jurisdictions provide additional guidance on how to interpret these terms (see footnotes 10-15).

Over time, additional screening criteria have been introduced that reach beyond the original concept of national security. They include, inter alia, the effects of foreign investments on the national economy – e.g. “smooth operation of the economy” (Japan), “stability of the UK financial system” (United Kingdom), “net benefit” (Canada), or “national steady economic growth” and “the R&D capacity of key technologies” (China). A growing number of jurisdictions is also taking the potential social costs of foreign investment into account – e.g. the “security of supply in services fundamental to the national interest” (Portugal), “the needs of the population to protect health and lives” and “environmental protection” (Poland), “fundamental interests of society” (Finland), or “Korean morals and customs” (Republic of Korea).

Table 1. Selected FDI screening criteria

Country	FDI screening criteria
Australia	national interest
Austria	public policy and public security, including services of public interest and crisis prevention, which affects a basic interest of society
Belgium (Flanders) <sup>10</sup>	strategic interests of the Flemish Community or the Flemish Region
Canada <sup>11</sup>	net benefit, national security
China	national security, impact on the core key technological innovation development capabilities in important areas of China, national steady economic growth, basic social living order, the R&D capacity of key technologies involving the national security
Germany	public order or security, essential security interests
Finland	key national interest: national defence, public order and security, fundamental interests of society
France	public order, public security or national defense
Hungary	security interests
Iceland	national security, public order, public safety or public health or in the event of serious economic, social or environmental difficulties in particular economic sectors or particular areas
Italy	defense interests, national security, essential interests of the State, order public
Japan	national security, public order, public safety; smooth operation of the economy
Korea, Republic of	national security, national safety and public order, public hygiene or the environmental preservation; Korean morals and customs
Latvia	national security
Lithuania <sup>12</sup>	national security
New Zealand	business experience and acumen, financial commitment, good character of an investor
Norway	national security

<sup>10</sup> Flemish *Administrative Decree of 7 December 2018* denotes as a threat to the strategic interests of the Flemish Community or the Flemish Region any situation when the continuity of vital processes is compromised, certain strategic or sensitive knowledge threatens to fall into foreign hands or the strategic independence of the Flemish Community or the Flemish Region is compromised.

<sup>11</sup> The *Investment Canada Act* provides for factors to be taken into account when a competent minister is considering whether a foreign investment is likely to be of net benefit to Canada. These are: the effect on the level and nature of economic activity in Canada, including employment, resource processing, utilization of parts, components and services produced in Canada and on exports from Canada; the degree and significance of participation by Canadians; the effect on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect on competition; the compatibility with national industrial, economic and cultural policies; and the contribution to Canada’s ability to compete in world markets.

<sup>12</sup> In Lithuania, the *Law on Protection of Objects Important to Ensuring National Security* specifies that national security interests shall mean vital and primary interests of national security within the meaning of the National Security Strategy, the development of the trans-European infrastructure and the essential public interests, including the provision of the most important services of common interest.

Poland	independence and territorial integrity, safeguarding human rights and freedoms, security and public order, environmental protection, ensuring the needs of the population to protect health and lives, prevention of activities and social and political phenomena disturbing international relations or impeding responsibilities of NATO membership
Portugal <sup>13</sup>	defense, national security, security of supply in services fundamental to the national interest
Romania	national security
Russian Federation	defense, security
South Africa	national security
United Kingdom	public interest, national security, stability of the UK financial system, accurate presentation of news, free expression of opinion
United States <sup>14</sup>	national security
European Union <sup>15</sup>	security or public order

Source: ©UNCTAD.

### C. Screening thresholds

Many countries have established capital thresholds that trigger national security-related screening of foreign investment. These thresholds may be uniform for all inward investment or may be sector-specific. Both types of thresholds differ considerably between countries (see Table 3).

Table 2. Selected FDI screening thresholds for national security reasons

Country	FDI screening thresholds <sup>16</sup>
Australia	5%, 10%, 20%, 40%
Austria	25%
Finland	1/10, 1/3, 1/2
France	33,33%
Germany	25% or 10% for companies developing and modifying software that is used for operating critical infrastructure in specific sectors
Hungary	25% or 10% for publicly traded companies
New Zealand	25%
Norway	1/3
Poland	20%, 25%, 33%, 50%
Portugal	control

<sup>13</sup> *Decreto-Lei n.º 138/2014* explains that a threat to the defence and national security or security of supply of the country in services fundamental to the national interest shall be determined against the following: the physical security and integrity of strategic asset and their availability and operability; the continuity, regularity and quality of services of general interest; preservation of the confidentiality of the data and information obtained by the persons who control the strategic assets; and the technological heritage necessary for the management of these assets.

<sup>14</sup> In the United States, Section 721 of the *Defense Production Act of 1950* provides the President with a list of factors to be considered while analysing threats to national security. They include: domestic production needed for national defence; the capability and capacity of domestic industries, including human resources, products, technology, materials, and other supplies and services; the foreign control of domestic industries and commercial activity; effects on sales of military goods, equipment, or technology to countries supporting terrorism or countries of concern regarding missile, nuclear, chemical and biological weapons proliferation; or posing a potential regional military threat to the interests of the United States; effects on United States international technological leadership, critical infrastructure, including major energy assets and critical technologies; whether it is a foreign government-controlled transaction; and the long-term requirements for energy sources and other critical resources and material, among others.

<sup>15</sup> Member States of the European Union are recommended to consider in their assessment of effects of a foreign investment on security or public order, whether (i) an investor is directly or indirectly controlled by the government (also through ownership structure or significant funding); (ii) an investor has been involved in activities affecting security or public order; or (iii) there is a serious risk that an investor engages in illegal or criminal activities.

<sup>16</sup> The appearance of several thresholds for a country without additional reference means that the relevant legislation provides for multiple thresholds. Each time that a foreign investor increases its shares in a company over these limits a separate screening procedure is or should be initiated.

United Kingdom <sup>17</sup>	target turnover: £70 million or £1 million for dual use, computing hardware and quantum technology
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Source: ©UNCTAD.

The most complex regulations concerning foreign investment thresholds triggering investment screening are in place in the United States, particularly after the adoption of the recent Foreign Investment Risk Review Modernization Act of 2018 (see Box 1).

#### D. Institutional set-up

FDI screening related to national security is conducted mostly at the ministerial or cabinet level. On occasion, a separate public agency is formed. Frequently, national security agencies are involved – if not in the decision-making process, then at the consultation stage. As investment is a cross-cutting issue, quite often representatives of different ministries, agencies and authorities are involved. One example is the Committee on Foreign Investment in the United States (CFIUS), which works under the auspices of the United States Treasury and the White House. It comprises the heads of the departments of the Treasury, Justice, Homeland Security, Commerce, Defense, State and Energy, as well as the Office of the U.S. Trade Representative and the Office of Science and Technology Policy, with the Director of National Intelligence and the Secretary of Labor as non-voting members.

Further, parliaments are becoming more involved in the screening processes in order to improve their transparency. Data on the outcomes of foreign investment screening is in many countries not publicly available. This situation is, however, evolving. For instance, in May 2019 France adopted a law containing an obligation of the government to submit a report to parliament with information relating to the prior authorization procedures for foreign investment in France, including the number and results of FDI screening procedures.

#### E. FDI screening and SOEs

Some countries use foreign investment screening regimes concerning national security to address specific concerns relating to investments by foreign State-owned enterprises in strategic industries and companies (see also WIR16). These countries often introduce additional screening requirements in this regard. For example, in Australia, foreign State-owned enterprises must comply with extended disclosure obligations and generally require prior governmental consent for their investments. In the Russian Federation, approval is compulsory for transactions involving foreign State-owned enterprises in minority stakes of domestic firms and such transactions are prohibited if a majority participation is intended.

#### F. Conditional investment authorizations

Some jurisdictions provide a platform for communication between public authorities and foreign investors, where public concerns may be addressed, and possible risks mitigated. This enables prospective investors to adjust their projects accordingly to avoid the outright rejection of the investment. For example, in Austria, France, Lithuania and South Africa, among others, a decision approving an investment may specify additional conditions that an investor has to adhere to. In the United States, section 721 of the Defense Production Act enables the conclusion of a mitigation agreement between a foreign investor and the competent public authority. Reportedly, there were 84 such agreements in place in 2017 monitored by the US Department of Defense alone.<sup>18</sup>

## 5. Conclusions and outlook

The screening of foreign investment for national security reasons is gaining importance as documented by the rising number of cases in recent years and important legislative developments in this area. There is a trend towards tightening investment screening by expanding the scope and depth of screening procedures and the corresponding

<sup>17</sup> The United Kingdom is the only jurisdiction presented in the table, where the dedicated FDI screening mechanism is intertwined with the merger control. Nevertheless, in 2018 it purposefully amended its merger regime by decreasing turnover thresholds in dual use, computing hardware and quantum technology to be able to screen foreign investment for national security reasons. See: <https://www.gov.uk/government/news/government-upgrades-national-security-investment-powers>.

<sup>18</sup> *Committee on Foreign Investment in the United States – Action Needed to Address Evolving National Security Concerns Facing the Department of Defense*, GAO-18-494, July 2018 (<https://www.gao.gov/assets/700/693659.pdf>).

disclosure obligations of foreign investors. A growing number of countries also see a need to protect core economic assets, in particular core technologies, or sensitive data in the screening process. Concerns have been expressed that an overly broad interpretation of these interests could create new investment barriers.

Intergovernmental dialogue could address these concerns. It could also aim at identifying international good practices, thus strengthening the transparency and predictability of policy measures.

## ANNEX I

### FDI screening: foreign takeovers over \$50 million blocked or abandoned for national security reasons, 2016-September 2019 (cases for which information is publicly available)<sup>19</sup>

Parties	Description	Host-country	Home-country	Value (USD millions)	Sector
Consortium led by Chinese investors  Philips NV	The CFIUS raised concerns about a planned sale by the Dutch electronics group Philips of the majority of its Lumiled (United States) LED lights unit to a consortium headed by Go Scale Capital of China on the basis of an alleged threat to the national security of the country. In January 2016, Phillips announced that it was abandoning the proposed sale.	USA	China	3.300	Electronics
Xiamen Sanan Integrated Circuit Co Ltd  GCS Holdings	Xiamen Sanan Integrated Circuit announced in March 2016 its intention of acquiring the Taiwan Province of China-based power electronics and chip foundry GCS Holdings Inc, including its California-based subsidiary Global Communication Semiconductors (GCS) LLC. The deal was abandoned on 1 August 2016 because of concerns expressed by the CFIUS.	Taiwan, Province of China / USA	China	226	Technology
Fujian Grand Chip Invest Fund  Aixtron SE	The German Ministry of Economy and Energy withdrew its initial certificate of non-objection to the takeover of Aixtron(Germany) by a Chinese company on 24 October 2016. On 2 December 2016, following a recommendation of the Committee on Foreign Investment in the United States (CFIUS), the President of the United States prohibited the acquisition of the United States subsidiary of Aixtron by the same Chinese company on the basis of national security concerns.	Germany / USA	China	723	Technology
Infineon Technologies AG  Cree Inc, Wolfspeed	On 16 February 2017, Cree Inc (United States) announced that it would terminate its agreement to sell Wolfspeed, which includes its silicon carbide substrate business, to Infineon Technologies AG (Germany). It stated that "Cree and Infineon have been unable to identify alternatives which would address the national security concerns of the Committee on Foreign Investment in the United States (CFIUS), and as a result, the proposed transaction will be terminated."	USA	Germany	850	Technology
Canyon Bridge Capital Partners LLC  Lattice Semiconductor Corporation	On 13 September 2017, the President of the United States issued an order prohibiting the acquisition of Lattice Semiconductor Corporation by a Chinese-backed private equity firm. The president followed a recommendation of the CFIUS, which had found that the acquisition by a group of investors, including the State-controlled venture capital fund, would pose a threat to United States national security.	USA	China	1.300	Technology
A consortium led by Navinfo Co  HERE International BV	On 26 September 2017, a group of investors led by the digital map provider NavInfo Co (China) abandoned its proposal to acquire a 10 per cent minority stake in the digital mapping service and software company HERE International BV, following opposition from the CFIUS.	Netherlands	China	330	Technology

<sup>19</sup> The actual number of cases is likely to be considerably higher.

CEFC China Energy Co Ltd Cowen Group Inc	CEFC China Energy Co agreed to acquire a 19.9 per cent minority stake in Cowen Group Inc (United States), an investment bank, in a privately negotiated transaction. However, on 24 November 2017, both parties announced that they had mutually agreed to withdraw from the filing with the CFIUS and not to pursue the deal owing to delays and uncertainty in securing approval from the CFIUS.	USA	China	100	Finance
Ant Small & Micro Financial Services Group Ltd MoneyGram International Inc	On 2 January 2018, Ant (a company owned by the Alibaba Group) withdrew offer to acquire MoneyGram, a United States provider of financial transaction services. According to a statement by MoneyGram, the parties had been advised that CFIUS clearance of the merger would not be forthcoming and both parties agreed to terminate the deal.	USA	China	1.200	Finance
HNA Group Co Ltd UDC Finance	On 17 January 2018, HNA (China) withdrew its plan to acquire UDC Finance (a subsidiary of ANZ Bank New Zealand Ltd) after New Zealand's Overseas Investment Office blocked the deal. According to the explanation provided by the Overseas Investment Office, the deal was declined because of "uncertainty over HNA's ownership structure, reflecting mounting international concerns about the aviation-to-shipping group's transparency and governance."	New Zealand	China	460	Finance
BlueFocus International Ltd Cogint, Inc	On 20 February 2018, Cogint (United States), a data solutions provider, and BlueFocus (Hong Kong, China) agreed to terminate their business combination agreement. Cogint stated that the CFIUS had indicated its unwillingness to approve the transaction.	USA	Hong Kong, China	100	Data
Unic Capital Management Co Ltd Xcerra Corporation	On 22 February 2018, Xcerra (United States) terminated its merger agreement with Unic Capital Management. Xcerra stated that after careful review of feedback received from the CFIUS, it considered that approval of this merger would be highly unlikely.	USA	China	580	Technology
Broadcom Ltd Qualcomm Inc	On 12 March 2018, the President of the United States prohibited the proposed takeover of chipmaker Qualcomm (United States) by Broadcom (Singapore) for national security reasons. In February 2018, Broadcom had proposed a bid for the takeover of Qualcomm.	USA	Singapore	117.000	Technology
China Communications Construction Company International Holding Ltd (CCCI) Aecon Group Inc	On 23 May 2018, the Canadian Government blocked a proposed acquisition of the Canadian construction company Aecon, by CCCI, a Chinese State-owned company and one of the world's largest engineering and construction firms. According to an official statement from the Canadian Minister of Innovation, Science and Economic Development, the deal compromised national security: The minister stated that the Canadian Government "is open to international investment that creates jobs and increases prosperity, but not at the expense of national security."	Canada	China	1.500	Construction
CC Logistics Rand Refrigerated Logistics	On 2 July 2018, the Automotive Holdings Group withdrew the disclosed sale of its subsidiary, Rand Refrigerated Logistics, to CC Logistics, a subsidiary of HNA International. The deal was terminated because of the lengthy administrative process of the Australian Foreign Investment Review Board and liquidity problems of HNA International.	Australia	Hong Kong, China	204	Transport and logistics
Shenzhen Energy Recurrent Energy LLC	On 9 August 2018, Shenzhen Energy Group issued a statement terminating the deal to acquire Recurrent Energy, a unit of Canadian Solar. According to the company, the planned acquisition did not receive approval from the CFIUS within the agreed time.	USA	China	232	Energy

Atlantia SpA Abertis Infraestructuras SA	In October 2018, Atlantia withdrew its bid offer to acquire Abertis Infraestructuras. The bid had faced political opposition because the Spanish Government was concerned that the deal could leave the country's most important roads under full foreign control. Thereafter, the deal was re-arranged as a joint acquisition by Atlantia and Hochtief (a German subsidiary of the Spanish company Actividades de Construccion y Servicios SA - ACS).	Spain	Italy	19.000	Infrastructure
CK Asset Holdings Ltd APA Group	On 20 November 2018, the Investor Group, a consortium led by CK Asset Holdings Ltd, withdrew its agreement to acquire the entire share capital of APA Group, a Sydney-based owner and operator of a natural gas infrastructure business. The Australian Federal treasurer justified the decision to prohibit the offer, stating "The FIRB was unable to reach a unanimous recommendation, expressing its concerns about aggregation and the national interest implications of such a dominant foreign player in the gas and electricity sectors over the longer term."	Australia	Hong Kong, China	9.800	Utilities
Grandland Holdings Group Co Ltd Lixil Group	On 27 November 2018, Grandland Holdings Group, a developer of real estate properties, withdrew its offer to acquire Lixil's building unit – Permasteelisa –after the deal was disapproved by the CFIUS on the basis of national security.	Japan	China	527	Building materials
Hydro one Ltd Avista Corp	On 23 January 2019, the Canadian State-owned company Hydro One and Avista (United States) agreed to end their merger agreement after the Washington Utilities and Transportation Commission and the Idaho Public Utilities Commission denied approval. According to the Washington Utilities and Transportation Commission, "the proposed merger agreement did not adequately protect Avista or its customers from political and financial risk or provide a net benefit to customers as required by state law."	USA	Canada	5.000	Utilities
Beijing Kunlun Tech Co. Grindr LLC	In spring of 2019, the Committee on Foreign Investment in the United States requested the Chinese gaming company Beijing Kunlun Tech to divest Grindr, a popular gay dating app containing information on users' sexual preferences, location, HIV status as well as their private messages, citing national security reasons. Kunlun acquired Grindr between 2016 and 2018.	USA	China	245	Technology & Data

Source: ©UNCTAD. The table was prepared on the basis of information available in *World Investment Report 2017, 2018 and 2019* and additional research.



## ANNEX II

FDI screening cases concerning national security, selected countries<sup>20</sup>(Number of cases per year<sup>21</sup>)

		Australia <sup>22</sup>	Canada <sup>23</sup>	France <sup>24</sup>	Germany <sup>25</sup>	Italy <sup>26</sup>	New Zealand <sup>27</sup>	United States <sup>28</sup>
2018	Filed/Examined	-	751	182	n/a	46	-	229
	Approved	633	-	-	-	-	36	-
	Rejected/Blocked	0	1	-	-	-	0	1
	Withdrawn	-	1	-	-	-	-	66
2017	Filed/ Examined	-	737	137	66	30	-	237
	Approved	676	-	-	-	-	22	-
	Rejected/Blocked	0	3	-	-	-	1	1
	Withdrawn	-	0	-	-	-	-	74
2016	Filed/ Examined	-	674	n/a	42	14	-	172
	Approved	645	-	-	-	-	25	-
	Rejected/Blocked	0	1	-	-	-	0	1
	Withdrawn	-	0	-	-	-	-	27
2015	Filed/ Examined	-	719	n/a	40	18	-	143
	Approved	586	-	-	-	-	22	-
	Rejected/Blocked	0	2	-	-	-	0	0
	Withdrawn	-	0	-	-	-	-	13
2014	Filed/ Examined	-	666	n/a	57	8	-	147
	Approved	585	-	-	-	-	15	-
	Rejected/Blocked	1	1	-	-	-	0	0
	Withdrawn	-	0	-	-	-	-	12

Source: ©UNCTAD.

<sup>20</sup> Empty cells in the table do not mean that there have been no cases filed, approved, rejected or withdrawn. Rather, the table reflects country-specific differences in publicly available screening data. E.g. some countries provide information only on approved or blocked foreign mergers and acquisitions. Others report on the aggravated number of all proceedings annually and include information on rejected cases and withdrawn applications. In yet other instances, only the overall number of proceedings is available.

<sup>21</sup> For Australia and Canada, reference is made to the fiscal year.

<sup>22</sup> *Foreign Investment Review Board, Annual Report, 2017-18* (<http://firb.gov.au/about/publication/2017-18-annual-report/>). In Australia, the screening procedure targets not only foreign direct investment, but also land-related transactions. For consistency purposes, these real estate acquisitions (residential and commercial) were not taken into account.

<sup>23</sup> *Annual Report, Investment Canada Act, 2017-18* ([http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h\\_lk81126.html#minister](http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81126.html#minister)).

<sup>24</sup> *Les chiffres clés des IEF* (<https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etranagers-en-france>)

<sup>25</sup> *Schriftliche Fragen mit den in der Woche vom 21. November 2016 eingegangenen Antworten der Bundesregierung*, Drucksache 18/10443, 25 November 2016 (<http://dip21.bundestag.de/dip21/btd/18/104/1810443.pdf>); *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Kerstin Andreae, Katharina Dröge, Anja Hajduk, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN*, Drucksache 19/1103, 7 March 2018 (<http://dip21.bundestag.de/dip21/btd/19/011/1901103.pdf>).

<sup>26</sup> *Relazione concernente l'attività svolta sulla base dei poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni*, 1 April 2019, Doc. LXV no.1, (<http://www.senato.it/service/PDF/PDFServer/BGT/1107558.pdf>).

<sup>27</sup> Information provided by the Overseas Investment Office. In New Zealand, the screening procedure covers both foreign direct investment and land-related acquisitions. For consistency purposes, information relating only to the first category (concerning significant business assets) is provided.

<sup>28</sup> *Covered Transactions, Withdrawals, and Presidential Decisions, 2014-2018* (<https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Summary-Data-2014-2018.pdf>).



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In parallel to the publication of this Investment Policy Monitor on foreign investment screening, UNCTAD has extended its **Laws Navigator** database available on its **Investment Policy Hub** by adding an **“FDI Screening Laws”** segment, covering national and regional rules and regulations on FDI screening.

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For further information, please contact

**Mr. James X. Zhan**

Director

Investment and Enterprise Division UNCTAD

[diaeinfo@unctad.org](mailto:diaeinfo@unctad.org)

+41 22 917 57 60



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