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THE EVOLUTION OF FDI SCREENING MECHANISMS – key trends and features –

HIGHLIGHTS

- At least 37 countries introduced a regulatory framework for the screening of investments on national security grounds since 1995. Key objectives included harmonizing or codifying dispersed provisions and practices on FDI entry, enhancing the protection of sensitive sectors from foreign takeovers, and ensuring sufficient publicity and visibility of the relevant regimes.
- Investment screening for national security was adopted predominantly by developed economies from Europe (22 out of 37), while the remainder of the schemes were adopted by a few developed and developing countries in other regions: 9 countries in Asia, 2 in North America, 2 in Oceania, 1 in Latin America and 1 in Africa.
- The trend towards the adoption or revision of FDI screening mechanisms accelerated in the second half of the 2000s, particularly after the global economic crisis, and reached a peak in 2020-2021, in the aftermath of the COVID-19 pandemic, both of which heightened concerns about potential foreign takeovers in sensitive sectors.
- Over the past five years, the scope and coverage of the "national security" concept was expanded, resulting in several new economic sub-sectors being considered as strategic. Governments also moved to subject new forms of critical know-how and strategic technologies to screening, including economic activities involving access to sensitive personal information or capable of shaping public opinion.
- Investment screening for national security comprises a patchwork of very diverse approaches, but some efforts to enhance regulatory alignment and achieve a higher level of harmonization are ongoing between jurisdictions within the European Union.
- In the context of the expanding use and scope of investment screening mechanisms, it is ever more relevant to take a balanced approach to policymaking, so as to enhance the State's ability to address essential security concerns without weakening its FDI promotion efforts in the interest of sustainable development.
- By reviewing different models and regulatory options, this IPM highlights some policy practices that can help enhance the predictability, transparency, and administrative efficiency of screening regimes, by clarifying the procedural rules applicable to investors, and providing decision-making guidance for the implementing authorities.

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Introduction

With an increasing number of economies adopting security-related investment screening regimes and the expansion of the concept and coverage of "national security",[1] policymakers are still attempting to find a balanced approach that preserves the attractiveness of a country to investments, while strengthening the State's ability to address potential national security threats posed by both foreign and national investments in strategic sectors.

The present Investment Policy Monitor (IPM) provides an overview and analysis of dedicated regimes for investment screening, outlining emerging trends and common features (see Box 1 for UNCTAD's approach). The analysis highlights the existence of a patchwork of different mechanisms, in which the key definitions, the coverage and the governance of investment screening varies significantly from country to country.

In the absence of a common model applicable to security-related foreign direct investment (FDI) screening, this IPM can offer policymakers considering the introduction or revision of a screening mechanism an overview of different approaches to address national security risks and provide them with a general understanding of the existing legislative options to design a system for reviewing investments in areas deemed worthy of protection.

Box 1 UNCTAD's methodological approach on investment screening

At the current stage of policy developments in this field, the depth and detail of screening mechanisms in force varies greatly among different jurisdictions. As an unfolding regulatory trend, so far there is little uniformity in the level of complexity and normative elaboration among existing regimes, as well as a significant disparity in the availability of official information.

These disparities mean that the contours of what constitutes a **dedicated regime for investment screening** are not set in stone. For the purpose of the analysis, this study relies on UNCTAD's Investment Screening Database, which adopts the following methodological approach:

- Screening involves the discretionary use of regulatory powers by public authorities, to be exercised on a case-by-case basis (thus not bound by statutory bans on FDI), and which involves national security considerations;
- Only nationwide screening is considered, thus excluding sub-national level reviews;
- Sectoral exclusions to FDI or negative-list schemes are not considered as screening;
- Prohibitions on foreign ownership of land based on border-related or territorial integrity grounds are not considered as screening.

Source: UNCTAD

[1] See: Clifford Chance (2022).

Section A illustrates the trend towards the adoption of investment screening mechanisms to address national security risks from 1995 to 2022. In light of the recent peak of legislative activities in this area, particular attention is given to measures adopted during the 2020-2022 period in the context of the COVID-19 pandemic, as well as screening measures adopted in response to the war in Ukraine.

Section B presents an overview of the differing policy approaches to address national security concerns. Issues of scope and rationale of investment screening and factors that are taken into consideration during the screening process, as well as screening governance are among those discussed.

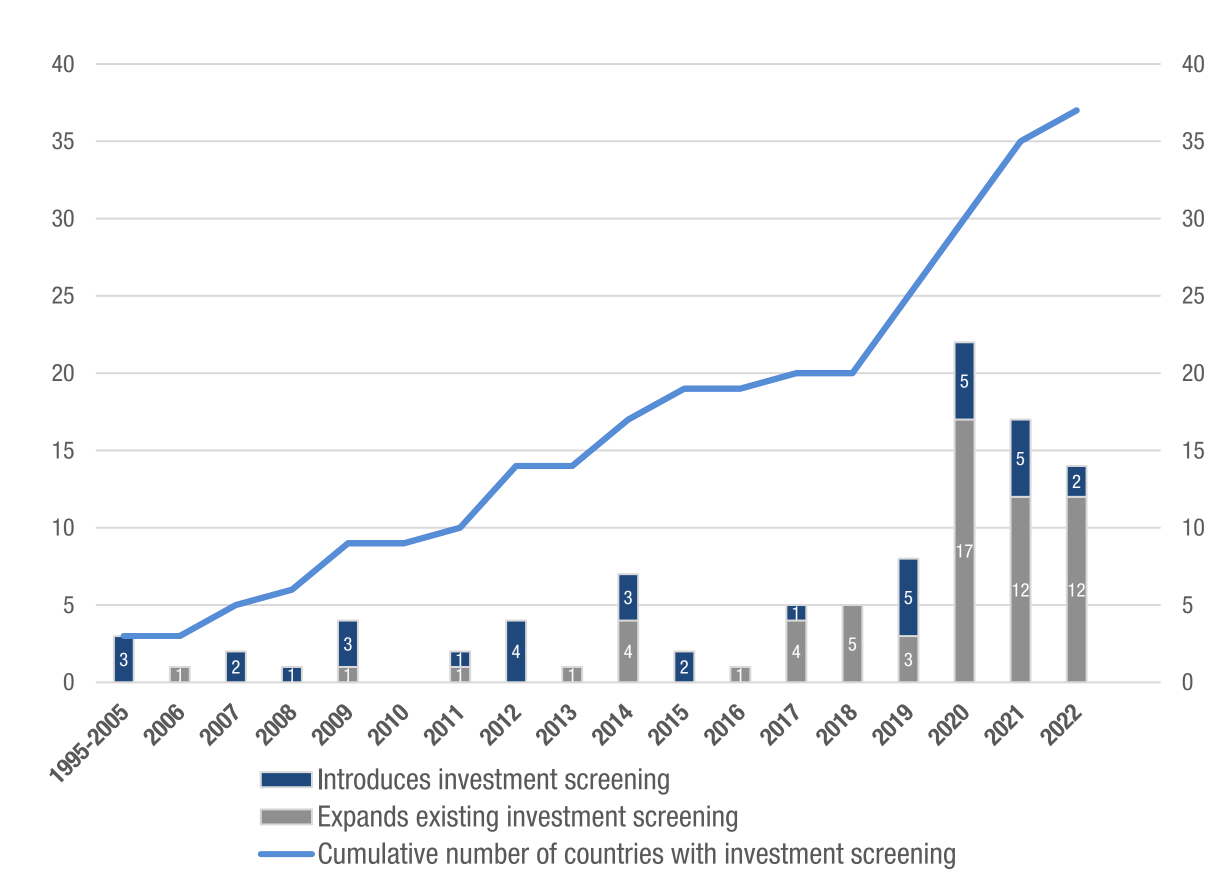
A. Key trends in FDI screening for national security

The concept of foreign investment screening on national security grounds is not new. Some countries use a general safeguard clause on national security in their investment laws that provides sufficient legal ground to reject unwanted foreign investments. Others include sector-specific restrictions where foreign participation above certain limits would be considered detrimental to national security. However, in recent years a new trend to adopt sophisticated procedures specifically dedicated to investment screening on national security grounds can be identified. This shift in legislative practices can be explained by the intention of countries to harmonize or codify existing dispersed provisions and practices on FDI entry and to ensure sufficient publicity and visibility of the security-related investment screening regimes.

The first signs of the current trend started to appear in the second half of the 2000s. Between 2006 and 2009, the number of countries making use of investment screening for national security increased threefold (from 3 to 9). In the aftermath of the global economic and financial crisis, and in parallel with the expansion of outward FDI from developing countries, more developed countries began to introduce dedicated regimes for the screening of investments. By 2014, a total of 17 countries had incorporated elements of investment screening to their national investment policies.

Starting from 2016, countries have introduced a significant number of amendments to existing investment screening regulations, mostly seeking to expand their scope. Most of these reforms took place in 2020 and 2021, when 17 and 12 countries respectively adopted amendments to their screening regimes. Figure 1 shows that the peak of regulatory activity came in 2020, when the world economy faced risks associated with the COVID-19 pandemic. The number of countries introducing new screening regimes had been steadily growing for the previous decade and the pandemic did not change this trend but rather accelerated it.

Figure 1: Number of countries introducing or expanding security-related investment screening (1995-2022)



Source: UNCTAD's Investment Policy Monitor

In total, from 1995 to 2022, at least 37 countries introduced new regulatory frameworks for the screening of investments that include national security considerations.[2] An additional 8 countries are undergoing a consultative or legislative process expected to lead to the adoption of a new mechanism, in response to the potential threat posed to its national security from some investments.[3]

Out of the 37 countries that have established investment screening for national security in the reviewed period 22 are developed economies from Europe. In other regions, these regulations are used only by a few developed and developing countries (9 countries in Asia, 2 in North America, 2 in Oceania, 1 in Latin America and 1 in Africa).

[2] These countries are Australia, Austria, Canada, China, Czechia, Denmark, Finland, France, Germany, Hungary, Iceland*, India, Israel*, Italy, Japan, LAO People's Democratic Republic*, Latvia, Lithuania, Malta, Mexico*, the Netherlands, New Zealand, Norway, the Philippines*, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, the Kingdom of Saudi Arabia*, Slovakia, Slovenia, South Africa*, Spain, Thailand*, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Countries for which no sufficient data on investment screening regulations are available are marked by an asterisk (*). These are not considered in the analysis of section B.

[3] These are: Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg, Sweden, and Switzerland. See: European Commission (2021)

Recent trends

Regulatory changes towards a tightening of screening procedures for national security enacted over the past five years focus on three substantial aspects. Firstly, they expanded the scope of sectors targeted by the screening mechanism, in order to cover new activities increasingly considered as strategic. Secondly, they lowered the threshold rule triggering the FDI review, whether such thresholds refer to transaction value or percentages of foreign capital participation. Thirdly, they broadened the definition of investment or control that triggers the FDI screening (i.e., by expanding the screening criteria or rationale, the scope of acquisitions and the type of investors falling under the screening regime).

Other regulatory changes during the period included an extension of initial review timeframes (e.g., the discretionary period during which the authorities can block an investment) and the introduction of sanctions and penalties for non-compliance with obligatory filing obligations.

The expansion in the scope of FDI screening indicates that national authorities are increasingly concerned by foreign ownership of companies operating in new services activities perceived as strategic. Also, governments have stepped up scrutiny over entities engaged in business activities involving access to sensitive personal information or capable of modifying the balance of public interest values such as the pluralism of the press or the shaping of public opinion. Finally, governments have recently moved to include new forms of critical know-how and strategic technologies under the scope of FDI screening mechanisms (Box 2).

Box 2	**Regulatory changes expanding FDI screening scope since 2018** (Policy examples)

Activities related to the protection of sensitive information

- In 2019, *Italy* amended its screening regime to include "access to sensitive information, freedom and pluralism in the media";
- In 2020, *Slovenia* introduced a temporary FDI screening mechanism whose scope includes acquisition of businesses which entail "access to sensitive information, including personal data, or the ability to control such information; the freedom and pluralism of the media";
- In 2021, *Malta* amended its FDI screening procedure to include "access to sensitive information, including personal data, or the ability to control such information";
- In 2021, *Canada* published new "Guidelines on the National Security Review on Investments", stipulating a set of national security factors to be taken into account by the authorities in their review of FDI transactions. Such factors include "the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation". Sensitive personal data under the guidelines covers a wide range of data on individuals;
- In 2022, *Australia* included a prior approval requirement for foreign investments targeting a "business or entity that has access to bulk sensitive personal information of over 100,000 Australian". According to the authorities, sensitive personal information may include, non-exhaustively, medical and/or psychological information, psychometric and profiling information, financial information of individuals and genetic information;
- In 2022, *the United States* strengthened the FDI screening mechanism. An Executive Order of the President (No. 14083) directed the Committee on Foreign Investment in the United States (CFIUS) to consider five

specific factors when conducting national security reviews, including risks to sensitive data of United States' citizens.

New strategic technology sub-sectors

- In 2018, *Lithuania* amended its screening regime to include "information technology hardware and software of the State Enterprise Centre of Registers, software platforms and data of the main state registers and state information systems that process critical information";
- In 2020, *Japan* expanded the scope of its screening regime by including "manufacturing industries related to highly-controlled medical devices";
- In 2022, *Australia* published a Guidance Note on national security matters regarding foreign investment, in which it orders a prior approval requirement for acquiring direct interest in the national internet domain administration (.au);
- In 2022, in *the United States,* Executive Order No. 14083 mentioned above also directed the CFIUS to consider, among others, the transaction's effect on the resilience of critical supply chains and on the technological leadership of the United States in specified industries, when conducting national security reviews.

Source: UNCTAD's Investment Policy Monitor

In addition, between 2020 and 2022, at least 12 jurisdictions introduced 25 screening measures in response to the COVID-19 pandemic (Box 3). The vast majority of these measures were either aimed at further restricting foreign investments by screening a wider scope of investments, transactions and investors or at creating more elaborate and detailed screening regimes (15 measures). In addition, several temporary security-related measures introduced during the COVID-19 pandemic were steadily extended for further periods or upgraded into a permanent screening regime (10 measures).

The ongoing war in Ukraine was another driver of current trends to accelerate the introduction of dedicated screening regimes focused on managing national security and public order risks brought by inward foreign investments, with Canada, Italy and the European Union (EU) enacting screening-related policy measures in response to the war in Ukraine (Box 3).

Box 3	**Recent changes to FDI screening legislation (2020-2022)** (Policy examples)

Measures adopted in response to Covid-19 pandemic*

- In 2020, *Australia* introduced temporary changes to the foreign investment review framework that are designed to protect national interests while dealing with the economic implications of the spread of COVID-19.
- In 2020, *Canada* enhanced scrutiny of FDI related to public health or involved in supply of critical goods as a response to "opportunistic investment behavior" in the context of the COVID-19 pandemic;
- In 2020, *France,* in response to the COVID-19 pandemic, included biotechnology in the list of sectors and critical technologies subject to review;

- In 2020, *Germany* stipulated that foreign acquisitions of at least 10 per cent stock in German companies developing, manufacturing or producing vaccines, medicines, protective medical equipment and other medical goods for the treatment of highly infectious diseases require prior governmental authorization;
- In 2020, *Hungary* introduced a temporary foreign investment screening mechanism applicable to investors from both inside and outside the European Union in 21 industries, including health care, pharmaceutical, medical device manufacturing, but also some non-medical industries;
- In 2020, *India* introduced the regime of prior authorization for all investments originating from countries that share land boarders with India "for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic";
- In 2020, *Italy* lowered the screening threshold and expanded the scope of FDI screening to cover the financial, credit and insurance sectors, infrastructure, and critical technologies, including energy, transport, water and health, food security, access to sensitive information (personal data), artificial intelligence, robotics, semiconductors, cyber-security, nanotechnology and biotechnology;
- In 2020, *Japan* expanded the scope of screening by including "manufacturing industries related to pharmaceuticals" and "manufacturing [industries] related to highly-controlled medical devices" into the list of companies subject to specific notification requirements.
- In 2020, *New Zealand* introduced a "national security test" that allows the Government to decline consent for certain transactions ordinarily screened if they are considered contrary to New Zealand's national interest;
- In 2020, *Poland* temporary extended the scope of FDI screening and widened the list of sectors/activities falling under the screening regime to include energy, gas and oil production, storage, distribution and transportation, manufacture of chemicals, pharmaceuticals and medical instruments, telecommunication and food processing;
- In 2020, *Slovenia* introduced a 3-year temporary FDI screening mechanism that applies, amongst others, to critical infrastructure, transport, water, aviation, media, data processing, artificial intelligence, medical and pharmaceutical technology, the supply of critical inputs;
- In 2020, *Spain* introduced a temporary screening procedure for all foreign investors from outside the European Union who acquire 10% or more of the share capital or an effective management or control of a Spanish company in the sectors of critical infrastructures, critical technologies and dual-use products, supply of fundamental inputs, sectors with access to sensitive information, and media;
- In 2022, *Italy* made the temporary COVID-related screening regime permanent. Furthermore, it broadened the scope of transactions falling under the FDI screening regime to include procurement of services and assets related to 5G networks and cloud services, and additional strategic assets and technologies in connection with cybersecurity and gave the Government authority to review acquisitions by investors from the European Economic Area (EEA);

Measures adopted in response to the war in Ukraine*

- In 2022, *Canada* issued a "Policy Statement on Foreign Investment Review and the Ukraine Crisis", indicating that, with respect to national security reviews, should it be determined that an investment, regardless of its value, has ties, direct or indirect, to an individual or entity associated with, controlled by or subject to influence by the Russian State, this will support a finding by the Minister that there are reasonable grounds to believe that the investment could be injurious to Canada's national security;
- In 2022, *Italy* introduced urgent measures to counter the economic and humanitarian effects of the Ukrainian crisis. Among others, it expanded a notification obligation to new subjects and widened the definition of non-EU individuals or entities;
- In 2022, *the European Union* adopted the "Guidance to the Member States concerning foreign direct investment from Russia and Belarus", where it urged EU Member States to implement the FDI Screening Regulation to address risks related to security or public order related to FDI from the Russian Federation and Belarus.

Source: UNCTAD's Investment Policy Monitor

Note: *Measures classified as such when the State has explicitly justified their introduction on the basis of the COVID-19 pandemic crisis or the war in Ukraine.

B. A review of dedicated regimes for investment screening

The analysis in this section covers 29 countries that have adopted dedicated regimes for investment screening, understood as those establishing a comprehensive set of substantive and procedural rules on the screening of foreign and national investments on national security grounds, which were available to UNCTAD for review.[4] Such regulatory frameworks typically set out explicitly the scope, coverage, rationale and conditions under which the scheme is applicable, including a procedural timeframe and an expiry period for the exercise of the blocking power by the relevant authority, as well as a clearly defined set of rights, obligations, sanctions and remedies for the investors concerned. Accordingly, this section does not cover those FDI review mechanisms whose main focus is competition, domestic market protection, local SME promotion or other grounds, which include only a single provision reserving the State's right to block a foreign acquisition on national security grounds.

As illustrated below, there is no unified approach to FDI screening for national security reasons, with significant differences as to the scope, clarity and the transparency of the various mechanisms. Indeed, the complexity of applicable rules, the wide margin of regulatory discretion and the lack of predictability inherent in several regimes may become significant barriers to investment and represent an increasing administrative burden for host country authorities. In this context countries should seek to balance the safeguard of essential security concerns with the promotion of FDI, so as to ensure that restrictions on investment, or conditions on transaction, do not exceed what is required to protect national security.

At the OECD level, guidelines to help countries design and implement FDI screening policies, so that they achieve their national security goals with the smallest possible impact on investment flows, were adopted in 2009.[5] More recently some harmonization attempts have been made at the European Union level. Through "Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union", the European Union sought to establish a Union-wide coordination and cooperation mechanisms on screening, including through a set of recommendations and principles governing the screening of investments.[6]

Scope and rationale of investment screening

Two main approaches in national legislation are identified to determine the main subject of the screening mechanism. One approach is to discriminate on the basis of the economic grouping/s of origin of the investor. At least 12 countries define foreign investors subject to screening in whole or in part as entities or citizens not

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[4] For country-specific examples see: Baker McKenzie (2017); C.S. Goldman (Ed.) (2017); Dechert LLP (2022) and Jones Day (2018).

[5] The guidelines include the principles of non-discrimination, transparency of policies and predictability of outcomes, proportionality of measures, and accountability of implementing authorities. In particular, they state that governments should rely on measures of general application which treat similarly situated investors in a similar fashion (non-discrimination), with regulatory objectives and practices made as transparent as possible so as to increase the predictability of outcomes (transparency/predictability). Restrictions on investment, or conditions on transaction, should not be greater than needed to protect national security and should be avoided when other existing measures are adequate and appropriate to address a national security concern (regulatory proportionality). Finally, in order to ensure accountability of the implementing authorities, oversight procedures should be established, including internal government oversight, parliamentary oversight, judicial review, and periodic regulatory impact assessments (OECD, 2009).

[6] Such recommendations include the introduction of provisions on transparency of screening rules and procedures; the protection of confidentiality of the information made available to the State; the establishment of screening timeframes and the possibility to seek judicial recourse against screening decisions of the national authorities, among other procedural elements. Furthermore, the Regulation mandates the European Commission to act as an advisory body on screening of FDI projects regarding EU-funded projects and programs. These involve development of critical infrastructure or critical technologies in sectors such as energy, transportation, telecommunications or scientific endeavors such as research on atomic energy and space exploration.

belonging to the European Union. Not belonging to the European Economic Area is used as a discriminant factor by at least 4 countries, to the European Free Trade Association (EFTA) by 4 countries and to the OECD by one country. A second approach is based on the public or private nature of the foreign entity subject to screening. In this regard, at least 11 countries have enacted special screening provisions targeting specifically acquisitions of national entities by foreign State-owned entities.

In terms of scope, screening procedures for the identification of national security risks can be classified in three categories. Cross-sectoral screening procedures are those that apply to transactions of a certain nature (e.g., critical infrastructure, dual use products and technologies etc.), rather than to specific sectors (21 countries). This approach is present in the majority of screening regimes and allows countries to preserve a broad level of regulatory discretion in such a sensitive topic as national security. Sector-specific screening is also frequently utilized and can be applied in parallel or in addition to cross-sectoral screening (20 countries). Much less frequent is entity-specific screening (e.g. those applying to natural monopolies or specific companies) (4 countries).

Detailed information about the rationale or criteria behind the screening process is provided by all analyzed countries except for two. In the wide range of criteria put forward, "public order" is the main screening criterion for 11 countries, while "national security" and "national interest" are offered as the key rationale in 6 and 5 countries respectively. Five countries provide more than one criterion (figure 2). The same criteria, however, can have different definitions depending on the regime considered.[7] This is not surprising, as essential security concerns are self-judging and each country has a right to determine what is necessary to protect its national security (OECD, 2009). The existence of such a wide range of often undefined criteria, however, can be a source of uncertainty for investors, with potentially deterrent effects on FDI.

Figure 2. Investment screening rationale

Source: UNCTAD, using Monkeylearn.com

[7] For examples, under national security interests *Norway* understands country sovereignty, territorial integrity and democratic governance, including security interests related to defence and emergency preparedness, economic stability and freedom of action. *Finland* defines its key national interest as securing military national defence, functions vital to society, foreign and security policy objectives, and safeguarding public order and security. For more on this see: UNCTAD (2019).

Assessment factors and legal certainty in investment screening

In order to increase the legal certainty and predictability of the screening process for investors, several countries have introduced provisions that set out in detail the factors to be considered by the authorities in the screening process, as well as the aspects or investor features that are taken into consideration for the assessment of an investment project (Box 4).

Box 4	**Examples of factors considered in the screening of investments**

- In *Austria*, when assessing a possible threat to security or public order, particular account shall be taken of whether an acquiring person is controlled directly or indirectly by the government of a third country; whether an acquiring person, or a natural person who holds a senior position in an acquiring legal entity, is or has been involved in activities that have or have had an impact on security or public order in another member State of the European Union, and whether there is a significant risk that an acquiring person, or a natural person who holds a management position in an acquiring legal entity, is or has been involved in illegal or criminal activities.[8]
- In *Canada*, the authorities will take into account the following factors: the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada; the degree and significance of participation by Canadians; the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect of the investment on competition within any industry or industries in Canada; the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment.[9]
- In *Germany*, the assessment of a likely effect on public order or security can also consider whether (a) the acquirer is directly or indirectly controlled by the government, including other state agencies or armed forces of a third country; (b) the acquirer has already been involved in activities which have had undesirable effects on the public order or security of Germany or of another member State of the European Union, or (c) there is a significant risk that the acquirer or the persons acting on his behalf have been or are involved in activities which, in Germany, would amount to a certain crime or administrative offence under national legislation.[10]
- In *Japan*, in the assessment, the authorities will take into consideration, among other factors, the capital structure of the foreign investor, its beneficial ownership and business relationships, the foreign investor's plan and their track record relating to the investment (including the degree of potential direct or indirect influence by foreign governments and other related parties on the foreign investor). Furthermore, the Government will assess the possibility of technologies or information leakage or the probability of use of these technologies or information against the objectives of protection of national security, maintenance of public order, or safeguard of public safety. Track record of the foreign investor's compliance with the Foreign Exchange and Foreign Trade Act and equivalent or similar legislation of other jurisdictions is also considered.[11]
- In *Slovenia*, in determining whether a foreign direct investment is likely to affect security or public policy, the Government authority shall take into account, in particular: whether the foreign investor is directly or indirectly controlled by the government of a third country, including state bodies or armed forces, including through ownership structure or significant funding; whether the foreign investor has already been involved in activities affecting the security or public order of a Member State; whether there is a serious risk that the foreign investor engages in illegal or criminal activities.[12]

Source: UNCTAD, based on the cited documents.

[8] Section 3 of Austrian Investment Control Act/ICA: unofficial translation (europa.eu)
[9] Section 20 of Investment Canada Act (justice.gc.ca)
[10] Section 55A of Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung - AWV) (gesetze-im-internet.de)
[11] Factors to be considered in authorities' screening of foreign direct investment : Ministry of Finance (mof.go.jp)
[12] Article 72 of Act determining the intervention measures to mitigate and remedy the consequences of the Covid-19 epidemic (europa.eu)

Often, the potential direct or indirect influence by foreign governments and records of investor's past behaviors relating to the investment are the first factors considered in national assessments. Awareness of the role played by new technologies in national security brought to existence new assessment factors, such as potential technology or information leakages or their potential use against the State. However, some assessment provisions are deliberately left open to interpretation, for example, the compatibility of the investment with national industrial, economic and cultural policies, which can add to the uncertainty associated with FDI screening regimes.

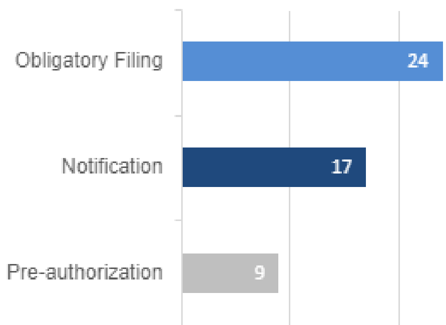
Standard-setting regarding the assessment factors in investment screening is also evolving at a regional level, which could lead to a certain degree of harmonization. In this regard, the EU Regulation 2019/452 provides recommendations for EU Member States in the form of a list of factors that should be taken into consideration when determining whether an FDI project is likely to affect national security or public order.

Governance of investment screening

In over half of the countries reviewed (15), the screening is conducted at ministerial level by the authorities in charge of investment matters (e.g., the Ministries of Investment, Industry, Economy, Energy or Trade). In several cases, however, a separate, ad hoc body was created (or is currently envisaged) to perform the screening and all procedures associated with the mechanism (8 countries). Only 6 countries rely on a national regulatory authority to take on screening duties. Finally, across 22 countries, the authority responsible for investment screening seeks advice from other government agencies or related bodies on the proposed investments, when their expertise is deemed necessary for the decision.

Investors affected by screening can be subject to different administrative requirements, as summarized in Figure 3. The large majority of countries (24) introduced obligatory filing schemes, including 7 countries that adopted several schemes either for different types of investors or for different sectors of activities. In addition to the obligatory filing or as a separate procedure, 17 countries have adopted a notification procedure. Finally, at least 9 countries use a pre-authorization (pre-formal screening) procedure. Each of the above-mentioned procedures is considered briefly below.

Figure 3. Administrative requirements in investment screening for national security (number of countries)



Source: UNCTAD

Under the obligatory filing scheme, investors must submit certain categories of transactions for review. Such categories may vary significantly from one country to another. Transactions subject to review may include those exceeding a certain value or a certain foreign ownership percentage threshold (21 countries), those taking place in specific sectors (1), or a combination of both (6 countries). In addition to those, or as a separate issue, some countries introduced a “control test” to examine specific transactions. These include those which may lead to the acquisition of a number of voting rights that would allow an investor to pass or block resolutions governing the affairs of the entity, to gain access to information, systems or technologies that are important for national security, or to transactions that would give an investor a significant influence over the management of the company in any other way.

Filing obligations can be “light”, i.e., requiring the investor to provide a general description regarding ownership of the acquiring entity and an overview of the proposed investment project (16 countries), or more extensive, i.e., requiring not only to report on ownership information but also to provide a draft of the potential merger or acquisition, as well as a detailed business plan for the economic activities of the acquiring entity (9 countries). These provisions are without prejudice to the authority’s power to request additional information or to conduct its own enquiry as to the provenance of the proposed investment.

On the other hand, the notification regime is characterized primarily by its voluntary nature and by a simplified procedure, which may lead the investor to notify the future investment plans to the screening authority, to wait for a “no objection order”, or to notify the investment post factum (Box 5).

Typically, investors choose to undergo the notification procedure to obtain legal certainty, in situations where the applicability of the filing scheme is not clear or when there is a risk that the transaction might be “called in” at a later stage. However, in some cases, the line between the notification and the filing regime is blurred (e.g., in situations where the declaration should be sent to the reviewing authority to report the beneficial ownership change of a shareholder of a company operating in a strategic sector). Failure to comply with this rule may result in a sanctioning decision to alienate shares or stocks of the equity capital of the said shareholder.

A pre-authorization (pre-formal screening) procedure is used to assist investors in cases when it is unclear whether the transaction in question falls under the official screening regulation. This procedure can help foreign investors to navigate the complicated screening rules, it may also reduce the workload of reviewing authority and allow them to focus on more critical transactions. In some cases, the pre-authorization procedure is obligatory for specific sectors (for example, nationwide radio or television, broadcasting, or a publisher of a periodic press), in which the State reserves the right to a certain degree of control, without subjecting these transactions to obligatory filing procedure.

Box 5	**Approaches to the governance of investment screening for national security**

- In *Australia,* the FDI screening mechanism includes: (a) Mandatory notification of proposed investments in certain assets and in national security business as defined in the regulation. In such cases, the investor should seek approval before taking action and is subject to penalties for failure to notify; (b) Voluntary notification of reviewable national security actions in such cases where there is no direct obligation to notify the reviewable actions. Guidance is provided for investors in investment areas where voluntary notification is encouraged. However, investors may choose to notify the investment in order to extinguish the ‘call-in’ power; (c) The investments that do not require mandatory notification may be ‘called-in’ for review on national security grounds by the authorities when the action is proposed or up to ten years after the action has been taken; and (d) Under exceptional circumstances, the authorities can require modification and even divestment of any approved investment where national security risks emerge (power of last resort).
- *China* introduced a three-level FDI screening system. When a foreign investment is made in any of the sectors specified in the regulation, it should be declared to the relevant authority. Before filing a formal

declaration for security review, a party may request a consultation with the relevant authority. Upon receipt of the declaration, the authority shall decide whether there is a need to conduct a security review of a declared investment and notify the party. Before the formal decision is received, a foreign investor cannot proceed with an investment. Further review may be conducted in the form of an ordinary review or a special review. During the special review, the investor may be requested to complete relevant documentation or provide additional details.

- In *Germany,* investment screening for national security is administered through: (a) mandatory filing of proposed acquisitions in German businesses above the established thresholds and in any of the listed sectors considered by the German Government as sensitive or strategic. The authority authorizes the acquisition if it does not raise any concerns regarding public order or national security; (b) voluntary notification of acquisitions of German businesses when the transaction entails ownership of over 25 per cent, in any other sector. Foreign investors may apply for a clearance certificate ("certificate of non-objection") to obtain legal certainty on whether an acquisition is subject to review and/or whether it may be prohibited; (c) an authority may initiate a review on its own initiative (ex officio) when it has knowledge of the acquisition up to five years after acquisition took place.
- In *Japan*, a foreign investor carrying out an inward direct investment as defined in the law will be required to file either: (a) a prior notification, when a foreign investor intends to engage in businesses that are likely to cause a situation that impairs national security; or (b) a post facto report, when the investment does not fall under the previous category. Failure to file a prior notification or post facto report can result in criminal and administrative penalties.
- In *the Russian Federation*, FDI screening for national security is conducted through: (a) mandatory filing of the proposed investments in strategic sectors for which a prior consent should be obtained in order to proceed with the investment; (b) post facto notification when, due to the change in voting rights distribution, the foreign investor gains control over the enterprise in the sectors of concern; (c) pre-authorization procedure for cases when the establishment of a foreign investor control is not clear. In this situation, the investor may request the relevant authorities to clarify whether the mandatory filing is necessary.
- In *the United States*, the FDI screening mechanism consists of: a) a voluntary filing process in which investors submit declarations or notices of transactions to the CFIUS. These notices are subject to review within 45 days, and CFIUS may initiate further investigation. Investors might fast-track the screening procedures through a lighter procedure by submitting a declaration on covered transaction in order to receive a potential "safe harbor" letter, which prevents CFIUS from subsequently initiating a review of a transaction, except in certain limited circumstances; b) a mandatory filing process for certain transactions that require authorization under FIRRMA; c) an ex officio procedure, in which the authority might review pending or completed transactions if it has reason to believe that the transaction is subject to CFIUS jurisdiction and may raise national security concerns.

Source: UNCTAD

Duration, transparency and other procedural elements in investment screening

The timeframe for the investment review is clearly indicated in the legal instruments of all countries, but only in half of the reviewed regimes, the investor has a right to judicial appeal against a decision blocking the proposed investment. In addition, only 7 countries include a provision establishing a tacit approval of the investment project upon expiration of a predefined period (Austria, Finland, Italy, Latvia, Lithuania, the Netherlands and Portugal).

Investment screening regimes tend to operate outside public scrutiny and provide limited levels of transparency to those involved in the screening process (OECD, 2021). While only 12 countries have a legal obligation to publish decisions on investment screening, no direct provisions related to prior notification of stakeholders about the planned changes in screening regulation were identified. Only two countries included legal provisions on prior consultation with relevant stakeholders or interested parties (UK, Japan).

While a small number of countries have started reporting official data on FDI screening (Australia, Canada, France, Germany, Italy, New Zealand, Russian Federation, United States) (UNCTAD, 2021), the type of information, reporting periods and metrics used vary from country to country. At the European Union level, attempts are ongoing to introduce reporting obligations on the application of the screening mechanisms on an annual basis, including on decisions allowing, prohibiting or subjecting foreign direct investments to conditions or mitigating measures.

Once the review process of an investment project on national security grounds is completed, the decision may lead to different consequences:

- To authorize the investment project, subject to certain conditions (25 countries);
- To order divestment measures (9 countries);
- To prohibit investments that are considered a threat to national security (25 countries).

Screening regulations provide for a broad range of sanctions for non-compliance with the relevant procedures. Injunctions can be issued: to modify the investment in order to exclude the possible risks for national security – 3 countries; to restore the *status quo* which existed before the investment – 4 countries; or any of the above - 9 countries.

Failure to comply with the obligatory filing requirements or other obligations under the screening regime may result in administrative fines (21 countries) or even criminal charges, including imprisonment (9 countries). In some cases, the court may order civil pecuniary penalties or interest to be paid (New Zealand); or register the non-compliance in a negative credit record (China); or to prohibit the representation of the company and the management of its record-keeping (Latvia).

Furthermore, a range of sanctions are envisaged to prevent investors from posing any harm to the protected interests of the country, in such cases where implementation of the injunction can be delayed. These include conservatory measures, such as a restriction to disclose company-related information to the acquirer, the appointment of a trustee or external manager (4 countries), or the imposition of vote rights restrictions (13 countries). As a legal conservatory measure, in 12 countries, the unauthorized investment transaction is considered void or nullified from the date on which it took place.

Conclusion

In the past decade, the number of countries introducing new screening regimes and amending the existing regulations has been steadily growing. At the moment, dedicated screening regimes are enacted predominantly by developed countries, but as the trend continues, it is likely to expand also among developing countries.

As investment screening regimes become more widespread and comprehensive, the complexity of applicable rules, the wide margin of regulatory discretion and the lack of predictability inherent in several regimes may become significant barriers to investment and represent an increasing administrative burden for host country authorities. Finding the proper balance between preserving the appropriate level of regulatory discretion to address constantly evolving challenges in the areas of national security and technological progress and ensuring an acceptable level of legal certainty and predictability to foreign investors is a challenge.

The policy practices put forward in this report, however, indicate that there is ample scope to improve the transparency, predictability and administrative efficiency of investment screening mechanisms, and introduce effective appeal. In particular:

(i) Pr**edictability:** the complexity of investment screening mechanisms both in terms of the applicable rules and possible substantive outcomes creates uncertainties about how these rules will be applied in practice. Introducing regularly updated guidelines on applied procedures or special notes on different aspects of screening, including illustrative examples and cases, can enhance predictability.

(ii) **Transparency:** information about the FDI screening procedures should be made available on dedicated websites or platforms. This may include relevant legal documents with a link to their official text and all relevant official information. Where possible, this should be available in languages commonly used by investors in the country. In addition, the publication of available statistics on screened and rejected FDI transactions may help potential investors to manage their expectations regarding the planned investments and expected FDI screening timeframes.

(iii) **Administrative efficiency:** the expansion of strategic sectors and transactions that fall under the scrutiny of the FDI screening mechanism can create significant administrative burden for the implementing authorities. Introducing information and communication channels and widening the scope of application of pre-authorization procedures allows to deal with less complex applications outside the lengthy and formal screening process and decrease the overall number of applications going through the filing procedures.

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