Acquisition- and ownership-related policies to safeguard essential security interests

Current and emerging trends, observed designs, and policy practice in 62 economies

Research note by the OECD Secretariat

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The present note is a preliminary summary of research carried out on acquisition- and ownership-related policies put in place to safeguard countries' essential security interests. In its current version, it has not yet been approved by the economies that participate in OECD-hosted policy dialogue on international investment policies. Its sole purpose is to inform interested parties about preliminary findings by the OECD Secretariat. The present document should not be reported as representing the official views of the OECD or of its Member countries. The opinions expressed and arguments employed are those of the authors. The report's content, including descriptions of mechanisms, is not intended to serve as an authoritative legal source

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OECD work on this policy area is available through the page http://oe.cd/natsec.

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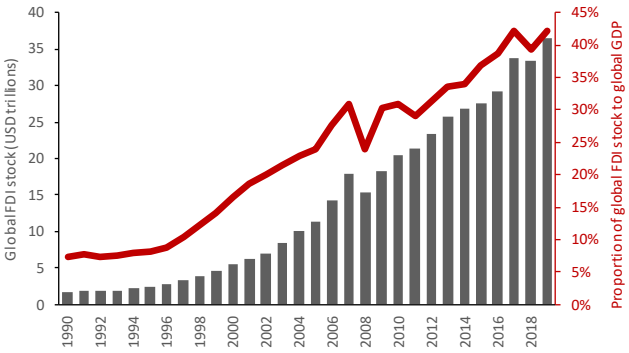
Table of contents

Figures

Context, purpose and structure of this report

1. Over the past decades, many countries have eliminated most barriers to trans-border capital flows and have abolished exceptions to national treatment for the acquisition, ownership, or operation of assets by foreigners. This openness has created economic opportunities for home and host economies and for enterprises. With these opportunities came occasional risks, including for the recipient country's essential security. International investment instruments and a number of investment treaties or investment chapters in preferential trade agreements explicitly recognise the State parties' rights to manage such risks.

2. Most countries have had some arrangement to review, assess, and address potential national security risks arising from specific foreign direct investments for decades. However, as international investment largely took place among allies and the ratio of FDI to GDP was much lower than it is today – only 7% in 1990 against around 40% now (see insert) – the amount of FDI covered by such mechanisms was likely relatively low. Correspondingly, the mechanisms enjoyed limited attention in most countries.



Source: IMF World Economic Outlook database; IMF Balance of Payments Database; OECD Foreign Direct Investment statistics database.

3. Today, many parameters are different: the proportion of world FDI to world GDP has increased six-fold, advanced and most transition economies have opened further to foreign capital, and the privatisation of infrastructure assets that many advanced economies carried out during the 1980s and 1990s created further potential for foreign investment.

4. By the mid-2000s, these open advanced economies were growing concerned about new prospective owners of certain assets or industries, as they feared that malicious owners could sabotage or withhold access to "critical infrastructure". Investments by Sovereign Wealth Funds (SWFs) and government-controlled investors (GCIs), then on the rise, contributed to these concerns, as these acquirers were often less transparent, and were suspected of being driven by political motivations.

5. In response to these concerns, a number of countries formulated policy responses. Internationally agreed standards of behaviour for SWFs – Sovereign Wealth Funds: Generally Accepted Principles and Practices (2008), better known as the "Santiago Principles" – and of recipient countries' policies, notably the OECD Guidance on Recipient Country Policies towards SWFs (2008), and the OECD Guidelines for Recipient Country Investment Policies relating to National Security (2009), as well as changing global economic conditions with the advent of the financial and economic crisis in 2008/2009 temporarily reduced attention to this policy area.

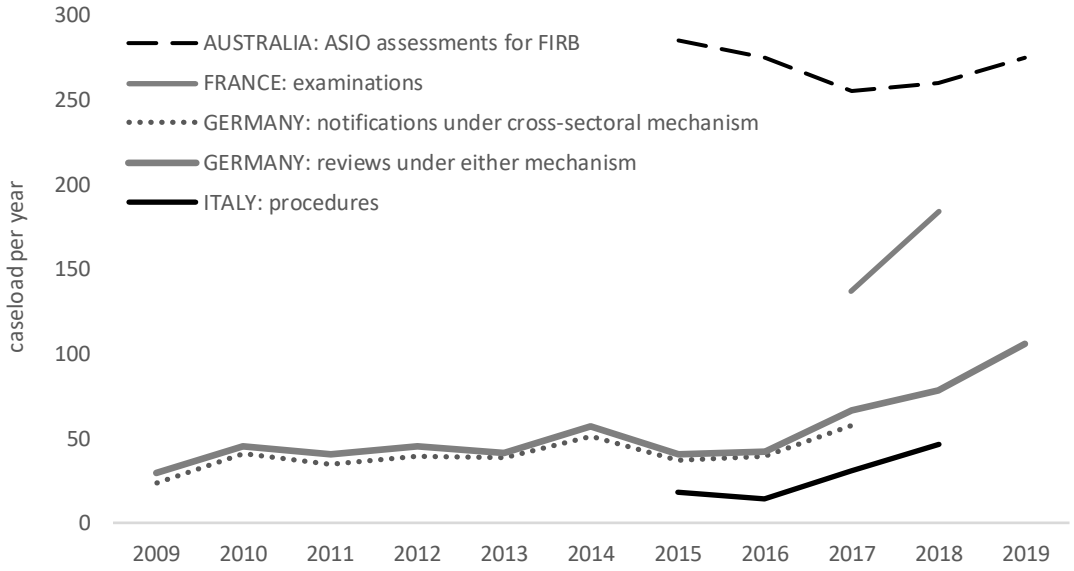
6. Soon after, around 2015, interest on the intersection of foreign investment and essential security interests began to rise again. Ever more countries began to complement, expand, or replace traditional authorisation requirements in sectors considered sensitive with new, more comprehensive policies that seek to address the security risks associated with inward investment. The reasons why this policy area has regained attention is – in part – reminiscent of the early 2000s:

- Concerns about investment originating in less than transparent economies and the involvement of foreign State-controlled entities.

- Concern that foreign ownership could threaten a State's security by limiting the diversity of suppliers of certain products or services, in addition to the more traditional risks of espionage and sabotage.
- Technological changes and the growing sensitivity and quantity of sensitive data.
- The more assertive stance of some countries in global economic and strategic competition.

7. Also, in recent years, the caseload under existing review mechanisms in some economies has grown – Figure 0.1 shows the evolution of reported cases in five economies for years in which data is publicly available.

Figure 0.1 Evolution of caseload under review mechanisms in selected economies 2009-2019



Note: Countries' statistics on caseload do not use the same indicators, partly due to differences in the design of their mechanisms. Trends shown as line-graphs reflect mandatory reviews or government-decisions to assess transactions, while evolutions represented in dotted graphs reflects investor-initiated procedures, in particular voluntary notifications. The data shown for Australia does not directly correspond to either of these groups.
Source: OECD based on information made public by governments of the mentioned countries.

8. In the face of uncertainty and risk, well-crafted policy responses are of paramount importance. In 2009, countries that had participated in the OECD-hosted dialogue on international investment policies adopted the OECD Guidelines for recipient country investment policies relating to national security. The adoption of these guidelines was preceded by intensive policy dialogue and analysis,[1] and summarised what the policy community at the time considered good policy in this area. The Guidelines have since served as a benchmark for policy design for the 39 governments[2] that have formally adhered to the instrument, as well as many other non-adherents.

[1] Some studies that supported and resulted from the conversations at the time are publicly available, including: Identification of foreign investors: A fact finding survey of investment review procedures, May 2010; Security-related Terms in International Investment Law and in National Security Strategies, May 2009; Accountability for Security-Related Investment Policies, November 2008; Transparency and Predictability for Investment Polices Addressing National Security Concerns: A Survey of Practices, May 2008; Proportionality of Security-Related Investment Instruments: A Survey of Practice, May 2008.

[2] All OECD Members as well as Argentina, Croatia and Kazakhstan have adhered to these Guidelines.

9. Under the OECD investment instruments and as a follow-up process to the Guidelines, the OECD-hosted international investment policy community continues to receive notifications of new policies,[3] and discussed a comparative study of countries' policies in this area in 2015.[4] That report covered 17 of the now 62 economies that are invited to participate in the OECD-hosted policy dialogue.[5] A still earlier comparative study of the policy area, conducted by the OECD policy community in 1984,[6] covered all 22 OECD Members at that time.

10. Much has changed and is still changing in this policy area. This report presents a comprehensive and up-to-date overview of the policies to manage acquisition- and ownership-related risk to essential security interests in the currently 62 economies that are invited to participate in OECD-hosted policy dialogue on this matter.

11. The report has several distinct objectives, to which two sections and an annex respond:[7]

- The first section describes characteristics of acquisition- and ownership-related policies to safeguard essential security interests and identify the contours of this class of arrangements in relation to adjacent policy areas. It summarises current and emerging trends in this policy area as well as challenges for policy design and implementation, and set out reforms and future initiatives that could help respond to these challenges.
- The second section deconstructs acquisition- and ownership-related mechanisms to identify their functional components. It identifies components of mechanisms, their composition to policies, and rationales that underlie the choices that countries have made.[8] This section also offers insights into the implications of certain designs on a given mechanism's outcomes.
- The Annex presents information on policies organised by jurisdiction. It identifies the mechanisms and policies of each of the 62 jurisdictions covered by this report, provides

[3] Notified measures are recorded in the List of measures reported for transparency under the National Treatment instrument, which forms part of the OECD Declaration on International Investment and Multinational Enterprises. The notifications are available at http://oe.cd/natsec.

[4] The document is publicly available as Frédéric WEHRLÉ/Joachim POHL, "*Investment Policies Related to National Security: A Survey of Country Practices*", OECD Working Paper on International Investment 2016/02.

[5] The invited economies include: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay, and the European Union.

[6] The survey, issued as DAFFE/IME/1984.6, underpinned the subsequent adoption of the Recommendation of the Council on Member Country Measures concerning National Treatment of Foreign-Controlled Enterprises in OECD Member Countries and Based on Considerations of Public Order and Essential Security Interest on 16 July 1986, one of the first OECD legal instruments on this policy area.

[7] The sections and annex are self-contained and can be understood independently from each other.

[8] This report uses the term "*mechanism*" when it refers to a self-contained instrument to manage acquisition- and ownership-related risk; the term "*policy*" is used for the aggregate of individual mechanisms in a given country that complement or substitute each other. Most countries aggregate several mechanisms to a policy.

information on their legislative basis, their historical development, scope, procedural design, and – where available – information on their implementation and outcomes.[9]

12. The information presented in this report is drawn from notifications required under certain OECD instruments,[10] information made publicly available by governments, and other material provided by governmental or non-governmental sources.[11] In line with the spirit and text of the OECD investment instruments, the determination of the purpose of a given policy or mechanism – to safeguard the country's essential security interests – is left to governments themselves. Where this report identifies a policy or mechanism as serving this particular purpose, it relies either on the stated purpose of the legislation or on the explicit classification that governments themselves have given when notifying the policy to the OECD pursuant to their obligations under the National Treatment instrument.[12]

13. This report seeks to describe mechanisms and policies that countries have established. No judgement on their adequacy is implied in the fact that their existence is being reported. Furthermore, the findings and interpretations presented in this note do not necessarily reflect the

[9] As with all material contained in this report, governments have not yet had – but will have – an opportunity to clarify and correct factual information.

[10] Adherents to the OECD Declaration on International Investment and Multinational Enterprises are required to notify the OECD of their investment policies related to national security, among others. The policies are recorded in the List of measures reported for transparency, which is annexed by country to the National Treatment instrument. Adherents to the OECD Codes of Liberalisation are required to notify the OECD of measures that have a bearing on the Codes; while this information is available to the OECD Secretariat and Members, it is not always immediately available to the public. Further information was drawn from the policy monitoring that the Secretariat carries out, as well as from sources that the OECD Secretariat has consulted in its research.

[11] This document includes a great number of references and hyperlinks to allow the reader to draw on more specific information, access legislation or other sources that were used to compile this report. Links and references are made to legislation published by governments, or alternatively to notifications of measures to the OECD where these contain legislative text. Target resources may be in one of the official languages of the OECD or in a language used in the country that it relates to. Countries make legislation available in different ways; some make consolidated texts available, in addition to historical versions. The current document links to texts where possible and refers either to current consolidated legislation or to historical text, depending on the purpose of the reference. External links and legislation are subject to rapid change, and not all links may continue to point to the intended resource, or legislation may have changed since the report was finalised.

[12] When OECD Members and Adherents to the OECD Declaration on International Investment and Multinational Enterprises notify any measures having a bearing on the National Treatment instrument (which is part of the Declaration), they need to indicate the policy purpose of the measure: *Exceptions* to national treatment are notified and recorded in a List of Exceptions to National Treatment, while measures taken to protect their national security are listed in the List of measures reported for transparency. This distinction results from the fact that, as the OECD Committee on International Investment and Multinational Enterprises put it in 1985, "*restrictions applied on the grounds of "public order" and essential security interests" were not to be considered as "exceptions" to national treatment, which are subject to a formal notification procedure* [note: the formal notification procedure was later extended to also cover measures taken to safeguard essential security interests]. *Rather, they are considered as inherent limitations of the commitment of Member countries to accord National Treatment to foreign-controlled enterprises.*" (DAFFE/IME/84.6 (1st Revision), paragraph 7). The mechanism associated with the OECD Codes of Liberalisation follows slightly different rules.

views of the OECD, its Member countries or non-Members that participate in OECD-hosted policy dialogue on international investment policy.

14. Developing a complete and static picture of a very dynamic policy area in which much information is kept confidential comes with particular challenges. While all reasonable care has been taken in the preparation of this report, available information may not always be complete and up-to-date and policy documents referred to and linked in this paper may no longer be available at the indicated location. In addition, while special care has been taken to identify authoritative sources, some information is based on reports by third parties, in particular media sources in certain cases; these quotes do not represent endorsements by the OECD Secretariat or Member and non-Member countries, but merely document the context in which certain information has reached the public domain. The report's content, including the descriptions of mechanisms, is not intended to serve as an authoritative legal source.

1. Current and emerging trends

15. Governments manage a great number of risks to essential security interests. They have a broad set of instruments at hand to fulfil this role. One of these instruments is the ability to restrict or condition the access of certain individuals to certain assets, in particular enterprises or parts thereof, through acquisition- or ownership controls. These restrictions, when taken specifically to safeguard essential security interests, are the subject of this report. Section 1.1 clarifies in greater detail the defining features of acquisition- and ownership-related policies motivated by concerns about essential security interests as understood for the purpose of this report.

16. Section 1.2 explores the diversity of approaches that are observed in today's policy practice in the 62 economies covered by this report. No uniform approach has yet emerged on how such policies should be scoped and designed. As of mid-May 2020, less than half of the 62 advanced and emerging economies covered by this report had developed detailed and operational mechanism, and many countries continue to rely on often decades-old administrative authorisation requirements or similar instruments that apply to a few narrow sectors.

17. Those countries that have advanced mechanisms to manage acquisition- and ownership-related risks have taken different approaches, chosen different criteria to identify risk, formulated policy and procedures with different level of detail, and have allocated vastly different institutional and financial resources to the implementation of their mechanisms. Even recent reforms or features of recently introduced mechanisms have not levelled these differences or brought about a degree of convergence in approaches that the existence of agreed policy principles, peer-learning processes, and available comparative information on policies could suggest. Despite this diversity, four trends emerge: Review mechanisms are geared towards routine implementation, with responsibilities and procedures set out more clearly; other indicators document the maturing of the policy area more generally; continuous risk-management complements one-time reviews at the time of an acquisition; and State-ownership as a means to manage risk attracts renewed interest after having broadly fallen out of fashion in the 1990s (section 1.3).

18. In a growing subset of countries, the appreciation of which assets and transaction types are sensitive appears to converge. While earlier policies had reflected concerns for essential security risks associated mainly with defence production, and later with critical infrastructure, many countries are including include advanced technology and personal data in the scope of sensitive assets. As transmission channels through which threats are thought to materialise have become more diverse, new transaction types are brought under the umbrella of acquisition- and ownership-related policies to manage essential security risk (section 1.4).

19. As part of a broader awareness and understanding of risks and types of exposure, some countries are recognising that non-ownership transactions may create exposure similar to that generated by ownership relations. Leases, procurement, use of certain equipment in critical infrastructure, and international research cooperation are among these types of economic interaction. Against the background of these new scenarios, acquisition- or ownership-focused policies may increasingly appear as only a partial solution to a broader challenge. While the understanding of these issues is growing, the need for and design of adequate policy responses needs to be explored further (section 1.5).

20. The proliferation of acquisition- and ownership-related mechanisms, their evolving design, and their more assertive implementation are likely to increase interaction between these mechanisms and rules and obligations under domestic and international law. These interactions may influence and occasionally constrain design and implementation of these policies, as set out in section 1.6.

21. Despite adaptable policies and continual reform, implementation of acquisition- and ownership-related policies has brought to light some practical challenges. Even flexible instruments may not necessarily lead to desirable outcomes in all cases, as examples in section 1.7 show.

22. The growing number of countries that operate review mechanisms, the expanding scope of their application, and the complexity of value chains spanning ever more jurisdictions, may increase the number of reviews that a single transaction needs to pass in individual jurisdictions significantly. This could complicate major transactions further and slow the functioning of processes that multinational enterprises traditionally rely on. Alignment of criteria and procedures and cooperation or mutual recognition among review authorities may potentially offer remedies, following experience and practice in other policy areas (section 1.8).

1.1. Constituting elements of acquisition- and ownership-related policies to manage risks for essential security interests

23. Almost all advanced and transition-economies have some arrangement to assess and address potential national security risks arising from specific foreign direct investments. Despite their long history and prevalence, the existence of these arrangements has remained almost invisible for decades as "investment policies related to national security". They included authorisation requirements, licensing procedures reserved to domestic or majority-domestic owners, and similar arrangements, most of which are limited to a few specified sectors.[13]

24. While these policy arrangements serve the same purpose – to address security risks associated with the acquisition or ownership of sensitive assets – they exhibit very different features. This diversity has slowed the development of a common understanding of their contours, categories and defining features. The recent emergence of new designs with similar purposes only further adds to this diversity.

25. Up to now, acquisition-triggered review mechanisms, commonly identified as "investment policies related to national security", have attracted most of the attention and have eclipsed a sizable group of arrangements that seek to achieve similar results, such as more mundane authorisation requirements for certain acquisitions or greenfield projects, licensing requirements that are inaccessible to foreign-controlled entities, and arrangements that relate to ownership or forms of control that are not conveyed by ownership. These latter mechanisms, however, share some of the features and objectives of review mechanisms.

26. Further notional diversity stems from the legislative context and authorities that are involved in implementation: For example, some countries have a standalone provision and corresponding institutional arrangements for reviews for national security purposes. Others address the issue as part of competition reviews under "public-interest" tests. Such embedded reviews – while functionally equivalent to investment reviews – are not uniformly classified: The United Kingdom's mechanism is widely considered – and has been notified to the OECD – as an investment policy related to national security. Similarly, the Federal Antimonopoly Service (FAS) of the Russian Federation, the country's competition authority, is in charge of implementing the country's rules on control of foreign ownership. The material ruleset related to the review with respect to essential security aspects in the United Kingdom is partly combined with the merger review regime, while the respective ruleset in the Russian Federation is distinct, and only

[13] An early survey by the OECD Committee on International Investment and Multinational Enterprises in 1985, DAFFE/IME/84.6, documents, in a historical snapshot, the design and relative frequency of these policies in the mid-1980s.

institutional arrangements are shared with the merger review mechanisms. Other countries' public interest test in competition-focused merger reviews do not have a separate ruleset related to essential security interest at all and are not consistently recognised as belonging to this category.[14]

27. New, nationality-neutral policies that subject acquisitions and ownership of certain sensitive assets to controls regardless of the nationality of the acquirer are seen in recent updates or new policies in some countries. Such nationality-neural policies are not often associated with acquisition- or ownership related measures but are rather associated with States' general regulatory powers.

28. A new group of mechanisms to manage risk associated with the *ownership* of certain assets that are inherently sensitive has just emerged. These mechanisms authorise the authorities to intervene in an ongoing ownership relationship; they are not operating in relation to an acquisition but at any time during an ownership relation. Like acquisition-related policies, they consider the relationship between a specified owner and a specified sensitive asset.

29. This report adopts a broad conception of acquisition- and ownership-related mechanisms to manage risks to essential security interests, following the notions set out in the OECD Investment instruments and the rationale of related notifications that governments have made under these instruments. It encompasses all arrangements

- whose primary *purpose* is to identify and address risks to essential security interests,
- where the risk is associated with the *acquisition* or *ownership* of an *asset*; and
- that address the risk through a government intervention in a transaction between private entities.

30. Governments use many other risk-management tools and mechanisms as substitutes or complements to acquisition- and ownership-related mechanisms. These include for example:

- licensing procedures, which, unlike acquisition- and ownership-related policies, regulate the *use* rather than the ownership of an asset;
- concessions and attribution of similar use rights in areas where governments hold monopolies and that do *not involve ownership*;[15]
- sales of assets in which the *government is the seller*, and risk can be managed by choice of the acquirer rather than an intervention in processes between two private entities (e.g. privatisation of State-owned assets);[16]
- acquisitions of assets or services in which the *government is the acquirer* (public procurement) and the government can manage risk through choice of its suppliers; and

[14] Analysis and country examples of public-interest tests in competition reviews are available at http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm, and in particular in Despina PACHNOU (2016), "*Public interest considerations in merger control – Background Paper by the Secretariat*", OECD, DAF/COMP/WP3(2016)3. The annex of this note provides further details on the institutional arrangements and rulesets in countries that address essential security risk in some relation to merger reviews or related institutional arrangements.

[15] In some countries, entire sectors operate on the bases of concessions and similar arrangements. In Israel, for example, over 90% of the entire landmass are State-managed, and real estate is attributed by the State for long periods rather than sold. In Bulgaria, public monopolies exist in areas of the economy, in particular in relation to infrastructure and related services, and private actors are granted concessions.

[16] The OECD Working Party on State-owned Enterprises and Privatisation Practices (WP SOPP) delivers analytical and normative work on this area.

- State ownership or control, including control ensured through special ("golden") shares, where the State can control decisions and risks as if it was a private actor.

31. None of these five mechanisms and instruments are identified as acquisition- and ownership-related policies to safeguard essential security interests for the purpose of this report. They are however mentioned in certain sections of this report as they interact, substitute or complement acquisition- and ownership-related mechanisms.

32. The choice to exclude these areas from the scope of the present study does not suggest that the excluded operations are irrelevant or inferior for safeguarding essential security interests now or in the future.[17] Rather, this choice has been made to focus the analysis on a group of policies that are currently of particular interest to many governments.

33. In rare cases, elements of acquisition- and ownership-related mechanisms and other instruments are almost inseparable in one mechanism. An economic activity may be very closely related to the control over an asset *and* the operation is subject to a licensing procedure – such as the operation of a mine, of a nuclear power plant or the establishment of a media or broadcasting enterprise. In these cases, where a license is required and no other reasonable use of the asset is possible beyond the activity subject to the license, a given government can manage the acquisition *through* the licensing procedure without resorting to an acquisition-related policy. Such situations are not currently the focus of policy debate and are therefore also excluded from the scope of the present study.

34. Most countries' policies are composed of several distinct mechanisms which co-exist and complement each other. This report refers to a "*mechanism*" as a contained set of rules to manage acquisition- or ownership-related risk. The term "*policy*" is used for the set of mechanisms that a given jurisdiction has put in place to manage such risk.[18]

1.2. Views slowly converge as to whether acquisition- or ownership-related risk needs to be managed

35. Most countries covered by this survey have had policies to manage some narrowly defined risks associated with acquisition or ownership in their legislation for many decades. A few countries enhanced their mechanisms in the first decade of this century, but in many countries, design and implementation practice suggest moderate attention to these risks until recently. Since around mid-2017, this policy area has attracted much broader debate regarding the merit, scope and design in many more countries, which have led a significant number of countries to enact comprehensive mechanisms for the first time. Simultaneously, even more countries made significant efforts to enhance their existing mechanisms.

36. Despite the swift increase in the number of countries that establish or strengthen mechanisms to manage risk to their essential security interests, not all countries currently consider acquisition- and ownership-related policies necessary or appropriate in their specific situation: transition economies in Asia and the Americas have so far largely abstained from bolstering their instruments to protect their essential security interests from threats induced by acquisition and

[17] The of scope made for the framing used here is hence narrower than the scope of rules under the OECD National Treatment instrument and of notifications recorded in the *List of Measures Reported for Transparency* under the National Treatment instrument. The National Treatment instrument also covers other instruments that are based on essential security considerations such as licenses, rules on corporate organisation, on government purchases and official aids and subsidies, among others.

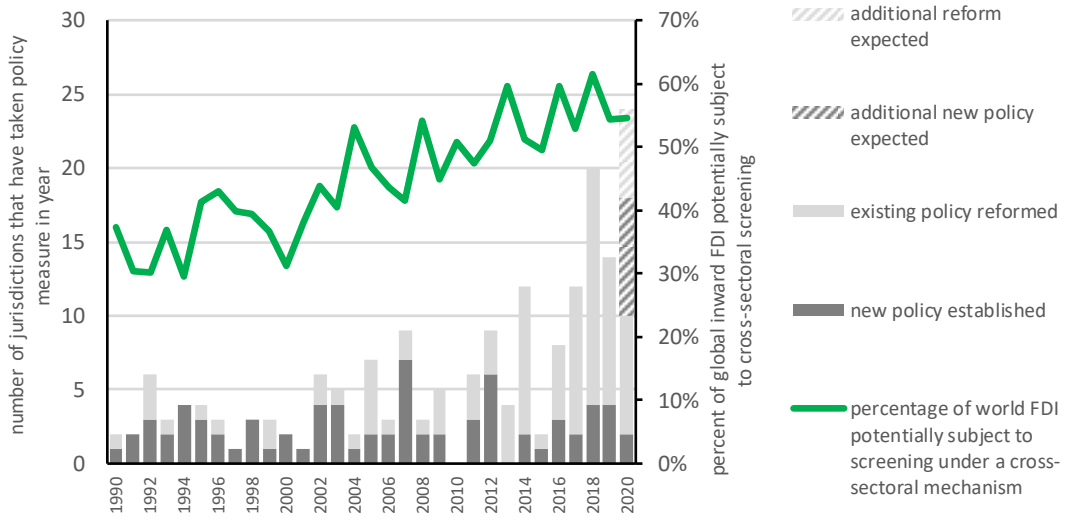
[18] See for more details on the composition of mechanisms to policies below section 2.9.1.

ownership of sensitive assets. Some small, open, advanced economies – including Belgium, Ireland, Luxembourg, and Switzerland – maintain that such policies can be focused narrowly on single sectors or are not currently required.[19]

37. In mid-May 2020, 77% of the 62 jurisdictions covered by this report had at least some mechanism to manage acquisition- or ownership-related risk to essential security interests in place. Less than half (44%) of jurisdictions, however, were operating developed acquisition-control mechanisms at that time or were expected to shortly begin operating such mechanisms.[20]

38. In most recent years, around 55% to 65% of global FDI-inflows went into countries that apply cross-sectoral review FDI processes – twice the share of global FDI inflows that were potentially subject to security-motivated screening for most of the 1990s (Figure 1.1).[21] The number of countries introducing such policies for the first time had been moderate until recently, and most policy activity, including reforms of existing mechanisms, was concentrated in a few countries that already had comprehensive policies.

Figure 1.1 Evolution of acquisition-related policies to manage essential security interest since 1990



Note: Based on the currently 62 economies that are invited to the OECD-hosted dialogue on international investment policies. While many mechanisms apply across sectors, only a fraction of inward investment is normally subjected to review, so the green graph should not be read as to represent the proportion of FDI that is *actually* subject to screening as a share of total FDI. In turn, the green graph does *not* take into account how much FDI that is potentially subject to review in countries that only review investment in certain sectors. These choices are driven by the absence of sufficiently fine-grained FDI data across the economies covered by the sample
Source: OECD. FDI data based on OECD FDI database and *OECD: FDI in Figures*. Some data for 2020 are based on estimates and projections.

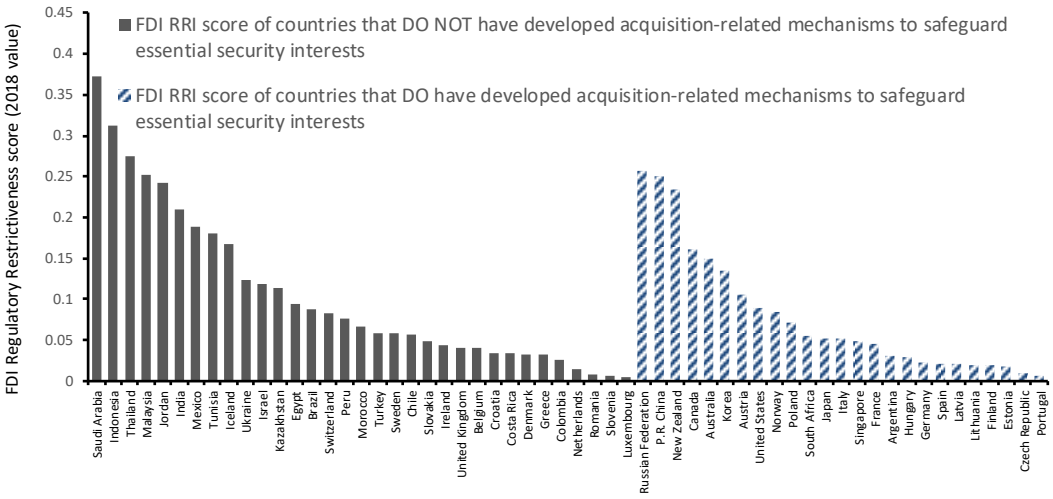
19 In mid-2019, the Netherlands for instance were preparing legislation to establish an acquisition-related policy exclusively for the telecommunications-sector. In Belgium, only Flanders has established, in late 2018, an acquisition-related policy with a relatively narrow scope of application; no such mechanism existed at federal level as of end April 2020. Switzerland decided in early 2019 that at the present time, acquisition-related policies did not appear necessary in the Swiss context.

20 On the notion of "developed", or "2nd generation" mechanism, see below section 1.3.1.

21 The share of total flows that are subject to review mechanisms or other restrictions in place to safeguard essential security risks cannot be determined given the absence of sufficiently fine-grained FDI data for individual sectors.

39. There is no obvious factor that would explain why countries have made different assessments of the merits of acquisition- and ownership-related policies and why this diversity of views persists until today.[22] In particular, there is no obvious link between the degree of openness to FDI and the presence of a developed mechanism to manage acquisition- or ownership-related risk: open economies do not seem to perceive a greater need for a mechanism of last-resort to protect their essential security interests. Figure 1.2 shows the restrictiveness to FDI – as measured by the OECD's FDI Regulatory Restrictiveness Index[23] – for 55 economies covered by this report for which the FDI RRI has been assessed and that do or do not operate a developed mechanism to manage risk associated with acquisition or ownership of certain assets.[24]

Figure 1.2. FDI Regulatory Restrictiveness and presence of developed acquisition-related mechanism to safeguard essential security interests



Note: No FDI RRI scores are yet available for Bulgaria, Paraguay and the European Union. The score for Singapore is provisional. Contains projections for entry into force of new mechanisms in 2020.
Source: OECD.

40. A time profile that plots the year of introduction of the first developed review mechanisms in relation to the regulatory restrictiveness score does also not offer a clear indication on what factors have influenced the timing of introduction of such policies (Figure 1.3). The data may

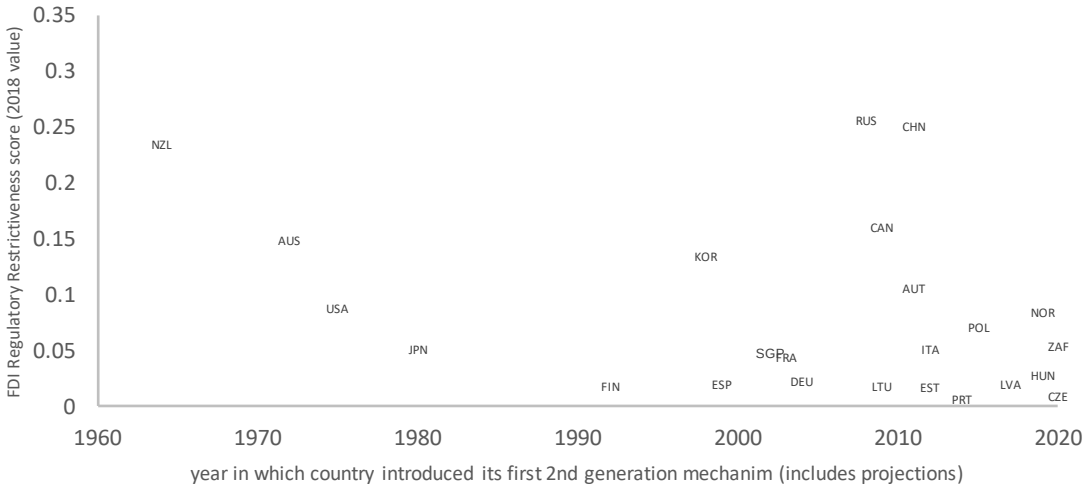
22 This observation has changed little over time: Thirty-five years ago, when the OECD Committee on International Investment and Multinational Enterprises carried out a comparative assessment of mechanisms and policies in this area, it found "*discrepancies between countries that had policies based on public order and essential security interests on the one hand, and those countries that have similar measures based on other grounds, or with no such measures*". It noted that this "*raises the question whether the security needs and the exercise of police powers of Member countries are so different from one another that some countries find a need to restrict foreign-controlled enterprises in protecting their security, […] while others do not*." (DAFFE/IME/84.6 (1st Revision), paragraph 12).

23 Information about the FDI-RRI, its methodology and scores for individual countries and sectors is available at www.oecd.org/investment/fdiindex.htm. Mechanisms directed at safeguarding essential security interests are not considered for the purpose of calculating the FDI-RRI.

24 Jurisdictions for which no FDI-RRI score is currently available but that are covered by the present report are: Bulgaria, Paraguay, Uruguay, and the European Union. Policies that consist of narrow sectoral equity caps are omitted from the assessment.

suggest that countries that have a generally lower restrictiveness score have introduced such mechanisms later, but a host of exceptions make the observation uncertain.

Figure 1.3. FDI Regulatory Restrictiveness score and time of first introduction of developed acquisition-related mechanisms to safeguard essential security interests



Note: No FDI RRI scores are yet available for Bulgaria, Paraguay, Uruguay and the European Union; the score for Singapore is provisional. Data for 2020 include projections. Policy related to Belgium only applies to the Region of Flanders. In the absence of a long time-series of the Restrictiveness Index, the graph shows the *current* score even for policies that were introduced in the past. Introduction dates for some mechanisms are based on projections.
Source: OECD.

41. Three factors have likely contributed to explaining some countries' policy choices: trigger events have contributed to their introduction, while government ownership of sensitive assets and the desire to signal openness to foreign capital are factors that have slowed their introduction.

42. Some governments continue to own or control assets in sectors that are widely considered sensitive. Given that these assets are not on the market or that only non-controlling stakes can be acquired, there may be no need to include them in the scope of acquisition- or ownership mechanisms. Some countries are known to have introduced policies in the context of identified trigger-events;[25] others introduced such policies when they had to abolish traditional mechanisms such as golden-shares arrangements that may fulfil similar functions;[26] and still others are likely to have been motivated by geographical exposure, or demographic particularities and resulting uncertainty about allegiances. Fiscal stress or the desire to signal openness to foreign capital is held to have motivated reticence to the introduction of such policies in some countries.

25 A smaller European country may serve as an example where the government has sought to halt the takeover of an enterprise by an organised-crime related entity but found no legal means to do so. A different country, the Netherlands, was considering, in 2019, a policy related to the telecommunications sector reportedly following the takeover bid, in 2013, of Dutch company *KPN* by a Mexican enterprise.

26 Italy for instance introduced policies in 2012 after the Court of Justice of the European Union had found Italy's "golden shares" arrangements in certain companies to be in contravention of European Union law (*CJEU judgement of 26 March 2009, Case C-326/07, Commission v. Italy*).

1.3. While diversity dominates, four transformational trends take root

43. Ninety-three distinct mechanisms to safeguard essential security interests have been identified to be in operation as of mid-May 2020 in the 62 jurisdictions surveyed for this report. These mechanisms feature almost as many different approaches in structure, scope, design, detail and allocated budget; they also generate widely different outcomes as measured by caseload and content. They reflect different perceptions on whether, where and under which conditions risk is concentrated and how management of this risk is ranked in relation to other policy objectives.

44. The diversity in approaches has an important upside for policy design: it offers an opportunity to compare, assess or estimate the likely effectiveness, and allows countries that wish to introduce new policies or reform existing ones to learn from experiences of others.

45. The diversity is also somewhat surprising, given the recognition that such policies have enjoyed in international law for decades,[27] ample opportunities for multilateral exchange on the subject,[28] widely available information,[29] and a growing body of comparative studies on the subject, and the newness and rather frequent reform of policies in several countries.

46. Despite this diversity, four trends have been observed to proliferate:

- Policies are now on average more detailed, sophisticated, and contain the necessary operational rules on conditions, procedures, responsibilities, sanctions, scope for mitigation measures, transparency, reporting requirements and so forth;
- The policy area as a whole appears to be maturing, albeit at a different pace in each country;
- In addition to controls that operate in an acquisition-context, some countries establish mechanisms that allow for continuous management of sensitive ownership positions with the purpose of safeguarding essential security interests; and
- State-ownership enjoys renewed interest as an instrument to manage ownership-related exposure.

1.3.1. Designs become detailed and sophisticated

47. The degree of detail of designs and the degree to which they can readily be implemented by the authorities places individual mechanisms on a spectrum. Broadly speaking, observed approaches can be distinguished to fall into more rudimentary *first generation* mechanisms and more developed *second generation* policies:

- *First generation policies*, as this report will refer to them, require a government authorisation prior to an acquisition of specific assets or assets in a specified narrow sector, or impose fixed ownership caps with the intention to reduce risk to a given

[27] The OECD Codes of Liberalisation, adopted in 1961, contain a self-judging exception for national security in relation to cross-border capital flows in Articles 3. Many investment treaties likewise contain similar carve-outs.

[28] The OECD launched its Freedom of Investment Roundtables, initially exclusively dedicated to this policy area, in June 2006.

[29] Notifications of new policies are discussed at the Freedom of Investment Roundtables – and publicly available in reports on the discussions at the Roundtables – are available on a dedicated website, and are set out in the *List of Measures Reported for Transparency* under the National Treatment instrument.

country's essential security interests. In some countries, constitutional law allows restrictions on certain transactions in principle, but no lower-ranking law establishes actual rules on how this authority is to be exercised. Where such rules exist, they are relatively rudimentary, mechanical and offer little guidance on responsibilities, criteria or procedures. Many of these policies are rarely activated, if at all.

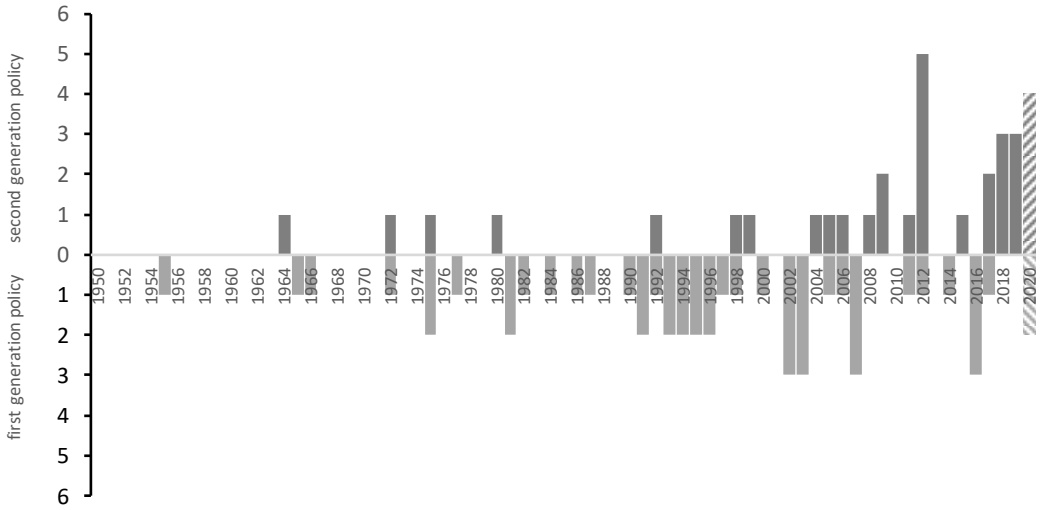
- *Second generation* policies, as this report will refer to them, are much more elaborate. They are designed for routine operation by a dedicated bureaucracy and contain the necessary operational rules on conditions, procedures, responsibilities, sanctions, scope for mitigation measures, costs and fees, transparency and reporting requirements and so forth. Second generation policies also come with explicit budgetary and institutional resources that confirm the intention of routine operation and implementation. Some countries have heavily resourced institutional arrangements that involve the intelligence community, rely on international cooperation, and have multi-million USD annual budgets. Different budget allocations correspond by and large to caseloads –several hundred transactions per year in some countries, and few or no transactions in others – and the presence and design of compliance mechanisms.[30]

48. The classification of policies into first- and second-generation policies does not imply any judgement on the merits of their design. Also, the designation does not suggest that certain policies are necessarily old. At times, the classification of a policy as first or second generation policy may not be obvious, and as policies evolve over time, reforms may also change a given mechanisms classification. Also, many countries operate first and second generation mechanisms in parallel.

49. When the 93 distinct acquisition- and ownership-related mechanisms that have been identified to be in force in mid-May 2020 are classified as "first" or "second" generation, newly introduced policies tend to be second generation policies since the mid-2000s; such second-generation policies were rare at the beginning of the 1990s. New first-generation policies still come into effect, but are less frequently used in recent years (Figure 1.4).

[30] See for details on the budget allocations below section 2.7 and, for detailed information on caseload in individual countries, Figure 0.1 as well as individual country sections in the Annex.

Figure 1.4. Introduction of first- and second-generation policies 1960-2019 – number of new policies per year and trend in the repartition among types



Note: Includes newly introduced policies in given year as well as reforms of existing policies if they lead to a change of category in that year (projections for 2020).
Source: OECD.

1.3.2. The policy area matures, albeit not uniformly

50. The growing regulatory depth of many mechanisms in this policy area is but one sign of its coming of age: specified administrative resources, specific budgets dedicated to the implementation of acquisition-reviews, and growing caseloads are further testimony that the policy area is being established as a stand-alone discipline in the management of international investment and security risks.

51. This process is not uniform, however. Many older mechanisms remain unreformed and thus retain their typically embryonic state of regulation. So far, few attempts to bring these rules in line with the current practice of more specific, predictable, and detailed regulation have been observed.

52. A further indication of the heterogeneous process of maturing of the policy area is the dominance of the executive branch in this policy area in most countries. Where rules and procedures have reached a significant regulatory depth, it has often been the executive that has established these rules, while legislation remains limited despite the significance of economic and security implications of the policy area. The judiciary has likewise not played a significant role in shaping or interpreting the rules to the extent that is observed in other areas of administrative law. Only a single case related to this policy area appears to have ever reached a court worldwide and was promptly settled.

1.3.3. Continuous ownership-risk management complements one-time acquisition reviews

53. Policies to manage risks associated with ownership of specific assets are traditionally geared at the moment of the acquisition of an asset or, more rarely, at the moment of the establishment of a new enterprise. Such acquisition-triggered policies are based on the assumption that a change of asset ownership can augment the associated security risk. Other types of changes that may alter the impact of asset ownership on security, in particular factual or circumstantial

changes or the composition of the owner, are sometimes not addressed by these policies, whether intentionally or unintentionally.

54. Acquisition-triggered policies create a one-off regulatory event: the assessment of whether an investment proposal threatens essential security interests occurs at the moment of an acquisition.[31] Aside from this regulatory gate-keeping, only two traditional instruments are used to address ownership-related risk that arises outside acquisition contexts: expropriations in the public interest, and in some constellations, sectoral ownership caps. However, these instruments have limitations. Both measures are rigid, and expropriating property in the public interest is potentially costly. Moreover, expropriation may leave the government with an asset that it does not wish to own.

55. Amidst heightened awareness of risk in some jurisdictions and recent concerns associated with foreign ownership of certain enterprises, some countries have begun to diversify and expand their risk-management instruments to gain a longer-term or even permanent ability to manage ownership-related risk. So far, such measures remain rare, but their broader adoption would herald transformational change in how governments approach risk that can occasionally result from the ownership or control of sensitive assets by certain individuals. There are four avenues by which governments have expanded the temporal scope of their risk management policies in this area: Explicit, dedicated legislation that permits open-ended intervention post-acquisition or post-establishment and independent of any earlier decision at entry;

- "Golden shares" that allow for governmental control and intervention in public companies through private-law instruments;
- *Ad hoc* agreements negotiated in the context of acquisition-reviews or conditions imposed in this context to mitigate the risks associated with the initially proposed transaction are used to manage risk associated with sensitive ownership relations over time; and
- Transactions that were not notified when they closed under "voluntary review" mechanisms in the past are being subjected to review.

57. Explicit ownership-related policies that allow for the management of essential-security risk stemming from the ownership of telecom and other critical infrastructure assets, outside the context of an acquisition, were spearheaded by Australia in 2018.[32] The application of these mechanisms is independent of any acquisition-related review and hence allows intervention, regardless of whether an acquisition-review of the asset and owner has taken place.

58. "*Golden shares*" have been a traditional means in some countries to ensure government influence over certain companies, especially after the privatisation of infrastructure assets. These shares typically grant voting rights in an enterprise beyond the proportion of invested capital and hence allow governments to exert control without committing significant capital. Many countries have abolished their golden share arrangements for various reasons in the 1990s, but in early 2019, as part of wider reforms, France expanded an existing "golden share" arrangement as a tool to manage essential security risks on a permanent basis – as an "owner".[33] A major technology

31 Some mechanisms allow the authorities to review acquisitions that have occurred in the past where they have not been subject to a review at that time. While these reviews do not take place "at the moment of an acquisition", they are nonetheless related to the acquisition and remain a one-off regulatory event.

32 The policies are established by the Security of Critical Infrastructure Act 2018, in force since 11 July 2018, and the Telecommunications and Other Legislation Amendment Act 2017, which has been in force since 18 September 2018. Other countries may have similar regulatory legislation, but are not known to have integrated responses to essential security interests.

33 Reforms that broaden the application of this mechanism were introduced through Article 154 of the Loi PACTE in 2019. Since the reform, "golden shares" can be established in two scenarios: Either,

company in the Russian Federation has likewise agreed to an *ad hoc* golden share arrangement in late 2019 to assuage Russian government concerns about essential security interests associated with the operation of the company and foreign ownership therein.[34]

59. Mitigation measures – conditions or obligations that are negotiated or imposed on the investor in the context of an acquisition – appear to be gaining further ground as an avenue to establish long-term or open-ended *ad hoc* control over the security-risks associated with individual assets. While the purpose of mitigation measures is to allow transactions to the extent possible, some arrangements run over longer periods and may open the possibility for the authorities to intervene on the transaction years after it has been reviewed and implemented.[35] As mitigation measures are often at most[36] circumscribed in legislation by their purpose rather than by their means, scope or options, they offer the possibility to agree on transaction-specific arrangements.

60. The variety of possibilities and practices, the frequency with which they are used, and the types of obligations considered for mitigation measures has been revealed recently and retrospectively in the context of annual reports on the implementation of review mechanisms, such as in Canada and the United States.[37] France has signalled greater attention to this area through recent legislative reforms.[38] Mitigation measures are understood to be used in many more countries in the context of acquisition-reviews, but only limited information on their use or content is publicly available. Japan has introduced, through a reform to come into force in mid-

as previously, they can be created in the context of a divestment of an asset by the State, or, as now added, when two conditions are present: The asset operates in a sector subject to acquisition-related policies to safeguard France's essential security interests as listed in article L. 151-3 du Code monétaire et financier; *and* the company is mentioned in the annex of the Decree 2004-963 (as amended in March 2019) or was held, on 1 January 2018, to at least 5% by the Banque Publique d'Investissement (Bpifrance) or its subsidiaries or by funds under its management.

34 "*Yandex Board Recommends Targeted Amendments to Corporate Governance Structure*", Yandex press release, 18 November 2019. The "priority share", held by a newly created "Public Interest Foundation" directed mainly by individuals chosen by Russian government linked institutions and under Russian Federation jurisdiction provides decision on certain governance decisions that are deemed sensitive to the public interest, including agreements with certain foreigners. The amendments to the corporate governance structure led to a withdrawal of a legislative proposal to limit the foreign ownership of strategically important internet companies to 20%.

35 Further details are available in section 2.2.1.

36 Several countries that have recently introduced new policies or reformed existing policies do not mention the possibility of mitigation measures in their laws and regulation, e.g. Hungary (2019). The United States is an example of the opposite approach: over time, United States laws feature progressively detailed provisions regarding the conditions for the negotiation or imposition of mitigation measures, on follow-up, phasing-out of conditions, sanctions for non-respect etc., which were further detailed in the reform in 2018 and the related changes in the review framework (50 USC 4565: Authority to review certain mergers, acquisitions, and takeovers).

37 See for instance the *Annual Report on the Investment Canada Act 2017-2018*, p.22, which lists types of measures that were "considered or imposed" and the *Committee on Foreign Investment in the United States Annual Report to Congress, Calendar Year 2015*, p.21, which lists only an illustrative subset of measures that were "negotiated and adopted in 2015". For Australia, the FIRB annual report 2017/2018, p.54, mentions that external auditors are used to monitor compliance of foreign investors with conditions.

38 France for instance has introduced an explicit clause on the revision of conditions introduced in the context of an acquisition review in the context of the "Loi PACTE" in 2019 (Article 152); it had practiced such amendments to mitigation measures before this introduction, however.

2020, typified mitigation measures – acquirers make undertakings on board membership or voting behaviour – that allow these acquirers to benefit from procedural advantages.[39]

61. Finally, a further means to manage risk outside an acquisition context may potentially gain greater prominence: In at least one country, where acquisition-related reviews were nominally voluntary, past acquisitions are being reopened with respect to security concerns. These transactions were probably not widely considered problematic at the time and were not notified to the review body, but they are now being re-evaluated, as greater attention is being paid to sensitive, personally identifiable information. The increasing frequency of assessing implemented or consummated transactions merits attention, as quite a few countries apply voluntary cross-sectoral reviews.[40]

62. All four approaches to establish longer term or open-ended[41] control over sensitive assets share similar characteristics: State powers are defined rather vaguely, public transparency and accountability of the use of these powers are limited, and all three mechanisms establish different classes of enterprises, in some cases without public knowledge. Such constraints may have unanticipated consequences for the access of shareholders to value-relevant information in affected companies, or have carryover effects on subsequent acquisitions.

63. Despite these potential challenges, the availability of a risk-management mechanism outside of an acquisition context may have important upsides, in particular repercussions on the use of acquisition-related policies. With the exception of mitigation measures in this role, policies that operate post-acquisition may for instance substitute the application of acquisition-triggered policies or reduce the frequency of denials and mitigations under these policies. The availability of means to intervene if and when a risk emerges from a specific ownership position may give governments comfort to allow acquisitions that they would otherwise rather prohibit for fear that the ownership could become problematic later. Rather than an accumulation, the existence of risk management tools post-establishment could appear as complementary which ultimately leads to fewer or lesser restrictions on acquisitions.

1.3.4. State-ownership of sensitive assets as a means to manage risk attracts renewed interest

64. State-ownership of sensitive assets has attracted little attention in the context of risk management instruments to safeguard essential security interests. State ownership is not an acquisition- or ownership-related policy in the sense of the present report. It may however complement acquisition- or ownership-related policies by rendering them redundant for sensitive assets that are not on the market and hence not likely to bear risk to essential security interests. In this sense, they are a means of managing risk to essential security interests.

65. While some countries have wound down ownership positions they had previously held, especially of infrastructure assets, thus exposing these assets to risk associated with malicious

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39 Information note issued by the Japanese Ministry of Foreign Affairs (2019) "*Frequently Asked Questions on the Amendment Bill of the Foreign Exchange and Foreign Trade Act*", item Q6, undated.

40 These include mechanisms in Finland, Germany and the United States, for example. Conditions in Germany's cross-sectoral mechanism preclude a review once 5 years have passed since the acquisition and once three months have passed since the government became aware of the transaction (§ 55 Foreign Trade and Payments Ordinance).

41 Several countries have recently formalised the procedure to wind down or amend obligations set out in the framework of mitigation agreements. For details, see below 2.2.1.

acquirers or owners, State ownership has never fallen out of fashion in some other countries. In fact, some countries covered by this report own significant holdings in sectors and industries that are covered by sector-specific acquisition-related policies in other countries,[42] and safeguarding essential security interest are acknowledged objectives of these ownership positions.[43]

66. One factor that contributed to the absence of attention to this means of managing risk in an otherwise dynamic policy area can likely be attributed to the rather static nature of policies and practices of State ownership in most countries.

67. Since mid-2018, some governments that had privatised potentially sensitive assets in the past have been somewhat unexpectedly expressing renewed interest in the State-ownership approach and have proposed or established corresponding policies or practices. For example, in February 2019, the German government suggested the use of a State-owned fund to acquire companies in order to prevent foreign takeovers in certain situations;[44] at that time, Germany had just used an existing State-controlled entity to acquire stakes in a company that owned an important electricity distribution grid and for which a foreign company had bid.[45] The German government stated that State acquisitions may be a necessary complement to protect the country's interests in the context of critical infrastructure acquisitions.[46]

68. Government-controlled funds exist in other countries, as well, and have been used, at least implicitly, to avoid exposure to acquisition-related risk in the past.[47] Denmark had a State-owned entity progressively acquire parts of its gas-distribution network and through this means reached

42 OECD (2017), "*The Size and Sectoral Distribution of State-Owned Enterprises*".

43 OECD (2015), "*State-Owned Enterprise Governance: A Stocktaking of Government Rationales for Enterprise Ownership*". The Swiss government noted, in the report released in early 2019, that a review mechanism was not currently warranted, as public ownership of several critical infrastructure assets attenuated the exposure of Switzerland to ownership-related risk (Conseil fédéral (2019), "*Investissements transfrontaliers et contrôles des investissements*", p.13.)

44 The initial proposal was made on 5 February 2019 ("National Industry Strategy 2030", Federal Ministry of the Economy and Energy, 5 February 2019). A revised strategy, issued on 29 November 2019, suggests that the *Kreditanstalt für Wiederaufbau* (KfW), an existing State-owned fund, would fulfil this role and decisions would be taken by a permanent commission of Ministries ("Industriestrategie 2030", Federal Ministry of the Economy and Energy, p.28).

45 In mid-2018 the State-owned German development bank *KfW acquired a 20% stake in a company that operates electricity grids, 50Hertz*; the German screening policy at the time had set the trigger threshold for government intervention at 25%. Therefore, the transaction did not meet the threshold to trigger the review mechanism.

46 Response to a parliamentary inquiry (BtDrs 19/3796), 5 September 2018, response to question 31.

47 In 2012, the French government investment fund FSI – now known as *Banque Publique d'Investissement* (BPI) – acquired *Areva's* stake in sensitive asset *Eramet* with this purpose ("*Agreement between AREVA and the Fonds Stratégique d'Investissement for the disposal of AREVA's stake in Eramet*", Areva press release, 16 March 2012); an allusion to the original statement by the then director general of the BPI is available in the minutes of the Economic Affairs Commission of the French Parliament of 15 May 2013, and secondary documentation is available in the OECD policy monitoring report covering measures taken 16 February to 15 September 2013 and the Summary of Discussions at Freedom of Investment Roundtable 19). In June 2018, the BPI and the Ministry of Defence created a further fund, DefInvest to support SMEs that are strategic for France's defence sector.

full state-ownership of the country's gas distribution network in March 2019.[48] The Finnish Parliament adopted a law in March 2019 that grants the government the power to refuse real estate acquisitions on grounds on essential security interests and establishes the right for the government to acquire these assets instead.[49] Calls have reportedly been made to re-nationalise an iron-ore mine in a sensitive location in one country. These solutions are reminiscent of earlier decades when State-ownership of critical infrastructure or other sensitive assets was widespread even in advanced economies.[50]

69. The extent to which States will embrace State-ownership as a means to protect their essential security interests is difficult to predict. Temporary State-ownership may be an option to absorb an asset under divestment from the market or as a means to take an asset out of the hands of an owner who raises concerns, given that a direct transfer to a different private owner is not normally possible under laws of most countries, requiring temporary State-ownership as an immediate step to re-privatisation in such cases.

70. Not all governments may wish to become permanent owner of assets that are too sensitive to be owned by any private owner, especially outside critical infrastructure that is associated with State functions. Also, some sensitive assets may be too-big-to-buy – and stretch some governments' financial means. Golden-share arrangements, as now expanded by France to manage acquisition- and ownership-related risks, allow governments to control assets without putting up the equity required to command the equivalent share of control under regular rules; this model may inspire other governments in the future. Finland, which fully or majority-owns some companies for strategic reasons has recently decided to bring some of its holdings down to just over 33% to free up capital – while retaining control over major decisions concerning these companies.[51]

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48 The Danish Electricity Supply Act and the Natural Gas Supply Act mandate *Energinet* to purchase any network assets when a distribution company divests such assets.

49 Law 470/2019, adopted on 29 March 2019 and in force since 1 January 2020. Finland has notified this policy to the OECD as DAF/INV/RD(2019)8. The Finnish government had expressed the opinion, in 2011 in a report prepared in the context of the 2012 reform of its review mechanism, that ownership is the ultimate and strongest tool from a security perspective where means of preparedness and specific security of supply arrangements do not suffice. New Zealand had introduced a similar requirement to offer "special land" to the government before selling it to other investors with the entry into force of the Overseas Investment Act 2005.

50 OECD (1985), "*National Treatment – Examination of Member country measures based on public order and essential security interests*", DAFFE/IME/84.6 (1st Revision), Annex III contains a list of public monopolies in the then Member countries as of 1985.

The renewed call for a greater role of the government in funding and owning sensitive areas to protect against threats is not limited to risks related to the acquisition or ownership of assets. Similar calls for greater financial engagement by governments to keep potentially malicious actors out are also being made in the context of research funding, see e.g. Alex JOSKE (2018), "*Picking Flowers, making honey*", Australian Strategic Policy Institute, Policy Brief, Report No.10/2018, 30 October 2018.

51 Finnish Government Resolution on the State Ownership Policy ("*Revenue through responsible ownership*"), 8 April 2020.

1.4. Risk perceptions evolve

71. Acquisitions of enterprises have always been pursued for a mix of motivations, including access to new markets or resources, to absorb a competitor, or to acquire access to technology and know-how that the target enterprise holds.

72. Governments' traditional concerns about foreign acquisitions in a security-context have centred on the risk associated with the physical presence of foreigners in sensitive locations or foreigners' market participation in sensitive enterprises as these potentially facilitate espionage and sabotage by malicious individuals. Consequently, concerns were initially concentrated on border areas and defence manufacturing, but with the privatisation of infrastructure – electricity generation and distribution, railroads, water supply, and telecommunications networks – in advanced economies beginning in the 1980s, these critical infrastructure assets had become available to investors and joined the list of sensitive assets. Eventually, sector-specific lists that enumerated individual asset categories gradually gave way to cross-sectoral review mechanisms of enterprises in any sector or cross-sectoral reviews that complemented sector-specific mechanisms. However, until recently, foreign presence was perceived as the primary risk.

73. How ownership of assets can transmit risk is now seen in a different light, at least in a growing number of jurisdictions. These perceptions of the transmission channels of risk are currently evolving, and the full spectrum of motivations for foreign investment now raises concerns: absorbing a competitor may lead to single-supplier-risk, and access to technology may raise concern as military and civilian use become increasingly intertwined and interchangeable in dual use goods.

74. The growing number of sectors seen as sensitive and the multiplication of transmission channels has led to an increase in the number of transactions that may attract scrutiny. This has heralded further transformational changes to the design and operation of acquisition- and ownership-related policies.

1.4.1. Additional asset categories are seen as sensitive

75. Several states have recently modified their policy or practice suggesting that ever more assets may be sensitive especially if under foreign control:

- Advanced, dual use and network technology;[52]
- Personal data and enterprises that control personal data;[53]
- Media assets;[54] and

[52] These areas are explicitly singled out in countries including (year indicates first explicit coverage): Germany (2017), France (2018), Italy (2018), United Kingdom – in a proposal for a future policy, "*National Security and Investment – Draft Statutory Statement of Policy Intent*" of July 2018), the United States (2018), and the European Union (2019), *Framework for screening of foreign direct investments into the European Union*.

[53] These areas are explicitly singled out in countries including (year indicates first explicit coverage): Germany (2017), France (2018), the United Kingdom (2018), the United States (2018), and the European Union (2018). In Australia, these types of assets have likewise been identified explicitly in a speech delivered on 14 August 2018 by the Chair of the Australian Foreign Investment Review Board (FIRB); given the design of the Australian review mechanism under FIRB, no explicit reforms of legislation or rules is required to implement such an adjustment.

[54] Germany introduced an explicit mentioning of mass-media in its cross-sectoral mechanism in 2018 (§ 55 (1) item 6 of the Foreign Trade and Payments Ordinance) with the result that a lower ownership threshold and an obligation to notify a transaction apply. France introduced, effective 1 April 2020,

- Assets identified as critical to ensure food security.[55]

76. Many assets falling into these categories are likely captured by cross-sectoral mechanisms, and the explicit reference of such assets was foreshadowed by implementation practice in some countries. Their inclusion in legislation now serves as a further clarification,[56] adds them in sector-lists as new items,[57] or modulates policy implementation or procedural rules.[58] Unlike the more traditional national-security relevant assets, which are associated with large, often listed companies, companies that produce advanced technology or hold and generate sensitive personal information may be small,[59] non-listed, sometimes young and little known, and produce items whose national security relevance is not obvious at first.

77. Real estate assets – a traditional item in some countries' acquisition- and ownership-related policies, especially when located in border areas – also attracts renewed attention, either because of their proximity to certain facilities or because review policies do not apply to greenfield investment.[60]

78. The inclusion of certain asset categories in individual countries' mechanisms is somewhat asynchronous, and countries' policies appear rooted in different decades in how they frame what bears risk – an observation that is reminiscent of the broader disagreement on whether specific

edition, print and distribution of printed and on-line media for political or general information (Décret n°2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France. The EU recognises media as a sensitive sector in Article 4 of the Framework that it adopted in 2019. The United Kingdom had listed aspects of media explicitly Enterprise Act 2002 (section 58) since December 2003, but it is not certain whether these are motivated by concerns about essential security interests or other public policy objectives. New Zealand's Overseas Investment Amendment Bill (No. 2), introduced in Parliament on 19 March 2020, lists among the strategically important businesses that would attract reviews under the new "National security and public order risk management regime".

55 France introduced the item explicitly in 2020 through the Décret n°2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France; this expansion of the scope of application came into effect on 1 April 2020.

56 Germany's reform in 2017 (Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung) contained – in regard to sectors – a mere clarification rather than a broadening of the cross-sectoral review mechanism. Germany also introduced specific procedural rules that apply to the identified sectors.

57 Italy made this modification through Article 14 of the Decreto-legge 16 October 2017, n.148, as confirmed, without modification, by the Legge of 4 December 2017, n° 172, notified to the OECD as DAF/INV/RD(2018)5.

58 The 2018 reform in the United States (Foreign Investment Risk Review Modernization Act (FIRRMA), Section 1703) introduces specific rules for investments that is related to "critical technologies" or "maintains or collects sensitive personal data of United States citizens".

59 The acquisition of assets by *Huawei* of *3Leaf Systems* in 2010 and divested in 2011, was valued at USD 2 million. Japan included the transaction of non-listed companies' shares (mainly SMEs' shares) between foreign investors in the scope of its mechanism in 2017.

60 The United States has explicitly included certain purchases or leases of real estate in close proximity to military installations or certain other government property in the scope of the CFIUS review in 2018 (FIRRMA, Section 1703). Finland adopted Law 470/2019 in March 2019 to establish a review mechanisms specifically with respect to acquisitions of real estate where such acquisitions could threaten Finland's essential security interests.

policies are needed to manage security risks associated with acquisitions or ownership of certain assets at all.

79. A further example of such asynchronous policy-changes are recent policies that itemise assets for the application of the review mechanisms. Such policies have been introduced in Poland in 2015[61] and Lithuania in 2017,[62] and, albeit in a post-acquisition setting, in Australia in 2018.[63] These approaches stand in some contrast to many countries' cross-sectoral approaches that use high levels of abstraction to define the scope of the policies' application.

1.4.2. Additional transmission channels for threats emerge

80. Just as perceptions evolve over which assets are sensitive for essential security interests, so do views over the transmission channels of these risks. As in this policy area more generally, concerns did and do not develop contemporaneously across countries; some countries expressed specific concerns earlier, and others often adopted the stance later.

81. How perceptions of transmission channels changed over time is well documented in the evolution of sector coverage: Traditional concerns focused primarily on *sabotage* and *espionage* – especially when defence assets and strategically located real estate were the main assets of concern. Later, with the possibility of foreigners acquiring critical infrastructure assets after privatisation, the possibility that infrastructure's *availability* could be *disrupted* or *withheld* became apparent as a further risk. Some countries are concerned about the risk of supply disruption in sectors beyond critical infrastructure.[64] *Leakage* of information, know-how, or sensitive personal data or the *malicious manipulation and alteration* of such data corresponds to the recent inclusion in security-related policy of technology assets and enterprises that hold or generate personal data.

82. Finally, as monopoly positions for certain critical technologies (e.g. software or certain hardware components) or raw materials such as rare (or not-so-rare) minerals emerge or grow in importance, *dependencies on sole suppliers* receive greater attention as a further transmission channel of risk to essential security interests.[65] Mergers and acquisitions may consolidate or further expand such sole-supplier positions and may trigger policies with a view to avoiding such

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61 *Act of 24th July 2015 on Control of Certain Investments*, notified to the OECD as DAF/INV/RD(2016)1.

62 *Law on the Protection of Objects of Importance to Ensuring National Security of the Republic of Lithuania*, notified to the OECD as DAF/INV/RD(2018)4.

63 The Australian mechanism, described in greater detail in Australia's notification to the OECD (DAF/INV/RD(2018)6), covers ownership of sensitive assets, rather than acquisitions; an acquisition-focused mechanism exists in parallel.

64 France has explicitly listed the risk of the discontinuation of supply as a security risk, Article R153-10 du Code monétaire et financier.

65 Theodore MORAN (2013), "*FDI and national security: Separating legitimate threats from implausible apprehensions*", In: Foreign Direct Investment in the United States: Benefits, Suspicions, and Risks with Special Attention to FDI from China, Peterson Institute for International Economics, p.56 points out that the United States government was concerned as early as 1988 that the United States' access to the supply of semiconductors might be brindled if foreigners – a Japanese company in this case – were to acquire a supplier. Very similar concerns were voiced three decades later in U.S. Department of Defence (2018), "*Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States*". The Netherlands' National Coordinator for Anti-terrorism and Security also cited concerns over single-supplier risk in 2018 ("*Nationale veiligheid bij overnames en investeringen of inkoop en aanbesteding*").

acquisitions. In some countries, concerns about sole suppliers and monopoly positions have existed for some time but were mainly based on undesirable dependence on foreign products or services, loss of "national champions" and pioneering industries and associated economic opportunities. The additional aspect of implications for essential security are only now becoming more prominent in many countries.

1.4.3. Additional transaction types are considered sensitive

83. As a direct consequence of the broadening of asset categories and risk-channels in several countries, additional adjustments to the risk-roster and overall policy design are underway. They include:

- The inclusion of smaller and minority investments in the scope of controls, with consequences for notification requirements and enhanced sanctions for non-compliance; and
- The inclusion of additional transaction types within the scope of reviewable transactions.

84. As access to technology and sensitive data are increasingly held to raise security threats, the traditional criterion of large or controlling stakes in the acquired assets loses relevance. Consequently, the criteria of size or influence in the acquisition target, which corresponded to espionage, sabotage and potentially single-supplier risk, has been abandoned or diminished in relevance in several countries. In 2018 alone, countries like the United Kingdom[66] and Germany[67] amended their rules to address potential risks associated with critical technology and sensitive personal data. The United States expanded jurisdiction to review certain non-passive but non-controlling investments into specified critical infrastructure, critical technologies, and United States businesses that generate or handle sensitive personal data.[68] In a similar vein, Japan has brought the transaction of non-listed companies' shares between foreign investors under the scope of its acquisition-related policies in 2017.[69] In mid-2019, the Austrian government was reportedly planning to lower the trigger-threshold from 25% to 10% in particularly sensitive sectors. In March 2020, New Zealand revealed its plans to carry out reviews for national security purposes that do not reach the values set for the current national interest test, as the current threshold had been identified as a loophole and may leave national security concerns in the context of the acquisition of smaller enterprises unaddressed.[70]

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66 See the United Kingdom's notification of the policy change in 2018 in DAF/INV/RD(2018)7.

67 Zwölfte Verordnung zur Änderung der Außenwirtschaftsverordnung, 19 December 2018 and Germany's notification of the policy change in DAF/INV/RD(2019)1.

68 "*Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies*", Department of the Treasury, Office of Investment Security, 31 CFR Part 801, FDR Vol 83, No 197, 11 October 2018, in particular § 801.302.

69 A rationale for these changes at least for the United States is postulated by Michael BROWN/Pavneet SINGH (2017), "*China's Technology Transfer Strategy: How Chinese Investment in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation*", Defense Innovation Unit Experimental.

70 New Zealand's Overseas Investment Amendment Bill (No. 2), was introduced in Parliament on 19 March 2020. Its Part 3 deals with the new "National security and public order risks management regime" that applies to certain transactions, including those that do not require consent, for example as they do not reach the trigger threshold that otherwise applies. The consultation page offers a comprehensive consultation document which sets out proposals and a rationale for related regulatory changes.

85. This expansion has implications for the administration of mechanisms: smaller, less visible transactions, especially in private equity, are more difficult to detect, and reporting requirements under securities legislation may not apply. Greater difficulty in detecting potentially reviewable transactions may explain the interest in mandatory notifications and a greater emphasis on sanctions for non-compliance that can be observed in recent reforms in several countries.

86. Concerns about the transfer of sensitive data, know-how or technology has ushered additional transaction types into or at least closer to the realm of traditional acquisition-control mechanisms. Traditional policies were strongly focused on transactions *located in the territory* of the country applying the policy regardless of the ownership of that asset[71] – quite understandable at a time when the primary concerns were sabotage and espionage. The focus has since evolved from *risks being imported* into one's territory to concerns regarding *sensitive assets being exported* to other jurisdictions where they could be used by malicious actors against the security interests of their "country of origin".

87. As a result of their territorial focus, traditional policies do not always cover the:

- creation of new enterprises through joint ventures,
- the divestment of parts of an enterprise, or
- the sale of certain individual assets.

88. None of these transaction-types grant control, influence or participation in the parent enterprise to the joint venture partner or acquirer of the divested asset. However, these transaction types may offer an avenue through which other parties may gain access to certain sensitive data, information, know-how, or sensitive technology. The effect (and resulting threat) is ultimately similar to the acquisition of an enterprise located in the host State's territory.[72]

89. Different avenues are being explored to address these risks. In early 2018, China established a policy trial that seeks to address the concern that international transactions lead to undesirable transfers of intellectual property abroad that may, in turn, threaten the country's essential security interests.[73] In the United States, legislative reform passed in 2018 has made the application of jurisdiction over joint ventures more explicit.[74] Separately, the United States export control reform legislation (ECRA) made the sale or transfer of certain emerging and foundational technologies subjected to export control mechanisms. Other countries have begun or proposed to begin mobilising government funds to pre-empt the sale of such assets abroad, at minimum to fill the funding gap that results from – perceived or real – tightening of controls over inward foreign investment.

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71 As further testimony of the territorial focus of traditional acquisition- and ownership-related policies, they are not normally triggered by transactions concerning assets owned or controlled by their nationals if these assets are located abroad.

72 United States legislation passed in 2018 explicitly recognises this link as it states in Section 1752 (10) of National Defense Authorization Act (NDAA) 2018 that "Export controls complement and are a critical element of the national security policies underlying the laws and regulations governing foreign direct investment in the United States, including controlling the transfer of critical technologies to certain foreign persons."

73 State Council Measures for the Overseas Transfers of Intellectual Property Rights (trial), State Council release No.19 (2018) of 18 March 2018 and in effect since 29 March 2018. The Measures set out review procedures for the transfer of intellectual property from China abroad that may impact Chinese national security as well as China's innovation and development capabilities.

74 Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). The change mentioned here is contained in Section 1703 of the NDAA 2018.

1.5. Threats transmitted through non-ownership transactions come to the fore, bring about policy responses and trigger workarounds

90. While the creation of joint ventures and the sale of assets has come into focus in some countries due to the similarity of the transaction-type addressed by acquisition-reviews, certain non-ownership transaction types have attracted attention because of the way in which they can facilitate similar threats. These transaction types include for example:

- Lease of infrastructure used for sensitive government operations to or from certain owners or procurement of goods or services by governments such as the refurbishment of critical infrastructure assets;
- Use of equipment and services from certain suppliers in privately- or publicly-owned sensitive infrastructure; and
- Joint research activities and inward and outward exchange of researchers.

91. In these transaction types, risk is not transmitted through acquisition or ownership, and they are consequently not being addressed in the context of related policies.[75] However, they merit attention in the context of acquisition- and ownership-related policies for three reasons:

- they share a similar mode of risk transmission;
- some of these transaction types appear to occasionally substitute ownership transactions in areas where a perceived or real tightening of policies or implementation practice has made acquisition more burdensome or even unviable; and
- acquisition-policies appear to be used occasionally to anticipate and manage risk that would otherwise have to be managed in the context of these transaction types.

92. It is for these reasons and to show the interconnection in economic and regulatory terms that these transaction-types are discussed in the context of acquisition- and ownership-related policies.

1.5.1. Leases and public procurement

93. Implications for **leases of infrastructure** to and from foreigners have recently attracted public attention in Australia and the United States, as they grant access to sensitive assets or data associated with such assets similar to the access granted by an acquisition. The contexts were different in the two countries. In Australia, a foreigner was leasing a sensitive infrastructure asset for 99 years;[76] in the United States, the government was leasing assets from foreigners.[77] While

[75] As an exception, certain contractual arrangement on services and goods for 5G-based communications services from non-EU providers are formally covered in this context in Italy as of 26 March 2019 (Decreto-Legge No. 22/2019 of 25 March 2019, passed into law on 13 May 2019).

[76] The lease of the Australian port of Darwin for a 99-year term contributed to policy changes in Australia, including the establishment of a Critical Infrastructure Centre. The United States have since 2018, through 50 USC §4565 (a)(4)(B),identified certain real estate leases in specified areas to a foreigner as a "covered transaction".

[77] In January 2017, the United States Government Accountability Office (GAO) recommended that the United States Federal Government "determine whether the beneficial owner of high-security leased space is a foreign entity and, if so, share that information with the tenant agencies for any needed security mitigation." GAO (2017), "*Federal Real Property – GSA Should Inform Tenant Agencies when Leasing High-Security Space from Foreign Owners*", January 2017.

the participants in the transactions are reversed, the potential risks are similar. Each transaction may grant access to sensitive information about security-related operations and could enable the foreign business partner to disrupt or stop the functioning of the asset – concerns that are very similar to those that acquisition- and ownership-centred policies seek to address.[78]

94. Similar concerns may arise in the context of **government procurement** more generally, especially with regards to building or refurbishing sensitive publicly-owned infrastructure assets or procurement in sensitive sectors such as defence.[79] Recently, concerns have been expressed about foreign ownership of election infrastructure and data service companies.[80] Non-discriminatory procurement rules for such contracts in many countries typically enable foreign or foreign-controlled firms to bid for such contracts; here, the knowledge of the assets' design, weaknesses, and the risk of sabotage, espionage or manipulation may raise issues that are again similar to those posed by ownership.

95. In most countries, management of such risks is carried out under different rules than those used for acquisitions. However, acquisition-based policies may occasionally allow States to anticipate the risk of later bids for contracts associated with sensitive assets.[81] In other cases, the transfer of control to foreigners may be allowed, but the acquired company is subsequently excluded from providing sensitive services such as data storage. In some countries, there are policies to regulate access privileges in order to manage the supplier-related risks; foreign ownership may be considered for the attribution of such privileges.[82] The United Kingdom has institutionalised collaborative oversight over a telecom equipment manufacturer to manage risks associated with the use of its products.[83]

96. Most recently, a more holistic approach to manage security risk stemming from a broader set of interactions between governments and businesses to identify potentially malicious actors begins to emerge. Such policies may or may not include acquisition control as a component.

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78 Since the reform of 2018, the United States includes leases of certain real estate assets by foreigners within the scope of its acquisition-review mechanism (section 1703 of the NDAA codified in 50 USC §4565 (a)(4)(B),). Australia's rules under the Foreign Acquisitions and Takeovers Act 1975 include leases for mining and residential real estate and any leases over Australian land that provides a right to occupy the land for more than five years.

79 In a letter to the Parliament dated 22 May 2018, the Dutch Minister of Justice and Security reportedly noted national security risks in tendering and hiring in sensitive sectors.

80 In mid-2018, a review of foreign ownership of United States election infrastructure has been called for.

81 Canada prohibited, on 23 May 2018, the acquisition of construction company *Aecon Group Inc*. by a foreign company; *Aecon* refurbishes nuclear power plants, builds airports and other major infrastructure for private or public entities in Canada. Whether current and future contracts on sensitive assets were taken into the consideration in the decision – as one editorial held they should – is not known.

82 In the United States, for instance, security clearances for companies are granted under the rules of the *National Industrial Security Program* as set out in the *National Industrial Security Program Operating Manual*. The rules may prevent a company under foreign control from obtaining certain clearances even though permission has been granted to a foreigner to acquire the company.

83 In the United Kingdom, a *Huawei Cyber Security Evaluation Centre* was established in November 2010 to mitigate any perceived risks arising from the involvement of *Huawei* in parts of the United Kingdom's critical national infrastructure. See for more details the *Fifth annual report for the National Security Adviser from the Huawei Cyber Security Evaluation Centre Oversight Board* (2019).

Australia for instance has complemented its acquisition-based review mechanisms with rules that grant the government certain powers over owners of specific infrastructure sensitive assets. Norway brought a comprehensive security law into force in January 2019 that covers acquisition control, procurement, and many related areas in a single law.[84] The Netherlands have adopted a comprehensive "economic security programme" that mentions acquisition-related risk but does not contain an ownership or acquisition control component.[85]

1.5.2. Use of equipment in privately- or publicly- owned sensitive infrastructure assets and supply chains

97. The use of certain products or services for sensitive operations or infrastructure – be they privately or publicly owned or operated – has recently emerged as a further concern with implications similar to those of foreign ownership.

98. A particularly visible example in this area are components of telecommunications network equipment, amid concerns that such equipment may give the manufacturer or other malicious actors access to sensitive information circulating in the network built from such components, allow them to alter information or processes in the network, or sabotage its operations. In several countries, governments have prohibited, warned against or withdrawn financial support for the use of products of certain manufacturers in 5G mobile telecommunications networks for instance, even when these networks are privately owned, or have imposed security obligations on carriers and carriage service providers to do their best to protect telecommunications networks and facilities from unauthorised interference or access.[86]

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84 Norway has included provisions on the handling of security-related procurement in its National Security Law (*Lov om nasjonal sikkerhet (sikkerhetsloven)*) (2019), Chapter 9.

85 The Dutch *National coordinator of Terrorism prevention and Security*, attached to the Ministry of Justice and Security, explicitly identifies take-overs of enterprises and public procurement as the two areas of risk for its economic security programme, "*Nationale veiligheid bij overnames en investeringen of inkoop en aanbesteding*", June 2018.

86 Australia's Telecommunications and Other Legislation Amendment Act 2017 for instance requires telecom service providers to notify changes to its supply chain, as indicated in notes on notification examples. Some countries have expressed outright bans on or expressed advice against certain suppliers for some network components, including New Zealand (where on 28 November 2018 the Government Communications Security Bureau has prohibited a telecom provider to choose equipment from a specific maker for the 5G network), the United Kingdom (whose National Cyber Security Centre has issued advice in May 2018 to a limited number of United Kingdom telecommunications operators regarding the potential use of *ZTE* equipment and services, stating that the "national security risks arising from the use of *ZTE* equipment or services within the context of the existing UK telecommunications infrastructure cannot be mitigated."), and the United States (where NDAA (2018), Section 889 prohibits executive-branch agencies from procuring or contracting for certain telecommunications equipment or services from certain companies – and where the Federal Communications Commission (FCC) has proposed in April 2018 that Universal Service Fund resources be not used for the purchase of equipment or services that may undermine United States national security. Arrangements in the United Kingdom have led to the establishment, in November 2010, of the *Huawei Cyber Security Evaluation Centre* to mitigate perceived risks arising from the use of the company's equipment in the United Kingdom's critical national infrastructure, as set out in the Centre's annual report 2018. On 17 December 2018, the National Cyber and Information Security Agency of the Czech Republic warned against the use of hard- and software of specified telecoms manufacturers.

99. Other products, including components for electricity generation and -transmission[87] as well as consumer products that are widely used, such as mobile phones, video-surveillance equipment, and small camera-carrying unmanned aerial vehicles (UAVs, "drones") have raised concerns recently for similar reasons, as they may also transmit or provide access to sensitive information to actors without the user's knowledge or explicit consent.[88] Outsourcing or maintenance by water- or power companies,[89] and the use of railway cars built by foreign-owned companies[90] has likewise raised concerns about espionage and sabotage.

100. In March 2019, Italy explicitly included 5G contracts – contracts with suppliers of 5G-based service or goods – in its rule-set of acquisition-related policies to manage risks to its essential security interests, suggesting the similarity of threats transmitted through use of equipment in sensitive infrastructure.[91]

1.5.3. International research cooperation and global allocation of venture and human capital

101. In a growing number of jurisdictions, foreign funding of research or exchange of researchers across borders have begun to raise concerns. On their face, these forms of collaboration across borders appear fairly far removed from acquisitions of existing enterprises, but there are worries that such collaboration could be a substitute to acquisitions in some sectors, especially in advanced technology and other cutting-edge, research-intensive domains: Joint research work in universities or research institutions, or research financed by foreign governments or foreign enterprises, or inward or outward researcher exchanges allow these researchers and their principals or funders to tap into knowledge, know-how and networks to acquire capabilities that are not available domestically.

102. While exchange of information across borders and mutual learning are among the very objectives of international research cooperation, it may in certain areas run counter some countries' endeavours to withhold certain capabilities from countries they believe may potentially threaten their security interest.[92] From some perspectives, the difference of foreign-funded

87 On 1 May 2020, the United States President made an executive order that prohibits Federal agencies and United States persons from acquiring, transferring, or installing equipment in which a foreign country or foreign national has any interest in the Bulk-Power System (BPS, the generating resources and high-voltage transmission equipment that make up the major electric system networks of the United States and Canada) to protect the system against unacceptable risk to national security.

88 Recent examples include the concerns over the alleged use of surveillance cameras produced by *Hikvision* in a military facility in Australia. The United States has, in 2018, banned by law (NDAA 2018, Section 889) the government procurement of equipment or services offered by four individually named companies, *Hytera Communications Corporation*, *Hangzhou Hikvision Digital Technology Company*, and *Dahua Technology Company*.

89 The Head of Australia's Critical Infrastructure Centre was quoted in September 2017 with statements made at the Australia National Security Summit 2017.

90 National security risk associated with railway cars produced by foreign-controlled companies have been highlighted in one U.S. statute and in another bill that is under consideration (NDAA 2018 (FIRRMA, Section 1719) and bill S. 1790 for NDAA 2019).

91 Decreto-Legge No. 22/2019 of 25 March 2019 and passed, with modifications passed into law of 20 May 2019, n. 41.

92 In relation to exchange of researchers affiliated with foreign military research institutions see Alex JOSKE (2018), "*Picking Flowers, making honey*", Australian Strategic Policy Institute, Policy Brief, Report No. 10/2018, 30 October 2018. More broadly on the implications of international research

research to acquisitions is in fact rather small: An acquisition provides the acquirer with access to the mature technology and know-how that the acquisition target possesses, while research funding or academic exchanges open access to technologies that are still in infant-stages.

103. Public discussions about the national security implications of foreign-funded research and academic exchanges has increased significantly since 2018;[93] while concerns appeared to be concentrated in a few countries – in particular Australia,[94] Canada,[95] the United Kingdom[96] and the United States[97] – they begin to attract greater attention in European countries.[98]

104. The understanding that risk is ultimately associated and transmitted within humans' capabilities would constitute the latest step on the current path of dematerialising the source of risk: From hardware in the past decades to intellectual property and data today to human capacity in the future. No tangible or intangible assets will then need to change ownership, but exchanges between humans will be considered the avenue through which risk spreads. It is yet unforeseeable how policies will respond to manage this transmission channel.

collaboration for essential security interests Stephanie SEGAL/Dylan GERSTEL (2019), "*Research Collaboration in an Era of Strategic Collaboration*" Center for Strategic and International Studies. With respect to research funding, see for example the announcement, made on 11 October 2017, by Chinese firm Alibaba of a global research programme for cutting-edge technology development, which was to set up research labs in the United States, Russia, Israel and Singapore among others, to work on "foundational and disruptive technology research including data intelligence, Internet of Things (IoT), fintech, quantum computing and human-machine interaction"– all areas that are now explicitly or implicitly singled out for their national security relevance in some countries.

93 As many aspects in this area, roots of these concerns and policy action can be traced back much further: In 1985, for example, the United States established a national policy for controlling the flow of science, technology and engineering information to "Eastern Bloc nations", ("*National policy on the transfer of scientific, technical and engineering information*", National Security Decision Directive, 21 September 1985).

94 Alex JOSKE (2018), "*Picking Flowers, making honey*", Australian Strategic Policy Institute, Policy Brief, Report No. 10/2018, 30 October 2018.

95 In Canada, collaboration between Canadian universities and *Huawei* over research on 5G wireless networks have raised concerns in some circles, "*How Canadian money and research are helping China become a global telecom superpower*", the *Globe and Mail*, 26 May 2018.

96 On 8 January 2019, Oxford University reportedly suspended new research grants and donations from *Huawei Technologies Co Ltd* or its related group companies, citing growing security concerns.

97 For the United States, policy proposals on such restrictions can be traced back to at least May 2016, and resurface in Michael BROWN/Pavneet SINGH (2017), "*China's Technology Transfer Strategy: How Chinese Investment in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation*", Defense Innovation Unit Experimental, p.5, who consider (p.24) whether Visas for Chinese foreign national students studying in the United States without developing any proposal. Further reports about United States government considerations on restricting foreign researchers' collaboration emerged in April 2018.

98 It was reported in April 2020 that the European Commission had begun planning policy action to prevent foreign interference in EU research institutions, including industrial espionage. Efforts in Germany are carried in connection with export control rules and through academic self-regulation but policy making has so far shown restraint. The proximity between acquisition-control mechanisms and research collaborations, specifically in Europe, has been suggested in a report issued in April 2020 (Agatha KRATZ/Mikko HUOTARI/Thilo HANEMANN/Rebecca ARCESATI (2020), "*Chinese FDI in Europe: 2019 update*", Rhodioum Group/Merics).

105. These trends may have secondary effects on global human resource allocation: Individual talent may move to countries where their ingenuity or knowledge fetches higher returns. A country that operates stricter rules on foreign acquisitions and technology transfer could inadvertently push the development of technology and innovation abroad and undermine the conditions for innovation in their country, hence undercutting the foundations on which its prosperity and security ultimately relies.[99]

1.6. Acquisition- and ownership-related policies interacts with norms of domestic and international law

106. Design and implementation of acquisition- and ownership-related policies to manage risk interact with adjacent areas of law, both international and domestic law. Such interaction is conceivable, for instance, with international obligations that many countries have taken on under investment treaties or multilateral arrangements such as OECD investment instruments, notably the Codes of Liberalisation. Treaty-based obligations may come into play in many scenarios, for instance:

- Treaties' market-access provisions may interact with prohibitions to acquire certain assets based on security concerns, and regimes established under mitigation agreements may qualify as performance requirements that may be restrained under certain treaty arrangements.[100]
- Established, treaty-protected investors may consider their treaty-based protections affected if an increase of their shareholding meets security concerns, if other foreign investors are precluded from contributing capital to their enterprise on essential security grounds, or if certain would-be acquirers of their business in a divestment scenario are barred from acquiring these assets on such grounds.
- National-treatment or most-favoured-nation provisions may come into play when treaty-covered, established companies seek to engage in security-sensitive business with

[99] The secondary effects of policies and implementation have received little attention so far, as focus appears to be concentrated on achieving primary objectives; Section 1752 (3) of NDAA 2018 may be understood to allude to these secondary effects when its states that "The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation. Such leadership requires that United States persons are competitive in global markets. The impact of the implementation of this part on such leadership and competitiveness must be evaluated on an ongoing basis and applied in imposing controls under sections 1753 and 1754 [which contain among others rules on technology transfer and export of foundational technologies] to avoid negatively affecting such leadership." A more direct description of the potentially conflicting interests is formulated by Robert WILLIAMS, "*The Innovation-Security Conundrum in U.S.-China Relations*", Lawfare, 24 July 2018 and Robert WILLIAMS, "*In the Balance: The Future of America's National Security and Innovation Ecosystem*", Lawfare, 30 November 2018.

[100] The annual report 1984/85 of Australia's Foreign Investment Review Board (FIRB), p.5 states that the FIRB had avoided imposing conditions that "would require parties to alter aspects of their proposed investments relating to the operations and conduct of their business; such 'performance requirements' would […] represent an unwarranted incursion of foreign investment policy into business affairs."

governments or trade in goods or services, for example for the use in security-sensitive infrastructure with other parties in a given country.[101]

107. Many treaties contain carve-outs that provide policy space and allow governments to safeguard essential security interests, and customary international law may also grant governments such policy space.[102] Whether the scope of treaties' carve-outs are always sufficient to accommodate necessary regulatory action would require further study.

108. Interaction is also possible with high-ranking domestic law, in particular constitutional law, for instance with respect to due-process rules or civil liberties.[103] Such interaction has been observed with constitutional law protections in countries that implement investment policies related to national security, especially where these policies allow for divestment orders. Again here, little study has been devoted to the issue in general and to conclusions for policy design in particular.

109. As additional transaction-types are brought under the cover of acquisition- and ownership-related policies, additional international rules may come into play and increase the scope of potential tensions or influence.

110. So far, these interactions have generated few known disputes. This may change however, as investment treaty protections are used more frequently and more ingeniously, and as pre-establishment provisions in investment treaties and post-establishment policies to manage risk become more widespread. These trends may increase the potential for frictions and suggest attention be paid to establish adequate safeguards in treaty design, including in older treaties. At present, not all treaties appear to contain explicit safeguards.

1.7. Dilemma situations emerge from policy practice

111. As ever more countries collect experience with their policies' implementation, they encounter more complex scenarios and occasionally difficult decisions. The power to prohibit certain transactions may not always address all implications of certain situations. For example:

- What needs to be done when debt-for-equity swaps in an insolvency scenario would bring in an acquirer deemed unsuitable? While rules may cover such scenarios, they do not necessarily decide who should own the sensitive assets – and at what price – if the beneficiary of the swap does not receive government consent to the acquisition?[104] Would

[101] In February 2019, it was reported that a manufacturer of equipment used in telecom-infrastructure was threatening a treaty-based claim – as well as claims under domestic law – against a government that had publicly warned about alleged security concerns in relation to the manufacturer's products.

[102] An earlier brief survey and on this matter is available in OECD (2007), "Essential Security Interests under International Investment Law".

[103] A case that is often cited in this context is United States Court of Appeals for the District of Columbia District, No. 13-5315 (15 July 2014), Ralls Corporation vs. CFIUS et al.; while the matter was ultimately settled, the Court of Appeals acknowledged that the acquirer's property interests benefited to some extent from a constitutional protection with respect to due process aspects. The judgement was rendered before the recent reforms of the framework under FIRRMA in 2018, so other considerations may apply now.

[104] This issue was debated in the context of financial difficulties reported for *Petroleos de Venezuela* (PDVSA). PDVSA has given its significant ownership stake in Houston-based *Citgo* as collateral in exchange for a USD 1.5 billion loan from Russian company *Rosneft*. The United States NDAA (2018), Section 1703, explicitly clarifies that transactions pursuant to bankruptcy proceedings or

companies that operate in sensitive sectors face tighter conditions for access to creditors if these fear to be unable to realise their collateral in case of a future insolvency?

- Can certain assets or companies – for instance those developing advanced dual-use technologies – become unsellable because all potential suitors are considered a risk for the home country's essential security interests?
- What if a person who may cause concern wishes to acquire an asset that is owned by a different individual who may also cause concern? Preventing the transaction merely keeps an already problematic situation in place.[105]

112. Two factors are likely to generate such situations more frequently:

- The growing number of countries that operate review systems and the growing scope of their individual coverage; and
- The interlinkages of MNEs whose affiliates and operations span an ever greater number of jurisdictions, potentially triggering reviews in ever more jurisdictions.

113. The complexity is only just building up, and solutions are yet to be developed.

114. The sole power to prohibit transactions or to order mitigating measures may not always offer sufficient flexibility to address security concerns and economic imperatives simultaneously; governments may increasingly need to orchestrate asset attribution or buy assets themselves to manage security implications of sensitive assets.

1.8. International cooperation may become increasingly critical for effectiveness and efficiency

115. At present, acquisition- and ownership related policies operate in individual countries on a strictly territorial basis related to the physical location of assets or incorporation of a takeover target or greenfield investment. This setup implies the assumption that the security threat materialises – and is to be managed – in the jurisdiction in which the assets under acquisition are located or incorporated. Where an enterprise that owns assets or subsidiaries in other countries is the target of an acquisition, every single jurisdiction where subsidiaries or assets are located would need to assess the risks of the transaction.

116. As more and more countries operate review mechanisms, and as supply chains and operations tend to involve more countries, individual transactions are likely to require clearance under acquisition-related policies in a growing number of jurisdictions. That multinational enterprises have to meet regulatory requirements in multiple jurisdictions is a standard occurrence in a globalised economy and not confined to security-focused reviews.

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other defaults on debt are covered by CFIUS reviews, but does not resolve the potential consequences. Germany also appears to cover transactions to provide collateral to secure credits (stated in "*FAQ zu Investitionsprüfungen nach der Außenwirtschaftsverordnung (AWV)*", Federal Ministry for Economy and Energy 13 May 2019), , but the process and consequences in such cases are not fully clear.

Iceland has rules to auction off the assets to find new owners for similar scenarios, albeit outside an essential security context, in which foreigners have obtained assets that they are not legally allowed to own (fisheries rights in this case).

105 Such a situation came to light with respect to an acquisition in the media sector in June 2019 in a G7-country.

117. In many areas where countries seek to regulate aspects of a globalised economy, international cooperation has helped attenuate the effects of the accumulation of review requirements. These examples and practices could inspire solutions for reviews for essential security interests as well, while taking into account the specificities of the area.

118. International cooperation can take many forms and may have several benefits. At an operational level, *information-sharing* can make reviews faster and more effective; it may also help in situations where an ally's security interests may need protection in light of a transaction in one's own territory.[106] Cooperation may be delicate where essential security interests are concerned, given the confidentiality that dominates this area, different strategies, vulnerabilities and risk assessments in different countries, among others, and countries may not be willing to share their concerns and information as willingly as in other areas. Even when considering these specificities, there is probably scope for cooperation: Some countries have established cooperation on national security issues that involve information-sharing,[107] have publicly emphasised the importance of "cooperation on investment reviews for national security purposes",[108] and some new policies – e.g. in the United States[109] or the European Union – call explicitly for international cooperation among each other and with third countries, without always making the avenues and mechanisms explicit. The *Framework for screening of foreign direct investments into the European Union* of 2019 establishes a means to exchange information and views among the 27 EU Member States,[110] thus creating the largest formal network in this policy area to date.

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106 Stephen KIRCHNER/Jared MONDSCHEIN (2018) "*Deal-breakers? Regulating foreign direct investment for national security in Australia and the United States*", The United States Study Centre at the University of Sydney, p.23, proposes that a Memorandum of Understanding be concluded to formalise the exchange of information as a lesson from the lease of the Port of Darwin in Australia to a foreign-controlled entity.

107 E.g. intelligence co-operation under the UKUSA Agreement ("Five Eyes"); a report on the findings of a Parliamentary inquiry in Australia on the "*Foreign investment Framework*" of 8 April 2016, p.31, explicitly mentions the role of "Five-Eyes" information exchanges for foreign investment review processes, in particular for reviews related to critical infrastructure. The Australian Foreign Investment Review Board has, according to the FIRB annual report 2017/2018, p.2, increased its cooperation on the matter with like-minded countries. France has given the authorities that implement its mechanism an explicit authorisation to seek information from foreign countries as early as 2005 (Article R153-12 du Code monétaire et financier).

108 E.g. "*Joint Statement of the Trilateral Meeting of the Trade Ministers of the European Union, Japan and the United States*", 9 January 2019. On 25 September 2018, a *Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union* had stated that "The Ministers confirmed the importance of coordination among themselves to mitigate risks to their national security from trade and foreign investment, including the continued cooperation between appropriate authorities of the three partners to share best practices and exchange information on foreign investment review mechanisms."

109 FIRRMA (2018), Section 1713 allows CFIUS to establish: a formal process for the exchange of information with governments of countries that are allies or partners of the United States that facilitates the harmonization of action with respect to trends in investment and technology that could pose risks to the national security of the United States and countries that are allies or partners of the United States; provide for the sharing of information with respect to specific technologies and entities acquiring such technologies as appropriate to ensure national security; and include consultations and meetings with representatives of the governments of such countries on a recurring basis.

110 European Union (2019), Framework for screening of foreign direct investments into the European Union, Article 13 states: "Members States and the Commission may cooperate with the responsible

119. At a more strategic level, *aligning rules and conditions for reviews* may lower costs for enterprises that need regulatory approval for a same transaction in multiple jurisdictions; *mutual recognition* may reduce the number of reviews that a given transaction needs to undergo.

120. In addition, regulatory alignment could be a promising avenue to reduce impediments to transactions that results from the differences in criteria and procedures that individual countries apply on a same given transaction. These differences increase costs and time required to complete transactions. Alignment of criteria and procedures, to the extent possible and practicable, could help lower the impact that the accumulation of review requirements in different jurisdictions is likely to have.

121. Harmonisation of practices and criteria could have the additional benefit of reducing the effects of regulatory arbitrage on the allocation of new capital for sensitive, advanced or data-intensive industries. Investors can reasonably be expected to allocate *new* investment preferably in jurisdictions where they expect less stringent acquisition-review regimes in place at the time when the assets are disposed of and sold on. The lower regulatory differences among jurisdictions are, especially among those jurisdictions that offer the required human capital and research capacity, the lower the effect of regulatory arbitrage is likely to be on the allocation of new capital.

122. In other policy areas, concentration of a government response in one jurisdiction, combined with full or partial recognition of findings or decisions by other jurisdictions have proven useful and effective: Examples include the cooperation among competition authorities in merger reviews to lower the burden for businesses and government resources.[111] Similarly, National Contact Points established under the OECD Guidelines for Multinational Enterprises to resolve specific instances of operations by MNEs cooperate and concentrate case-handling in the NCP that is closest to the issue.

123. Other examples from related policy areas have shown that international standards can attenuate the undesirable effect of regulatory differences on capital allocation and business operations. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), along with extensive definitions of territorial and personal jurisdiction in this field in some economies, has been a successful tool to level differences in regulatory regimes regarding the bribery of foreign officials and resulting differential treatment of business practices across countries.[112]

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authorities of third countries on issues related to screening of foreign direct investment on grounds of security and public order"

An exploratory memorandum issued by the Commission ("*MEMO - Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union*", undated) explains in item 23: "The regulation encourages Member States and the Commission to cooperate with the responsible authorities of like-minded countries on issues relating to the screening of foreign direct investments on grounds of security and public order. International cooperation may be pursued in bilateral or plurilateral format, such as the G7 or the OECD. This may include sharing experiences, best practices and information regarding investment trends."

111 See on this effort to foster cooperation among competition authorities the OECD work on *International co-operation in competition*, OECD webpage, undated.

112 The introduction of the Foreign Corrupt Practices Act (FCPA) in the United States in 1977 had led to perceptions of unfair disadvantages for United States businesses, who faced penal sanctions for the bribery of foreign public officials unlike their competitors operating in other jurisdictions – despite the progressive extension of jurisdiction to foreign firms that had links to the United States. This regulatory difference led to calls for regulatory alignment, which was furthered by the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business

124. International cooperation relies on understanding, information on policy and practice, and trust. Only where information is readily available to peers, can regulatory alignment work, and the basis for mutual recognition be established. This survey of practices, along with OECD-hosted policy dialogue and transparency mechanisms contributes to informing governments about the policy choices their peers have made.

Transactions in 1997 and, later, with the adoption of the United Nations Convention against Corruption (2003).

2. Mechanisms and policies: components and composition

125. Mechanisms to manage acquisition- and ownership-related risks to essential security interests are built from a finite set of components. The selection and combination of these components determine the functioning and principal characteristics of a given mechanism and, along with its implementation, ultimately its operation and performance in a specific context.

126. Most countries in the sample have put in place several distinct mechanisms to manage acquisition- or ownership-related risk. These mechanisms operate in parallel and often address different sets of transactions, come with a variety of different responsibilities and rule-sets, or address either acquisition- or ownership-related risk, for example. They may also use different instruments and procedures and may be administered by different parts of government.

127. The scope of a given country's acquisition- and ownership-related policies to safeguard essential security interests is thus the result of two distinct components:

- The design of *individual* mechanisms, and
- Where applicable, the availability of a *combination* of distinct mechanisms to a given country's overall policy.

128. This section describes how policies observed in the 62 jurisdictions covered by this report are designed with respect to both these aspects. It sets out:

- Which criteria frame a given transaction or ownership-situation as potentially concerning and how the presence of actual risk is determined (section 2.1);
- Which policy responses are available to respond to identified threats associated with a given transaction, either before closure of following the detection of a transaction that has occurred in the past (section 2.2);
- How mechanisms are designed to ensure that transactions that are framed as reviewable are detected (section 2.3)
- To what extent and how mechanisms respond to a change of the risk assessment that emerges or develops later and outside of an acquisition context (section 2.4);
- How transparency accountability for policy implementation is granted to the public as well as to individual investors, owners or other market participants (section 2.5);
- How fiscal costs of the implementation of the policies are managed and allocated (section 2.7);
- Through which means and designs the effect of mechanisms on benign investment is limited (section 2.8); and
- How distinct mechanism are composed to a given country's policy and what rationale and implications the use of certain components has for policies' overall functioning and outcome (section 2.9).

129. Section 2.10 summarises some conclusions for policy makers tasked with designing new or assessing existing acquisition- and ownership-related mechanism or policies to manage risks to essential security interests. This section attempts to set out a step-by-step guide to the design of a mechanism and refers to the individual sections of this chapter for details and country examples. This last section, as indeed the whole report, takes no position of whether certain choices are warranted, preferable, or effective; or which residual risk, collateral impact on innocuous transactions, and fiscal cost are acceptable. Its sole purpose is to compile the wealth of approaches that countries have developed and to organise this information according to functional categories to assist policy-making and -evaluation.

2.1. Identifying potential and assessing actual risk of acquisitions or ownership-positions

130. One of the main objectives and challenges of acquisition- or ownership-related mechanisms to manage threats to essential security interests is to identify harmful transactions or ownership positions and to filter them out from the large number of innocuous acquisitions that should be allowed to go forward with minimal disruption and delay. Today, most mechanisms determine whether a specific transaction can go forward in a two-step process:

- the first step identifies, as an *abstract* pre-selection, transactions that *potentially* present risk based on a roster of legislated or otherwise pre-determined criteria. The criteria are tailored more or less tightly to anticipated areas of risks and reflect greater or lesser delegation of appreciation of risk to the implementing authorities;
- in the second step, the thus identified transactions are subject to a *specific*, case-by-case assessment of the *actual* risk that they present for "essential security" or similarly framed concepts. This step is carried out by the implementing authorities based on a typically different set of criteria.

131. The determination of whether a specific transaction actually presents risk to essential security interests is thus a shared responsibility between rule-makers – the legislator and often the executive as additional rule-setter – and the implementing authorities that apply these rules to individual cases. The rule-setter frames certain categories of transactions as potentially problematic by laying down a set of criteria that includes or excludes them from review – thereby reflecting their perception of where risk is sufficiently concentrated to merit a review and potential government intervention. Where these criteria are met, the authorities *may* or *must* assess the transaction specifically.

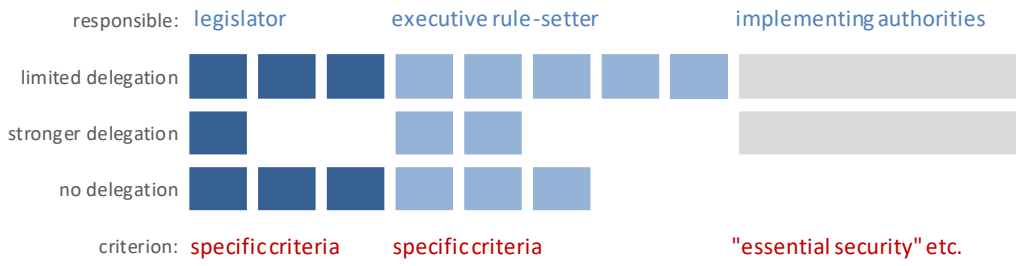
132. The criteria set by the rule-maker also establish and limit the competence of the implementing authorities to only these identified transactions. Once the competence of the implementing authorities for a specific transaction is thus established, the administration has a delegated responsibility to assess whether the specific transaction does in fact present a risk for essential security interests as framed in the policy.

133. The extent to which mechanisms filter out presumably innocuous transactions in the first step and exclude them from any specific review varies widely: some mechanisms set only a few parameters that, when met, allow a transaction to be subjected to a case-by-case assessment, typically implying a greater degree of delegation of risk assessment to the implementing authorities. This acknowledges the difficulties for the rule-setter to adequately anticipate risk and express this anticipation through a set of abstract criteria, but it may lead to a greater case-load in the implementation of the mechanisms, or to more frequent adaptions of the criteria to evolving threat scenarios or technological developments.

134. Fixed ownership caps that a few countries maintain in certain sectors to manage risks to essential security interest are an exception to the more common two-step process described above. In this design, no power is delegated to assess the specific riskiness of an individual transaction or ownership situation. Rather, the rule-setter prohibits all transactions that meet the criteria set in the abstract, implicitly assuming that all transactions determined by the criteria generates an unacceptable risk across the board that can exclusively be addressed by an acquisition- or ownership restriction.

135. Figure 2.1 presents the attribution of responsibilities and degree of delegation in different approaches visually. Blue items represent filter criteria set by different rule-makers for the *first step* in the risk assessment; grey bars indicate the scope of appreciation by the implementing authorities in the *second step*, based on a further, distinct set of criteria such as "essential security".

Figure 2.1. Schematic representation of shared responsibilities for risk-assessments and the degree of delegation to assess specific risk to the implementing authorities



Source: OECD.

136. The pre-selection of transactions in the first step has functions beyond filtering out a large number of likely innocuous transactions from the more detailed case-by-case scrutiny or a role in ownership-caps. In many mechanisms, procedural or material consequences follow if the pre-selection criteria are fulfilled. These may include notification requirements or the obligation to obtain prior approval to close a transaction.

137. The following subsections present how mechanisms frame transactions or ownership positions as *potentially* problematic in the first step (below 2.1.1) and how the case-specific determination of these transactions' *actual* risk is made in a second step (below 2.1.2), thus following the structure of most mechanisms observed in the 62 countries covered by this report.

2.1.1. Step 1: Framing transactions or ownership positions as potentially problematic

138. The abstract, *ex-ante* determination of potentially threatening transactions or ownership positions in a first step – which simultaneously establishes and limits competence of the administration to assess specifically identified transactions – typically relies on combinations of several criteria. In all, nine categories of criteria have been found in the sample of mechanisms, with much variation within these categories. Some of these relate to the *assets* under acquisition or owned, while others relate to the *acquirer* or owner of an asset.[113] A few mechanisms use hybrid parameters that combine asset- and acquirer-related aspects.

139. Criteria as they appear in mechanisms fulfil different function. Some criteria determine whether a specific transaction can or must be considered by the authorities. As they need to be present to activate a mechanism, this report refers to criteria in this role as *constituting* or *trigger* criteria. Few mechanisms however combine such constituting criteria in a linear list of conditions. Often, *modulating* criteria determine the string of conditions that needs to be met to activate a mechanism or certain procedural consequences. In this role, criteria allow for alternative paths in the rule-set to classify a transaction or ownership position as potentially problematic.

[113] The distinction of asset- and acquirer-related elements as made here is one possible categorisation among many; it is chosen for its clarity as its correspondence to many observed mechanisms. Some mechanisms could also be presented as composed of three parameters, namely asset-characteristics, acquirer-characteristics, and transaction-characteristics. Examples for constructions that suggest three components include the European framework or the proposal for the United Kingdom's reform (National Security and Investment, Draft Statutory Statement of Policy Intent, July 2018).

140. The choice and combination of these criteria and parameters, and the values set for them, constitute a given mechanism's implicit risk profiling and fingerprint. No two mechanisms' fingerprints are currently identical or even very similar, resulting in a large variety of designs and contributing to challenges to compare different mechanisms and, for instance, their breadth of application.

141. The following section describes in greater detail the different parameters found in acquisition- or ownership-related policies in the sample, the functions that they fulfil, and the values that are set for these parameters, as well as recent trends in the use of parameters and values. They show broad differences, but also commonalities, both in today's mechanisms and in recent trends.

Asset-related parameters

142. Asset-related parameters are an almost universal element of criteria-sets that determine whether a given transaction or ownership position is potentially injurious to essential security interests. Many mechanisms combine several asset-related parameters to determine the subset of transactions or ownership positions that are deemed potentially problematic.

143. Six genuinely different groups of asset-related parameters have been identified in the sample; in most groups, different variants are observed. The six groups of parameters refer to:

- The industry sectors or specific assets that are owned or about to be acquired;
- The equity stake or voting rights that an acquirer would or an owner holds in the target asset as a result of the transaction;
- The transaction value or the size of the equity stake or voting rights that the transaction represents;
- The total size or significance of the target asset as a whole;
- The physical location of the asset;
- Whether the target asset is an *established* enterprise or an *enterprise under establishment* ("greenfield investment").

Asset-related parameters (1): Industry sectors, individualised assets, and asset groups

144. Many mechanisms refer to a list of industry sectors to specify where the legislator expects risks, or particular risk, related to acquisition or ownership to be concentrated.[114] All observed lists of industry sectors or assets groups in the sample are positive lists. Most frequently, inclusion of a sector in the list triggers, jointly with other factors, the policy, but some policies use the sector criterion to modulate the set of rules that apply to a specific transaction.[115]

[114] A current proposal for a reform in the United Kingdom distinguishes industry sectors by the degree to which concerns are likely; it does not conclude to limit the review mechanism to these sectors in recognition of residual risk in any other sector ("*National Security and Investment – Draft Statutory Statement of Policy Intent*" of July 2018, p.16-21).

[115] Australia, for example distinguishes 'sensitive' from 'non-sensitive' businesses; the former imply lower trigger thresholds for reviews. 'Sensitive businesses' for the application of Australia's mechanism include: media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities, according to the FIRB website and the Foreign Acquisitions and Takeover Act 1975, Section 51.

145. A few countries have established *asset-specific* lists to identify the assets whose ownership may raise concerns. This approach appears in acquisition-related mechanisms in Lithuania and Poland,[116] and a recent ownership related mechanism in Australia.[117] The practice of listing individual assets appears to be more prevalent in smaller economies where few items can make up an entire industry sector. In some countries, the distinction between sector lists and asset lists may ultimately be marginal, given the potentially low number of individual assets in the identified sector.

146. A great number of industries are included in sector lists. They include traditional items such as defence production, energy generation and transmission, other critical infrastructure, as well as sectors where concerns have emerged more recently, such as mass media.[118] Occasionally, sectors are identified by relative references to other areas of policy such as industries subject to export controls.[119]

147. While sector lists are characterised by relative clarity, they offer limited flexibility to governments, especially in response to changing risk analyses.[120] Some countries that use sector lists have passed amendments in relatively quick sequence to adjust to evolving circumstances. Germany for instance clarified in 2013 the scope of "crypto-technology", an item in its sector list, and in 2017 expanded the scope of "war weapons", another item in the sector list, to broaden to

116 In Lithuania, the specific assets are set out in annexes to the *Law on the Protection of Objects of Importance to Ensuring National Security* (see Lithuania's notification of the most recent set of policies, as of 2018, in DAF/INV/RD(2018)6). In Poland, a list of "entities under protection" is established under the Act of 24th July 2015 on Control of Certain Investments by way of a regulation of the Council of Ministers; criteria for the inclusion of individual enterprises in the list are listed in Article 4.2 and include "market share of the entity, the scale of operations, real and sufficiently serious threats to the fundamental interests of society related to the operation of the entity to be protected" (see for more details the notification DAF/INV/RD(2016)1 as well as DAF/INV/RD(2016)1/REV1 and DAF/INV/RD(2016)19).

117 Under Australia's Security of Critical Infrastructure Act 2018 (SOCI Act) and the related Security of Critical Infrastructure Rules 2018, critical infrastructure assets are listed in a non-public register; asset-owners are aware that their assets are contained in the register, and certain obligations are attached to this entry.

118 In Australia, all foreign persons need to seek approval of investment in media – daily newspapers, television and radio, including internet sites that broadcast or represent these forms of media – that leads to a 5% stake, regardless of the value of the investment (Foreign Acquisitions and Takeovers Regulations 2015, Section 55). Germany mentions certain media as a sensitive sector in its cross-sectoral mechanisms since 2018 (§ 55 Foreign Trade and Payments Ordinance). The European Union Framework for screening of foreign direct investments into the European Union of 2019, Article 4 1.(e) recognises the freedom and pluralism of the media as an objective related to security or public order. France introduced, effective 1 April 2020, edition, print and distribution of printed and on-line media for political or general information (Décret n°2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France).

119 For example, since an amendment that became effective on 1 October 2017, Japan includes in its sector list a reference to "manufacture of the dual-use goods based on the international export control regimes, including the List of Dual-Use Goods and Technologies and the Munitions List of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies", see DAF/INV/RD(2017)4.

120 In its *White Paper 'National Security and Investment: proposed legislative reforms'*, July 2018, paragraph 2.15, the United Kingdom government reported that its decision *against* a sector list in its planned reform was motivated by the associated need of "frequent amendments".

non-traditional sensor and electronic warfare products.[121] France also changed its sector list thrice in the past years, in 2014, in 2018, and again in 2020[122] and so did Japan in 2017 and then in 2019.[123]

148. Some countries that use sector lists to establish competence for reviews operate mechanisms in parallel that allow for reviews in additional sectors as well (e.g. Germany).[124]

Asset-related parameters (2): Resulting volume of equity stake, voting rights, other forms of control, overall assets of a person in the country or overall share of foreign ownership in a company

149. Many mechanisms in the sample consider the position that the acquirer would hold as a *result* of a proposed transaction in the target asset or in the national economy as a whole as a criterion that triggers the application of a mechanism. This approach is distinct from a variant in which the parameters of the transaction itself are considered (see below in the next subsection). Different countries' policies use different indicators and trigger values for the resulting positions, and some rule-sets combine several parameters alternatively or cumulatively.

150. Variables observed in policy practice include: the size of an equity stake resulting from a transaction or the percentage of voting rights in the target enterprise,[125] rights to participate in the oversight of the target company,[126] or access to certain information granted based on the position of the acquirer,[127] among others.

151. All these variables consider the relative power of the acquirer in the acquisition-target that would result from the transaction. The assumption that underpins the choice of such a policy design is that smaller stakes or minor forms of influence over an asset are unlikely or unable to

121 Außenwirtschaftsverordnung, 2 August 2013, BGBl. I, p.2865 and Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung (amendment to the Foreign Trade and Payments Ordinance) of 14 July 2017.

122 Décret No. 2014-479 of 14 May 2014, Décret No. 2018-1057 of 29 November 2018, and Décret n°2019-1590 du 31 décembre 2019.

123 The prior notification requirement and screening procedures were extended in October 2017 by the Act for Partial Revision of the Foreign Exchange and Foreign Trade Act, followed by a further expansion in May 2019 by the Public notice of the revision the types of businesses subject to the provisions over inward direct investment.

124 More details on the combination of mechanisms to policies are available in section 2.8.

125 E.g. Germany (§ 56 and § 60a of the Foreign Trade and Payments Ordinance); Finland (Section 2 of the Act on the Screening of Foreign Corporate Acquisitions).

126 E.g. Norway (§ 10-1 of the National Security Act (*Lov om nasjonal sikkerhet (sikkerhetsloven)*), where "significant influence over the management of a company" is among three alternative criteria that trigger notification requirements); Austria (Foreign Trade Act, § 25a.(4), subjects acquisitions that lead to a "controlling influence" over the target enterprise to reviews, if other conditions are met); Australia (section 54 Foreign Acquisitions and Takeovers Act 1975 also refers to "control" of an entity and defines the conditions through which "control" is acquired; in Australia, change in "control" is one criterion among others that lead to legal consequences and potentially to a review).

127 For the United States, FIRRMA Section 1703 (D) (i).

constitute a risk that would justify government intervention. This assumption is not universally shared, as some countries' mechanisms[128] and recent reforms[129] document.

152. *Equity stakes* and *voting rights* are the most common **variables** employed in this context. They are ubiquitous in more rigid mechanisms such as legislated ownership caps, but also serve as a criterion for excluding transactions that remain below the set ceiling from the application of a mechanism. Some countries' policies contain rules on shareholder agreements to cater for the acquisition of stakes by coordinated stakeholders.[130]

153. An infrequently used variant considers aggregate foreign participation in a sector or business, and caps acquisitions once the ceiling is reached.[131]

154. Where mechanisms employ relative trigger thresholds for equity holdings or voting rights, observed **values** range between 1%,[132] 5%,[133] 25%,[134] and, in two cases 50%.[135]

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128 Some countries apply zero-values in this regard either to the entirety of their review mechanism (e.g. Canada) or in combination with other criteria (e.g. Australia for certain acquisitions by foreign government-controlled investors).

129 The United Sates have recently included non-passive but non-controlling transactions in the scope of their review (Code of Federal Regulations, Title 31, chapter VIII, subtitle B, Part 801, Subpart B, § 801.209 Pilot program covered investment).

130 Germany's Foreign Trade and Payments Ordinance, § 56 and § 60a; Austria's Foreign Trade Act, § 25a.(4); Norway's National Security Act, § 10-1. France's review mechanism established under the Code monétaire et financier also refers to the acquisition of control by reference to article L. 233-3 du Code de Commerce. Section 2 of Finland's Act on the Screening of Foreign Corporate Acquisitions in Finland 172/2012.

131 This approach is used in Mexico's Ley de Inversión Extranjera, Article 7, which caps overall foreign participation in the manufacturing and commercialisation of explosives, firearms, cartridges, and ammunitions, among others. Hungary also employs this criterion in the *Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests*, Article 2, Section 2(2) (an unofficial translation of the law is available in Hungary's notification of the mechanism to the OECD, DAF/INV/RD(2019)2).

132 The threshold will apply to certain enterprises that operate in specific sectors in Japan once the Amendment of the Foreign Exchange and Foreign Trade Law, which had been adopted in late 2019 but was not yet fully implemented as of mid-May 2020.

133 E.g. in Spain for the defence sector, Real Decreto 664/1999, Article 11. Australia has a 5% trigger threshold with respect to holdings in media enterprises, regardless of value (Foreign Acquisitions and Takeovers Regulation 2015, section 55); it is not certain whether this mechanisms is designed to address risk for essential security interests or for other public policy purposes.

134 E.g in France, Article R. 151-2 du Code monétaire et financier; the threshold is higher for the acquisition of a branch of an enterprise, as in these cases, only the acquisition of a majority stakes in the branch can be subject to a review. For Norway, § 10-1 of the National Security Act (*Lov om nasjonal sikkerhet (sikkerhetsloven)*); again here, smaller participations can trigger consequences if "significant influence over the management of a company" is achieved below this shareholding.

135 Finland's and Poland's mechanisms use stepped approaches in which transactions that lead to passing of set thresholds each require a review of the acquisition. In Finland, thresholds are set at 10%, 33.33% and 50% for the acquisition of shares in a defence company (Act on the Monitoring Foreign Acquisitions, section 2.5) as well as under the cross-sectoral mechanism; the 50% trigger threshold constitutes thus only the potentially third occasion for review rather than the first or only. An amendment of the Finish legislation in 2014 makes it possible that for a particular reason, the authority processing the matter may also oblige the buyer to submit an application or a notification concerning a measure that increases their influence that does not result in exceeding these limits

155. All identified policies employ thresholds as trigger criteria, and no occurrence has been identified where a threshold has been used to modulate the application of other criteria. In turn, the actual value of trigger thresholds is occasionally modulated by other parameters: Some countries differentiate trigger thresholds according to asset or acquirer parameters, such as industry sectors,[136] State-ownership of the acquirer,[137] or acquirer nationality.[138]

156. In some countries, the values set for this parameter for certain mechanisms have recently evolved: Germany and France have recently lowered the trigger thresholds;[139] Australia as part of preferential rules agreed in some of its recent Preferential Trade Agreements (PTAs), has increased the trigger thresholds for some acquisition types in relation to acquirers from certain countries.

157. Jurisdiction authority that consider the resulting equity stake in an enterprise has certain implications once the trigger threshold is exceeded or when the stake's size remains just below the trigger threshold: under some mechanisms, every even very small additional stake may trigger a new review requirement once the holding has exceeded the threshold. Also, changes beyond the influence of an owner – such as share buybacks – may increase the voting rights or shareholding of an investor and trigger a review without an active intervention of the investor.

158. A few countries have set rules to address these implications: Mechanisms may only be triggered when a specific threshold is crossed for the first time.[140] Australian authorities introduced business exemption certificates in 2017. These certificates permit an approved foreign

taken after the processing of their application or notification has been completed In Poland, the trigger values are 20%, 25%, 33% and 50% (Act of 24 July 2015 on the Control of Certain Investments (as amended), Article 3. (3) and (4)).

136 Germany applies, since late 2018, different equity stakes as triggers depending on industry sectors, according to § 56 and § 60a of Germany's Foreign Trade and Payments Ordinance. The United Kingdom, also since 2018, applies different turnover values of a given enterprises under acquisition depending on industry sector (the change was introduced by the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018). In the United States, acquisitions of non-controlling stakes in specified industry sectors attract some of the consequences of the review mechanism, again since 2018.

137 Australia applies zero-Dollar trigger thresholds to acquisitions by State-owned entities, while significantly higher thresholds apply to acquisitions by private investors. Foreign Acquisitions and Takeovers Regulation 2015, section 56. FIRB Guidance note #23 explicitly points out the national security implications of foreign government-controlled investors.

138 Australia and New Zealand apply differential trigger thresholds for parts of their mechanisms. Australia applies around four times higher trigger thresholds for acquisitions in non-sensitive sectors by so-called "Agreement country investors" (investors from Chile, P.R. China, Japan, Korea, New Zealand, Singapore, the United States and any State Party to the CPTPP, except foreign government investors) than to investors from countries with whom it has not concluded trade agreements with preferential trigger thresholds. New Zealand grants Australian investors higher thresholds as well.

139 Austria had reportedly planned to likewise lower its current 25% trigger threshold for certain sectors in mid-2019, and the coalition agreement for the government 2020 to 2024, p.91 contains the commitment to lower the threshold to 10%, along with the introduction of new criteria.

140 The mechanism established under France's Code monétaire et financier, Article R151-2 considers the first passing of the 25%. Under Finland's legislation, the passing of 10%, 33% and 50% thresholds each trigger reviews (Act on the Monitoring Foreign Acquisitions, section 2.5).

investor to make multiple acquisitions without seeking authorisation for each individual acquisition.[141]

159. The reliance on voting or ownership share thresholds as a trigger criterion may have implications for private equity and asset purchases that countries have resolved in different fashions.

160. With respect to *private equity*, not all countries appear to consider non-listed enterprises for the purpose of reviews, and voting rights and similar parameters may not always be as easily to determine as in publicly traded companies, and information on private equity transactions may be less readily available in the absence of publicity requirements associated with publicly traded companies.[142] Japan has, in 2017, included the transaction of non-listed companies' shares between foreign investors in the scope of its review mechanism.[143]

161. *Asset acquisitions*, that is, transactions in which assets rather than stock of an existing enterprise are acquired, pose particular challenges with regard to the criterion of voting or ownership thresholds. In these cases, the acquirer may obtain security sensitive assets but no formal control or influence over the selling company at all. In some countries, asset acquisitions are explicitly covered by the rules as an acquisition modus,[144] and in others, anti-circumvention clauses may bring these types of transactions under the scope of the review mechanisms – but not all mechanisms that refer to control of a target enterprise may offer this possibility.[145]

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141 Australia introduced such "business exemption certificates" on 1 July 2017 (Foreign Acquisitions and Takeovers Regulation 2015, section 42, FIRB Guidance note 26 and further explanations in the FIRB annual report 2017/2018, p.17).

142 See on the role of such information for the detection of transactions section 2.3.2.

143 Article 26 (3) of the Foreign Exchange and Foreign Trade Law (Law No.228 of 1949), as amended in October 2017, notified to the OECD in DAF/INV/RD(2017)4.

144 Canada's rules in the Investment Canada Act, Section 28, explicitly include asset acquisitions – "all or substantially all of the assets" – in the definition of manners to acquire control, besides the possibility that control is achieved by the acquisition of voting shares and other methods. An *Interpretation Note No.3* has been issued to clarify the meaning of the term. Germany was about to explicitly include asset acquisitions under the scope of its mechanism as part of a reform, first announced on 27 April 2020, of its decree (Außenwirtschaftsverordnung). The German Ministry of Economy and Energy had stated in a legally non-binding information note issued in May 2019 that asset acquisitions "can" be subject to the control mechanism, while the rules in German law and regulation only refer to acquisitions of (voting) participations in a target company; trigger thresholds are expressed, in some detail, in voting rights in the target enterprise (Außenwirtschaftsverordnung, §§ 56 and 60a), and the anti-circumvention clause appears to only address arrangements regarding the acquirer's nationality.

145 The Austrian mechanism under Außenwirtschaftsgesetz, § 25a(11) contains an anti-circumvention clause, but this clause does not capture asset-acquisitions but only refers to circumventions of the nationality criterion and voting rights conditions. In the United States, in turn, the reform of 2018 brought an explicit broad anti-circumvention clause (50 U.S.C. 4565(a)(4)(B)(v), in addition to jurisdiction of asset purchases that concern real estate (50 U.S.C. 4565(a)(4)(B)(ii)). The *Framework for screening of foreign direct investments into the European Union* of 2019, Preamble item 10 calls for anti-circumvention rules as well, but they refer to artificial arrangements to avoid third-country nationality and do not cater for asset-acquisitions.

Asset-related parameters (3): Absolute transaction value

162. A single mechanisms in the sample refers to the parameters of the transaction in absolute terms[146] – rather than on the outcome of a transaction (see previous subsection) or other parameters of the acquisition target (see the following section). This approach filters out small transactions in absolute terms, without relation to the result on or economic significance of the target enterprise.[147]

Asset-related parameters (4): Other parameters of the acquisition target

163. A few countries consider for the application of their acquisition-related mechanisms a group of other criteria such as this asset's overall value, turnover, or market share in the sector where it operates. It also plays a role in the selection of entities included in asset-specific lists to which certain controls apply.[148]

164. The economic significance is assessed according to different criteria in different countries: in the United Kingdom, the criterion is triggered if the *annual turnover* of the target in the United Kingdom reaches or exceeds GBP 70 million or GBP 1 million, depending on the sector in which the enterprise operates.[149] In Australia, the criterion is fulfilled when the Australian subsidiaries or *gross assets* of the acquisition target are valued above AUD 261 million.[150] Finland had used this approach until its reform of 2012; before that date, a "monitored entity" for the purpose of the mechanism was assessed based on the number of employees, turnover and balance sheet.[151]

165. The rationale behind this criterion is that small target enterprises are unlikely to play a role in the economy that could lead to a threat to essential security interests.

Asset-related parameters (5): Physical location of an asset

166. Some mechanisms use the physical location of the target asset or parts of the target asset as a trigger criterion. Which physical location matters for security relevance can be expressed in absolute terms or relatively in relation to other assets.

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146 Australia uses this approach for the application of the threshold test for some types of transactions under the Foreign Acquisitions and Takeovers Act 1975, Section 51, items 1 and 4.

147 In the sole case where this criterion is used, the criterion is combined with a control test that reintroduces the additional criterion of outcome of the transaction in relation to the asset under acquisition, see Australia's Foreign Acquisitions and Takeovers Act 1975, Section 54.

148 Poland for example, has included seven entities in the list that are subject to controls under the Act on the Control over Certain Investments; the choice was made in part on their presence in the Polish market (see DAF/INV/RD(2016)19, p.3 and the Regulation of the Council of Ministers of 21 June 2016 on the list of entities subject to protection (Journal of Laws of 2016, item 977) and its successors.

149 Section 23 of the Enterprise Act 2002, as amended in June 2018.

150 The Australian rules under the Foreign Takeovers Act 1975 and the Foreign Acquisitions and Takeovers Regulation 2015 defines a large number of combinations among parameters such as asset type, country of the investor, etc. that can trigger a review requirement. The case mentioned here refers to the "threshold test" under Section 51 of the Act for the acquisition of interests in securities of an enterprise. Many other reference values and condition sets exist.

151 The Act on the Screening of Foreign Corporate Acquisitions in Finland (Act 1612/1992) with amendments up to 623/1999 included (no longer in effect).

167. The physical location – with absolute references to the location – in border areas[152] or other pre-determined "strategic"[153] zones has been historically been subject of acquisition-related mechanisms in many countries. Some mechanisms refer to physical locations in *relative* terms, for instance by referring to a location near a sensitive site or defence installation.[154] Finally, some mechanisms refer to land that is qualified by certain features, which may include physical location.[155]

168. An assets' physical location has attracted more attention in the context of acquisition- and ownership-related policies recently and led to reforms in some countries. These reforms:

- clarified the application of mechanisms to real estate assets that are not part of an enterprise (and may hence not be covered by general rules with certainty),[156]
- seek to establish a mechanism to prevent threats from real estate acquisitions in areas outside border or strategic sites.[157]

169. Physical proximity of assets to certain locations can be an important factor; in 2018, Australia for instance blocked a transaction in farmland located in the vicinity of a weapons testing range, the Woomera Prohibited Area, because of security issues related to the nature of

[152] Border zones as sensitive areas (e.g. Chile (Decreto Ley 1939, Articles 6 and 7, Brazil (Article 20 of the Brazilian Constitution); Costa Rica (Article 7 of Ley de Tierras y colonización (Ley n°2825); Kazakhstan (Articles 23 and 24 of the Land Code of 20 June 2003 № 442-II)).

[153] The Argentinian 1944's Decreto Ley – Creacíón de Zonas de Seguridad, (Decreto Ley 15.385/1944) creates "security zones". Article 4 declare of national convenience that the assets located in the security zone belong to native Argentine citizens; To safeguard the interest of national defense and security Spanish Ley 8/1975, de zonas e instalaciones de interés para la Defensa Nacional creates three different kinds of zones, each one determining special acquisition or ownership conditions for foreigners.

[154] FIRRMA, Section 1703 applies the mechanism to real estate located in proximity to sensitive federal government property; According to paragraph I (I) of the Notice of the General Office of the State Council on the Establishment of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors ("Circular Six"), China applies his national security review to "neighbouring enterprises of key and sensitive military facilities".

[155] New Zealand applies parts of its mechanism to "sensitive land"; sensitive land is defined by a series of factors including type of land, surface and location with respect to certain features or vicinity to identified land *or* land specified islands. See Overseas Investment Act 2005, Schedule 1.

[156] The United States, for instance, has explicitly included certain real estate in its acquisition-related mechanism in 2018. The United Kingdom suggested its coverage under the reform proposal made public in mid-2018, "*National Security and Investment – Draft Statutory Statement of Policy Intent*" of July 2018 items 2.36; 2.37 states "A trigger event involving land in the wider economy may pose a risk to national security because the land is located in close proximity to a sensitive site. This is because, where a trigger event relates to land (rather than other assets) the location of land (as well as its nature) is relevant to the Senior Minister's assessment of the national security risk that the trigger event may pose."

[157] In Finland, the Law 470/2019 was adopted in March 2019 in response to this type of perceived threat.

the site.[158] Similarly, the United States had ordered divestment of a site in 2012 because of its proximity to an area with military applications.[159]

170. Concerns about real estate were historically tied to the risks that are associated with its location in border or strategic areas or relative to security-relevant installations in the context of espionage. More recently concerns have also been voiced about the establishment of hidden military installations or installations that could fulfil military functions for foreign powers.[160]

Asset-related parameters (6): Greenfield investment vs established enterprises

171. Most countries' mechanisms apply exclusively to the acquisition of existing enterprises or parts thereof rather than the creation of new enterprises or the creation of a new area of activity from within an existing enterprise.

172. Two observed approaches an exception to this rule:

- sector-caps which limit certain investors' *presence* in a given sector independent of the acquisition-mode; or
- the inclusion of greenfield investment in the scope of the acquisition-review mechanism.

173. Sector caps that are motivated by essential security concerns[161] are observed in several countries, especially is transition economies. They may complement or substitute business licenses, a further means to regulate presence and activity in a given sector to manage essential

158 "*Statement on decision to prevent sale of S. Kidman & Co. Limited*", Australian Treasurer, 19 November 2015 concerning the sale of a cattle farm located within the Woomera Prohibited Area, a weapons testing range. The acquisition of a mining company by a foreigner that would have included a mine in this large testing site had already been initially blocked in 2009 based on national security concerns and led to a policy statement on mining uses in the Woomera area in 2010.

159 A comprehensive description of facts and circumstances is available in United States Court of Appeals for the District of Columbia District, No. 13-5315 (15 July 2014), Ralls Corporation vs. CFIUS et al.).

160 Examples include concerns in 2018 that a foreign power was allegedly placing military equipment and installations in the territory of Finland.

161 Foreign ownership caps exist in some economies for other purposes than safeguarding essential security interests (see for a comprehensive albeit not complete list the List of Exceptions to National Treatment under the OECD National Treatment instrument). Ownership caps that are motivated by essential security concerns are recorded in the List of Measures reported for Transparency under the same instrument. Throughout this note, only policies that governments have explicitly declared to be motivated by their essential security interests are mentioned. This explicit revelation of the purpose of the policy can be found in the categorisation of a given policy in one of the two abovementioned lists for OECD Members and Adherents to the Declaration or by an explicit statement in the legislation for economies that are covered by this report but have not yet adhered to the Declaration and for which no entries in either lists exist.

security implications.[162] They may apply for instance to sectors such as defence production,[163] telecoms,[164] port services or maritime shipping,[165] or airlines or air transport services.[166]

174. Subjecting greenfield investment directly to acquisition-related mechanisms is a more rarely followed path, and currently observed only in Australia, Canada and Hungary.[167] Australia reviews any greenfield investment by foreign *government* investors and for any foreigner who

[162] E.g. India combines sector caps for sectors such as defence, telecoms, and air ground handling, now set to 49% in defence and telecom with the possibility of full ownership after government review, with a security review; operations in some of these sectors also require business licenses (Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017, section 16, B., items 6, 9.4 and 14). Mexico has a foreign ownership cap at 49% in enterprises that manufacture or commercialise explosives, firearms, cartridges, and ammunitions and fireworks under Ley de Inversión Extranjera¸ Article 7. This cap has been notified to the OECD as being based on public order and essential security considerations in Mexico's entry in the List of Measures reported for Transparency under the National Treatment instrument. Thailand bars enterprises that are not majority-Thai owned from obtaining licenses to manufacture, distribute or maintain firearms, ammunition and defence material or to operate domestic transportation by land, water or air. This prohibition is explicitly based on essential security grounds, Foreign Business Act B.E. 2542 (1999).

[163] E.g.: Mexico, *Ley de Inversión Extranjera*, Article 7, III., p); Argentina, *Ley nº 12.709* – Creación de la Dirección General de Fabricaciones Militares, Articles 6, 7 and 8; Indonesia, Presidential Regulation concerning List of business that are closed to and business fields that are open with conditions to investment (N°44 of year 2016), Appendix III, F; Lithuania, Law on Investment, Article 8, 2, 1; China, Catalogue of Industries for Guiding Foreign Investment (Revision 2017), June 28, 2017, Part II – Catalogue of Prohibited Industries for Foreign Investment, 9).

[164] Mexico (Ley de Inversión Extranjera, Article 5), notified to the OECD as being based on public order and essential security considerations in Mexico's entry in the List of Measures reported for Transparency under the National Treatment instrument.

[165] Mexico (Ley de Inversión Extranjera, Article 5) , notified to the OECD as being based on public order and essential security considerations in Mexico's entry in the List of Measures reported for Transparency under the National Treatment instrument.

[166] The United States maintains a 25% foreign ownership cap in airlines since 1920, which is, according to the Unites States notification of the measure in the List of Measures reported for Transparency under the National Treatment instrument motivated by national security concerns; the United States Government Accountability Office (2019), "*U.S. Airlines: Information on DOT's Oversight of and Stakeholders' Perspectives on Foreign Ownership*", GAO-19-540R, at footnote 22 deems that the cap is *partly* motivated by such concerns. Brazil had a 20% foreign ownership cap in this area until 13 December 2018; the cap was abolished by Provisional Measure No.863 of 13 December 2018; the abolition was confirmed by Law no.13842 of 17 June 2019. Iceland similarly used to limit ownership of Icelandic airlines by non-EEA-residents to 49% under Act N° 34/1991 on Investment by Non-residents in Business Enterprises, Article 4(3) until the restriction was later abolished.

[167] Law on the Control of the Foreign Investments that Violate the National Security of Hungary, Section 1.2.

starts a media business.[168] Canada's national security review scope applies to any foreign investment, regardless of value, including investments to establish a new business in Canada.[169]

175. The near-absence of greenfield investment from control under acquisition- and ownership-related mechanisms is notable. Greenfield investment may lead to similar exposure as mergers and acquisitions in relatively short time-spans, for example in sectors like the media or products that generate sensitive personalised data. Not in all these sectors do licensing requirements exist to offer a means to address potential ownership-related risks.

Acquirer-or owner-related parameters

176. Almost all mechanisms in place in the 62 economies covered by this report combine asset-related parameters with parameters related to the would-be acquirer or owner of an asset to pre-determine which acquisitions or ownership positions warrant attention and potentially intervention.

177. Two groups of parameters that relate to the acquirer or owner have been identified:

- The nationality, foreignness, or residency of an acquirer or owner; and
- The ownership of the acquirer, in particular foreign State ownership.

178. The frequency of use of these parameters is very uneven across the sample, with foreignness or non-residency being almost ubiquitous.

Acquirer- and owner-related parameters (1): Nationality, foreignness, and residence of the acquirer or owner

179. The overwhelming majority of mechanisms in the sample employ nationality, foreignness or residency of the acquirer or owner of an asset as a trigger- or modulating criterion for their application. Only a few mechanisms focus predominantly on the asset under acquisition or owned and do not consider acquirer-characteristics in the pre-selection of transactions as potentially threatening.[170]

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168 For State-Owned Enterprise investments see Foreign Acquisitions and Takeovers Regulation 2015, Section 56 (1)(b); the requirement was introduced as of 1 December 2015. It covers situations where "a foreign government investor starts to carry on an Australian business, or if a foreign government investor already carries on an Australian business, the business starts a new activity under the Australian and New Zealand Standard Industrial Classification (ANZSIC, 2006) Codes and the activity is not incidental to an existing activity of the Australian business and the activity is within a different Division under the Codes. For a foreign government investor that already carries on an Australian business, starting a new business excludes when they establish a new entity, alone or with others, to undertake the same Australian business or acquire interests in such an Australian business", according to FIRB annual report 2017/2018, p.44. Further explanations are provided in FIRB Guidance note 23 (version as of 15 January 2019). The rule on the start of a media enterprise is laid down in section 55 of the Foreign Acquisitions and Takeovers Regulation 2015; further details are available in FIRB Guidance note 25 (version as of 1 July 2017).

169 Investment Canada Act, Section 25.1.

170 The following mechanisms apply indifferently of the nationality of the acquirer or owner: Australia's Security of Critical Infrastructure Act 2018; Lithuania's Law on the Protection of Objects of Importance Ensuring National Security; Norway's National Security Act (*Lov om nasjonal sikkerhet*) Chapter 10; and Spanish rules for acquisitions in the defence sector under *Real Decreto 664/1999*, article 11. Anti-circumvention clauses in some countries may result in the review of acquisitions by nominally domestic entities (e.g. Germany Foreign Trade and Payments Ordinance, section 60 paragraph 1) but these mechanisms are not nationality- or residency-neutral as such. That

180. The rationale for the discriminatory application of mechanisms exclusively to *foreigners* or *non-residents* is rarely ever stated explicitly; rationales for the application to foreigners may differ from those that justify their application to non-residents.

181. As much as the application of policies to *foreigners* is frequent, as much the rationale is uncertain and implicit. As an exception, a recent proposal for the United Kingdom suggests explicitly that foreigners present greater risk than British individuals without elaborating further on the exact mechanics of this assumption.[171]

182. In 1985, the reasons that in advanced economies' view at the time warranted differential treatment of foreign-controlled enterprises with respect to essential security interests were somewhat different. They are documented as being related to foreign-controlled enterprises "lesser security motivation", potential shortcomings of domestic legislation to "cover all the components of [security] objectives vis-à-vis the practices of established foreign-controlled enterprises", or "differences of interest may give rise to situations of conflicting requirements which may be avoided when restrictions are placed on the activities of established foreign-controlled enterprises".[172]

183. Increasing lifetime mobility may have weakened the attachment and loyalty to a home country defined by place of birth or genealogy, that may have underpinned scepticism about foreigners allegiance; in countries that attribute citizenship restrictively and unrelated to place of birth for instance, a bond to the nation of their grandfathers may have never existed in nominal foreigners who were born in their country of residence. Finally, "home-grown" and insider threats come increasingly to the fore in the wider security policy debate and shed further doubt on the merits of using foreignness as a valid and reliable predictor of risk.

184. Focus on *non-residency*, as observed in Australia, New Zealand several European countries but likewise not typically justified in legislative material, may be related to the availability of information on the would-be acquirer; belonging to a community rather than formal citizenship may also play a roles and may have left its trace in the inclusion or exclusion of nationals: For the application of Australia's acquisition-review mechanism, expatriate Australians are "foreign persons"[173] and their investments in Australia may hence be subject to review. New Zealand's Overseas Investment Act 2005 applies to "overseas persons" – anyone who is neither a citizen nor regular resident in New Zealand.[174] Iceland also uses residency – irrespective of nationality –

nationality or residency are not used as a filter criterion in the first step does not exclude their relevance for the review in the second step of the process, see below section 2.1.2.

171 A policy proposal in the United Kingdom, "*National Security and Investment – Draft Statutory Statement of Policy Intent*" of July 2018 items 4.20-4.21 explicitly states, albeit cautiously, that the U.K. "Government considers that foreign nationality could prove to be a national security risk factor" and that foreign national "therefore are comparatively more likely to pose a risk than UK-based or British acquirers."

172 OECD (1985), "*National Treatment – Examination of Member country measures based on public order and essential security interests*", DAFFE/IME/84.6 (1st Revision), paragraph 42.

173 Foreign Acquisitions and Takeovers Act 1975, section 4.

174 Overseas Investment Act 2005, section 7.

as a criterion,[175] and so does France[176] and some other European countries, at times for the mechanisms that address risks in less sensitive sectors.[177]

185. Despite the focus on nationality and foreignness, no country is known to have treated the loss of nationality of one of its citizens as an acquisition that would require review – although such an event could likely be framed as an acquisition by a foreigner under many mechanisms.

186. The treatment of *double nationals* receives diverse treatments: most mechanisms apply to individuals that do *not* hold the State's nationality through a negative definition, while some mechanisms apply to nationals of countries that are included in a positive list and may thus include its own (double) nationals.[178]

187. Despite the frequency of foreignness as a criterion in acquisition- and ownership-related policies is not a universally shared understanding: Countries that do not or did not until very recently have any mechanisms in place also did not consider that foreigners presented risk that warrants a policy intervention. As the relevance of nationality tends to fade with greater individual mobility and with widening possibilities for natural persons to obtain additional nationalities,[179] the plausibility of a selective application of acquisition-related policies to foreigners can be expected to decline.

188. Most mechanisms use nationality as a trigger criterion, but specific nationalities are also observed as modulators of rules. In this context, some mechanisms achieve further differentiation by "**white-listing**" or "**grey-listing**" certain nationalities. As used here, white-listing refers to a partial or total exemption of investors from the application of a given mechanism, while grey-listing refers to explicit singling out of acquirers that hold certain nationalities for scrutiny.

- White lists are observed in particular in some EU Member States or States of the European Economic Area (EEA); many of their mechanisms do not apply at all or only partly to nationals or residents of other EU Member States and EEA nationals.[180] The United States

175 Act N° 34/1991 on Investment by Non-residents in Business Enterprises, Article 12.

176 The Code monétaire et financier, Article R151-1, includes, as of 1 April 2020 « Toute personne physique de nationalité française qui n'est pas domiciliée en France au sens de l'article 4 B du code général des impôts" in the scope of individuals whose investments are subject to the control mechanism.

177 E.g. Section 2 of Finland's Act on the Screening of Foreign Corporate Acquisitions in Finland 172/2012 applies residency across its mechanisms for defence and other sectors; Germany uses the criterion of residency only with respect to the cross-sectoral mechanism (§ 55 of the Foreign Trade and Payments Ordinance), but refers to nationality for the application of the sector-specific mechanism (§ 60 of Germany's Foreign Trade and Payments Ordinance).

178 Some of India's mechanisms single out citizens of Bangladesh and Pakistan, (Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017, section 5 and section 16, B, items 6, 9.4 and 14).

179 For an overview of available schemes see XIN Xu/Ahmed EL-ASHRAM /Judith GOLD, (2015) "*Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs*", IMF Working Paper 15/93.

180 Germany's cross-sectoral mechanism, established under Section 55 of the Foreign Trade and Payments Ordinance, refers to *non-EU residents*, for instance; the country's sector-specific mechanism, established under Section 60 of the Foreign Trade and Payments Ordinance, applies to all *foreign nationals*. Portugal does not apply its mechanism to any resident of EEA (Lei 9/2014 of 24th of February, Art.3(b) and Decreto-Lei 138/2014, Art.2(a)). In Estonian legislation any natural person who is not a citizen or a legal person whose seat is not in a contracting party to the EEA Agreement is prohibited from acquiring immovable in some areas; Article 8.2 of the Lithuanian Law

has also introduced in early 2020 the possibility of an exception to limit new parts of its mechanism for investors if they meet certain nationality requirements.[181]

- Grey lists are less frequent, but are observed for instance in Chile, India, Japan, and Ukraine. The countries whose nationals are concerned are occasionally identified by features that allow their identification in combination with other rules.[182]

Given the regulatory technique, individuals having several nationalities typically benefit from the white-listing or receive less favourable treatment through grey listing.

189. Differentiated scopes of application of white-lists and grey-lists illustrate well the use of modulating criteria to pre-select potentially problematic transactions. Nationalities of acquirers interact with several other, in particular asset related parameters, such as industry sectors, and trigger thresholds:

- With regards to industry sectors, Finland, Germany, Italy, and Portugal for instance apply only some of their mechanisms to all foreigners, while other mechanisms do not apply to acquirers with EU or EEA[183] nationalities. In these countries, mechanisms that specifically concern traditional sectors in defence, tend to apply to all foreigners without exception.[184]
- With regards to trigger thresholds, Australia and New Zealand apply differential trigger thresholds for parts of their mechanisms. Australia applies around four times higher trigger thresholds for acquisitions in non-sensitive sectors by so-called "Agreement country investors" (investors from Chile, P.R. China, Japan, Korea, New Zealand, Singapore, the United States and any State Party to the CPTPP, except foreign government investors) than to investors from countries with whom it has not concluded trade

on Investment prohibits any foreign investment in activities guaranteeing state security and defence excepts for investment by the foreign entities meeting the criteria of European and Transatlantic integration which Lithuania has opted for. Some countries' mechanisms (e.g. Austria's and Germany's mechanisms contain anti-circumvention clauses to avoid that the whitelisting is used to circumvent the review processes).

181 The *Provisions Pertaining to Certain Investments in the United States by Foreign Persons (31 C.F.R. part 800)* Section 800.218, in effect as of 13 February 2020, identify three countries whose nationals may, under certain conditions, be exempted from the application of parts of the review rules under the CFIUS mechanism compared to nationals of other States.

182 Japan's Foreign Exchange and Foreign Trade Act, Article 27(3)(i) requires a review of investments in line with the treaties or agreements that Japan has acceded, and Article 27(3)(ii) provides that direct investments involving certain countries are subject to a review from the viewpoint of reciprocity (e.g. North Korea). Chile lists its immediate neighbour countries (Article 7 of the Decreto Ley 1.939 – Normas sobre adquisición, administración y disposición de bienes del Estado); Ukraine refers to "aggressor States" (Law of Ukraine About Television and Broadcasting, Article 12); India has specific, more restrictive rules for nationals of Bangladesh and Pakistan, identified as "countries of concern" in Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017.

183 Finland's legislation refers to EU and EFTA Member States.

184 Germany's cross-sectoral mechanism, established under Section 55 of the Foreign Trade and Payments Ordinance, refers to *non-EU residents*, for instance; the country's sector-specific mechanism, established under Section 60 of the Foreign Trade and Payments Ordinance, applies to all foreign nationals.

agreements with preferential trigger thresholds.[185] New Zealand grants Australian investors higher thresholds as well.[186]

190. Discrimination based on nationality has a series of implications, both for the application to natural and legal persons.

191. For **natural persons**, these challenges relate essentially to the acquisition of the nationality of the host country of a planned investment or of countries that are white-listed for the application of its policies. Some countries do indeed grant nationality – or intermediate steps such as visa and residency permits to individuals in return for their commitment of funds to the local economy under so called "citizenship by investment" (CBI) or "residency by investment" (RBI) schemes, including for relatively minor, passive placements of funds with no or minimal residency requirements.[187] These schemes have attracted government attention foremost in the context of tax avoidance,[188] financial stability,[189] and money laundering,[190] but have other implications, including related to essential security interests. In particular, they further weaken the legitimacy of nationality- or residency- based discrimination for the application of Acquisition- or ownership-related mechanisms.

192. Some policies explicitly apply rules established for natural persons analogous to **legal persons**.[191] The nationality of legal persons is a fungible and fluid concept, unrelated to the nationality of the owners or beneficiaries of the legal person, and determined according to different rules in different countries. Nationality of a legal person is typically determined by a company's place of incorporation or seat, which can be relatively freely chosen and altered in many jurisdictions, with few limitations, at manageable cost, and not normally subject to any national-security related assessment.

193. The application to legal persons raises the question which person in a potentially long ownership chain matters for the appreciation of foreignness or non-residency. Some countries

185 The Chair of the Australian Foreign Investment Review Board (FIRB), in a speech delivered on 14 August 2018, maintains however that "Australia's investment regime is […] non-discriminatory – applications are treated in the same manner regardless of the nationality of the applicant". Different trigger thresholds mean, however, that some applications are not even required in the first place as some acquisitions by investors from "agreement countries" do not reach the higher thresholds.

186 Overseas Investment Regulations 2005, Schedule 5, Clause 11.

187 European Parliamentary Research Service (2018), "*Citizenship by investment (CBI) and residency by investment (RBI) schemes in the EU State of play, issues and impacts*", PE 627.128 – October 2018.

188 OECD Automatic Exchange Portal, "*Residence/Citizenship by investment schemes*".

189 Xin XU/Ahmed EL-ASHRAM/Judith GOLD, (2015) "*Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs*", IMF Working Paper 15/93.

190 The United Kingdom Parliament identified funds of dubious origins from a specified jurisdiction as an issue for its national security.

191 This choice is prevalent in mechanisms established by European countries in particular, e.g. in Austria (Foreign Trade Act, § 25a.(2) Nr. 3), France (code monétaire et financier, article R. 151-1), Germany (Foreign Trade and Payments Ordinance, § 55), Italy (Art.2(5) of the Decreto-Legge 15 marzo 2012, n.21).

treat legal persons as transparent, and the nationality-consideration applies to the beneficial owner of a given acquisition or ownership position.[192]

194. In turn, many mechanisms appear to consider the nationality of a legal person itself for the application of the nationality- or residency-criterion, as documented by explicit rules on legal persons and their nationality. Such rules are sometimes complemented by provisions on the nationality of the person that owns or controls the acquirer,[193] or circumvention rules seek to counter efforts to bypass the rules' filter criteria through nationality planning and company structuring.[194]

195. There is a great amount of uncertainty about how these rules are applied and to what extent beneficial ownership is considered under different rule-sets. Statistics that are made available by some countries indicate that some efforts are made to identify the beneficial owner of an acquirer, but also suggest that this process meets limits when encountering deliberate efforts to obscure beneficial ownership.[195] Examples also exist where companies have been benefitting from access to review regimes that are more favourable to their interest thanks to diligent structuring of the investment.[196]

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192 Canada for example considers the foreignness of the persons that control the acquirer, with detailed criteria to determine when such control exists (Investment Canada Act, Art.26). Domestic legal persons controlled by foreigners may thus be subject to reviews under Canada's policies. The United States are likewise known to consider the ultimate beneficial owner rather than the characteristics of a legal person that is the immediate acquirer.

193 E.g. Finland defines as foreign legal person an entity that is either incorporated in certain foreign countries or that is partially owned by foreigners, The Act on the Screening of Foreign Corporate Acquisitions in Finland, Section 2. France covers some transactions in which foreigners control a domestic acquirer (Article R151-1, read in opposition to the previous sections).

194 Austria (Foreign Trade Act, § 25a (11); Germany (Foreign Trade and Payments Ordinance, § 60 I 2, introduced in July 2017); Portugal (Decreto Lei no. 138/2014, which refers to Lei no. 19/2012, Article 36 paragraph 3. The European regulation establishing a framework for the screening of FDI, Article 3.6, explicitly underlines that "Member States which have a screening mechanism in place shall maintain, amend or adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions".

195 Germany's cross sectoral mechanism considers the country at the nationality of the first level of non-EU Member ownership in a corporate ownership chain. In many cases, this territorial entity has been identified as is a small opaque transit jurisdiction known for its hosting of shell-companies and anonymous trusts and that is unlikely to be the home-country of the ultimate beneficial owner. According to implementation statistics that Germany published for the period 2008-November 2016, almost 20% of the owners (57 cases out of 301 cross-sectoral reviews) were reported to be domiciled in such small opaque jurisdictions (Deutscher Bundestag, BtDrs 18/10443, 25 November 2016); the representation of jurisdictions in this document is not fully consistent and has been adjusted for this calculation.

Earlier surveys undertaken at the OECD-hosted Freedom of Investment Roundtable to determine country practice, and which may no longer reflect policy or practice include "*Identification of foreign investors: A fact finding survey of investment review procedures*", OECD, 2010 and "*Identification of ultimate beneficiary ownership and control of cross-border direct investors*", OECD 2007.

196 An Australian subsidiary of a U.K.-owned company reportedly acquired a New Zealand food company in May 2019; the acquisition did not attract a review by New Zealand's Overseas Investment Office as Australian acquirers benefit form a higher review threshold – NZD $530 million in 2019 – than investors form many other countries, including the United Kingdom; it is not suggested that the specific investment referred to here was deliberately structured through Australia.

Acquirer- and owner-related parameters (2): foreign government-controlled vs privately owned acquirers

196. The particularities of foreign government-controlled investors (GCIs) in the international market have raised concerns in several policy areas recently,[197] including to specific risks in relation to essential security interests. At present, only a few countries' policies explicitly include government ownership or -control of the acquirer as a criterion and predictor of increased risk for essential security interests: In Australia, France,[198] Japan, the Russian Federation, the United States, and Uruguay,[199] government control of the acquirer modulate the applicable rules; Italy has identified, through legislative change in 2017, foreign government ownership as a risk factor.[200] The European Union has also included government control, including through significant government funding, as a factor that EU Member governments may consider in their own assessment.[201]

197. In Australia, GCI investments are systematically subjected to reviews, and the filters – trigger thresholds or preliminary assessments – that exempt certain foreign private investment from the policies do not apply;[202] also, foreign government ownership opens the review process

When *LetterOne*, a Luxembourg-based investment-fund controlled by a Russian national, acquired previously German-owned gas-distribution enterprise *DEA* in 2014, the German government stated that the residency of the investor in the European Union did not allow a review unless an abusive structuring was observed, which was not the case in the specific situation (documented in the response by the German government to a parliamentary question in BtDrs 18/2828, response to question 7).

197 For some aspects related to international investment and adjacent policy fields, see "*State-Owned Enterprises as Global Competitors – A Challenge or an Opportunity?*", OECD 2016; Yuri SHIMA (2015), "*The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey*", OECD Working Paper on International Investment 2015/01. David GAUKRODGER (2010), "*Foreign State Immunity and Foreign Government Controlled Investors*", OECD Working Paper on International Investment 2010/02. Kathryn GORDON/April TASH (2009), "*Foreign government-controlled investors and recipient country investment policies: a scoping paper*", OECD 2009.

198 France has introduced, with effect of early 2020, an obligation of the prospective acquirer to proactively reveal significant funding links with foreign (non-EU) governments that they may have (Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France, Article 1,II, 7°), and links to foreign governments or foreign public entity are explicitly mentioned as a consideration of refusal of the authorisation (Code monétaire et financier, Article R.151-10, introduced by Décret n°2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France).

199 Ley n°19283 – Declaración de interes general la preservación y defensa de la plena soberanía del Estado Uruguayo en la relación con los recursos naturales y la tierra of September 2014 prohibits the acquisition of rural properties and agricultural exploitations, by foreign States, sovereign funds, and corporations (*sociedades anonimas*) or companies limited by shares (*sociedades en comandita por acciones*) which have sovereign shareholders.

200 Art.14 of decree-law of 16 October 2017 confirmed as law without modification by the law of 4 December 2017.

201 European Union (2019), Framework for screening of foreign direct investments into the European Union, Article 4(2)(a).

202 FIRB Guidance note #23 explicitly points out the national security implications of foreign government-controlled investors.

to greenfield investment or a change in business orientation.[203] In Japan, State-owned enterprise are not normally eligible for the exemption from prior notification of a planned transaction.[204] In the Russian Federation, equity caps for foreign investment in certain enterprises are lower for government controlled investors than for privately owned investors.[205] In the United States, foreign government-controlled transactions have a more stringent certification threshold to clear in review rather than proceed to an investigation stage,[206] and CFIUS now, since the reform of 2018, requires filing for certain transactions involving critical technology, critical infrastructure, or sensitive personal data (as defined in regulations) in which a foreign government has a "substantial interest".[207]

198. Not all governments single out foreign government-control in the pre-identification of transactions that require a specific assessment. Canada, for instance, does not mention government control in its rules related to essential security interests, while it applies a lower threshold for reviewing GCI than private sector investments under its "net-benefit" test.[208] The German government has publicly stated that the ownership of the acquirer does not influence its risk assessment provided that the enterprise operates according to market principles; government financing or control may however play a role when the investment is done for "strategic" purposes.[209]

199. Different countries apply different criteria to identify what constitutes government-controlled investors for the application of the policies. In Australia, the definition of foreign GCIs includes entities that are directly or indirectly government owned or controlled; individual and aggregate thresholds apply for mixed ownership.[210] Russia also includes international

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203 Foreign Acquisitions and Takeovers Regulation 2015, sections 10 and 56.

204 Conditions under which investment by State-Owned Enterprises are eligible for such an exemption are set out in an information note Japanese Ministry of Foreign Affairs (2019) "*Frequently Asked Questions on the Amendment Bill of the Foreign Exchange and Foreign Trade Act*", undated.

205 Foreign government controlled investors are prohibited from acquiring controlling stakes in Russian strategic companies, while private investors may acquire up to 50% stakes; further, foreign GCIs must seek government approval to acquire a minority stake of 25% or more of the voting shares (5% or more for companies that exploit subsoil resources) or gain the power to block decisions made by management. Foreign private investments are only subject to approval requirements when they reach or exceed 50% (25% or more for companies that exploit subsoil resources).

206 The rule was introduced in 1992 as the so-called Byrd-Amendment – see for details James JACKSON (2018), "*The Committee on Foreign Investment in the United States (CFIUS)*", Congressional Research Service, p.4.

207 FIRRMA permits CFIUS to impose mandatory declarations for investments involving "critical technologies" regardless of whether there is government control. FIRRMA requires CFIUS to impose mandatory declarations for certain investments in which a foreign government has a "substantial interest." (Pub. L. 115–232, div. A, title XVII, §§1704, 1727(b), Aug. 13, 2018, 132 Stat. 2184-2187)

208 Canada's policies related to essential security – including the Guidelines on the National Security Review of Investments of 2017 – do not explicitly single out foreign government-controlled investors.

209 The statement was made in May 2018 in a response by the Government to a parliamentary question; BtDrS 19/2143, response to questions 12 and 13.

210 A foreign government investor includes, for the purpose of Australia's policy and according to section 17 of the Foreign Acquisitions and Takeovers Regulation 2015: a foreign government or separate government entity; entities in which a foreign government or separate government entity, alone or together with associates, hold an interest of 20% or more; entities in which foreign

organisations, with some exceptions of international organisations in which the Russian Federation is a member.[211] The United States include "any government or body exercising governmental functions […] including […] national and subnational governments, including their respective departments, agencies, and instrumentalities."[212]

200. To what extent GCIs receive different treatment under national security screening processes in practice, including in countries where government control is not singled out as a risk factor has been subject to little research,[213] and the absence of an explicit criterion in many countries' rules makes it unlikely that empirical data will be gathered to elucidate the question in the near future.

Acquirer- and owner-related parameters (3): Operations in the same sector

201. A few mechanisms consider whether the acquirer carries out operations or has interests in the same or related sector in the country of the acquisition target or in third countries. These criteria have different rationales, which include single-supplier risk, that is, the dependency on a single supplier for a specific product or service. The likelihood of unwanted transfer of intellectual property or know-how may also play a role.

202. At present, one mechanisms, in place in Argentina considers operations of the would-be acquirer in the same sector *in other countries* when assessing a transaction in a sector in Argentina.[214] The policy proposal advanced by the United Kingdom government in July 2018 acknowledges that "the risk posed by the acquirer would be increased if an acquirer has control over other entities within the sector or significant holdings within a core area. This could mean they may be able to use this inappropriate leverage over the Government as they could threaten essential services".[215] Other countries may consider such cumulative ownership in their country or in other countries for the risk assessment, but have not included the factor explicitly in the criteria of their mechanisms.

Hybrid parameters: Essential security review mechanisms associated with merger reviews

203. A few mechanism to manage acquisition- or ownership-related risk are built on top of merger reviews for competition purposes. Two variants of combination of merger review systems and security reviews are observed in policy practice:

governments or entities of more than one foreign country hold an aggregate interest of 40% or more. FIRB Guidance note #23 sets out the provisions in greater detail.

211 The Strategic Investment Law provides an exemption for transactions involving certain financial organisations such as the EBRD, MIGA, and the International Finance Corporation. The full list of organizations is contained in a *Governmental Directive* dated 3 February 2012.

212 Federal Register, Title 31, *Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons*, §800.213

213 Some empirical information, based on acquisition information of foreign firms in the United States from 1990 to 2012 is available in JING Li/JUN Xia/ZHOUYU Lin (2017), "*Cross-border acquisitions by State-owned firms: How do legitimacy concerns affect the completion and duration of their acquisitions?*", Strategic Management Journal, 38: 1915–1934 (2017).

214 Ley nº 12.709 – Creación de la Dirección General de Fabricaciones Militares, Article 8.

215 Department for Business, Energy and Industrial Strategy, "*National Security and Investment – Draft Statutory Statement of Policy Intent*", July 2018, item 4.24, p.30.

- Administratively, the competition authorities also carry out acquisition reviews, albeit under an entirely separate and different rule-set and only share administrative arrangements for the implementation; or
- The merger review regime is the exclusive entre point for an acquisition-review that, once this entry point is passed focused on essential security risks, either as an integrated component or additional element of the merger review.

Only the latter combination of merger- and security-focused reviews is of interest here, as it establishes hybrid criteria sets for the trigger of the security review that are composed of elements relevant for competition and for security purposes.

204. The pursuit of two quite different policy objectives in one review process may appear counterintuitive, especially as concerns under any of the two areas may arise independently; in particular, essential security risks may be at stake when no competition concerns arise at all. From a perspective of security objectives, it may further be disconcerting that the few mechanisms that have been observed in the country sample rank the competition objective higher than the essential security objective: only transactions that raise competition concerns can also be reviewed for their essential security implications.[216]

205. The United Kingdom, one of the few countries that currently uses this approach as a primary means to manage acquisition-related risks to essential security, has addressed part of this issue in a reform in 2018,[217] while simultaneously suggesting that an entirely different rule-set may replace the current, merger-review based approach.[218]

206. Recent concerns about single-supplier risk[219] suggest that there may be, at least occasionally, alignment of objectives of competition policies and mechanisms to protect essential security through acquirer- or ownership related policies.

207. Some other countries have built a mechanism to manage acquisition-related essential security risk on top of or into a merger review for competition purposes, including China,[220] France,[221] Romania,[222] and Spain[223]; at least China, France, and Spain have additional mechanisms in place to manage essential security risk associated with acquisitions of assets.[224]

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216 In a recent case in Spain, documented in a release of the Comisión Nacional del Mercado de Valores dated 8 January 2018, the government agency responsible for regulation of the securities market was competent but found no concerns and hence did not pass the transaction to the Government for a review with respect to essential security concerns.

217 The modifications that were made in 2018 to the Enterprise Act 2002 and their underlying rationale are available in the notification DAF/INV/RD(2018)7.

218 "*National Security and Investment – Draft Statutory Statement of Policy Intent*", Department of International Trade, 25 July 2018.

219 See, for example the speech by Peter Navarro, delivered at the CSIS on 9 November 2018: "[…] if you're dependent on foreigners for that [components in the supply chain for a fighter plane], that would be a vulnerability."

220 Anti-Monopoly Law of 2007, Article 31.

221 Code de Commerce, Article L 430-7-1.

222 Law of Competition, Article 46 (9).

223 Ley 15/2007 de Defensa de la Competencia, Article 10(4) (a) and (b).

224 See for more details on the combination of mechanisms and instruments rooted in other policy areas below section 2.8.

2.1.2. Step 2: Assessing pre-identified transactions for actual treats and other consequences

208. A transaction or ownership position that meets all conditions set out in an individual mechanism may trigger a series of consequences, substantive, procedural and institutional. For example, the acquisition may not be allowed to go forward until an explicit or tacit decision on its acceptability has been taken; the would-be acquirer and, less frequently, the target enterprise, need to inform the authorities of the planned transaction; and in the case of legislated ownership caps, the transaction is automatically prohibited by decision of the rule-maker.[225] Further, additional parts of governments may become involved when the conditions of a mechanism are met.

209. Importantly, the framing of a given transaction as potentially problematic also establishes the competence of the implementing authorities to carry out a review of that specific transaction; some mechanisms oblige, others merely allow, the authorities to carry out such a review.

210. Criteria employed for the filtering of transactions in the first step need to be clear to allow a given would-be acquirer to respect potential notification requirements or identify risks for the viability of a planned transaction.

211. The assessment of whether the framed transaction represents an *actual* risk for essential security interest is carried out against new criteria, which typically differ from those established for the framing of the transaction as *potentially* threatening. Criteria employed in the first step may or may not play a role for the assessment of actual risk determined in the second step.

212. The criteria for the assessment of specific transactions in this second step are typically less densely regulated than those applied to the first step to give the implementing authorities a wider margin of interpretation and application. While investors will thus most often be able to assess whether their planned transaction meets the criteria of the first step, they may be rather uncertain how the government will assess the case in the second step.

213. The definition of criteria applied for the specific assessment of a transaction's riskiness in the second step has important repercussions on the breadth and functioning of a given mechanism and the predictability of outcomes for investors: the overall outcome of a mechanism depends on the interplay between the pre-selection criteria in the first stage – which may retain more or less transactions, depending on the filter rules – and the criteria for the specific assessment in the second step.

214. For the assessment of a transaction in the second step, most mechanisms employ broad concepts such as "essential security", "national security", "national interests", or "public order"; some countries spell out components of these concepts or additional aspects separately.[226] Whether there are material differences in meaning between the different designations of the public interest is not known, given lack of comparable information on the specific interpretation and application.[227]

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225 Ownership caps and other one-step mechanisms that do not involve the implementing authorities are not addressed in greater detail in this section.

226 Portugal for instance spells out, in Decreto-Lei 138/2014, Article 3(1), "…defence and national security…" alongside "…the Country's security of supply of services fundamental for the national interest. […]."

227 An analysis of this terminology on a limited set of countries and legal documents is available in OECD (2009), "*Security-related terms in international investment law and in national security strategies*".

215. In many cases, the interpretation of these rather broad terms is guided by the legislator or the executive.[228] Some countries' national security strategies may offer additional hints on the contours of these notions, but are rarely very specific. Practice and past decisions do not typically offer significant clues, at least to outsiders, as most decisions and the reasons for these decisions are not publicly available; in some cases, the considerations of past practice is made public, however, and can provide further guidance without binding a government.[229]

216. Different techniques to specify the meaning of broad concepts of essential security interests are observed in the sample of mechanisms. They may be combined in a single mechanism and include:

- Sector lists, features of the acquirer, or both, that guide the interpretation based on the commonalities of the listed items – an approach reminiscent of but not identical with, criteria used for the framing of a transaction as potentially threatening;
- Specific public interests or threats to specific public interests are identified as endangering the interest described by the overarching concept; or
- References that are made to external legal sources and their interpretation.

Examples for these approaches from spelt-out policy and, to the extent it is known, from implementation practice, are set out below.

Asset- and acquirer-characteristics

217. Some mechanisms contain guidance for the interpretation of broader terms such as "essential security" or "national security" through lists of asset- or acquirer-related features. Unlike criteria set out in the first step of the risk assessment, these lists are open-ended and support interpretation of terms through illustration and analogy based on the commonalities of the listed items.

218. Lists that refer to asset-related features are observed for instance in Germany's cross-sectoral mechanism, where they resemble lists for the purpose of the first step of the risk assessment, but are, crucially, open-ended and explicitly illustrative.[230]

219. Lists that refer to acquirer-characteristics are more common. They often focus on the acquirer's criminal record or prognosis of criminal activity in the future – an aspect that has allegedly also occasionally played a role in individual decisions in countries whose mechanisms

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228 In Australia, information about interpretation and implementation of the concept "contrary to the national interest" is laid down in a sizeable number of guidance notes. Canada has provided an illustrative list of considerations in Guidelines on the National Security Review of Investments (as published in 2016), item 6.

229 Such backward-looking information on considerations is made available for instance in "*Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States*", Federal Register Vol.73, No.236 (8 December 2008), p.74567 [74570].

230 Germany's cross-sectoral review mechanism specifies in § 55 I 2 Foreign Trade and Payments Ordinance that "a threat to public order or public security *may* be present *in particular* if the acquisition target (1.) operates critical infrastructure […]; (2.) develops software used for the operation of critical infrastructure […];" etc. [emphasis added]. The relationship with the same term in the same legislation, but for the sector-specific mechanism, is unclear; for the sector-specific mechanism, no such specifications are available, as the sectors are already a criterion for the assessment in the first step.

do not explicitly mention this factor.[231] Explicit references are for example observed in France,[232] Lithuania,[233] New Zealand,[234] Portugal,[235] and South Africa.[236] The Framework that the European Union adopted in 2019 recognise that EU Member States' policies may take into consideration whether the investor has already endangered the security of an EU Member State or whether there is a risk that the acquirer will engage in illegal or criminal activities.[237] The reform proposal published by the United Kingdom Government in 2018 also mentions the criminal record as a factor that needs to be taken into account for the assessment of acquirer risk.[238]

220. Other factors related to the acquirer appear as well, albeit less frequently. Affiliations and potential for third party influence appear in several policies, for example in Canada[239] and the proposal for the reform in the United Kingdom.[240] These references recall criteria used for the

231 The motivations are not normally known publicly, but bribery allegations against the would-be acquirer in third countries have reportedly played a role in at least one decision.

232 In France (Code monétaire et financier, Article R151-10), the Minister may deny the approval of a transaction that falls under the scope of the mechanisms if she or he considers that the investor is likely to commit criminal offenses.

233 Lithuania refers to characteristics of the *investor* that make the person unsuitable (Article 11 of the Law on The Protection of Objects of importance to Ensuring National Security), mentioning persons who are dominant importer of fossil energy resources; maintains relations with institutions of foreign states which pose a threat to national security or with groups of foreign states related to international terrorist organisations, has been found guilty of a grave crime under the Criminal Code of Lithuania or corresponding laws of other States, including crimes against the independence, territorial integrity and constitutional order of Lithuania, among others.

234 New Zealand (Overseas Investment Act 2005, Section 18) considers criminal convictions, the likelihood that the foreign investor commit an offence, or adherence to a terrorist organisation under the umbrella of "good character" and under a "national interest" test (which covers essential security interests).

235 Portugal for instance mentions, in Decreto-Lei 138/2014, Article 3(3), connections with countries that do not respect fundamental principles of democracy or the rule of law, or that represent risk to the international community, among others.

236 Act. N°18 of 2018: Competition Amendment Act, 2018: "Insertion of section 18A in Act 89 of 1998: (…) (4) In determining what constitutes national security interests for purposes of *this Act*, the President must take into account all relevant factors, including the potential impact of a merger transaction— *(g)* to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime;

237 European Union (2019), Framework for screening of foreign direct investments into the European Union, Article 4.2 states: "[...] whether: (b) the foreign investor has already been involved in activities affecting security or public order of a Member State; or whether there is a serious risk that the foreign investors engages in illegal or criminal activities".

238 United Kingdom (2018), *National Security and Investment – Draft Statutory Statement of Policy Intent*, item 4.06. The attribution of this element as a criterion employed in the first or second step is yet uncertain in the absence of legislation.

239 Canada's Guidelines on the National Security Review of Investments, item 6. state that the assessment considers "the nature of the asset or business activities and the parties, including the potential for third party influence, involved in the transaction […]."

240 United Kingdom (2018), *National Security and Investment – Draft Statutory Statement of Policy Intent*, item 4.06.

first step-assessment in some countries, where they are associated with trigger thresholds and voting agreements of affiliated shareholders.

Specific public interests and threats to public interests

221. A further means employed to specify the notion of concepts such as "essential security" or "national security" consist of listing specific public interests that make up the notion of these concepts. In some cases, these interests are circumscribed through threats that may endanger the interests.

222. Direct listings of public interests that are subcategories of "essential security", "national security" or similar terms are observed in Canada[241] and Lithuania.[242] Mechanisms that refer to *threats* to public interests, in particular the disruption of supply of essential goods or services, are observed in Italy,[243] Poland,[244] and Portugal.[245]

223. Some of the public interests that are mentioned in these approaches to frame essential security interests appear to focus on the defence against *external* threats – in particular the supply of defence equipment – reminiscent of an earlier observation that threats are perceived to originate in foreign countries and in foreign persons. More recent paradigms that include essential security risks originating in domestic or not man-made threats – such as results of pandemics or natural disasters – are less often observed.[246]

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241 Canada's Guidelines on the National Security Review of Investments, item 6., mention the impact on: defence capabilities; the transfer of sensitive technology or know-how outside of Canada; involvement in the research, manufacture or sale of defence goods; the security of critical infrastructure; the supply of critical goods and services to Canadians or the Government of Canada; the potential of the investment to enable foreign surveillance or espionage; potential negative impact on intelligence or law enforcement operations; Canada's international interests; and on the activities of illicit actors, such as terrorists or organized crime.

242 Lithuania's Law on Enterprises and Facilities of Strategic Importance, Article 2, section 1.(7), lists specifies the notion of "national security interests" as follows: "National security interests shall mean the 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 enshrined in the laws of the Republic of Lithuania, including the provision of the most important services of common interest, […]".

243 For the mechanism related to energy, transport and communication, the Decree Law 21/2012 that was later converted, with amendments, into law by the Law of 11 May 2012, n. 56, Article 2 mentions public interests "relating to the safety and the functioning of the networks and systems and the continuity of supply".

244 Poland (Law on the control of certain investments, Article 11.1., item 2) ("ensuring the implementation of obligations imposed on the Republic of Poland related to safeguarding the independence and integrity of the territory of the Republic of Poland, assuring the freedom and human and civil rights, citizens' security and environmental protection, […] preventing […] activities or phenomena making it impossible or difficult for the Republic of Poland to fulfil its obligations arising from the North Atlantic Treaty, […], preventing social or political activities or phenomena that may potentially distort the foreign relations of the Republic of Poland, […] ensuring, […] public order or security of the Republic of Poland, as well as covering the indispensable needs of the population, in order to protect population health and life.")

245 Decreto-Lei 138/2014, Article 3(3).

246 Portugal explicitly recognises such threats to its essential security interests, Decreto-Lei 138/2014, which frames essential security interests as difficulties "which threatens the defence and national security or the security of supply of the country as regards services which are fundamental to the

References to external legal documents

224. A third approach to specify the content of concepts such as "essential security" or "national security" is the reference to external legal sources and their interpretation. This approach is common in mechanisms in EU Member States that refer to the notions of the European Treaties[247] or other international law documents.[248]

2.2. Consequences for transactions that are identified as threatening essential security interests

225. Transactions or ownership positions that do not appear to represent actual risk to essential security interests do not require a policy response and are authorised under the mechanisms studied for this report. Many mechanisms foresee nonetheless the possibility that the authorities issue a certificate or other document to establish legal certainty about the absence of concerns. In some mechanisms, the absence of a response represents a tacit authorisation.[249] In turn, transactions that have been found to present actual risk to essential security interests call for a response to remove the identified threat. This section sets out how such policy responses are designed in the mechanisms surveyed for this report.

226. Where concerns about essential security interest are addressed through ownership caps, the policy response is straightforward and defined by the legislator: Ownership caps to manage risks for essential security interests imply the assumption that *all* transactions in the class described in the mechanism trigger an unacceptable risk. There is no individual assessment of a specific transaction, and no conditions can be applied to allow the transaction, even modified, to go forward.[250]

national interest may cause grave disturbance, not just to the defence and national security and to the national economic activity, but also to the life of the population in general".

247 E.g. Austria (Foreign Trade Act, § 25a (2)), Finland (Act 172/2012 on the Monitoring of Foreign Acquisitions, Section 2.1.: "securing national defence or safeguarding public order and security in accordance with Articles 52 and 65 of the Treaty on the Functioning of the European Union"); Germany (Foreign Trade and Payments Act, § 4(1) item 4.); and Poland (Law on the control of certain investments, Article 4.2 and 11.1 "…to ensure public order or public safety, referred to in Art. 52 (1) and art. 65 (1) of the Treaty on the Functioning of the European Union").

In some countries, the referenced law defines the *outer limit* of the application such as in Lithuania (Article 1 (4) of the Law on The Protection of Objects of importance to Ensuring National Security "Decisions of the Government of the Republic of Lithuania … shall be adopted without prejudice to the obligations of the Republic of Lithuania assumed under the provisions of Articles 52 and 65 of the Treaty on the Functioning of the European Union".

248 Portugal (Decreto-Lei n° 138/2014, Article 3 "Safeguarding strategic assets (…) 4 - The procedure for opposing the operations referred to in paragraph 1 shall respect the rules and obligations binding internationally on the Portuguese State contained in international conventions or acts, agreements and decisions of the World Trade Organization."

249 E.g. Austria (Foreign Trade Act, § 25a (8)), Germany (Foreign Trade and Payments Ordinance, § 58); Portugal (Decreto-Lei 138/2014, article 4(6)).

250 Ownership caps that are motivated by essential security interests, according to the legislation itself or according to the notifications of the measures by governments to the OECD remain in place in a number of countries and sectors. For examples, see references in footnote 162 and following.

227. Other mechanisms that call on the implementing administration to make a specific assessment of a given transaction typically allow the administrations to formulate a tailored response. This response may include, depending on the design of a given mechanism, the power to prohibit the transaction entirely or to authorise it under certain conditions or obligations – negotiated or imposed – that seek to remedy the security concern. Conditions or obligations to address risk while allowing the transaction to go forward are often collectively referred to as "mitigation measures".

228. The regulatory depth of any measures that the administration can take to address identified risk varies on a very broad spectrum. Some mechanisms contain almost no rules on the implementation of the powers to review transactions for their security implications – suggesting that the legislator deemed an actual implementation of the mechanisms an unlikely event. It is not obvious to what extent general rules on responsibilities and competencies step in to fill the gap in operational rules. The absence of sufficiently detailed rules on competencies and procedures may render certain mechanisms almost inoperable, especially when combined with short response times for the administration.[251]

229. The options that are available to the administration to address an identified risk depend in part on the moment in time when a concern comes to the attention of the authorities. This can be:

- Before a planned or pending acquisition has been implemented; or
- After an acquisition has closed.

230. Many mechanisms covered by this report appear to be primarily designed and formulated to respond to risks that come to the authorities' attention in the context of an impending acquisition. The possible policy responses for these cases are set out in the following subsection 2.2.1. For scenarios in which a transaction and associated risk come to the attention of the authorities after an acquisition has closed, some of the policy responses that may exist before closure are not available or need to be are adapted. The options available to the implementing authorities to address these scenarios are set out in the then following subsection 2.2.2. Finally, where no prior authorisation is required before a transaction closes, undesirable outcomes may intervene before the transaction has been reviewed. To avoid these outcomes, some mechanisms specifically regulate which interim measures can be taken while a review is ongoing. These types of measures are laid out in subsection 2.2.3.

2.2.1. Policy responses to identified threats before closure: prohibition or authorisation under conditions or obligations

231. Planned or impending transactions that have been identified as representing risk for essential security interests can meet two different government responses: They can be either prohibited as a whole – a rare occurrence in practice – or be authorised provided that certain conditions or obligations are met.

[251] It is understood that some countries have informally established internal procedures and responsibilities, which are not set out in the published laws and regulations and which may to some extent fill the identified gaps until a further maturing of this still relatively recent policy area brings about comprehensive rule-sets as they are known to exist in other areas of administrative law in countries that have advanced legal systems.

Prohibitions

232. Fixed ownership caps set prohibitions as the one and only policy response. Where authorities are empowered to develop a tailored solution to address an identified security risk, prohibitions are available as a response of last resort.

233. In practice, downright prohibitions are rare. This rarity is the result of two factors: they are often subject to significant formal requirements and publicity: some rules require that they be issued by high-ranking government officials,[252] or are subject to cabinet decisions,[253] as recommended by the OECD Guidelines for Recipient Country Investment Policies relating to National Security (2009); also, in many countries, prohibitions need to be announced publicly.[254] These formal requirements make them an onerous and thus potentially unattractive choice for the authorities. The publicity associated with a refusal may also make this approach unattractive for the acquirer or the acquisition target; would-be acquirers hence tend to retract their proposal when receiving signals that a prohibition is likely. Officially reported numbers of formal prohibitions – often cited as proof of the constrained application of review mechanisms – do thus not reflect the full extent of occasions where the planned transaction would not be allowed.[255]

234. The design of mechanisms occasionally reveals the exceptional status of prohibitions: Where mechanisms contain a presumption of denial, the competent authorities to express the prohibitions are often lower ranking than in mechanisms that formulate the authorisation of a transaction as the norm.[256]

Mitigation: agreed or imposed conditions and obligations

235. A more frequent, albeit not universally available[257] response to essential security threats associated with a given transaction is the negotiation or imposition of obligations or conditions.

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252 In Australia: the Treasurer (Section 67 of the Foreign Takeovers Act 1975); in Canada: the Governor in Council; in Finland, denials are decided by the Government Plenary Session (Act on the Screening of Foreign Corporate Acquisitions (2012), sections 4 and 5); in France: the Minister in charge of the economy (Code monétaire et financier, article R151-10); in Norway: the Council of Ministers (Sikkerhetsloven, § 10-3); in Poland: the Minister competent for Energy or the State Treasury, depending on the sector in which the target enterprise operates (Law on the control of certain investments, Article 3.1., item 6); in the Russian Federation: Prime Minister; in the United States: the President; in China when no agreement is reached among the members of the Joint Conference, the State Council (*Notice of the General Office of the State Council on the Establishment of a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, IV., item III).

253 A refusal or imposition under Germany's cross sectoral mechanism for example requires a cabinet decision (Foreign Trade and Payments Ordinance, § 59). In Portugal, the decision to oppose operations is taken by the Council of Ministers (Decreto-Lei 138/2014, Article 3(1)). In Spain the decision is also taken by the Council of Ministers (Real Decreto 664/1999, Article 11).

254 Information on publication requirements is available below in section 2.5

255 Retractions may be motivated by several, including commercial, reasons that are not provided in official statistics. A full assessment of the numbers or proportions of prohibitions is thus challenging.

256 The two mechanisms in Germany illustrate this: The cross-sectoral review mechanism set out in § 55 AWO with a presumption of authorisation requires Cabinet approval for a prohibition; the sector-specific review mechanism under § 60 AWO, which leans towards a presumption of denial, only requires a decision by the Ministry of the Economy.

257 The Polish mechanism established under the Act on the Control over Certain Investments for example does not allow the imposition of mitigation agreements (see DAF/INV/RD(2016)19, p.4).

These obligations seek to remove to the extent necessary circumstances that trigger security concerns that would otherwise lead the authorities to deny authorisation of the transaction.

236. Mitigation measures were used early to address essential security risk and their use is documented since at least 1997, if not earlier.[258] Formalised rules that set out their scope, content, conditions and duration of application remain rare, however.[259] Some mechanisms merely refer to their existence and possibility,[260] but greater regulatory detail is now observed in certain countries such as France,[261] Norway,[262] and the United States[263] in newly introduced legislation or following recent reforms.

237. The low level of detail in regulations, the confidentiality of the agreements with individual acquirers in many countries,[264] limited, if any public information about follow-up and enforcement of agreements, and limited aggregate information on the use and contents of agreements[265] all contributed to the limited attention to this kind of arrangement as a class of

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The Finnish mechanism under the Act on the Screening of Foreign Corporate Acquisitions (2012), also does not regulate the possibility of mitigation measures.

258 *CFIUS Annual Report 2007*, p.15. The Annual Report 1984/1985 by the Foreign Investment Review Board, p.4, also mentions the imposition of conditions "to ensure that the foreign investment was in accord with Australia's interests"; it cannot be ascertained however whether the conditions referred to in the report related to risks to essential security interests.

259 A now dated survey of practices and policies in OECD countries, "*Proportionality of Security-Related Investment Instruments: A Survey of Practices*", OECD, May 2008, p.5, suggests that rules were generally spotty in this regard a decade ago. As an exception to this observation, the United States had codified such rules into statute in 2007. Further information on the arrangements and practices before then are available in an early report by the Congressional Research Service of the United States Congress (James JACKSON (2008), "*The Committee on Foreign Investment in the United States (CFIUS)*", p.14) which notes that "Since the implementation of the Exon-Florio provision in the 1980s, CFIUS had developed several informal practices that likely were not envisioned when the statute was drafted. In particular, members of CFIUS on occasion had negotiated conditions with firms to mitigate or to remove business arrangement that raised national security concerns among the members of CFIUS. Such agreements often were informal arrangements that had an uncertain basis in statute and had not been tested in court."

260 In Canada, the power to impose obligations is mentioned (Investment Canada Act, section 25.4 (1)(b)); Rules in Germany mention orders or negotiations between the government and the acquirer without specification (Foreign Trade and Payments Ordinance, §§ 59(2) and 62(2)).

261 More detailed provisions on the matter were introduced in 2019 and early 2020 and are now in Code monétaire et financier, Article L151-3, and Article R.151-8; rules on later amendments, at the initiative of the investor or he government, are, since early 2020, set out in Article R.151-9.

262 The Norwegian National Security Law (*Lov om nasjonal sikkerhet (sikkerhetsloven)*) effective as of 1 January 2019, states in § 10-3: "*The King may in a council decide* (…) *that conditions for the implementation shall be set* (…) *A decision pursuant to the first sentence is a particular compulsory basis pursuant to Chapter 13 of the Enforcement Act*".

263 Updates of certain provisions were introduced with effect of 10 November 2018 through an interim rule issued by the Office of Investment Security, Department of the Treasury, 83 FR 51316 and made permanent by two final regulations released by the Department of the Treasury on 13 February 2020, (85 FR 3158 (31 C.F.R Part 800 and 31 C.F.R Part 802).

264 Some information is available on a few arrangements, such as the detailed lists of thirteen undertakings that an investor in an Australian mining company took on in 2009.

265 Relatively rich information is available for the United States: Aggregate information on mitigation agreements is available in the Justification of the Performance Budget of the United States Justice

government action and, with very few exceptions, to the sort that was reserved to proposed transactions as a whole. Proposed obligations that were unacceptable for the would-be acquirer can be expected to result in withdrawal and abandon of a planned transaction, and permanent arrangements remained undisclosed and unknown in most countries.

238. Mitigation agreements have recently stepped out of this shadow: disclosure by authorities in the context of individual decisions[266] or in annual reports,[267] debate in the context of reforms, more detailed regulation of mitigation agreements in some countries, public announcements of sanctions imposed for non-respect of obligations,[268] and establishment of dedicated resources to monitor compliance have all contributed to shedding more light on the frequency of use, contents of arrangements, and challenges that are associated with their implementation and follow-up of these arrangements to ensure their respect.

239. Two types of mitigation measures can be distinguished:

- The security risks is addressed by changes to the transaction itself (divestment of a part of the acquisition target, restructuring of the operation, etc…).[269] The transaction that takes place is thus different from the one initially subjected to approval, and the identified threat is addressed through the imposed or agreed change. At times, the transaction may become unviable as a consequence of such a requested change and is abandoned, or may be rejected with an invitation to resubmit an altered proposal.
- The security risk is addressed through obligations[270] that the acquirer accepts to implement in continuity after the transaction has been implemented – and potentially

Department – National Security Division for financial year 2020, which mentions, on p.8, that by 2019, 161 mitigation agreements have accumulated under the responsibility of the Justice Department alone. More detailed information on the number of mitigation agreements concluded between 2011 and 2016 is available in Government Accountability Office (2018), "Committee on Foreign Investment in the United States: Treasury should coordinate assessments of resources needed to address increased workload", GAO-18-249, 14 February 2018, p.14. A longer time-series from 2000 to 2017, but limited to agreements for which the Department of Defence is responsible, is in "*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, p.66.

266 In Australia, the Treasurer publicly announces decisions on high-profile investments, including at times specific mitigation measures that were imposed in the context of approvals. These announcements document that Restriction on shareholding percentage to 17.55% or adherence to private agreements between investor and target company; residence conditions for directors and CEOs as well as condition to follow industrial rules in Australia and indigenous employment, or reporting obligations have been imposed.

267 In particular *Annual Report on the Investment Canada Act 2017-2018*, p.22; FIRB annual report 2017/2018, p.54; *Committee on Foreign Investment in the United States Annual Report to Congress, Calendar Year 2015*, p.21.

268 "*Penalties Imposed Pursuant to Section 721(h) and Unilateral Reviews Initiated*", United States Treasury file, undated (but referring to 2018).

269 In some countries, similar outcomes are achieved by a rejection of the initial transaction combined with an invitation to re-submit a modified proposal. In Australia, for example, this process was followed for the proposed acquisition of assets of OZminerals in 2009 and Kidman&Co in 2015.

270 Obligations that the acquirer takes on are often referred to as "conditions". This terminology, which suggests that the validity of an approval of a transactions depends on the respect of the agreed arrangements, may be misleading. In practice, the arrangements appear to be stand-alone obligations that are enforced through separate procedures, rather than "conditions" that would automatically

indefinitely (e.g., seeking individual government approval for business locations, hiring of certain personnel, implementation of audited security protocols, localization requirements, etc.). These obligations are occasionally assorted with a monitoring or reporting mechanism to ensure that they are respected.

Both types of measures can be present cumulatively in a single transaction.

Modifications to the transaction before closure

240. Mitigation agreements that require a modification of the transaction before closure are relatively straightforward in several ways:

- The would-be acquirer may accept the request, modify and implement the transaction or decide not to pursue it.
- Even without explicit legal basis, such measures would represent a lesser "evil" than the prohibition of the transaction in full that would otherwise apply.
- Mitigation measures that require a modification before the closure do not require follow-up or monitoring, and no information about non-compliance has been become publicly available.

Obligations attached to the transaction for implementation post-closure

241. Obligations that may be imposed to address a risk to essential security interests that are associated with a specific transaction have different and additional implications compared to demands for changes to a transaction as discussed above. These relate for example to:

- The legal basis and legal limits of what the authorities can agree on with a given would-be acquirer;
- Transparency about obligations weighing on the acquirer or the acquisition target to the general public and market participants that have relations with the asset involved in the transaction;
- Resources dedicated to follow-up and related costs;
- Responses to non-compliance; and
- Adjustment of obligations that were imposed in the past but may become obsolete or inadequate over time.

242. Rules on individual mechanisms address these aspects in different ways and to different extent, and country practice appears to be diverse as well[271].

243. **Scope and legal limits of obligations**: Only a few countries explicitly regulate the scope and limits of ongoing obligations for acquirers or acquisition targets imposed as mitigation measures. France requires such measures to be "proportionate",[272] a standard that will implicitly exist in many other countries.

244. **Transparency**: Most countries do not make the contents of mitigation agreements on individual transactions publicly available. The protection of legitimate confidential business information is one of the main reasons for the limited transparency about the existence and contents of mitigation arrangements. With the growing public interests in the outcome of reviews

invalidate the approval if not met. For this reason, this report uses the term "obligations" rather than "conditions".

271 The recent Spanish Proyecto de Real Decreto sobre inversiones exteriores, art. 9.3, gives a list of different practices that the administration can follow in order to mitigate a national security threat.

272 Code monétaire et financier, Art. R.151-8.

in some countries, this practice may however meet concerns about accountability to the public and, where obligations are significant, contrasts to some extent to the publication requirements and practices associated with denials of transactions.

245. Market participants that may be in contact with the acquirer or acquisition target –creditors, shareholders or would-be shareholders – may have no access to information on permanent obligations imposed on these entities, although some obligations may influence the profitability of the acquisition target or the acquirer. This may result in information imbalances and a tension with transparency requirements or -expectations associated with publicly held companies.

246. **Enforcement of obligations**: Enforcement of owners' compliance with ongoing obligations on a specific enterprise have attracted greater attention recently, as obligation regimes are accumulating over time and compliance was occasionally found wanting.[273] At the occasion of recent reforms of acquisition- and ownership related policies, some countries have clarified or strengthened enforcement regimes.[274]

247. Individual mechanisms employ different means to enforce obligations taken on under mitigation measures. Enforcement has been observed to rely on different types of sanctions, including:

- financial penalties, ranging on a broad spectrum;[275]
- the possibility to subject the principal transaction to a fresh review in cases of material breach of the obligations;[276]

[273] There appears to be no comprehensive public information on the respect of obligations taken on under mitigation agreements. One exception is a mention by Australia's Foreign Investment Review Board, in the Foreign Investment Review Board Annual Report 2017-18, p.56, that a compliance audit pilot programme demonstrated "that foreign investors are largely meeting their obligations and, to date, have not identified compliance issues warranting enforcement action". The United States issued a fine in 2018 for continued material breach of an obligation by an unnamed acquirer; this was the first public notice that the issuing of fine in this context has become public.

[274] Legislation introduced in France in 2019, for instance, has enhanced the authorities' means to respond to and sanction non-compliance with mitigation measures: In May 2019, sections were included in the Code monétaire et financier, Article L151-3-1 and L151-3-2 to this effect. The United States lowered the degree of intent required to allow the application of sanctions; previously, sanctions could only applied if a breach was made "intentionally or through gross negligence", while negligence has been set as a new standard in C.F.R. Section 800.801 through an interim rule issued by the Treasury on 11 October 2018.

[275] Austria can apply penal sanctions for intentional non-compliance up to three years imprisonment (Foreign trade act, § 79. (1) item 25); no sanctions for legal persons are available. France has reframed financial sanctions for non-compliance with mitigation obligations in May 2019. The rules, in Code monétaire et financier, Article L151-3-1 and L151-3-2 require that administrative sanctions be proportionate to the breach and are capped at the highest amount of the following: twice the value of the illegal investment, *or* 10% of the annual turnover before tax of the target enterprise, *or* EUR 5 million for legal persons or EUR 1 million for natural persons. Germany can apply administrative sanctions for negligent or intentional non-compliance with obligations imposed as mitigation measures (Foreign trade and payments ordinance, § 81 I item 6 in conjunction with Foreign trade and payments act, § 19 III 1)b) and § 19 VI); the maximum penalty is capped at EUR 30,000. The United States 31 C.F.R. § 800.801(b) authorises the imposition of a "civil penalty not to exceed $250,000 per violation or the value of the transaction, whichever is greater".

[276] This possibility has been introduced in the United States legislation in 2018 (50 U.S.C. § 4565(l)(6)(D)(iii)).

- the imposition of new or other obligations to mitigate the security threat;[277]
- the retraction of the authorization of the principal transaction.[278]

248. The enforcement of compliance with obligations is often administered by the same authorities that are in charge of the review mechanism.[279] In some cases, however, these authorities have to mobilise other authorities or courts to trigger enforcement action, at least for certain measures.[280]

249. **Compliance monitoring**: Compliance monitoring is an essential procedural complement to make enforcement of mitigation obligations possible and the material obligations effective. In many countries, rules on compliance monitoring are fairly light, if not entirely absent. Even in more developed and detailed mechanisms, regulatory depth appears to thin out in respect to the specificities on implementation and follow-up.

250. **Resource implications of compliance monitoring**: As perpetual obligations accumulate over time and grow in complexity, compliance monitoring costs and resources for governments are growing.[281] Some countries have resorted to outsourcing parts of the compliance monitoring to independent third parties paid for by the enterprise that is under the material obligations.[282]

251. **Adjustments of obligations over time**: Permanent obligations imposed at the time of an acquisition may become obsolete over time or may require adjustments to keep them effective in removing the security concern that was identified in the context of the acquisition review. Some countries' mechanisms address the possibility for adjustments of obligations, for example in Australia,[283] France,[284] and the United States.[285] Some countries regulate exclusively the abolition or reduction of obligations, but amendments that may lead to more burdensome obligations that

277 E.g. France, Code monétaire et financier, Article L151-3-1 II, item 3.

278 France (Code monétaire et financier, Article L151-3-1 (II) item 1, introduced in May 2019).

279 This is the case in France and the United States, for example.

280 Sanctions under the Investment Canada Act for non-compliance may be ordered by a Court upon an application made on behalf of the Minister of the Industry, (Investment Canada Act, Sections 39 and 40). Austria's rules also require a court decision, given their nature as penal, rather than administrative, sanctions.

281 For examples see the GAO report: GAO, CFIUS – Action Needed to Address Evolving National Security Concerns Facing the Department of Defense, July 2018, p. 38-46

282 Examples of considered practice in Canada are related in the Annual Report 2017-2018 – Investment Canada Act. The reform of rules in the United States through FIRRMA officially recognizes the role of independent entities from outside the United States Government for the purpose of monitoring compliance.

283 Adjustments are referred to as "variation orders" and are based on the *Foreign Acquisitions and Takeovers Act 1975*, section 76. Guidance Note No.40 provides non-binding explanations and the FIRB annual report 2017/2018, p.49 gives indications on the practice, albeit not specifically with respect to conditions set to safeguard essential security interests. A variation can only be made with the consent of the concerned person, or if the measure lightens the burden on that person.

284 France clarified the rules in 2019 and set out further detail in Code monétaire et financier, Article L.151-3 and Articles R.151-8 and R.151-9.

285 50 USC §4565 (I)(3)(B) states: "Treatment of outdated agreements or conditions – The chairperson and the head of the lead agency shall periodically review the appropriateness of an agreement or condition imposed under subparagraph (A) and terminate, phase out, or otherwise amend the agreement or condition if a threat no longer requires mitigation through the agreement or condition."

those agreed to in the context of the acquisition have also been considered and has now been explicitly allowed in France in certain scenarios and under certain conditions.[286]

2.2.2. Policy responses to identified risks post-closure: divestment orders, nullity, and mitigation measures

252. Despite notification and approval requirements established by several mechanisms, some acquisitions that may raise essential security concerns may come to a government's attention or are decided upon only after closure. This situation may arise in at least four scenarios:[287]

- The acquisition *was not* subject to a government review or approval process at the time of its closure but raises concerns now;
- The acquisition fell in the scope of a *voluntary* review mechanism but did not undergo a review before it closed.[288] The review carried out post-implementation reveals essential security concerns that call for a policy response;
- The acquisition was subject to a *mandatory* review process at the time of closure but was not subjected to such a review despite the legal obligation; or
- The acquisition was rejected pre-closure but was implemented regardless of the prohibition.

253. The first scenario reflects a situation in which the government's assessment about the risk associated with a transaction has changed since the transaction, without the acquirer necessarily having contributed to the changing risk assessment. The treatment of changed risk assessments are discussed in section 2.3. This present section only addresses the three remaining scenarios, in which a transaction has not been subject to government consideration as it could or should have been or where the acquirer has not respected the order to abandon a planned transaction.

254. Not all mechanisms surveyed for this report address all three remaining scenarios explicitly and provide for policy responses that a government can implement to redress the resulting situations.[289] This is particularly the case for the last scenario where an acquirer implements a transaction that was previously expressly prohibited.

255. It may be assumed, however, that even mechanisms that are silent on these scenarios allow the authorities to take measures that *correspond* to the powers that are granted before a planned investment and that lead to outcomes *similar* to those that would have been achieved had the planned acquisition been subjected to a review prior to its implementation. Such *corresponding* measures include orders to divest the acquired assets – corresponding to prohibitions to acquire

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286 Code monétaire et financier, Article R.151-9 (II).

287 The Polish mechanism established under the Act on the Control over Certain Investments caters for a scenario in which control in a Polish entity has been acquired through a transaction implemented outside its jurisdiction; the mechanism can respond by suspending the voting and other rights that result from the indirect acquisition and that overshoot a permissible level of participation (see explanations DAF/INV/RD(2016)19, p.4).

288 Voluntary reviews exist in some mechanisms in Finland, Germany, Lithuania, Portugal and the United States, for example.

289 For example, Germany's sector-specific review mechanism set out in the Foreign Trade and Payments Ordinance does not expressly cover these scenarios. France's mechanism does contain rules tailored to this scenario (Article L153-3-1 of the Code monétaire et financier), with recent reforms of mid-2019 adding more detail. The Investment Canada Act, Section 25.4 (1) elaborates on the powers of the Governor in Council to respond to national security concerns that are identified in the course of or after an acquisition.

the assets – and obligations that are imposed to mitigate the risks that result from the ownership position.

Declaration of nullity and divestment orders

256. Different designs are observed to establish a situation where the acquirer does not hold the position in the target asset that triggers the risk for essential security interests. They include:

- the declaration of nullity, legislated or expressed by an administrative decision with effect from the beginning or a specified point in time; and
- divestment orders based on a separate administrative decision under legislated conditions.

257. The practical relevance of such measures orders has probably grown in at least some jurisdictions – at least according to the limited information that is publicly available and formally acknowledged by governments.[290] Canada has publicly reported seven divestment orders in the period since 2014-15.[291] No other information on divestment orders based on considerations of essential security interests has been formally released by governments, while media reports suggest that more divestment orders have recently been made, and greater attention to the issue is also evidenced by recent policy changes in some countries.

258. Policy designs that can eventually lead to the owner's obligation to divest an asset differ:

- Most countries that explicitly set out options to remedy threats post-acquisition allow the authorities to order a divestment,[292] a partial divestment,[293] or declare an investment void[294] as a distinct, constitutive act.
- For a few mechanism, the legislator has laid down that an acquisition that has not been approved is void *without* requiring a further constitutive act.[295]

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290 Not all governments formally release information about divestment orders in individual cases or in the aggregate unless certain special conditions are met. Availability of formal government information across countries is thus uneven. Overall, transparency over divestment orders can be assumed to be greater than about the obstacles before closure, where withdrawals may be less visible.

291 *Annual Report on the Investment Canada Act 2018-2019*, p. 16.

292 E.g. France's Article L153-3-1 of the Code monétaire et financier, introduced through recent reforms introduced in May 2019, regulates this matter in significant detail; previous rules had imposed nullity of the acquisition in certain scenarios. For Australia, Section 69 of the Foreign Takeovers Act 1975. Investment Canada Act, Section 25.4 (1). In Germany, in the absence of a notification requirement, divestment orders are the default policy response under the cross-sectoral mechanism (§ 59 Foreign Trade and Payments Ordinance), although their practical relevance is low; would-be acquirers appear to ask for a certificate of non-objection under § 58 Foreign Trade and Payments Ordinance.

293 Under Finland's Act on the Screening of Foreign Corporate Acquisitions (2012) and with respect to entities outside of the defence sector, the government may order the investor to dispose of shares to the extent that the threshold specified in the Act is not exceeded or to cancel an agreement implementing the transaction (Section 8 of the Act).

294 Portugal Lei 9/2014, Art.3 (d).

295 French legislation (Article L151-4 of the then valid version of the Code monétaire et financier) declares null and void any commitment or contractual obligation under the scope of the review mechanism if it had not been subjected to prior review; no adjustment is possible, at least on the face of the text. In Germany, a transaction that falls under the sector-specific mechanism is temporarily ineffective unless and until it has been explicitly authorised (BtDrs 15/2537, p.9 and § 31 AWG (2013) and BtDrs 19/1103, p.5). In Hungary, Act LVII of 2018 on Controlling Foreign Investments

259. Interposing a separate decision-process to express a divestment order gives more flexibility to the authorities than legislated consequences, which may explain their relative frequency and tendencies to move to this model.[296] Divestment is economically disruptive for the acquirer and the acquisition target as well as other stakeholders such as shareholders, suppliers, creditors, etc. A separate order allows to some extent to address the interest of these groups and to manage the divestment process to limit disruption at least for those stakeholders whose interest merit protection.

260. Where a separate decision is required by the applicable rules, the implementation of divestment orders is regulated to different degree of detail. Related rules can include the type of measures that the authorities can take or demand, including interim measures,[297] time delays for the execution of a divestment order,[298] or sanctions and consequences of non-compliance.[299]

Mitigation or adaption

261. Whereas divestment orders correspond to prohibitions in a pre-closure scenario, there may be situations in which post-closure obligations – that correspond to mitigation measures – could sufficiently and permanently[300] eliminate the essential security threat from the point of their imposition forward. Such adaptions could include obligations for the conduct of the business or partial divestments of the position that triggers the concern, for example to reach a minority holding.

262. Some mechanisms address the options at the hand of the authorities explicitly. They may empower the authorities to request an adjustment to the investment.[301] At times, powers to take such measures are vested in different institutions.

263. Not all mechanisms provide for the possibility to resolve security threats related to implemented transactions. In particular, designs, which order legislated invalidity of the initial

Violating Hungary's Security Interests, section 8(4) declares a transaction that was not notified or not approved to be void.

296 The impact assessment that France carried out for its recent reform – in which the approach was changed – is instructive about such considerations (*Étude d'impact – Projet de Loi relatif à la croissance et à la transformation des entreprises*, 18 June 2018, p.471-472.)

297 In Germany, § 59 Foreign Trade and Payments Ordinance allows the authorities to prohibition the exercise voting rights and the mandate of a third party to divest the assets.

298 In France, the Minister of Economy is authorised to determine a delay for the implementation of a divestment order (Article L. 151-3-1 of the Code monétaire et financier).

299 E.g. Investment Canada Act, section 39.1; under the rules, non-compliance with a divestment order cannot directly be sanctioned by the authorities but require a court order following a separate procedure according to Investment Canada Act, Section 40; penalties for non-compliance may also be ordered as part of the court procedure.

300 Interim measures to address a security threat resulting from a completed transaction are discussed in the following section.

301 For France, Article L151-3-1 (I) No.3 of the Code monétaire et financier, introduced in May 2019, which also specifies that sanction for non-respect can be ordered at the same occasion. Finland may order, pursuant to the The Act on the Screening of Foreign Corporate Acquisitions, § 8(1), the reduction of the foreign shareholding to below 10% or any other shareholding that is authorised in the context of a review; no equivalent rule exists for holdings in private equity, where only total divestment is explicitly regulated by law (§ 8(2) of the Act).

acquisition without a separate decision by the authorities make such arrangements legally impossible.[302]

264. Little information is available on frequency and practice of post-closure mitigation arrangements. In particular, such agreements are not always[303] reported separately in statistical information that some countries' authorities make available on their implementation practice.

2.2.3. Interim measures

265. Where mechanisms do not require a prior authorisation or where a prior authorisation requirements have not been respected, the acquirer is typically in a position to consummate the transaction, at times before a fully security assessment has been finalised. This may lead to undesirable outcomes, for example when sensitive information such as personal data or know-how about advanced technologies is shared with the acquirer, when the acquirer may obtain physical access to assets to obtain information or install weaknesses, or when the acquirer can influence governance decisions of the acquired enterprise.

266. These actions cannot always be undone; information for example cannot be recalled when the transaction is eventually prohibited, and the security threat may thus materialise irrevocably. Where a security concern is identified with regard to a transaction that has already been implemented, interim measures may be appropriate or necessary to temporarily reduce the security threat before a permanent remedy, such as divestment, has become effective. Finally, interim measures may be needed when the obligations agree under a mitigation agreement have been breached.

267. In some jurisdictions, the practice of interim measures in this domain is not entirely new,[304] but explicit rules have so far been rare and are now added to complement existing tools or to regulate existing practice.[305]

268. In substance, a broad range of different interim measures are observed in legislation or practice. They include suspension of voting rights or economic benefits such as dividends, prohibition to access assets or to divest assets, requirements to not to transfer information; some mechanisms also foresee that a person is tasked with overseeing the respect of any measures within the acquired enterprise.

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302 French legislation (Code monétaire et financier, article L151-4) declares void a transaction that realises an investment that has not been approved despite being subject to review (explanations are available in *Étude d'impact – Projet de Loi relatif à la croissance et à la transformation des entreprises*, 18 June 2018, p.471-472, which also sets out the motivations for the reform.) New rules in effect since mid-2019 and codified in Code monétaire et financier, article L151-3-2, implement this rule and grant greater flexibility to the government.

303 The United States Committee on Foreign Investment in the United States (CFIUS) provides statistical information in the declassified versions of Annual Reports.

304 Interim measures practice was already mentioned in the 2009 CFIUS Annual Report to Congress November 2009, p.16. More recent examples form the United Kingdom include two orders made in 2019 (Public Interest Merger Reference (Mettis Aerospace Ltd.) (Pre-emptive Action) Order 2019 and Public Interest Merger Reference (Gardner Aerospace Holdings Ltd. and Impcross Ltd.) (Pre-emptive Action) Order 2019).

305 Some examples of explicit recent introduction are rules in the United States in 2018 (FIRRMA, Sec. 1718), in France in 2019 (Article 152 loi Pacte and now regulated in Article L151-3-1 Code monétaire et financier); explicit rules were also planned in Germany in early 2020 (legislative reform proposal introduced in parliament on 21 April 2020, BtDrs 19/18700).

269. Non-respect of imposed interim measures is, in some countries, subject to sanctions, including administrative or penal sanctions.[306]

2.3. Framing and detecting potentially harmful transactions or ownership positions

270. To be able to respond to potential threats to essential security interests associated with planned or implemented acquisitions, the authorities need to detect potentially problematic transactions or ownership positions. This requires rules that

- frame relevant transactions as reviewable events, as well as
- procedures to ascertain that such transactions are detected in practice.

2.3.1. Framing a transaction as a potentially reviewable event

271. The acquisition of an asset or of certain degrees of control over an asset may appear as an obvious and unambiguous description of a reviewable transaction. However, certain legal changes[307] that affect the acquirer or owner of a sensitive asset may not obviously qualify as a reviewable transaction, especially when such events intervene after an acquisition. Changes of beneficial owners at the top of a long ownership chain – where the immediate ownership of the sensitive asset remains unchanged – may or may not qualify as a reviewable transaction. The conclusion of a shareholder agreement on the joint exercise of voting rights *after* the direct acquisition of a sensitive asset may or may not constitute an event that requires a review of a past transaction.

272. Rule-makers have made different choices on how to frame transactions as reviewable events. Many mechanisms appear to be designed with a direct transaction of a sensitive asset in mind, while the treatment of later legal events has received less attention or regulation. This uneven depth of regulation potentially opens opportunities to circumvent the rules, and at a minimum generates uncertainty and ambiguity about the application of the rules and obligations of would-be acquirers.

273. To what extent *changes of beneficial owners* further up in an ownership chain qualify as a new reviewable transaction has been decided differently for different mechanisms. Some mechanisms frame any *direct or indirect* acquisition of a participation in an asset as a reviewable

306 Little and likely uneven information is available about the practice of meting out sanctions for the breach of interim measures. A first penalty imposed for non-respect of an interim measure in 2019 was announced by the United States Treasury Department.

307 See on the response to factual changes the separate section 2.4 below.

transaction.[308] In some mechanisms, there is ambiguity as to whether indirect acquisitions are reviewable transactions under the rules.[309]

274. Some uncertainty exists in several mechanisms about *shareholder agreements* to exercise voting rights jointly. While several countries' rules dwell on the subject of such voting agreements, they seem to matter only for the review of an acquisition. Later agreements among shareholders are not framed as acquisitions in their own right and appear to remain without consequences once the initial transaction is approved.[310]

275. Some mechanisms refer to acquisition of "control" of a sensitive asset to frame a transaction as a reviewable event.[311] The conditions under which an entity "controls" another are less clear than shareholdings or voting rights, which are expressed in numeric terms and by formal criteria. Changes in the facts that that would lead to "control" may or may not be framed as reviewable events.

276. How frequently such later legal changes occur and to what extent they are notified and subject to review in practice is unknown. Practical challenges to detect any such changes that intervene after the direct acquisition of the sensitive asset in the reviewing country are discussed below.

2.3.2. Detecting reviewable transactions

277. The effectiveness of acquisition- and ownership-related policies to safeguard essential security interests depends on the adequacy of the related detection mechanisms, regardless of how the mechanism is designed otherwise.

278. The importance of the detection mechanism – and potentially perceived shortcomings in past policy practice or evolving needs – is documented in a series of reforms that several countries

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308 Austria's mechanism under Außenwirtschaftsgesetz, § 25a(1) captures any form of acquisition of control over an Austrian business and does not require that such control must be direct. Canada's rules under the Investment Canada Act, Section 28, likewise cover indirect control over Canadian target enterprises. Germany's mechanisms, Außenwirtschaftsverordnung, Sections 55 and 60 explicitly include indirect acquisitions and control; these same mechanisms' rules on notification requirements refer however to the *direct* acquirer, generating some uncertainty about the application of the mechanisms for changes of indirect ownership or control. The *Framework for screening of foreign direct investments into the European Union* of 2019, Preamble item 11 calls for EU-Members to make arrangement sthat allow them to "assess risks to security or public order arising from significant changes to the ownership structure or key characteristics of a foreign investor".

309 France's main mechanism under Articles L.151-1 to L.151-4 of the Financial and monetary code for instance is activated by the acquisition of control – as defined in the Code de commerce, Article L233-3 – or by ownership of more than 25% of capital or voting rights; there is probably some uncertainty whether an *indirect* owner "holds capital" in the enterprise established in France at all under the second scenario described in the law, as the capital is technically held by the direct owner that the indirect owner controls.

310 Such rules can for instance be found in Austria's Außenwirtschaftsgesetz 2011, and Germany's mechanisms, Außenwirtschaftsverordnung, Sections 56 and 60a.

311 Canada's rules under the Investment Canada Act refer to the concept of "control", for example. The Investment Canada Act, Section 28, indicates modes how control can be established, and further definitions are available in *Interpretation Note No.3*. A policy proposal in the United Kingdom, "*National Security and Investment – Draft Statutory Statement of Policy Intent*" of July 2018, dedicates a full chapter (chapter 5) to the notion of "significant influence or control"; as of end April 2020, no draft legislation had become known that would operationalise these considerations.

have undertaken and that seek to enhance the likelihood that transactions come to the attention of the authorities in a timely fashion. Such reforms include the introduction of mandatory notification requirements[312] and enhanced sanctions for non-compliance with filing obligations.[313]

279. Detection mechanisms may be *associated directly with the review-mechanism* and establish roles and responsibilities for different entities, most prominently the acquirer, the acquisition-target, and government authorities. Authorities may also draw on *other sources of information* that are available to governments, for example from notifications for statistical purposes, or from observations of markets or sensitive assets.

Detection mechanisms directly associated with the review mechanism

280. Most acquisition- and ownership-related policies are associated with a dedicated detection mechanism, which most often engages the would-be acquirer. The would-be acquirer may either be legally obliged to notify a planned or just implemented transaction, or may be merely encouraged to notify such a transaction.[314] The distinction between mandatory and voluntary notification has consequences for the legal validity of the transaction and the application of potential administrative or penal sanctions.

281. Notifications are the main – or at least the most visible – avenue to obtain information on transactions that potentially trigger acquisition- and ownership-related mechanisms. Where mechanisms require the notification of a transaction, the acquirer or would be acquirer is always under the obligation to notify the authorities. In some cases, the acquisition target[315] or other

312 Germany introduced, in late 2018, a notification requirement for acquisitions in some sectors under its cross-sectoral mechanism, § 55 IV AWO; previously, no notification requirement existed under this cross-sectoral mechanism. The United States, where notifications under the CFIUS mechanism were voluntary previously, introduced mandatory declarations for certain transactions concerning advanced technology (31 CFR Parts 800 and 801 – Provisions Pertaining to Certain Investments in the United States by Foreign Persons, Subpart D, § 800.401). The United Kingdom also noted that the voluntary mechanism may be insufficient ("*National security and infrastructure investment review – The Government's review of the national security implications of foreign ownership or control*", October 2017, p.31, paragraph75).

313 France, through Loi PACTE, Article 152 expanded, in May 2019, the financial sanctions applicable for the non-respect of the notification of reviewable transactions. Japan strengthened the sanction regime associated with the foreign investment review mechanism through an amendment to the Foreign Exchange and Foreign Trade Control Act in 2017; in particular, the reform introduces the possibility to apply administrative sanctions such as divestment orders, now regulated in Article 29 of the Act, when transactions have not been notified as required.

314 Mechanisms that do *not* require a notification, at least not for the entire scope of their application, are observed in Finland, Germany, Lithuania, Portugal, United Kingdom, and the United States, among others.

315 Under one of Korea's mechanisms, representatives of a potential acquisition target need to inform authorities about acquisition-plans that come to their attention (Enforcement Decree of the Act on Prevention of Divulgence and Protection of Industrial Technology, Article 18-2). Poland requires the "protected company" (i.e. an enterprise identified as sensitive) to submit information about a subsequent acquisition by a party, Act of 24 July 2015 on the control of certain investments (as amended), article 5.5. France has introduced, effective early 2019, the mere *possibility* for the target company to request whether its activity falls within the scope of the prior authorisation regime, Code monétaire et financier, Article R151-4. In Austria, plans for a reform of the review mechanisms of mid-2019., which had not been passed as law by mid-May 2020, sought to extend the notification requirement to the acquisition target, not least because the criminal sanctions for non-compliance

parties[316] are also occasionally assigned a responsibility or given the opportunity to share information about a planned transaction.

282. Some countries are known to seek actively for transactions that have not been notified but are of interest to authorities to protect against threats to essential security interests. Germany had stated in 2009, in the context of a mechanism that featured voluntary notifications, that Ministry staff was monitoring transactions and received input from the Banking Supervision authority.[317] Canada carries out "environmental scanning" and draws on public information sources to discover non-notified transactions.[318] France has mandated a special institution – the *Service de l'Information Stratégique et à la Sécurité Économiques* (SISSE) – with contributing to the detection and identification of transactions;[319] the SISSE can draw on a regional network across the country to access relevant information. The United States reforms of the CFIUS rules establish an obligation for the Committee to actively search for transactions that have not been notified but where threats to national security may exist – so-called – non-notified (NN) transactions.[320] Efforts to identify such "NN" transaction based on publicly available data had begun at least as of 2010.[321] Australia has carried out a compliance programme to ensure that foreign investors meet obligations, in particular notification obligations, under the review framework.[322]

283. The practical role of government initiated reviews is uncertain and likely uneven across countries. Germany has reported that between 2009 and July 2017, only one transaction had been

were deemed difficult to apply and enforce against foreign companies (AußWG-Novelle–Erläuterungen, Parliamentary documentation, May 2019).

316 In Argentina, for example, notaries involved in transactions that fall under the review mechanism must file a request for authorisation with the Argentinian authorities if a foreign client seek to acquire or rent any real estate in the "security zone" (art. 2, Decree No. 32.530). Lithuania's Law on the Protection of Objects of Importance to Ensuring National Security, 10 October 2002 No IX-1132, Article 12 allows a number of actors to inform the authorities about reviewable transactions. For the involvement of authorities that receive information for statistical purposes and related third parties see below footnote 326.

317 Information related in "*11th Roundtable on Freedom of Investment, National Security and "Strategic" Industries (7 October 2009) – Summary of Roundtable discussions by the OECD Secretariat*", p.3.

318 Canada reports, in the *Annual Report on the Investment Canada Act 2018-2019*, p.19.

319 The Décret 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique, Article 3. II specifically mandates the SISSE to carry out this role.

320 The reform of the CFIUS process in the United States included an explicit mandate for CFIUS to "establish a process to identify covered transactions for which— ''(i) a notice under clause (i) of subparagraph (C) or a declaration under clause (v) of that subparagraph is not submitted to the Committee; and ''(ii) information is reasonably available.'" (FIRRMA, Section 1710 and inserted as Section 721(b)(1) of 50 U.S.C. 4565(b)(1)). The budget submission of the Bureau of Industry and Security, US Department of Commerce for Fiscal year 2019, p.32 provides some insights how this branch of the US government carries out the search for un-notified transactions.

321 Government Accountability Office (2018), "Committee on Foreign Investment in the United States: Treasury should coordinate assessments of resources needed to address increased workload", GAO-18-249, 14 February 2018, reports about the established processes in several CFIUS member agencies and the Federal Bureau of Investigations (FBI) (p.5) and about the number and trends in the identification of potential non-notified transactions (p.20).

322 FIRB Annual report 2017/2018, p.53.

reviewed at the initiative of the authorities under the (voluntary) cross-sectoral review mechanism.[323]

284. In some countries, authorities are given strict timelines to detect transactions that may require scrutiny; once this time is passed, a transaction cannot be called in for review. While such time limitations enhance certainty for investors that their past transactions cannot be reopened and reviewed, they require association with strong detection mechanisms if they are to be effective. In Portugal, for instance, where some transactions are subject to a voluntary regime, the authorities need to react within 30 days of the operation becoming *publicly* known to be able to review a transaction that the need to first identify.[324] In Germany, a call-in of a transaction must take place within 3 months of the Ministry having knowledge of the contract on the acquisition, and at most 5 years under any circumstances.[325]

Detection through other information sources not established as part of the mechanism

285. In addition to information sources related directly to the acquisition- or ownership- review mechanism, authorities may draw on additional sources of information to ensure the effectiveness of the mechanism. These include information that is generated in the *context of transactions* through the administration of reviews unrelated to essential security purposes, or feed-in from authorities or institutions that obtain such information in other, for example statistical contexts,[326] under securities legislation,[327] or under procurement rules.[328] Where more than one mechanism exists in a given country, information provided or obtained for one mechanism may be used for the implementation of another, parallel mechanism.

286. Further information that may alert authorities about potentially problematic transactions may come from partners abroad to the extent that authorities of different countries share information on sensitive transactions.

287. Little is known about information flows to authorities within a given country and between authorities of different countries. Avenues of cooperation and information exchange that have been established recently, for example between EU Member States and by the United States for

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323 Statistics are reported in the response of the Government to a parliamentary question, BtDrs 19/2143.

324 Decreto-Lei nº138/2014 of 15 September 2014; an unofficial translation is available in the notification of the mechanism to the OECD in DAF/INV/RD(2019)7.

325 Außenwirtschaftsverordnung, § 55 III.

326 In France, trans-border transactions that exceed certain monetary values need to be notified to the *Banque de France*, according to Code monétaire et financier, Article R152. Financial institutions involved in these operations are required to report such information as a further example of the involvement of third parties in the generation of information. It is not known to what extent the *Ministry of Economy and Finance* – which implements the investment review – has access to the information available to the *Banque de France* under this rule.

327 In Germany, for example, securities legislation (Wertpapierhandelsgesetz, § 33) requires an acquirer to notify within short timelines the crossing of thresholds to the Securities regulator. A further rule requires, under certain circumstances, the publication of additional information within 20 days. It is not publicly known to what extent this information is shared between the securities regulator and the authorities in charge of the investment reviews.

328 In the United Kingdom, procurement policy of the Ministry of Defence requires contractors to notify the Ministry of any "intended, planned or actual change in control of the contractor", as set out in "*National security and infrastructure investment review – The Government's review of the national security implications of foreign ownership or control*", October 2017, p.27, paragraph 63.

its CFIUS mechanism, are likely to give more prominence to these sources of information in the future.[329]

Detection through observation of identified sensitive assets

288. Information for use in acquisition- and ownership-related mechanisms can also result from an *observation of certain assets* that a government considers sensitive and that are continually subject to government attention for this reason. This attention potentially increases the likelihood of detection of a transaction related to such assets.

289. A number of countries appear to have identified lists of such assets, either as part of or outside an acquisition review mechanism. Asset-specific mechanisms are an obvious example where the identification of sensitive assets is likely associated with a particular attention to transactions related to an identified asset.[330] In some countries, undisclosed lists of sensitive assets have been established in the context of acquisition- or ownership-related mechanisms.[331] France has established a country-wide network that identifies, on a permanent basis, enterprises that may be sensitive or strategic for its economic interests; these cooperate directly with the institutions in charge of implementing the acquisition-review mechanism.[332] Norway has embedded it acquisition review process into a broader framework to protect sensitive assets and has tasked each ministry to identify and supervise infrastructure assets as well and companies falling within the scope of the Norwegian National Security Act.

2.3.3. Ensuring that reviewable transactions are detected

290. Governments use multiple mechanisms to ensure that transactions of interest come indeed to their attention and are detected. These include in particular:

- Information campaigns that inform businesses about obligations or benefits to bring planned or implemented transactions to the attention of authorities;
- Incentives to bring transactions to the attention of authorities; and
- Sanctions for non-compliance with notification requirements where notifications are mandatory.

329 See section 1.8 for specific examples of cooperation between countries.

330 Lithuania and Poland for example operate asset-specific mechanisms with lists of assets set out in legislation or associated regulations.

331 Australia, under the Security of Critical Infrastructure Act 2018 has established an undisclosed list of assets that is identified as critical infrastructure. Owners and operators are aware of the inclusion of their assets in the list, but the list is not made public.

332 France has established a country-wide network to identify potential mergers; a detailed explanation of the procedures and institutions involved in this approach is available in the minutes of a parliamentary inquiry into the decisions of the government in relation to takeovers, Assemblée Nationale, *Commission d'enquête chargée d'examiner les décisions de l'État en matière de politique industrielle, au regard des fusions d'entreprises intervenues récemment, notamment dans les cas d'Alstom, d'Alcatel et de STX, ainsi que les moyens susceptibles de protéger nos fleurons industriels nationaux dans un contexte commercial mondialisé, Compte rendu No 16* (25 January 2018), p.4. The Décret 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique sets out the mission of the institution in greater detail and mentions, in Article 3 II the specific role to contribute to identify non-notified transactions for the purpose of the acquisition-review mechanism.

Public communications and awareness about existence of policy

291. The public debate that has accompanied the recent introduction or reform of acquisition- and ownership-related policies in several countries has brought the existence and scope of such mechanisms to the attention of a broader audience. In some countries, authorities have made additional efforts to raise awareness as part of their compliance framework,[333] have sought to increase interaction with stakeholders.[334] Some countries have concrete outcomes that are seen as beneficial for the purpose of the review mechanism's effectiveness.[335]

292. Administrative practice and public communications are very uneven across the sample, and mechanisms that have not been subject to recent reforms have been much less subject to public awareness campaigns than mechanisms that are used more frequently and have been subject to reform recently.

Mechanisms to compel entities to reveal transactions

293. In addition to information about legal obligations and mechanisms, most countries have established a set of mechanisms to compel entities to reveal transactions and to reveal materially correct and complete information. Two principle mechanisms are in use, often in combination:

- The imposition of adverse economic consequences regarding the transaction that triggers the concerns for essential security interests; and
- Civil or penal sanctions for omissions to notify transactions, where legal obligations to do so are established.

Adverse economic consequences for non-notification

294. Mechanisms typically attach adverse economic consequences to transactions that have not been notified despite being of concern for essential security interests. These consequences – essentially the threat to unwind an implemented transaction to order the divestment of an asset[336] – are available in mechanisms that require notification and in those in which filings are voluntary.

295. The incentive set by the threat to unwind a transaction is compelling given the potential cost and disruption that forced sales generate – a number of divestment orders lately have shown the difficulties to divest the assets under time pressure. An additional benefit of this approach is its tendency to encourage self-selection of riskier transactions, as the incentive grows with the

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333 In Australia, FIRB reported such efforts to educate the community in its Annual report 2017/2018, p.54. Part of the information campaign is a reminder about the penal and civil sanctions available for non-compliance in the same Annual report 2017/2018, p.55.

334 France's "Service de l'information stratégique et de la sécurité économiques" is specifically tasked to sensitise economic actors about economic security issues through Décret 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique, Article 2.3. France has also carried out a public consultation in mid-2019 in the context of a reform ("Ouverture d'une consultation publique sur la modification de l'arrêté relatif aux investissements étrangers en France", Ministry of Economy and Finance website, 29 May 2019). The United States has likewise sought public comment on proposed rules in 2019 in the context of the reforms of the CFIUS mechanism. New Zealand and the United Kingdom have taken similar initiatives, albeit without a specific regulatory text by end April 2020.

335 Canada, for example, in the *Annual Report on the Investment Canada Act 2018-2019*, p.19 reports that issuance of guidelines in 2016 and annual reporting on the national security review provisions have led to a more and more relevant filings and interactions with authorities.

336 See on the details of these actions and their availability section 2.2.2.

likelihood that a given transaction does indeed raise security concerns. The incentive, in the context of voluntary reviews, thus also entails greater economy for the implementing authorities as they are more likely to receive information about sensitive transactions.

296. Some mechanisms offer the additional possibility to suspend voting rights of the acquirer in a transaction that raises concerns. This approach may be less disruptive for the acquired enterprise and their clients and employees that a divestment order, while preventing the acquirer to exercise some rights that the transaction sought to procure.[337]

297. Some countries have explicitly limited the effect of this lever to compel notifications by granting "safe harbour" when a certain period of time has elapsed,[338] while others do not offer this advantage without having had the express opportunity to review the transaction and their implications.

Civil and penal sanctions

298. Where mechanisms oblige the acquirer or the target entity to bring information about the transaction to the attention of the authorities, civil or penal sanctions typically compel the concerned entities to meet their notification obligations. While most countries have established penal sanctions for non-compliance with reporting obligations[339] or material misstatements,[340] some have omitted to do so.[341]

299. In addition to penal sanctions, some countries have established civil sanctions for the non-respect of notification obligations: France, for example, can impose fines of twice the amount of the non-notified transaction on the acquirer.[342]

337 E.g. Hungary: Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests, Section 8 II. Lithuania: Law on the Protection of Objects of Importance to Ensuring National Security, 10 October 2002 No IX-1132 (As last amended on 12 January 2018 No XIII-992), Article 14. Poland: Act of 24 July 2015 on the Control of Certain Investments (as amended), Article 12.3.

338 E.g. Germany under the cross-sectoral mechanism, Außenwirtschaftsverordnung § 55 III.

339 E.g. Hungary: Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests, section 10. Japan: Foreign Exchange and Foreign Trade Control Law, Article 70(1)(xxii); Poland: Act of 24 July 2015 on the Control of Certain Investments, Article 15.1. allows for imprisonment of up to five years; Article 16.1. of the same law also penalises individuals associated with the acquisition target who do not bring the information to the knowledge of the authorities and individuals who vote on company decisions despite not being authorised to do so under the mechanism.

340 Japan: Foreign Exchange and Foreign Trade Control Law, Article 70(1)(xxii).

341 Non-respect of the recently introduced obligation to notify transactions in some sectors under Germany's cross-sectoral review mechanism (Außenwirtschaftsverordnung § 55 IV, is not sanctioned, as confirmed in BtDrs.19/9681 (24 April 2019), response to question 8, as the government deems that the potential that a divestment be ordered is sufficient.

342 Code monétaire et financier, Article 151-3-2. The sanction is the capped at the highest of either twice the amount of the irregular investment, 10% of the annual turnover of the acquisition-target or EUR 5 million (natural persons)/ EUR 10 million (legal persons).

2.4. Response to changes in risk associated with ownership-relations

300. Concerns over risks to essential security interests associated with the acquisition or ownership of specific assets may arise in diverse circumstances, for diverse reasons and at different moments in time. Acquisition-related policies to safeguard essential security interests are activated in the context of a proposed acquisition of an asset, or in certain cases, when an earlier acquisition that may raise concerns comes to the attention of the host government.

301. Ownership-related risks may however evolve in other situations than acquisition contexts: technological change, an asset's business orientation or portfolio, or circumstantial changes, (that is, where the asset does not change, but its environment does) may all increase ownership-related risk for essential security interests significantly. This section describes to what extent mechanisms are designed to address factual changes that may alter the risk of an ownership-relation in significant ways.

302. Two archetypical types of factual changes in the context of ownership-related policies can be distinguished:

- An asset or product that was not previously sensitive becomes security-relevant through a *change in its environment, context*, or *use*.
- A company that did not produce any security relevant products or services *changes its business orientation* to include and henceforth produces security-relevant products.

2.4.1. Changing security relevance of an asset through changes in environment, context or use

303. The security relevance of assets changes over time. Many factors can lead to such change and are sometimes beyond the control of owners of a business: The success and market penetration of a product or service for instance can make an asset relevant for countries' essential security interests: mobile phones, mere gadgets in the 1990s, became relevant for essential security by the 2000s at the latest due to their technical development such as the integration of sensors, ubiquity and use. Internet-based services, in particular large "social" network providers and applications, followed a similar path around two decades later, and penetrated markets much more quickly and in unpredictable ways, with some becoming sensitive for essential security aspects in a matter of years.

304. Other examples exist outside the technology-context: The ownership of a building may raise concerns for essential security interests following changes in its physical neighbourhood, even where ownership, location and occupation of the building have not changed. Changing circumstances in the neighbourhood, beyond the reach of the owner, can change the security relevance in sometimes unpredictable ways.

305. Policies can respond in different ways to such circumstantial changes: A few policies have recently been introduced that establish permanent government powers to address ownership-related risk and order measures considered necessary, provided that the assets in question fall under the scope of these mechanisms.[343]

306. In the absence of such policies, governments may be able to subject earlier acquisitions to reviews, even if the security concerns did not exist and could not necessarily be anticipated at the time of the acquisition that now appears in a different light. Some but not all mechanisms

[343] See for examples of such policies section 1.3.2.

explicitly exclude reviews when a certain time has elapsed since the acquisition; others allow an intervention for any transaction that has not been reviewed without time limits.[344]

307. Where mechanisms that feature *voluntary* reviews retain greater flexibility for governments for deferred and potentially indefinite intervention for governments, they shift the risk of factual changes to the owner of an asset. In turn, where an acquirer notifies and obtains clearance of a transaction under *mandatory* mechanisms, the same risk of unanticipated changes is borne by the government and the societies they serve. Voluntary mechanisms with an absolute time limit distribute the risk of later factual changes, including those beyond the reach of the owner.

2.4.2. Changing business orientation of companies

308. Changing business orientations or -success of an existing enterprise may lead an enterprise into sectors that are relevant for essential security interests, without any acquisition contributing to this result. It is not uncommon that businesses change their orientations or portfolio: *Nokia* is an often cited example that produced pulp and rubber product before eventually venturing into mobile communications; *Mannesmann*'s main business was steel-pipes, before it diversified its portfolio and started offering mobile communication services. Both companies were operating in fields that were unlikely to be considered sensitive by any standard before, while their changed portfolio led them into a sensitive business field. Inordinate successes of some businesses may also lead companies or some of their activities to become security sensitive; software firms that develop mobile phone applications are an example of a business where such change can happen rather quickly.

309. Only a few acquisition- and ownership-related policies are designed to respond to changes in the security relevance of assets or enterprises that result from the development of their business and absent any acquisition or ownership change. These include policy designs mentioned above – permanent ownership-oversight and open-ended possibilities to review past acquisitions that have not been formally reviewed. In addition, some policies that regulate *presence* of an enterprise in a given sector – e.g. telecommunications or media – can respond to changes in business orientation or portfolio.[345] One single mechanisms in the sample has been identified that approaches the issue head-on: Hungary in the *Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests*, Article 2, Section 4(1) requires enterprises that expand their operations into listed sensitive sectors to notify such expansions to the Minister.

2.5. Transparency and accountability

310. The legitimacy of acquisition- and ownership-related policies to safeguard essential security risks, especially where policies may have an impact on legitimate investment, depend on

[344] Germany's cross-sectoral review mechanisms, which does not require prior authorisation, does not allow any reviews once five years since the acquisition have passed (Außenwirtschaftsverordnung, § 55(III)6). In turn, Finland's likewise voluntary cross-sectoral review mechanism does not feature such time limitations, The Act on the Screening of Foreign Corporate Acquisitions, Section 5. The United States' mechanisms operated by CFIUS also allows the committee to review any past transactions that have not been approved in the past without time limitations; the power to review covered transactions under 50 USC §4565,(b),(1),(D) is not limited in time.

[345] Only a few policies in the sample use this approach, which is more common to pursue other regulatory purposes (diversity of the media for example).

transparency and accountability for the policies' implementation.[346] This legitimacy needs to be earned with respect to several audiences:

- the general public as a whole as the sovereign over government policy overall;
- would-be acquirers;
- owners of assets that are the object of a planned acquisition;
- owners of assets that are potentially security relevant;
- third parties who may have a stake or an interest in the outcome of a decision taken under the policies; and
- other market participants.

Information needs of these audiences are different and provision of information serves different, if overlapping purposes.

311. The recent public discussion about this policy area, new policy initiatives in many countries and a more robust implementation practice in countries that have operated mechanisms for longer has drawn more public attention to this policy area – as evidenced by media reporting or parliamentary inquiries, for instance – and brought greater expectations with regards to transparency and accountability about the implementation of policies. In many countries, these expectations have now resulted in greater transparency recently.[347]

312. The public interest for information on processes and decisions in this area competes with the interest of businesses that are involved in the transaction to keep certain information confidential. Individual countries' choices about which of these competing interests should prevail in different scenarios have led to a broad spectrum of policies and practices with regard to the publication of information related to the implementation of acquisition- and ownership-related policies to safeguard essential security interests.

313. The approaches governments have chosen can be classified in relation to several parameters, in particular:

- Whether information is provided in a *proactive or reactive* manner;
- *Who* receives the information; and
- Which *granularity* the information has.

In many countries, different combinations of these parameters have been chosen, resulting in a broad spectrum of overall availability of information.

346 The OECD Guidelines for Recipient Country Investment Policies relating to National Security (2009) explicitly call for accountability of governments for the implementation of acquisition- and ownership-related policies to safeguard essential security interests. The Guidelines explicitly recognise accountability vis-à-vis citizens on whose behalf measures are taken. The Guidelines further recommend that investment policy actions, including those related to safeguarding essential security interests, be disclosed publicly, while recognising the need to protect confidentiality of sensitive information.

347 A survey of country's practices by the OECD Secretariat conducted in 2008 – OECD (2008), "Accountability for Security-Related Investment Policies" – found that little information was made available about the implementation of acquisition- and ownership-related policies to safeguard essential security interests then: For example, only three out of twelve countries surveyed made individual decisions public, and only two countries prepared aggregate annual reports.

314. Immediate or almost immediate *public information* on *individual decisions* is specifically required by law in Austria,[348] and New Zealand,[349], among others. In the United States, only prohibitions of specific transactions by the President are made public. In some additional countries, including Australia[350] and the United Kingdom,[351] such decisions are made public in practice, even in the absence of legal obligations to do so.

315. The publication requirement or practice echoes the fact that laws typically require a political-level official or even the government as a whole to deny a transaction – suggesting that these are "political" decisions to which a public interest corresponds. However, publication of denials is not systematic across all countries, neither as a requirement in law nor as observed practice.[352]

316. Some countries provide the *public* with *aggregate information* in periodic, often annual, reports. A legal obligation to issue such pubic reports exist in Australia since 1984/85,[353] Canada since 2016,[354] Italy since the establishment of the mechanism in 2012,[355] in the United States since

348 The requirement is set out in Foreign Trade Act, § 25a(14) and covers final decisions regardless of their outcome. Since the establishment of the mechanism in 2011 and until end-2019, only a single transaction is been recorded on the Ministry's website where such decisions ae made publicly available, while six applications and two approvals have been reported until May 2018 unofficially (Jacques BOURGEOIS (Ed.) (2018), "EU Framework for Foreign Direct Investment Control", Chapter 4).

349 Case-specific and information is available through a webpage of Land Information New Zealand and is lagged by around one month.

350 It has been practice over several years that the Treasurer announces decisions in cases where a proposed transaction is not allowed or subject to significant obligations. In the absence of a rule on such publications, it is not certain whether this practice is consistently applied, however.

351 Detailed information appears on the website of the Competition and Markets Authority (CMA website); this information includes the fact that a "public interest intervention" has been made (announcing the formal beginning of a review), the ultimate decision, including undertakings and the reasons for the decision. Since late 2019, the decision to open a Public Interest Intervention is also made public as secondary legislation on the United Kingdom Government's legislation website.

352 The German government, which decided to block an acquisition under its cross-sectoral review mechanism in August 2018 – the acquisition of *Leifeld Metal Spinning* –, did not announce the decision publicly. The German government explained in a response to a parliamentary request (BtDrs.19/9681 (24 April 2019), response to question 13) that information related to individual reviews is kept confidential to protect the confidentiality of business-related information. Austria has a similar practice: The temporary publication of individual decisions aside, the Austrian government responds in a reactive fashion to parliamentary requests that are later publicly available; the only such response available by mid-May 2020 had been issued on 17 June 2019 and likewise emphasised the need to protect information on the involved parties.

353 Annual reports by the Foreign Investment Review Board are available for all years since 1984 on a FIRB webpage; the earliest available report on 1984/85 covers aggregate data backwards to 1981/82.

354 The legal obligation is laid down in Investment Canada Act, section 38.1. When Canada began releasing annual reports with information on the implementation of its security related elements, it reported aggregate numbers backwards up to the year of to the introduction of the mechanisms in 2009.

355 Reports are required under in Decree Law 21/2012 that was later converted, with amendments, into law by the Law of 11 May 2012, n. 56, Article 3bis and are publicly available through the website of the Italian Senate.

2007,[356] and was introduced in France in 2019.[357] Annual reports are also required under the European Framework of 2019.[358] The reports are available more or less promptly[359] and contain more or less disaggregate information.

317. Security-sensitivity and confidentiality concerns have led some countries to publish information only to *representatives of the public*, such as the parliament, or to grant representatives of the public a greater level of detail than is made available to the general public.[360] In some countries, the audience of certain information is further restrained and limited to parliamentary committees or individuals, for instance.[361]

318. Some jurisdictions' mechanisms provide for obligations to provide information in a *reactive fashion*, either in addition to or instead of proactive means of information. Mechanisms in place in France[362] and the European Union's framework explicitly regulate such reactive means

356 The obligation to establish annual report to Congress was first established in the Foreign Investment and National Security Act of 2007, Section 7; that Act did not establish a requirement to make annual reports publicly available, however.

357 Article 153 of the Loi PACTE of May 2019 introduced the requirement that an annual report on annual statistics of the implementation is made public (Code monétaire et financier, article L.151-6). Detailed provisions on the contents of the report – including anonymised information on requests for approvals, approvals, rejections and mitigation measures as well as enforcement – are set out in the law.

358 The Regulation of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, Article 5, requires annual reports from Member States that maintain screening mechanisms that contain aggregated information on the application of their mechanisms; the Commission is likewise required to report publicly on the implementation of the Regulation.

359 Governments of Australia and Canada release annual reports shortly after the end of the corresponding year. Other countries release public versions of reports with some time lapse. Public versions of reports by CFIUS for example, are released around three years after the end of the period that they cover.

360 In the United States, for example, the Congress receives an additional report which contains legally and properly classified information, while the public only has access to a less detailed report. A similar approach is in place since 2019 in France. In Iceland, a report to the Parliament is due annually since an amendment to the Act N° 34/1991 on Investment by Non-residents in Business Enterprises passed in 1996; the reporting obligation explicitly covers the application of the mechanism to safeguard Iceland's essential security interests.

361 Since a reform in 2019, legislation in France – Article L.151-7 (I) of the Code monétaire et financier – requires that the government forward an annual report on the implementation of measures to safeguard France's essential security interests to the presidents of the parliamentary commissions in charge of economic affairs of both houses of parliament. This report is in addition to the less detailed report that is now to the public (see footnote 357). In the United States, specific Members of Congress obtain prompt information on each decision that CFIUS has taken, hence generating accountability vis-à-vis Congress. France similarly allows the parliamentary commission presidents to question – in a confidential setting – relevant ministers and request certain documents related to the implementation of the review mechanism.

362 Article L151-7 (II) du Code monétaire et financier, introduced by Loi n°2019-486 du 22 mai 2019, art. 153.

of information,[363] and in other jurisdictions, general rules on parliamentary oversight and access to information regarding executive decisions exist.[364]

319. Information provided by other parties, including information that companies need to disclosure under securities legislation, can also provide some degree of information in relation to specific cases; their format often limits their use only to specialised audiences.

2.6. Judicial or otherwise independent review of decisions

320. Independent review of decisions taken under acquisition- and ownership-related policies serves an individual and a collective purpose: Individually, independent review can contribute to ensuring material and procedural justice for the would-be acquirer, owner, or other interested parties; collectively, such review also contributes to a consistent application of rules, disciplines the implementing authorities, and helps identify reform needs where outcomes do not correspond to policy intentions. Independent review – here used synonymously with judicial review – is typically characterised by its public nature and access to all decision-relevant information for the involved parties; it may thus conflict with requirements to keep certain security-related information secret, including vis-à-vis the concerned or aggrieved party. Balancing the benefits of independent review with the needs to keep certain information secret may thus lead to limited access to or scope of review in certain mechanisms and countries.

321. For many mechanisms in the sample, access to judicial remedies is explicitly regulated, circumscribed, or, in certain cases, excluded. In other countries, no special rules are laid down, leading to the application of a given country's general rules on judicial review of administrative decisions.

322. The extent to which decisions made under acquisition- and ownership-related policies to safeguard essential security interests can be subjected to judicial or otherwise independent review depends on several factors:

- whether or not judicial or independent review is granted with regard to decisions under acquisition- and ownership-related policies; and
- which scope and depth of review is available in light of the security-sensitivity other confidentiality requirements.

323. Most of the aspects related to judicial or independent review remain uncertain. So far, judicial review of decisions made under acquisition- and ownership-related policies to safeguard essential security interests has been exceedingly rare. One single challenge to the application of such policies has become known in the entire sample of 62 economies over the entire history of the field, and this case was ultimately settled.

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363 The Regulation of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, Article 5, requires annual reports from Member States that maintain screening mechanisms that contain aggregated information on the application of their mechanisms; the Commission is likewise required to report publicly on the implementation of the Regulation.

364 Information on Germany's implementation practice is currently almost exclusively available through public responses by the Government to requests from within the parliament; the available information depends on the question and the response it receives. A recent example of a comprehensive response is available in Parliament document BtDRs 19/1103.

2.6.1. Availability of judicial or otherwise independent review

324. Some countries categorically exclude final decisions taken by the authorities under acquisition- and ownership related mechanisms from judicial review; this approach is stated in law in China.[365] In the United States, the action by the President to suspend or prohibit any covered transaction as well as the findings of the President is not subject to judicial review.[366] However, "a civil action challenging an action or finding… may be brought… in the United States Court of Appeals for the District of Columbia Circuit."[367]

325. On the other hand, some countries explicitly grant access to judicial review at least in the case of a denial of the transaction; this is the case in Finland,[368] France,[369] Lithuania,[370] and Portugal,[371] for example. The EU Regulation explicitly requires – as far as EU Member States' review mechanisms are concerned – that foreign investors be given a means to seek recourse against screening decisions.[372] In some countries, no explicit rules on the availability of judicial review are included in or associated with the mechanism, suggesting that regular rules on the independent review of administrative decisions apply.[373]

2.6.2. Scope and depth of review

326. Countries that allow for independent review of have also made a broad spectrum of choices with respect to the scope and depth of judicial review; *scope* as used here refers to the material rules on which a claim can be based and whose breach can be challenged, while *depth* of the review refers to the breadth of the power of the judiciary to judge the decision of the executive.

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365 China's Foreign Investment Law of the People's Republic of China, 2019, Article 35.

366 50 U.S. Code § 4565. Authority to review certain mergers, acquisitions, and takeovers, e), (1) states that "The actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review."

367 50 U.S. Code § 4565. Authority to review certain mergers, acquisitions, and takeovers, e), (2)

368 Act on the Screening of Foreign Corporate Acquisitions (2012), Section 9.

369 Code monétaire et financier, Article L151-3-1 (IV); the explicit rule applies to decisions regarding transactions that have not been notified but are, according to the authorities, notifiable, as well as decisions on the non-respect of obligations undertaken as part of mitigation agreements. However, general principles of French administrative law would make other decisions taken in this domain reviewable as well.

370 Lithuania's Law on the protection of objects of importance to ensuring national security Article 20, which states: "*Judicial review of decisions adopted in the course of application of this Law* – Decisions adopted by entities of public administration pursuant to this Law may be appealed against to Vilnius Regional Administrative Court in accordance with the procedure laid down in the Law of the Republic of Lithuania on Administrative Proceedings. Such an appeal must be considered not later than within 45 days from the admission thereof and an appeal against a decision of the administrative court of first instance – not later than within 30 days from the admission thereof."

371 Decreto-Lei 138/2014, Article 4(8).

372 Regulation establishing a framework for the screening of FDI into the EU, Article 3(5).

373 This is the case in Germany, for instance, where access to and review by administrative tribunals are available under general rules as confirmed by the Ministry of the Economy in an unofficial information note of May 2019, item iv. Poland's mechanisms established by the Law on the control of certain investments does also not state whether and to what extent judicial review is available; it refers to decisions of the administrative court in a different context (Article 9.6).

327. Some countries limit the scope of judicial review. Finland for instance, allows complaints only against denials of approvals under its two mechanisms, not against intermediary decisions such as the decision to review a transaction.[374]

328. In some countries, the scope of judicial review is explicitly limited.

329. Other countries are likely to limit the review under their regular rules; in Germany, for instance, the judiciary would under current doctrine limit its review of risk and prognosis decisions to certain aspects such as wrong factual assessments and manifest errors of law. In the absence of jurisprudence, uncertainty about the depth of review remains for most jurisdictions, however.

2.7. Resources and fiscal costs for the policies' administration and cost recovery

330. Depending on their design and implementation, acquisition- and ownership-related policies to manage risks for essential security interests may entail more or less significant resource implications for the implementing administration. While such resources – fiscal costs[375] or human resources – may be easily expressed in numbers, their overall appreciation requires context: acquisition- and ownership-related policies may substitute other means to protect these interests and lower costs for other means and lead to a lower a country's net expenditure to manage exposure to certain risks.[376] For this reason, the information provided in this section should not be read as a "net" representation of resources and costs, but rather seeks to provide information on individual countries' expenditure and staffing for the use of *this specific tool*. For this and other reasons, the information provided should also not be construed to indicate the efficiency of a given country's approach.

2.7.1. Resources dedicated to the operation of mechanisms

331. Not all acquisition- and ownership-related mechanisms to safeguard essential security interests generate implementation costs or require human resources for their implementation. Fixed sector caps in particular would not normally generate implementation costs, compliance control and enforcement aside.

332. Information on resources allocated for the implementation of acquisition- and ownership-related mechanisms to safeguard essential security interests are rarely disclosed or even specifically assessed. Some information on the resources dedicated to individual countries' mechanisms however is directly available or can be roughly estimated based on available data.[377] The information either relates to annual budget allocations or to staffing levels of the parts of the administration that are directly involved in the implementation of the mechanisms.

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374 Act on the Screening of Foreign Corporate Acquisitions (2012), Section 9.

375 For greater clarity, the concept of fiscal costs employed here only includes costs that the administration of the implementation requires. Other costs or potential losses to the government – e.g. tax income – are not addressed here.

376 More details on complementarity and substitution of acquisition- and ownership-related policies to safeguard essential security interests is available in section 2.8.

377 These estimates are made by the OECD Secretariat based on publicly available information. Governments participating in the Roundtable have not endorsed these estimates, and some governments consider that these figures are themselves national-security-sensitive.

333. Based on these estimates, it would appear that the resources that individual countries allocate to their acquisition- and ownership-related mechanism vary widely between near zero and 8-digit USD amounts per year and may differ by several orders of magnitude despite similarly sized economies.

334. Some countries that have reviewed very few or no cases can be expected to expend at most moderate amounts, but even countries that review several dozen cases per year report fairly low expenditure for the implementation of their review mechanisms: The Finnish government reportedly directly employs two officials for the administration of its policy.[378] Denmark imposes an annual fee on defence manufacturers to finance the administration of an Act under which certain interactions with foreigners are subject to government authorisation.[379] Germany had publicly stated in mid-2017 that its total average annual expenditure for the administration of its two review mechanisms over the years 2009-2015 did not exceed EUR 6000;[380] in early 2020, Germany estimated the annual additional cost that would result from an adjustment of its mechanism at EUR 4,7 million, an almost 800-fold increase.[381] While no explicit information is available on the fiscal costs of France's policies related to national security, numbers revealed in a recent impact assessment allow to estimate direct costs of well over EUR 1 million per year for France's main review mechanism.[382] The review mechanism for the European Union – covering foreign direct investments that are likely to have cross-border impact or to affect projects or programmes of Union interests but also a coordination mechanism among EU Member States and the Commission – initially estimated annual expenditure of EUR 3.2 million for its

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378 According to Copenhagen Economics (2018), "*Screening of FDI towards the EU*", p.42.

379 The rules are contained in the Act on War Material – Consolidated Act No.1004 of 22 October 2012, Article 13 and can be traced back to predecessor legislation dating at least to 1937. Under current legislation, the total annual fee is indexed to salary developments in the public sector and was set at DKK 230,000 in 1991 – around USD 34,000 at today's exchange rate. All companies that operate in the sector contribute to this sum in proportion to their annual turnover share of defence production in Denmark, with a minimum of DKK 500.

380 Germany reported the estimated costs in the justification and explanation to the reform in *Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung*, 14 July 2017. In this document, the German government estimated, then based on over at least 7 years of experience with the mechanisms, that EUR 125 are spent per case under the cross-sectoral review mechanism and EUR 195 per case under the sector-specific review mechanism. Over the period 2009-2015, Germany has reviewed around 30 to 50 cases per year, according to official reports to Parliament in BtDrs 18/10443 (25 November 2016), BtDrs 19/1103 (7 March 2018) and BtDrs 19/2143 (11 November 2018). Four staff are reported in an official response by the German government to a parliamentary question (BtDrs 19/9484, 16 April 2019, response to question 6). Copenhagen Economics (2018), "*Screening of FDI towards the EU*", p.42 reports that the unit consists of five officials.

381 Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes, bill as of 31 March 2020, item E.3. A detailed explanation of the expected additional costs is available in the same document on p.17.

382 Current and expected future staffing levels for the inter-ministerial committee are reported in the impact assessment ECOT18167RD of 24 October 2018 on the *Décret n° 2018-1057 du 29 novembre 2018 relatif aux investissements étrangers soumis à autorisation préalable*, p.12. The assessment refers to 23 officials in the inter-ministerial committee that prepares decisions, in addition to officials in the front office in the Ministry of Finance and the Economy. An increase of human resources by 5 to 10 full-time equivalent positions is expected to handle the expected increase in numbers of cases after the reform introduced by *Décret n°2018-1057*. For the 5 to 10 additional positions, costs of EUR 315,000 per year are estimated.

implementation, partly to finance an estimated 22 Commission officials needed to implement the different aspects of the Framework.[383]

335. Towards the other end of the known expenditure spectrum, the United States expends tens of millions USD on the CFIUS process per year, with further increases resulting from the reform of 2018.[384] Through its 2019 budget, and not limited exclusively to foreign investment review, the Government of Canada allocated significant new funding to address economic-based national security threats.[385]

2.7.2. Cost recovery

336. Fiscal costs associated with the implementation of acquisition- and ownership-related mechanisms to safeguard essential security interests can be carried by taxpayers or, at least in part, by individual applicants or other entities that directly benefit from the review as a condition to realise their acquisition plans.

337. Unlike many bureaucratic authorisations that are subject to the citizen paying a fee, review processes under acquisition- and ownership-related mechanisms are taxpayer-funded in most countries.[386] Only a few countries in the sample have been found to levy processing fees, either for individual reviews (Australia, Finland, and the United Kingdom), or as for the implementation of a related act that are shared by the industry independent of specific reviews (Denmark). The United States recently incorporated fees should parties request an expedited review process for certain transactions.[387]

338. Australia introduced fees for its review mechanism in 2015; these fees are inflation-indexed staggered flat fees and can reach over AUD 105,000 for larger transactions.[388] Finland operates a flat-rate charge of EUR 5000 for handling of applications for foreign investment in Finland.[389]

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383 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM(2017) 487 final, p.17.

384 Treasury and Department of Justice budget documents reveal that for financial year 2020, over USD 40 million are requested for these parts of the administration of the CFIUS process alone; this represents, for the two departments, an increase of over USD 25 million compared to their 2019 budget allocation (see Department of Justice – National Security Division, FY 2020 Department Performance Budget – Congressional Justification and Department of the Treasury, Committee on Foreign Investment in the United States Activities, Congressional Budget Justification and Annual Performance Report and Plan, FY 2020).

385 According to information provided by the Canadian government, Canada's Budget 2019 invested CAD 67.3 million over five years, starting in 2019-20, and CAD 13.8 million per year ongoing, to address economic-based national security threats.

386 Poland (Law on the control of certain investments, Article 14.3 contains an explicit provisions on this funding source.

387 On March 4, 2020, a proposed regulation was issued establishing a fee for parties filing a voluntary notice of certain transaction for review by CFIUS.

388 Fees are set by the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*. FIRB Guidance note GN 30 provides explanations specifically with respect to fees for business investments.

389 The fees are included in decrees that have a validity of one calendar year. For 2020, the fee has been set to EUR 5000, up from EUR 2000 in earlier years (for 2017, the fee was contained in *Ministry of Employment and the Economy Decree 1465/2016*, and for 2018 in *Decree of the Ministry of*

The United Kingdom levies fees for the review of individual transactions, currently part of its merger review, that depend on the transaction value, exclude SME transactions, and only arise when a transaction reaches an advanced stage of the process and if further conditions are met.[390] The United States has introduced, in 2018 the possibility to levy fees that depend on the value of the transaction, but are capped in relative terms at 1% of the transaction value and in absolute terms at USD 300.000 for individual transactions and, as an aggregate, the costs of the CFIUS process.[391]

339. Finland and the United States have capped the cost recovery at the average or actual cost of the review or of administering the review regime.[392] Australia does not apply such a cap; moreover Australia cross-finances parts of its efforts to safeguard its essential security interests – in particular the Critical Infrastructure Centre – through fees collected from applicants for permissions to acquire residential real estate, a service not associated with essential security issues or critical infrastructure.[393]

340. In all countries in which costs are currently levied on individual applicants, the fees are service fees for the process and not contingent on the outcome of the process. Other choices are possible: fees could be levied for instance only for approvals, when the benefit arises to the applicant, or only for denials, to recover costs from parties that submit unwelcome proposals.

2.8. Limiting the effect of acquisition- and ownership-related policies on benign investment

341. Acquisition- and ownership-related policies to safeguard essential security interests may have effects on benign investment, and, to the extent that most countries' mechanisms single out foreigners, benign *foreign* investment. This alleged effect is one of the main arguments brought forward by those that are opposed to their introduction and is, at least implicitly, often acknowledged in the context of reforms of mechanisms or punctual denials of specific investment proposals in some countries.

342. While the protection of essential security interests is a right and indeed duty of governments, and acquisition- and ownership-related policies to safeguard essential security interests are legitimate, their design can influence benign investment, and markets more generally.

Employment and the Economy on fees payable by the Ministry of Employment and the Economy (1050/2017)).

390 Details of the conditions under which fees are due are set out in Competition and Markets Authority (2014), "*Mergers: Guidance on the CMA's jurisdiction and procedure*", in particular sections 16 and 20.

391 FIRRMA, section 1722. The Department of the Treasury, Committee on Foreign Investment in the United States Activities, Congressional Budget Justification and Annual Performance Report and Plan, FY 2020, p.5 expects to recover USD 10 million per year under this mechanism in 2020. Income through CFIUS fees to the tune of USD 20 million is expected in the following years, according to Budget of the United States Government, Fiscal Year 2020 - Analytical Perspectives, p.168.

392 Information for Finland according to Copenhagen Economics (2018), "*Screening of FDI towards the EU*", p.42. The United States has codified the aggregate ceiling in 50 USC §4565.(p).

393 This cross-financing became effective on 1 July 2017, in conjunction with a 10%-increase of most fees that foreign investors pay when seeking approval to purchase residential real estate, according to Foreign Investment Review Board, "Budget 2017 changes" undated website.

The extent to which such benign investment and markets are affected by the mechanisms depends in large part on their specific design.

343. The 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security recommend certain policy principles to balance openness to investment and the pursuit of legitimate security objectives. This section seeks to shed more specific light on the potential effects of security-related mechanisms on benign investment and global capital allocation, and documents policy practice in this regard.

344. Acquisition- and ownership-related policies to safeguard essential security interests could have several different effects on (international) investment and international capital allocation more generally. They could for instance *discourage* some legitimate would-be acquirers from investment decisions; could *distort* the market for mergers and acquisitions in favour of investors that are subject to lesser or no review mechanisms; influence *valuations* of assets that are considered sensitive; or lead to secondary effects with regards to the global allocation of capital.

345. Empirical information on the existence and magnitude of any effect of acquisition- and ownership-related policies on legitimate investment or capital allocation is scarce for several reasons, such as confidentiality and informality of many processes that do not leave a trace in publicly available data. Some anecdotal evidence however suggests that some or more of the following effects may occur:

- Investors may refrain from considering a specific merger that would be subject to reviews if they deem the risk of a prohibition of the acquisition too high and rather avoid the associated uncertainty or reputational risk of a refusal. Their own or observed experience may have a chilling effect on certain investors or certain transactions. This effect is likely to affect investors of specific origin or State-owned investors more than others.
- Investors may consider the costs and fees associated with a review too high to make an acquisition economically worthwhile even if they are confident to obtain regulatory approval eventually. These costs include fees for specialised outside or in-house counsel to navigate the sometimes complex procedures, plus fees that some countries levy for the review process itself.[394] Requirements to obtain approval in several jurisdictions may lead to significant costs in absolute terms. Costs and fees for reviews may discourage smaller acquisitions disproportionately as the expenditure relative to transaction value may make an operation unviable.
- Certain investors may be or disadvantaged in or *de facto* excluded from certain markets or market segments where investment reviews lead to differential regulatory requirements. Owners of assets under acquisition may be opposed to an engagement with an acquirer that needs additional regulatory approval (as a foreigner or State-owned company, for example), may demand a higher closing price, or request onerous *reverse termination fees*[395] to compensate for expected uncertainty or delays. Conditions agreed

394 Little information is available on the costs of outside counsel who assist companies in the procedures. An impact study carried out in France in 2018 in the context of a recent reform reports that in 90% of the cases observed in France, the acquirer uses outside counsel; fees for these services are estimated at around 3.5% to 4% of the transaction value (Fiche d'impact generale – Décret relatif aux investissements étrangers soumis à autorisation préalable (2018), p.12-13).

395 "Reverse termination fees" as used here refer to payments that a prospective buyer owes the acquisition target when a planned merger and acquisition fails, in particular due to the absence of regulatory approval. Availability of information on reverse termination fees is very uneven, and the examples of cases in which they were agreed specifically to absorb risk of regulatory approval under investment review processes is only anecdotal and illustrative absent a systematic study. For example, several companies have reported in SEC filings the existence of reverse termination fees

under mitigation measures may reduce the economic benefits of the transaction for the acquirer, even if the transaction is ultimately approved.

- Where only a few potential bidders may be eligible to acquire particularly sensitive assets, valuations may be lower,[396] and raising fresh capital in advanced or otherwise sensitive technology or critical infrastructure may be more difficult.
- While there is large inelasticity for acquisitions at presence – assets can only be acquired in the jurisdictions where they are located –, enterprises may engage in regulatory arbitrage when they allocate their *future* investments. To avoid anticipated later regulatory hurdles when they seek to sell sensitive assets or businesses on the global market, they may allocate capital for their R&D capacity or other sensitive operations in jurisdictions where regulatory controls are expected to remain less stringent to enhance chances of potentially higher returns at divestment to other acquirers in the future.[397] As the likelihood of regulatory intervention will likely depend on the degree of innovation, acquisition-related policies may influence where and how capital, in particular venture capital, is allocated and where now enterprises of subsidiaries are incorporated.

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relating to CFIUS contingency for a proposed transaction. They suggest that recently, reverse termination fees of up to 9% of the target enterprise value – or almost USD 12 billion (*proposed by Broadcom* for the acquisition of *Qualcomm* in February 2018) – have been offered, and fees of up to 6% of the transaction value for transactions in the technology sector in one jurisdiction appear common to absorb the uncertainty about regulatory approval under acquisition-related mechanisms based on essential security grounds. In a recent case, the acquisition of Ingram Micro Inc by Tianjin Tianhai in 2016, a fee of USD 400 million (representing over 6% of the transaction value) was agreed as payable, among others, if CFIUS approval was not obtained by the would-be acquirer. Likewise in 2016, a consortium of buyers agreed to pay a reverse termination fee of USD 95 million (over 2.5% of the transaction value) in case that the *acquisition of Lexmark* would fail to be approved by regulators, including by CFIUS. In 2017, a reverse termination fee of over USD 58 million (about 4% of the transaction value) was agreed in case the *acquisition of Lattice Semiconductor by Canyon Bridge* could not be implemented, including for failure to obtain regulatory approval; the fee was explicitly requested by the acquisition target in light of uncertainties about approval on national security grounds (p.38 of the SEC notification). *Wolfspeed's* parent company reported a reverse termination fee of USD 12.5 million for *Infineon's* proposed acquisition of *Wolfspeed* relating to national security regulatory risk in 2017, representing around 1.5% of the transaction value.

396 A drop in values of sensitive infrastructure assets in Australia has been argued and allegedly confirmed in actual prices in 2018 for electricity grid values after Australia's government had announced a more rigorous review approach in this sector. Significantly lowered prices were also observed in some recent technology-sector transactions where essential security concerns related to the initial acquirer could not be resolved; the alternative buyer offered a lower acquisition price. Price differentials may be explained by multiple factors and need to be interpreted with caution. Later events, overvaluation to acquire assets for motives beyond their economic use or in anticipation of currency valuation may play a role in the differential pricing between bidders in different circumstances.

397 Significant price depressions of assets that were considered sensitive by governments of the seller have been observed early. Theodore MORAN (2013), "*FDI and national security: Separating legitimate threats from implausible apprehensions*", In: *Foreign Direct Investment in the United States: Benefits, Suspicions, and Risks with Special Attention to FDI from China*, Peterson Institute for International Economics, p.56 mentions that after the sale of *Fairchild Semiconductors* to *Fujitsu* was blocked in 1987, the acquisition by *National Semiconductor* came at a substantial discount. Similar discounts were observed in other transactions – e.g. *Philips*' sale of its 80.1% stake in *Lumileds* in December 2016 earned Philips only around USD 1.6 billion, slightly over half of what had been agreed with a different prospective acquirer in March 2015 (USD 2.9 billion) but for whose acquisition regulatory clearance national security grounds had not been granted.

346. The presence and magnitude of such potential effects remain uncertain and under-researched. However, specific designs may help reduce the risk that such effect materialise, without necessarily compromising or affecting the mechanisms' capacity to avert risks for essential security risks. As certain transactions may require approvals in more than one jurisdiction, efforts to reduce effects of acquisition- and ownership-related policies on benign investment have a domestic as well as an international component.

2.8.1. Domestic policy designs to reduce the impact of acquisition- and ownership-related policies on benign investment

347. Some of the effects that acquisition- and ownership-related policies may have on benign investment may be attenuated by specific design features of these policies. As recognised by the 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security, legislators and governments can in particular:

- Enhance predictability about criteria, process, and timelines;
- Provide an early opportunity for informal consultation with authorities;
- Tailor the scope of reviewable transactions tightly to areas where risk to essential security interest exists; and
- Stagger the procedures to allow for early decisions under certain criteria.

348. Some recent reforms have leveraged one or more of these approaches to reduce the impact of the mechanisms on benign investment, at times to attenuate the effects of simultaneous expansion of mechanisms.

Enhance predictability about criteria, process, and timelines

349. Predictability of applicable criteria, process and timelines of review mechanisms is crucial for would-be acquirers to anticipate the likelihood, implications, cost and likely outcome of a review. Clarity about the legislated contours and scope of the mechanisms is an obvious necessity,[398] but may have its limits, especially for mechanisms that apply cross-sectoral. Additional guidelines or information – legally binding or not – have been issued in some jurisdictions to avoid to the extent possible miscalculations. Retrospective information in annual reports[399] – provided they are issued early – can also shed light on administrative practice and deliver up-to-date information on administrative practice to would-be acquirers.[400]

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398 The 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security recommend, among others: "*Codification and publication*. Primary and subordinate laws should be codified and made available to the public in a convenient form (e.g. in a public register; on Internet). In particular, evaluation criteria used in reviews should be made available to the public."

399 The 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security recommend, among others: "*Disclosure of investment policy actions* is the first step in assuring accountability. Governments should ensure that they adequately disclose investment policy actions (e.g. through press releases, annual reports or reports to Parliament), while also protecting commercially-sensitive and classified information."

400 Canada has reported that "Following the issuance of the Guidelines [Guidelines on the National Security Review of Investments] in 2016 and annual reporting on the national security review provisions, the proportion of investments for which a filing is submitted in advance of implementation has increased significantly, and the characteristics of advance filings correlate strongly with the factors set out in the Guidelines.", "*Investment Canada Act – Annual Report 2018/2019*", p.19. Australia had, as of end April 2020, issued 50 not legally binding "*Guidance Notes*" on the implementation of the foreign investment review process, along with policy

350. Information appears to be more readily available for mechanisms that are frequently used and regulated in some detail. In turn, such information is particularly scarce on many mechanisms that are regulated in little detail or are rarely activated; this tendency is observed in countries that operate several mechanisms in parallel – and of which one or more are more marginal than others – and where only one single, scarcely regulated mechanism exists. The absence of information on such rarely invoked mechanisms may be particularly problematic as the regulatory depth is already shallow.[401]

351. Very little information on administrative practice and criteria is typically available where essential security concerns can be addressed in the context of reviews rooted in other policy areas, in particular merger reviews for competition purposes.

352. Predictable and appropriate timelines for the conduct of the process are a further important element to enhance the predictability of process and outcomes for would-be acquirers.[402] Many of the mechanisms that are regulated in greater detail contain clear schedules[403] and some include legal fictions of approval if authorities have not taken an explicit decision by the end of a predetermined period.[404] In some mechanisms however, the start of these periods may be determined by the authorities at their appreciation (e.g. "when the required information is complete") or be based on uncertain criteria ("the operation becomes publicly known")[405], reintroducing some uncertainty about the exact calendar of the review.

353. The absolute length of the review process is likewise of importance to both the would-be acquirer and the target enterprise. Most mechanisms that regulate the procedures with some degree of detail set such timelines explicitly. Some countries have set relatively short timelines

documents, some of which are specifically relevant for essential security aspects of the mechanism. Other countries have made similar efforts, albeit in a more informal fashion and not always to the same extent, e.g. Germany Ministry of the Economy and Energy, "*FAQ zu Investitionsprüfungen nach der Außenwirtschaftsverordnung (AWV)*", 13 May 2019.

401 While Canada, for example, has made substantive efforts to explain the operation of its mechanism under the Investment Canada Act, little information is available on the operation of its parallel review procedures for acquisitions in the financial sector, which apply cumulatively and whose regulatory depth is low (see the section on Canada in the Annex for further information on the mechanisms).

402 The 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security recommend, among others: "*Procedural fairness and predictability*. Strict time limits should be applied to review procedures for foreign investments. […]. Where possible, rules providing for approval of transactions if action is not taken to restrict or condition a transaction within a specified time frame should be considered."

403 The rules under the Investment Canada Act set a clear schedule for the National Security Review Process, further explained in the *Guidelines on the National Security Review of Investments* (2016).

404 Such fictions exist for example: in Finland's Act on the Screening of Foreign Corporate Acquisitions, section 5, for transactions outside the defense sector; in Germany for both the sector-specific and the cross-sectoral mechanisms under the Außenwirtschaftsverordnung; in Mexico under the Ley de Inversión Extranjera, Article 28; and Portugal under Decreto-Lei 138/2014 of 15 September 2014, Article 4 and 5; in Lithuania under the Law on the Protection of Objects of Importance to Ensuring National Security, 10 October 2002 No IX-1132, Article 12(10). Spain appears to have contradicting rules on the consequences of the authorities' silence once a specified time has elapsed: The Ley 19/2003, article 6.2 suggests that silence means refusal, while the related Orden de 28 Mayo 2001, article 11.3, suggests that silence means consent.

405 Portugal's Decreto-Lei 138/2014 of 15 September 2014, Article 4 and 5.

but allow for an extension should this be required.[406] While this approach does not always allow businesses to anticipate the overall time that will pass until a decision is taken, it requires the authorities to be transparent about the need for extensions.

354. Many of the mechanisms that are regulated in lesser detail lack such predictable schedules or defined timeframes, however.[407] Where mechanisms apply cumulatively with other mechanisms, the benefits of detailed regulation of those other mechanisms may ultimately not benefit the would-be acquirer.[408]

Providing early opportunities for informal consultations with authorities on specific investment projects

355. Some governments offer investors the opportunity to consult with authorities informally before embarking on a formal notification or review process. This possibility may offer the would-be acquirer case-specific insights to assess the merits of engaging in potentially costly formal procedures.

356. Informal consultations are rarely explicitly regulated, but appear to be increasingly frequent in administrative practice. In 2008, out of a sample of 12 countries that participated in the OECD-hosted "Freedom of Investment" process, only two – France and Japan – reported that they allowed for such advance consultations.[409] In 2015, a majority of the 17 countries that were surveyed allowed investors to engage in such preliminary consultations.[410] Some countries now actively encourage would-be acquirers to seek informal contacts with the authorities.[411]

357. Information on sensitivities may also be important for potential acquisition targets to anticipate obstacles when planning a sale of assets. Some countries have explicitly introduced the

406 E.g. Canada under the Investment Canada Act, Section 25.3(7): two extensions are possible without the acquirers consent, and further extensions as needed by agreement. In Lithuania, the Law on the Protection of Objects of Importance to Ensuring National Security, 10 October 2002 No IX-1132, Article 12(11) also allows for the extension of time-limits in certain circumstances.

407 The Chilean Decreto 232 del Ministerio de Relaciones Exteriores, del 15 de Abril de 1994 sets out the process for demanding an authorisation but does not specify a response timeline for the government. Similarly, the Netherland's Regulation on notification of change in control of the Electricity Act 1998 and Gas Act for instance specifies when the would-be acquirer needs to announce its intention, but sets no timeframe for the authorities to respond.

408 See for more details on the combination of several mechanisms section 2.9 below.

409 The countries surveyed were: Australia, Canada, France, Germany, Italy, Japan, Korea, Mexico, Poland, Russian Federation, Spain and the United States: Transparency and Predictability for Investment Policies Addressing Security Concerns: A Survey of Practice (OECD, May 2008).

410 Frédéric WEHRLÉ/Joachim POHL (2016), "*Investment Policies Related to National Security: A Survey of Country Practices*", OECD Working Papers on International Investment, No. 2016/02 report that prior consultations were regulated in P.R. China, France, Japan, Korea, Mexico, the Russian Federation and the United Kingdom, and practiced in additional countries including Canada, Germany and Italy.

411 The Canadian government, in "*Investment Canada Act – Annual Report 2018/2019*", p.19 states that "Investment Review Division officials are available to meet with Canadian businesses and investors about their investment projects. Such consultations provide a useful forum for discussion and the exchange of views which may serve to eliminate possible difficulties and encourage the development of investments of benefit to Canada."

possibility for companies to obtain information on the authorities' interpretation of the applicable rules so that these can be factored in ahead of a sales-process.[412]

Multi-step procedure to allow for early decisions under certain criteria

358. Some countries which carry out acquisition-reviews have divided their review procedures into several steps. This approach allows for leaner and quicker procedures for transactions that are less complex, lower risk, or require lesser scrutiny for other reasons. The advantage of such an approach is potentially a reduction of processing time or lower requirements in terms of documentation.

359. The most common example of differentiation of procedures in response to different risk-scenarios are combinations of mandatory and voluntary reviews as are observed for example in Finland, Germany and Italy.[413]

Tailoring of mechanisms close to need, and allowing for exceptions and mitigation measures

360. As a restriction to acquire or own certain assets, acquisition- and ownership-related mechanism are a relatively incisive means to manage risk. The principle of proportionality, as specifically mentioned in the 2009 Guidelines, require that such an intervention be limited to the extent necessary.[414] The increasingly detailed design of mechanisms and their growing differentiation testify of the efforts that governments are making to set the outer limits of the mechanisms carefully to avoid overreach, even though there may be a perception that the scope of application of mechanisms in generally expanding.

361. Not all mechanisms observed in the sample are limited to the strictly necessary: Sector-caps in particular, while relatively clear and easy to implement, are likely to extend beyond the strictly necessary as they do not allow for a case-by-case assessment or a policy response that corresponds to the identified risk. While new measures of this kind have not been introduced lately, a number of such mechanisms remain in place.

362. An important instrument in the effort to tailor the application of mechanisms to the strictly necessary is the possibility to introduce mitigation measures.[415] As mentioned in greater detail above in section 2.2, many mechanisms that are regulated in some detail allow the authorities to agree to a certain transaction with modifications or obligations. This possibility enables

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412 Since 2018, French rules set out in the Code monétaire et financier, Article R153-7 allow the investor or a target enterprise to inquire with the Ministry of the Economy whether a certain transaction would be covered by the scope of the review mechanism.

413 For more details on these mechanisms see the respective country-sections in the Annex.

414 The 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security recommend, among others: "*Regulatory Proportionality* – restrictions on investment, or conditions on transaction, should not be greater than needed to protect national security and they should be avoided when other existing measures are adequate and appropriate to address a national security concern. […] *Narrow focus.* Investment restrictions should be narrowly focused on concerns related to national security."

415 The 2009 OECD Guidelines for Recipient Country Investment Policies relating to National Security recommend, among others: "*Tailored responses*. If used at all, restrictive investment measures should be tailored to the specific risks posed by specific investment proposals. This would include providing for policy measures (especially risk mitigation agreements) that address security concerns, but fall short of blocking investments."

acquisitions to the extent they do not pose unacceptable risk and thus to limit the effect of the mechanism on benign or acceptable investment.

2.8.2. International cooperation

363. Domestic efforts in the design or rules and procedures can make an important contribution to limiting the impact of acquisition- and ownership-related mechanisms on benign investment. The proliferation of mechanisms and the expansion of their individual scope makes it likely that major transactions require approvals in several jurisdictions. International efforts to align criteria and coordinate approval processes are thus an important component of efforts to limit the impact of these policies on benign investment.

364. Efforts to align criteria or procedures, to coordinate reviews, or to recognise part or all of a third countries' decisions on individual cases appear in their infant stages (see some examples of recent efforts in section 1.8). Significant efficiency gains may still be possible here, drawing on intelligence cooperation and experience in related policy areas.

365. International cooperation and harmonisation of practices and criteria may also be an effective means to prevent regulatory arbitrage and the allocation of capital, especially in advanced technologies, data-intensive or otherwise sensitive industries. The lower regulatory differences are, especially in jurisdictions that also offer the required human capital and research capacity, the lower the effect of regulatory arbitrage is likely to be.

2.9. Composition of mechanisms to policies and their interaction with other risk-management mechanisms

366. As mentioned earlier in this report, many countries have put in place several distinct mechanisms to manage acquisition- and ownership-related threats to their essential security interests; combined, these *mechanisms* form a given country's acquisition- and ownership-related *policy*.[416] Also, certain risks are or can be managed by other mechanisms that may complement or substitute acquisition- and ownership-related mechanisms, such as licensing or outright State-ownership of certain sensitive assets or their control under "golden share" arrangements. This section presents how countries have designed their risk management instruments with regard to the

- Composition of individual acquisition- and ownership-related mechanisms to comprehensive policies (2.9.1); and
- The relationship of such mechanisms or policies with other risk-management instruments (2.9.2).

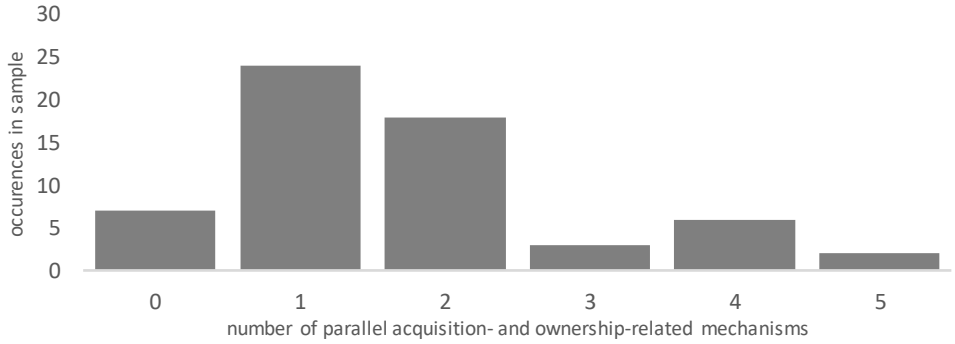
2.9.1. Composition of individual acquisition- and ownership-related mechanisms to comprehensive policies

367. About a third of the countries in the sample manage acquisition- and ownership-related risk through a combination of two or more distinct mechanisms; just over a third rely on a single

[416] As mentioned earlier, the distinction between mechanisms in a given country's policies is not an exact science. The purpose of their distinction here is to enhance the understanding about the design of mechanisms and policies and about constructive differences and choices made in policy design. Criteria used for the distinction of mechanisms include separation in legislative texts; significantly different criteria for the mechanisms' application, rules on implementation, or institutional designs.

mechanism. Up to six coexisting acquisition- and ownership-related mechanisms have been observed in the sample. Figure 2.2 shows the distribution of the number of parallel mechanisms in the sample.

Figure 2.2. Parallel acquisition- and ownership-related mechanisms: distribution of frequency in the sample



Source: OECD.

368. The aggregation of mechanisms can result from different circumstances and motivations:

- Different mechanisms in a given country can be used to respond to different concerns with individual mechanisms which are tailored to the specifics of these concerns;
- Mechanisms may have been developed in the context of different policy areas and are administered by different authorities, while functionally complementing each other to manage acquisition- and ownership-related risk; or
- Mechanisms may have been developed at different times and, as they were not consolidated to a single instrument, continue to coexist.

369. Purposeful combination of different mechanisms is observed in a number of countries and appears to be particularly frequent where recent reforms have modernised acquisition- and ownership-related mechanism. In some cases, mechanisms share certain rules or are set out in the same legislation or other regulatory document, while having otherwise different constituting characteristics.

370. The combination of mechanisms may be driven by several factors:

371. Combinations of *two or more distinct risk management mechanisms* allow to ensure a differentiated response to different risk intensities: For example, one mechanism can afford greater control and more stringent rules for one set of transactions where risk appears more concentrated, while a second mechanism enables the government to also control other transactions under a regime that imposes lesser obligations on acquirers and excludes certain acquirers from its application – with the presumption that these other transactions would generally be allowed.[417] In Finland and Germany, for example, the acquisition review mechanisms are set out in the same law, but criteria, parameters, and rules are set distinctly for each mechanism. Table 2.1 illustrates the different features in substantive and procedural aspects of the two respective coexisting mechanisms in these countries.[418] In other countries, similar differentiation is achieved within a

[417] The German Government has explicitly stated this as being the rationale for the differential treatment in Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes, bill as of 31 March 2020, p.23.

[418] Italy could be cited as a further country using this approach but is left out for greater conciseness.

same acquisition-review mechanism, for example through modulating parameters[419] or by inclusion of greenfield investment in one sector where only acquisitions of existing enterprises are addressed in others.[420]

In its proposal for reform of the United Kingdom's policies, "*National Security and Investment – Draft Statutory Statement of Policy Intent*" of July 2018, item 2.09), different degrees of risk are explicitly acknowledged in 'core' and other areas of the economy, and an empirical prognosis is made that some enumerated sectors will attract a greater amount of attention. The proposal stops short of drawing the conclusion that an aggregate of distinct mechanisms may be an appropriate response to the thus identified difference of risk as Finland and Germany, among others, have implemented for their policies.

419 On this notion see above section 2.1.1.

420 Australia's acquisition-related mechanism illustrates this approach: it distinguishes the value of trigger-thresholds in relation to whether the acquisition target is a "sensitive business" – as identified by a list of sectors; also, it includes greenfield investment in media companies, while the remainder of the acquisition-related mechanism does not cover greenfield investment.

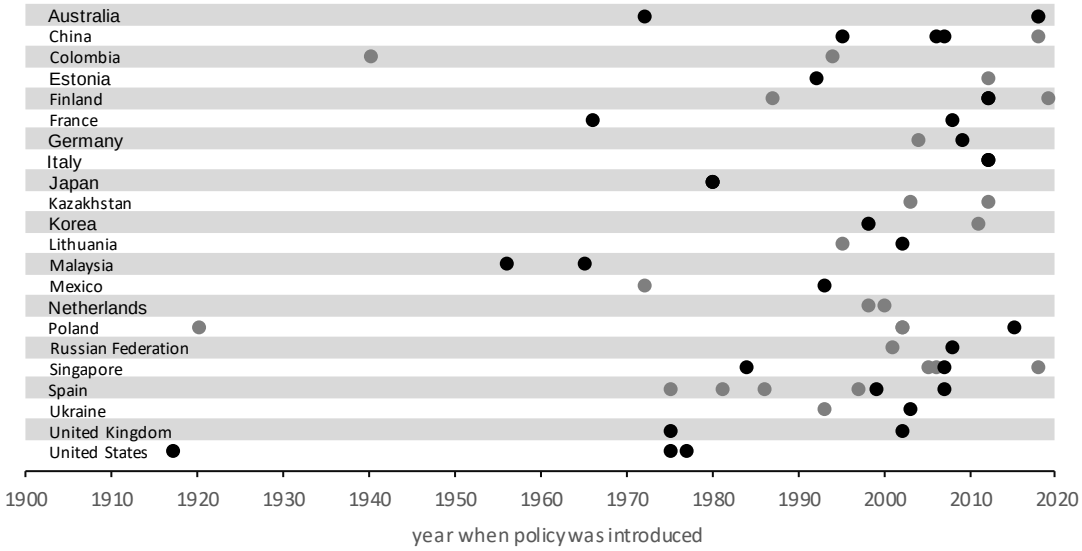
Table 2.1. Distinctive features of acquisition review mechanisms operating in parallel: Finland and Germany

	Finland: Acquisitions in the defense sector – Law on the monitoring of foreign acquisitions, Section 4	**Finland**: Cross-sectoral review – Law on the monitoring of foreign acquisitions, Section 5	**Germany**: Sector-specific review – Foreign Trade and Payments Ordinance, Section 60	**Germany**: Cross-sectoral review – Foreign Trade and Payments Ordinance, Section 55
Scope: asset-related parameters	Sector specified	No sector specification	Sectors enumerated	No sector specification
Scope: Acquirer-related parameters	Any foreigner and domestic companies with foreign shareholding of more than 10%.	Foreigners who are non-EU/EFTA-residents.	Any foreigner.	Non-residents regardless of nationality.
Time of review relative to closure of transaction	Prior mandatory review	Prior review optional	Prior review mandatory	Prior review optional
Default outcome when authorities do not announce decide within set timeframe	No legal consequence of silence under this mechanism; an explicit authorisation is required.	Absence of explicit decision to notification is treated as approval.	Non-response to filing within three months is treated as approval.	Absence of government action within set time-limit precludes later action; non-response to filing within two months is treated as approval.
Prohibition requires…	…a decision by the General Council of the Government.	…a decision by the General Council of the Government.	…a decision by the Minister.	…a Cabinet decision.
Exceptions	Exceptions of review requirement for proportional acquisition of shares in the context of capital increase, inheritance or marriage.	Exceptions for proportional acquisition of shares in the context of capital increase; enterprise is already under foreign control; acquisition from other foreign owner, and inheritance or marriage.		

Source: OECD.

372. In some countries, the introduction of complementary policies is spread over several decades. Current attention to new, cross-sectoral acquisition-related policies tends to overshadow a sizable stock of often older, more focused mechanisms that have been left in place when new, often broader mechanisms were introduced. This co-existence of sector-specific and broader policies is a frequent occurrence in the sample. A time-profile on the introduction of complementary acquisition- and ownership-related policies in selected economies is shown in Figure 2.3.

Figure 2.3. Sequence of introduction of complementary acquisition- and ownership-mechanisms in selected countries



Note: Only countries that have at least two distinct acquisition- and ownership-related policies in operation are included. Grey dots indicate the year of introduction of a mechanism with narrow focus on one or very few sectors, while black dots indicate the year of introduction of a broad or cross-sectoral acquisition-related policy.
Source: OECD.

373. In jurisdictions where more than one mechanism coexists, these mechanisms may apply alternatively or cumulatively. The alternative application may be explicitly spelt out in the legislation[421] or be implicit by the procedure.[422] In some countries, approvals have to be obtained cumulatively under each mechanism. These mechanisms may follow different rules and criteria and have different procedural implications.[423]

2.9.2. Relationship with other risk-management instruments that complement or could substitute acquisition and ownership-related mechanisms

374. Acquisition- and ownership-related policies seek to address certain risk that results from a specific individual's ownership of or control over a specific asset. Many other mechanisms are available to and used by governments to manage risk; these mechanisms complement or, in some cases substitute acquisition- and ownership-related risk mechanisms, in particular investment

421 Finland's Law on the monitoring of foreign acquisitions for instance distinguishes "acquisitions in the defence sector" from "other acquisitions".

422 Under the German Außenwirtschaftsverordnung, the approval by the government authorises a given transaction under all applicable mechanisms.

423 Canada, for example, operates a cross-sectoral review mechanism to safeguard its essential security interests in any sector (see below in the section on Canada). This mechanism has strict timelines. In parallel, Canada has sector-specific review mechanisms for certain acquisitions in the financial sector that also cater for the protection of essential security interests; these latter mechanisms appear to apply cumulatively, but no timelines have been set, and the procedures and criteria for their application are set out with a lesser degree of detail.

review mechanisms. Licenses, for example, can be used to manage the *use* of assets for specific purposes, export controls can be used to prevent certain individuals from obtaining access to certain technologies or information, and government procurement rules can avoid that companies that may raise concerns participate in supply chains or are allowed to providing sensitive goods or services. Rules on access controls and on key personnel are further instruments that governments can use to manage the risk that arises from the nexus between potentially malicious actors and sensitive assets. Finally, some countries own sensitive assets or controlling stakes in such assets, occasionally through special "golden" shares.

375. Layering of different government risk identification and mitigation mechanisms can be both an efficient and effective way for governments to identify and address risks in this landscape. In this light,

- Export licensing or authorisation requirements can help manage export of a controlled technology;
- Licensing or authorisation requirements can help manage the *use* of an asset; and
- Acquisition- related mechanisms for essential security purposes can provide options to address risks not covered under these types of instruments or can provide an additional layer of protection that adds to such instruments, for example through mitigation arrangements that are attached to an acquisition in the course of a review.[424]
- Exclusions from government procurement, obligations relating to the nationality of key personnel, the place of incorporation, disconnection from other assets, data localisation requirements, reporting obligations, and similar instruments can be seen as interventions still closer to the risk and typically implying a lesser constraint for parties.[425]

376. Appreciating the most effective and efficient solution to address a risk requires access to comprehensive administrative and intelligence resources and prognostic capacities that may not be available to all governments to the same measure. Acquirer- and ownership-related mechanisms may offer a relatively straightforward way to address risk in the face of greater uncertainty, a factor that may contribute to the currently observed attractiveness of these policies.

2.10. Conclusions and practical considerations for policy makers

377. Based on the foregoing analysis of design elements and country practice, a certain number of conclusions for policy makers can be drawn. They are presented here without the intention to judge individual policy choices and for the sole purpose of presenting a simplified step-by-step sequence of considerations as a means to synthesise the information contained in the preceding sections.

378. First, if a government considers the introduction or reform of acquisition- and ownership-related mechanisms, an assessment of the risk exposure that needs to be managed is warranted. Other mechanisms such as xport controls and licences are important tools but may not address all

[424] Examples in this regard include requirements to seek approve for third-party vendors and mandate obligations relating to key personnel (e.g., security director, Chief Information Security Officer), access requirements, data security requirements, audit and other reporting obligations to the government. More information on the types of requirements that can or are being included in mitigation arrangements is available in section 2.2.1.

[425] Applied to the practical example of defence production, a country could prohibit certain persons, such as foreigners from owning defence manufacturers; it could allow foreign ownership but require a license for defence production to manage risk that it associates with ownership in this sector; or it could set defence procurement policies to avoid risk associated with certain ownership of a producer.

essential security risks arising from transactions. This analysis allows countries to identify whether there are gaps in existing authorities and ensure any acquisition-related policy to safeguard essential security interests can fill those gaps (see for details section 2.9.2).

379. Second, when a need or preference for an acquisition- and ownership-related mechanism to safeguard essential security interests is established, policymakers may wish to consider whether the risk is concentrated in relation to certain parameters that can be captured in legislation. Countries can consider shaping their acquisition-related mechanism to be broad enough to capture the current and future dynamics while also focusing bureaucratic and legislative attention on those areas of greatest concern. For example, while countries can choose to have general applicability of their review authorities over all sectors, they may choose to mandate or prioritize reviews in specific sectors or types of business (see on the combination of several mechanisms as a means to achieve this objective section 2.9.1).

380. Third, the design of how the mechanism will operate depends on several factors. These factors relate to the risk assessment, such as whether greenfield investment needs to be addressed or if other unique aspects of the economy need to considered. Addressing staff and resources limitation are also necessary considerations when designing an acquisition-review mechanism.. This latter aspect would entail considerations of:

- How many transactions per year will likely require review, taking into account the size of the economy and the identified areas of the economy exposed to risk.
- The extent to which transactions that need to be reviewed are likely be detected if notification were voluntary.
- The extent to which residual risk in the identified areas can be tolerated if the policy does not cover certain transactions or if a transaction would remain undetected.
- Administrative resources that are available for the implementation of the policies, and how costs associated with their application are allocated to the beneficiaries of the policy (see section 2.7 for details)?

381. Other design elements, such as the availability of independent review, typically by the judiciary, and transparency mechanisms, will likely be determined in relation to a given country's administrative and constitutional law, as well as its existing practices and related societal expectations (see sections 2.6 and 2.5 for further details on these aspects).

Annex A. Individual countries' acquisition- and ownership-related policies to safeguard essential security interests

Argentina

382. Argentina operates two distinct mechanisms to manage acquisition- and ownership-related threats to its essential security interests:[426]

- It maintains limitations on foreign ownership in the production of war weapons and ammunition, established by Ley nº 12.709 – Creación de la Dirección General de Fabricaciones Militares of October 1941; and
- Requires that foreigners seek prior governmental approval for direct or indirect acquisitions of any right over real estate situated in "security zones" under Decreto Ley – Creación de Zonas de Seguridad, (Decreto Ley 15.385/1944) of 1944.[427]

383. Both mechanisms have not undergone structural changes since at least the 1990s, and little is known about the practical use and outcomes of decisions under either mechanism.

384. The rules on foreign participation in the production of weapons, ammunition and "other materials of essentially military character" under Ley nº12.709 require that any foreign participation in these sectors must be made through a joint venture with the *General Directorate of Military Manufacturing*. The joint venture must be established under Argentinean law, and the acquisition be authorised by the Executive. The foreign partners in such joint ventures may not be part of a holding or be under control of any company having similar interests abroad (Article 8 of the law).

385. The Decreto Ley 15.385/1944 establishes that any operation that grants a foreign natural or legal person direct or indirect rights over real estate located in a "security zone" must be authorised beforehand by the National Commission of Security Zones.[428]

386. "Security zones", according to Article 1 of the Decreto Ley, "complement the regional forecast of national defence that comprises a strip along the country's land and maritime borders for defence purposes, including areas along the country's land and water borders, as well as areas surrounding inland military or civilian establishments that are of special interest to the defence of the country". They may be up to 150km wide for a land border, 50km for a maritime boundary,

426 Under the OECD National Treatment instrument, Argentina has also has notified *exceptions* to national treatment in radio and television as well as road transport. The notification as exceptions suggests that these policies are not based on essential security considerations.

427 Argentina also has restrictions on foreign ownership of rural land under the Ley 26.737 – Régimen de Protección al Dominio Nacional sobre la Propiedad, Posesión o Tenencia de las Tierras Rurales, which entered into force in 2011. There are no firm indications that this policy is motivated by concerns about essential security interests beyond a broad reference to food security.

428 Created in 1945 by the Decreto 8.007/45, the National Commission of Security Zones organization was reshaped in 1963 through the Decreto 9.329/1963. Among others, this decree defines the Commission's action, its composition and each member's role within it. A recent reform through Decreto 27/2017 reorganizes the composition of the National Commission of Security Zones.

and 30km around internal zones.[429] The last modification of the dimensions of the "Security zones" dates was made in 2018[430].

387. Argentina also keeps some enterprises in sectors traditionally sensitive – such as defence, energy, telecoms, and transport – in State ownership.[431]

Australia

388. Australia has been operating a cross-sectoral review-mechanism for certain acquisitions since the 1970s and has recently added two-ownership related mechanisms, one for critical infrastructure and one related to telecommunications assets.[432]

389. The cross-sectoral review-mechanism, now contained in the Foreign Acquisitions and Takeovers Act 1975 and the Foreign Acquisitions and Takeovers Regulations 2015 was initially established by the Companies (Foreign Take-overs) Act 1972. It allows the Treasurer to block acquisitions by foreigners that she or he deems to be "against the national interest", a concept that includes essential security considerations among other aspects.[433] Both the legislation and the Regulations have been amended repeatedly,[434] and complemented in 2015 by rules on fees due for the reviews.[435] A significant number of Guidance Notes provide non-binding explanations on the assessment made by the Foreign Investment Review Board (FIRB), which recommends decisions to the Treasurer who is in charge of ultimate decisions.

390. The reviews are triggered when a string of conditions are met; they can include thresholds related to the sector in which the target assets operate, the value or stake-size under acquisition, State-ownership of the acquirer, the specific nationality of the acquirer, among other criteria. Greenfield investment can be subject to review, but not all acquisitions are reviewable, in particular if value thresholds are not reached.

391. In response to the economic conditions that resulted from the COVID-19 pandemic, Australia reduced the trigger threshold for its review mechanism to zero so that all investments that fulfil the remaining criteria are henceforth subject to review.[436]

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429 The Decreto 32.530 (1948) and the Resolución 166/2009, specify important information about the procedure that foreign investors must follow in order to acquire governmental approval for direct or indirect acquisitions of any right over real estate situated in "security zones".

430 Ministerio de Seguridad, Decreto 253/2018.

431 A recent overview of Argentina's SOE-related policies is available in OECD (2018), "*OECD Review of the corporate governance of State-owned enterprises – Argentina*".

432 Australia has also capped foreign ownership in sectors such as airports, telecommunications and shipping but there is no indication that these restrictions seek to managing risks related to its essential security interests.

433 The FIRB annual report 2017/2018, p.70 lists "national security" as the first out of five "national interest factors".

434 The most recent major amendment came in 2016 and added acquisitions from sub-federal entities to the scope of reviewable transactions; this amendment followed a controversial lease of a port by one of Australia's states.

435 Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (No.152 of 2015).

436 Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020. "*Changes to foreign investment framework*", Treasurer announcement, 29 March 2020. While the Treasurer

392. In 2017 and in 2018, Australia introduced two ownership-related policies to manage threats to its telecommunications sector[437] and its critical infrastructure (electricity, gas, water and ports sectors).[438] Also in 2017, Australia established a Critical Infrastructure Centre, an entity under the Department of Home affairs, to advise the FIRB on the management of national security risks that can arise through foreign investment and supply chain arrangements; the Critical Infrastructure Centre also administers the ownership-related mechanisms established under the Telecommunications and Other Legislation Amendment Act 2017 and the Security of Critical Infrastructure Act 2018.

Austria

393. Austria introduced its first and so far only mechanism to manage acquisition- or ownership-related risk to its essential security interests in December 2011. At that time, the legislation was passed as part of a law that amended legislation in a large number of areas related to budget and finance allocations.[439] It added a section 25a to the Foreign Trade Law 2011 (AWG 2011), which regulated the entirety of the mechanism.[440]

394. Less than a year after its adoption, an initiative was launched in November 2012 to overhaul the new rules by clarifying and amending the mechanism, not least following interventions by the European Union.[441] The changes, effective since 26 February 2013, limited the scope of application and added an obligation that decisions be made public as well as a rule to prevent circumvention.[442] A further modification had been planned in May 2019, in particular to lower the trigger threshold to 10% from 25% previously in certain sectors and to establish a permanent

announcement explicitly stated that the change was temporary, no end of its validity had been regulated or announced by mid-May 2020.

437 The mechanism, which came into effect on 18 September 2018, is contained in the Telecommunications and Other Legislation Amendment Act 2017 (No.111 of 2017).

438 Security of Critical Infrastructure Act 2018 (No.29 of 2018), in force since April 2018.

439 Art.21, Budgetbegleitgesetz 2012, as adopted by the Austrian Parliament on 1 December 2011 and published in the Bundesgesetzblatt I Nr.112/2011 on 7 December 2011. The review mechanism was inserted upon the initiative of the Chancellery of the Upper Chamber of the Austrian Parliament – representing the Regions – on 17 November 2011, two weeks before adoption of the law on 1 December 2011 and after the main debates in Parliament on the remaining matters addressed in the law had finished. Due to this late introduction, there is no publicly available documentation that would explain the rationale for the introduction of the mechanism and the choices that were made for its design; the explanation of the original bill did not include the mechanism, and parliamentary processes and deliberations that took place after its introduction into the bill did not address this additional matter. The mechanism was notified to the OECD as DAF/INV/RD(2012)6; this document also contains an unofficial translation of the relevant section of the law.

440 The addition is highlighted in the version of the bill of 17 November 2011.

441 Parliamentary debates document these interventions by the European Commission but do not elaborate on the exact issues that these covered; see Protocol, Nationalrat XXIV.GP, 187th session, p.270. The full details of the Parliamentary process contain little specific information on what motivated the reform.

442 The amending law was adopted on 30 January 2013 and entered into effect on 26 February 2013. An unofficial English translation of the amended text is available in DAF/INV/RD(2013)3.

inter-ministerial committee to carry out the reviews; this reform had not passed by mid-May 2020 but continues to be planned.[443]

395. Between the introduction of the mechanism in 2012 and mid-May 2020, nine formal requests have been made, of which only three contained a (positive) decision on the merits;[444] individual cases are temporarily reported on the Ministry's website, but no further systematic public reporting is required.

396. Austria also holds some assets that are traditionally considered sensitive under State ownership through holding company OeBAG.[445] Holdings currently include companies in the energy, postal and telecommunications sector, among others. It is uncertain whether these holdings are specifically motivated by essential security considerations.

Belgium

397. At federal level, Belgium does not currently operate any acquisition- and ownership-related mechanisms to manage risk to its essential security interests. A motion in the Federal Parliament, introduced on 17 January 2019, called for the establishment, at federal level, of a screening mechanisms for foreign investment in strategic sectors, but this motion had not led to specific legislative action by mid-May 2020.[446]

398. At federal level, Belgium operates however two "golden share" arrangements that are motivated by security concerns and were established in the mid-1990s for transport on canals and for gas distribution.[447]

399. At subnational level, Flanders introduced legislation ("Bestuursdecreet" of 7 December 2018) on safeguarding the strategic interests of the Flemish Community and Flemish Region.[448] The rule became effective on 1 January 2019. It allows the Government of Flanders to annul or

443 An outline of the proposed reform is available in parliamentary documentation of May 2019, in particular "*Novellierung der Investitionskontrollbestimmungen des Außenwirtschaftsgesetzes 2011 (AußWG 2011)*", Federal Ministry for Digitalisation and Economy, 7 May 2019. The coalition agreement for the government 2020 to 2024, p.91 contains the commitment to lower the threshold to 10%, along with the introduction of new criteria for critical technology and critical infrastructure.

444 A government response to a parliamentary request of 17 June 2019 (BMDW-10.101/0086-Präs/4a/2019) refers to eight cases, and one additional case had become known through the Ministry's website in November 2019.

445 The new holding company was established on 1 January 2019 and took over assets from its predecessor organisation.

446 "Proposition de résolution visant à instaurer un mécanisme de filtrage des investissements étrangers dans les entreprises opérant dans les secteurs stratégiques", Chambre des Représentants de Belgique, DOC 54 3472/001, 17 January 2019.

447 The Golden Shares were established by the Arrêté royal du 10 juin 1994 instituant au profit de l'État une action spécifique de la Société Nationale de Transport par Canalisations, and the rules on the exercise of rights provided by these shares were set out in the Arrêté royal fixant les critères pour l'exercice des droits spéciaux attachés aux actions spécifiques instituées au profit de l'État auprès de la Société Nationale de Transport par Canalisations et de Distrigaz.

448 Decree of 7 December 2018, Article III.59 and III.60, Moniteur Belge, 19 December 2018, no. 297, p.100797. The proposal Draft Decree 1656 (2017-2018) No.1 of 9 July 2018, p.163 contains detailed considerations on the scope of application, and the interpretation of the clauses. It also sheds light on the risk-scenarios and strategic interests that the Flemish Parliament had in mind when passing the rule.

declare inapplicable a legal act by a government body through which a foreign natural or legal person gains power of control or decision-making power in a government body, provided that the strategic interests of the Flemish Community or the Flemish Region are threatened – namely if the continuity of vital processes is jeopardised, if certain strategic or sensitive knowledge could fall into foreign hands, or if the strategic independence of the Flemish Community or the Flemish Region would be compromised – and provided that the Government of Flanders can demonstrate that it has attempted to achieve the safeguarding of strategic interests with the consent of the government body concerned.

Brazil

400. Brazil manages acquisition- and ownership-related risks to its essential security interests through controls over certain activities that are conducted within a security zone of 150km along its national land borders.[449] This mechanism was introduced in 1979 by Lei 6.634 and the Decreto N°85.064 of 1980 – following on from earlier similar legislation dating back to Lei 2.597 of 1955. Since its introduction, the mechanisms has been subject to only minimal changes.

401. The mechanism requires investors to obtain prior approval by the National Security Council for certain acquisitions and greenfield investment in the 150km-wide border area by any person, irrespective of nationality. The transactions include transfers of lands, construction of certain infrastructure and means of broadcasting, establishment and operation of certain industries, among others. In addition, foreigners must also obtain approval for the acquisition of rural property in the border zone. The establishment and operation of enterprises in the border zone is subject to additional conditions such as majority ownership of Brazilian nationals, majority of Brazilian employees and Brazilian controlled management.

Bulgaria

402. As of mid-May 2020, Bulgaria did not have specific policies in place to manage risks for its essential security interests associated with the acquisition or ownership of certain assets, and, information provided by the government of Bulgaria to the OECD suggests that the introduction of a screening mechanism in Bulgaria was not imminent at this time; Bulgaria was however preparing legislation to implement the requirements resulting from the Regulation establishing a framework for the screening of FDI into the EU.

403. Bulgaria however maintains certain assets under State ownership and control, hence making acquisition- and ownership-related policies in these companies redundant. State ownership predominates in sectors such as infrastructure and distribution in electricity and gas markets as well as in railways and postal services.[450] In other areas, the Constitution and other laws establish State monopolies; this is the case for rail transport, post and telecommunications, nuclear energy and radioactive products, or defence production, for instance. In these areas, Bulgaria grants concessions to operators and can manage risks to its essential security interest through the concession process.[451]

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449 According to the Brazilian authorities, around 27% of Brazil's land-mass are considered border areas as a result of this rule, see "Brazil: Position under the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations", DAF/INV/ICC(2019)1, p.19.

450 A list of entities over which Bulgaria exerts control is available from the website of the Bulgarian Ministry of Finance.

451 See for example the Energy Act, Article 51.

Canada

404. Since 2009, Canada's legislation provides for the possibility of a Government-initiated review of acquisitions by foreigners in any sector of the economy where these acquisitions may be "injurious to national security". Before then, and henceforth in parallel, Canada assesses certain foreign investments into Canada under a "net benefit" test, a mechanism that applies different criteria that are unrelated to concerns about Canada's national security interests. Canada also operates parallel review mechanisms that concern certain acquisitions and incorporations in some financial sector companies.

405. Canada's review mechanism for the purpose of safeguarding the country's national security interest is governed by the Investment Canada Act (ICA), in particular its Part IV.1[452] and the National Security Review of Investments Regulations of September 2009 (last amended in March 2015[453]). Since December 2016, the Guidelines on the National Security Review of Investments provide information on the considerations and procedures that the Canadian authorities apply in the course of the review. Finally, the Investment Canada Regulations contain rules on the notification of investments, one avenue to bring potentially concerning transactions to the attention of the authorities.

406. The national security review provisions cover potentially a broad scope of acquisitions: it includes acquisition, in whole or in part, of existing enterprises as well as greenfield investment; is value independent; and covers all sectors of the economy. Since the inception of the mechanism a decade ago, over 5,000 transactions have been reviewed, but only less than 1% of these – between one and five per year – resulted in prohibitions, mitigation measures or divestment orders.[454]

407. Canada also operates several sector-specific mechanisms for transactions related to companies in the financial sector. Restrictions on the incorporation of insurance enterprises that would be owned, directly or indirectly, by a foreign government or agency or political subdivision thereof are enshrined in the Insurance Companies Act, section 23(1). Parallel provisions exist in the Bank Act, section 23.[455] In addition, authorisations on establishment and acquisitions require an approval by the Superintendent or Minister, and "national security" is to be considered as part of this decision.[456] Only minimal procedural and material provisions are set out for these decisions, in particular, there are no delays to be respected.

Chile

408. Chile operates one single mechanism to manage acquisition- or ownership-related risks to its essential security interests that are related to foreign ownership of real estate in border areas.

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452 The change was introduced with the Investment Canada Act – National Security Review of Investments Regulations, P.C. 2009-1596, 17 September 2009, Canada Gazette Vol. 143, No. 20 of 30 September 2009.

453 Regulations Amending the National Security Review of Investments Regulations, P.C. 2015-311 March 12, 2015.

454 Annual reports, published since 2012 to enhance transparency of the implementation of the mechanism, show that around 600 reviews took place per year.

455 There is no information available to the OECD Secretariat about the rationale for these prohibitions; they may hence be motivated by other than security considerations.

456 Bank Act, section 973; Insurance Companies Act, section 1016.1; Cooperative Credit Associations Act, section 459.3.

The mechanism was established in October 1977 by Decreto Ley 1.939 – Normas sobre adquisición, administración y disposición de bienes del Estado in the context of the *Beagle conflict*, a border dispute with Argentina that climaxed at this time.

409. While the initial version of the Decreto Ley prohibited the acquisition or ownership of real estate situated in border areas by foreign nationals – natural or legal person owned to at least 20% by foreign nationals – unless the country offered reciprocity, an amendment of 1983[457] applied the restrictions specifically to nationals of Argentina, Bolivia, and Peru – the three countries with which Chile has land borders – and any company controlled by 40% or more by nationals from those countries. The amendment also allowed the Chilean President to grant individual exemptions by supreme decree.

P.R. China

410. China introduced explicit rules to manage risks to its essential security interests associated with inbound foreign investment in 1995.[458] Since then, China has overhauled its policies repeatedly and complemented its initial mechanism by additional ones. As a result, three mechanisms to manage risks to essential security interest associated with inward investment coexist as of early 2020:

- A dedicated review mechanism combining a multi-sectoral and a cross-sectoral approach that was first established in 2003 and updated in 2006, 2011, 2018, and 2019;
- Sector-restrictions, based on a negative list of industries where foreign investment is restricted or prohibited; and
- A cross-sectoral mechanism attached to the competition review mechanism established by the Anti-Monopoly Law of 2007 that explicitly allows for a review against national security interests.[459]

411. The dedicated review mechanisms to manage risks to essential security interests was initially established in 2003 in the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. These provisions established a procedure for the decision on investments that could threaten China's "economic security"[460] and replaced in 2006 by the Regulation on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors. In 2011, the mechanism was again overhauled by the introduction of the Notice of the General Office of the State Council on the Establishment of a Security Review System for Mergers and

457 Ley 18.255 of 9 November 1983.

458 The Interim Provisions on Guiding the Orientation of Foreign Investment, Article 7, stipulated that a foreign investment "*harming national security or impairing the public interest"* or *"harming the safety and usage of military facilities*" should be prohibited, without providing further details on the application or implementation of this rule.

459 Article 31 of the Anti-Monopoly Law of 2007 allows Chinese authorities to conduct a national security review of a transaction that has been found to negatively impact competition; this review may also apply to mergers and acquisitions involving domestic acquirers.

460 The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. Article 19 of the Interim Provisions established that if a government agency considers that "*important factors* [in relation to the transaction] *exist which seriously impact* (…) *State economic security*", then the investor may be required to inform the Ministry of Commerce of the People's Republic of China (MOFCOM) of the transaction.

Acquisitions of Domestic Enterprises by Foreign Investors.[461] The introduction of Measures for the Overseas Transfers of Intellectual Property Rights, State Council release No.19 of 18 March 2018 provide for the possibility to review overseas transfers of intellectual property and circumscribe parts of the scope of the national security review.

412. On 1 January 2020, with the entry into force of the Foreign Investment Law (2019), new rules were announced, but had not been established by the time of the Law's entry into force.[462] Details about the scope and implementation of this new framework as well as its relation to co-existing mechanisms were thus unknown in early 2020. The National Development and Reform Commission (NDRC) had announced in April 2019 that it had taken over the implementation of the mechanism from the Ministry of Commerce.

413. Restrictions on foreign investment in specified sectors are contained in a negative list of sectors in which foreign investment is either prohibited or restricted.[463] Some inclusions in the negative list are presumably motivated by concerns about essential security, although the list does not explicitly reveal the motivation for the inclusion of certain sectors.[464] The negative list approach was introduced in 2017 and replaced a catalogue system dating back to 1995 under which foreign investment in specific industries were exhaustively categorised as "encouraged", "permitted", "restricted" or "prohibited".

461 China's State Council had triggered the policy development by the 2010 State Council's Opinions on Further Improving the use of Foreign Capital. The Notice of the General Office of the State Council on the Establishment of a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors was complemented by the Interim Provisions on Matters Relevant to the Implementation of the System for Security Review of Acquisition of Domestic Enterprises by Foreign Investors, Announce n° 8 of March 2011 and the Provisions of the Ministry of Commerce on Implementing a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Announce n°53 of September 2011. The entry into force of the National Security Law on 1 July 2015 brought further changes to the system, according to statements by the Chinese government (see Summary of discussions of Freedom of Investment Roundtable 23 (October 2015), DAF/INV/WD(2015)15, p.19).

462 The Foreign Investment Law of the People's Republic of China, adopted on 15 March 2019 by the National People's Congress contains, in Article 35, a reference to a "*security review system for foreign investment*" without providing much detail on its operation and scope. The earlier draft of the Foreign Investment Law of 2015 had contained a full section on the scope and procedures for the review, which was however not included when the Foreign Investment Law was passed in 2019. On 12 December 2019, the State Council adopted "Regulations for the Implementation of the Foreign Investment Law of the People's Republic of China"; they refer, in Article 40, to the review mechanism but contain no further detail on criteria, procedures and responsibilities.

463 The negative list applicable in end April 2020 was issued by the Ministry of Commerce and the National Development and Reform Commission ("NDRC") and came into effect on 28 July 2018; it is contained in the Special Administrative Measures for Foreign Investment (Negative List) (2018 Edition), which replaces sections of the Catalogue of Industries for Guiding Foreign Investment (Revision 2017), of 28 June 2017.

464 Some industries in the "restricted" or "prohibited" categories are typically considered sensitive, such as "manufacturing of weapons and ammunitions" or in the "exploration, exploitation and ore dressing of radioactive minerals" (Part II of the 2017 Catalogue).

Colombia

414. Colombia operates two sector-specific mechanisms to manage acquisition- and ownership-related threats to its essential security interests, which were introduced between 1940 and in 1994 and have seen little or no reform since:

- A prohibition for foreign natural or foreign-controlled legal person to acquire or own land and real estate rights in borderlands, at the coast, and on islands, established in 1940 under Decreto No.1415 of 18 July 1940 (as amended), Article 5.
- A prohibition for foreigners to acquire interests in private security and surveillance companies, established under Decreto N°356 of 11 February 1994; only Colombian nationals can be "*partners*" of corporations operating in this sector. Foreign shareholdings that predate the adoption of the Decree remain authorised, but no increase of the share of foreign participation is permitted.

Costa Rica

415. Costa Rica operates a sector-specific mechanism related to private security services to manage acquisition- and ownership-related risk to its essential security interests. The mechanism, established by the Ley de Regulación de los Servicios de Seguridad Privados (Ley n°8395) of 2003, Article 45, prohibits Costa Rican nationals to *sell* their shares in a company that has been authorized to provide private security services, to foreigners.

416. Costa Rica also operates a special regime for acquisitions or ownership of real estate in a 2km-wide stretch along the borders with Nicaragua and Panama, established in October 1961 by the Ley de Tierras y colonización (Ley n°2825). This mechanism is not an acquisition- and ownership-related mechanism as defined for the purpose of this report but controls risk through a system of concessions. The territory itself is under State control but the Rural Development Institute may grant concessions under Decreto Ejecutivo n°39668 of 2016, Article 3; concessions can only be granted to legal persons domiciled in Costa Rica whose capital stock is majority-owned by Costa Rican nationals, or to foreign natural persons who have permanent resident status in Costa Rica.

Croatia

417. Croatia has a provision in its constitution that explicitly foresees the possibility for legislated mechanisms to manage ownership-related risk to its essential security interests. As of mid-May 2020, Croatia had used this possibility with respect to ownership of real estate. Specifically, it prohibits foreigners to own real estate in areas designated to this effect to safeguard Croatia's interests and security.[465] Other general restrictions in the public interest, including essential security interests, could be legislated under the Act on ownership and other real rights, Article 32, but specific legislation in this regard has not been passed.

418. No acquisition-related policies to safeguard Croatia's essential security interests were in place in mid-May 2020.

419. Croatia continues to hold a range of assets that are traditionally considered sensitive in State ownership, in particular in the energy, communications, transport, and infrastructure sectors:

[465] Act on Ownership and Other Real Rights, Article 358.

In 2016, 1.149 enterprises were majority-owned by the State,[466] and in mid-May 2020, Croatia still owned majority stakes in approximately 85 enterprises. These and other enterprises are contained in a list of entities of strategic and special interest for Croatia.[467] The list contains several enterprises in the energy, postal and communications, transport, utility, and water sectors.

Czech Republic

420. As of mid-May 2020, the Czech Republic did not operate any mechanism to manage acquisition- or ownership related risk to its essential security interests. This situation may change in the near future however: In March 2019, the Czech Government considered the merits of introducing such policies, and brought a bill to the Czech Parliament in April 2020.[468]

421. The Czech Government retains stakes or control in enterprises especially in the energy and utilities sectors, thus reducing to some extent exposure to risks in these sectors.[469] The Security Strategy of the Czech Republic (2015) explicitly mentions State ownership as an instrument to protect essential security interests, especially with regard to critical infrastructure.[470]

Denmark

422. As of mid-May 2020, Denmark managed risks to its essential security interests associated with acquisitions and ownership through a sector-specific mechanism related to the production and arms and defence material under the Act on War Material – Consolidated Act No.1004 of 22 October 2012.[471]

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466 Anto BAJO/Marko PRIMORAC/Lana ZUBER (2018), "*Financial performance of state-owned enterprises*", FISCUS, Institute of Public Finance, No.5, p.2.

467 The lists of companies are decided by the Government and, pursuant to provisions of the Law on State Property Management No. 52/2018, published in the official Gazette ("Odluka o pravnim osobama od posebnog interesa za Republiku Hrvatsku, NN 71/2018", Official Gazette, 4 August 2018).

468 "Prověřování zahraničních investic", Ministry of Industry and Trade website, undated; *Návrh zákona o prověřování zahraničních investic/Bill on Foreign Investment Review*, legislative documents database *ODok*, undated. The bill proposes two mechanisms: one mechanism in which mandatory notifications and approval requirements would apply to a limited number of sectors such as the defence industry, dual-use goods and critical infrastructure (which includes telecommunications), and a second, cross-sectoral mechanism with voluntary notifications for reviews or *ex officio* investigations.

469 The government retains, for example, a 70% stake in the largest Czech electricity company, *CEZ* (see *CEZ Group*, Shareholder structure, 31 December 2018) and OECD (2017), "*The Size and Sectoral Distribution of State-Owned Enterprises*", especially its data annex.

470 The Security Strategy suggests to "retain control over critical infrastructure where it is still owned by the state, and to avoid diminishing the state's influence and control over strategic companies operating in individual areas of critical infrastructure.", Security Strategy of the Czech Republic (2015), p.20.

471 In addition to this mechanism, Denmark has notified the European Union of a mechanisms related to power transmission cables and pipelines in territorial waters under the Act on the continental shelf and certain pipeline installations on territorial waters – Consolidated Act No.1189 of 21 September 2018) (see "*List of screening mechanisms notified by Member States*", EU Commission document last updated 22 July 2019). The rules contained in this Act provide that prior authorization is required for *laying* such installations, and that this autorisation may be denied based on essential security interests. For the purpose of this report, this mechanisms is not considered an acquisition- and

423. While under this legislation any production of arms and defence material requires a permission by the Ministry of Justice, an additional authorisation is required if a *foreigner* acquires or directs such a business; such a business is domiciled outside Denmark, over 20% of the company's board members are foreigners; foreigners own more than 40% of the share capital; foreigners obtain a controlling influence over such a company; or the company takes a loan from a foreigner or a foreign-guaranteed loan. Such rules have existed in this area in Denmark since at least 1937.[472]

424. Denmark maintains State-ownership of some types of infrastructure that is often considered critical. In particular, Denmark has established a legal obligation for its State-controlled energy infrastructure company *Energinet* to acquire electricity and gas network assets if they are divested from private owners.[473]

425. Further changes to Denmark's acquisition- and ownership-related policies to safeguard essential security interests are planned: In February 2019, the Danish Government announced that it had set up an inter-ministerial group to work on legislation that it aspired to bring into force before the end of 2019.[474]

Egypt

426. As of mid-May 2020, Egypt did not appear to have put in place a specific mechanism to protect its essential security interests against risks associated with the acquisition or ownership of certain assets.

427. Egypt holds some enterprises in sectors traditionally considered sensitive – such as infrastructure, energy, telecoms, and transport – under State control, along with some specific assets, as the Suez Canal, thus attenuating any needs for risk-management in these areas.[475]

Estonia

428. Estonia manages acquisition- and ownership-related risk to its essential security interests in relation to real estate in individually identified areas of Estonia's land-mass, notably certain islands and municipalities close to Estonia's international land border with the Russian

ownership-related policy, as it does not relate to the risks of an acquisition or ownership of the installations but rather to the exercise of a specific operation.

472 The Act No. 139 of 7 May 1937 on Control of Manufacture of Military Equipment, etc. restricted authorizations to produce defence material exclusively to Danish nationals. With the passing of the Law No.400 of 13 June 1990, the authorisation could under certain circumstances be accorded to allow foreign participation in the sector. The current rules on foreign participation in defense production in Denmark are essentially identical to those introduced by the Law No.400 of 13 June 1990.

473 Under the related provision of the Natural Gas Supply Act, Energinet has completed the acquisition of all of Denmark's gas-distribution infrastructure in 2019 in subsequent acquisitions of assets from the previous private owners that began in 2016.

474 Government statement prepared for the Danish Parliament's Foreign Affairs Committee on 28 February 2019.

475 OECD (2013), "*State-Owned Enterprises in the Middle East and North Africa: Engines of Development and Competitiveness?*", p.116.

Federation; this mechanism was established under the Restrictions on Acquisition of Immovables Act of 2012.[476]

429. Estonia's Constitution also allows the legislator to introduce additional restrictions of acquisitions of other assets by foreigners on public interest grounds,[477] but no legislation has been passed under this provision. As of mid-May 2020, no initiatives to expand its mechanisms to manage acquisition- or ownership-related risk were known to be underway; it would appear that Estonia classifies risk associated with acquisition and ownership of assets as relatively minor in comparison to other threats to its essential security interests.[478]

430. Estonia keeps significant infrastructure assets under State ownership, thus making acquisition- and ownership-related mechanisms in these areas redundant. For example, the main electricity and gas operators *Eesti Energia* and *Elering* as well as a host of transport operators and related infrastructure such as *Estonian Railways*, the *Port of Tallinn* and *Tallinn Airport*, the national carrier *Nordic Aviation Group AS*, flight control and boat pilotage services figure among its 36 federal-level SOEs.[479]

Finland

431. Finland protects its essential security interests against threats associated with the acquisition- and ownership of certain assets through the following instruments:

- Rules established by the Act on the Screening of Foreign Corporate Acquisitions (2012), that cover foreign acquisitions of companies in the defence and dual-use industries on the one hand, and corporate acquisitions of companies in critical civil sectors ("monitored entities") on the other, with partly different rule-sets applicable to the two areas that the rules cover; and
- A mechanism of mandatory prior authorisation of acquisitions of real estate by foreigners, established in 2019 by the Act on transfers of real estate property requiring permission that came into force on 1 January 2020.[480]

432. Finland's review and authorisation mechanisms now contained in the Act on the Screening of Foreign Corporate Acquisitions (2012) can be traced back to at least 1939.[481] From 1 January 1993 onwards, these policies were contained in the Act on the Follow-up of Foreign Acquisitions (1612/1992), which provided for broad review powers and authorisation requirements for acquisitions by foreigners for purposes reaching beyond essential security interest. Effective 1 June 2012, this legislation was replaced by the Act on the Screening of Foreign Corporate

[476] The restriction applies to all islands in the sea except Saaremaa, Hiiumaa, Muhua and Vormsi. In addition, restrictions apply to municipalities listed separately in Ida-Virumaa, Tartu, Põlva and Võru counties. An explanatory memorandum sets out the motivations for the choice of the concerned regions. There review mechanism also covers the acquisition of larger portions of land – 10ha or more of agricultural or forest land –, but for reasons unrelated to the protection of Estonia's essential security interests.

[477] Art. 32 of the Estonian Constitution.

[478] Estonian Foreign Intelligence Service (2019), "*International Security and Estonia 2019*".

[479] The Estonian government makes an up-to-date list of its State-owned enterprises available on its website.

[480] Finland's notification of this policy to the OECD is available as DAF/INV/RD(2019)8.

[481] These rules were laid down in acts 219/1939, 225/1939 and 884/1942.

Acquisitions in Finland (172/2012),[482] which was reformed with effect on 1 July 2014.[483] The Finnish Ministry of Economic Affairs and Employment is responsible for the national legislation and screening processes in this field.

433. In March 2019, the Act on transfers of real estate property requiring permission (470/2019) established the requirement of prior approval of real estate acquisitions by individuals or entities from outside the European Economic Area; the rules came into effect on 1 January 2020. If authorisation is not granted, the acquirer must divest the asset within a year's time. The law addresses a perceived vulnerability that the Ministry of Defence had identified in a report dated 20 April 2017.[484] Finland had abolished controls over real estate acquisitions by foreigners on 1 January 2000, after restrictions in this area that had existed since at least 1939 had gradually been wound down.[485]

434. Finally, Finland continues to keep certain companies and operators under partial or full State-ownership. There is some degree of ambivalence about the purpose of State-ownership in some cases, but several documents suggest that the protection of essential security interests that is achieved through State ownership: State-ownership in some companies is justified by the "strategic interest",[486] include defence and infrastructure companies, transport, gas and electricity infrastructure companies, among others.[487] The 2020 Government Resolution on State-Ownership

[482] Laki ulkomaalaisten yritysostojen seurannasta 172/2012. Finland's notification to the OECD [DAF/INV/RD(2012)16]. An unofficial English language translation, incorporating the later reform of 2014, is made available by the Finnish Ministry of Economic Affairs and Employment.

[483] Act amending the Act on the Screening of Foreign Acquisitions 496/2014.

[484] As documented in the context of the initial bill (Bill HE 253/2018, tabled in the Finnish Parliament on 29 November 2018) concerns had grown following suspicions in late 2016 that nationals from a foreign country were buying property near military sites in Finland, followed by reports of the discovery in September 2018 that foreign nationals were secretly building what was perceived as *de facto* military bases in the Turku archipelago off the coast of the Finnish mainland. Reports by the Ministry of Defence (2017), "*Valtion kokonaisturvallisuudesta kiinteän omaisuuden siirroissa*", 20 April 2017 and a working group mandated by the Prime Minister's office on "*National security in land use and transfers of immovable property*" provide further details on the considerations underpinning the legislation.

[485] On initial restrictions and their scope in Act 219/1939, the changes brought by Act 1613/1992 in 1993, and the abolition by Act 1299/1999 see in greater detail the documentation of the legislative proposal 253/2018 (in Finnish).

[486] The most recent listing as of mid-May 2020 of State ownership interests is laid out in the Government Resolution on the State Ownership Policy ("*Revenue through responsible ownership*") of 8 April 2020, p.23 and also listed on the website of the Prime Minister's office. The previous Government Resolution on State-Ownership Policy ("*Making the balance sheet work – Growth-generating ownership policy*") of 13 May 2016 had listed "national defence, the security of supply" among aspects of strategic interest that justifies State ownership. The function of State-ownership to protect these interests is also acknowledged as "non-legislative means" in the Parliamentary documentation on the bill HE 42/2011, which brought the reform of the Finnish legislation to monitor foreign acquisition (2012). The Government Resolution on the State Ownership Policy of 8 April 2020 mentions the security-related motivations in the context of individual holdings. The 2016 Government Resolution on State-Ownership Policy had called for a reduction of some government-held stakes to 33.4%, which would still guarantee a right to veto for most decisions.

[487] Lists are available at the Ministry of Finance website "State-owned companies and unincorporated State enterprises" (undated) and the Prime Minister's Office website.

Policy lists and defines the strategic basis of the companies with strategic interests. The government-held stakes in these companies currently vary from 100% to 22%.

France

435. France has had an acquisition- and ownership-related mechanism to safeguard its essential security interests since at least 1966. As of mid-May 2020, France operated two different instruments to manage acquisition- and ownership-related threats to its essential security interests:

- A mandatory review mechanism for certain acquisitions by foreigners in specified sectors under the Code monétaire et financier;[488] and
- A mechanisms associated with merger reviews, that allows ministerial intervention in public interest cases under the Code de commerce regardless of the nationality of the acquirer.[489]

436. The review mechanism under the Code monétaire et financier has been subject to several major amendments since its introduction in 1966, concerning its design, scope and operation;[490] some of these reforms were contemporaneous with takeover attempts of individual firms that were perceived as evidence of the mechanism's shortcomings.[491] More recent reforms, in particular those passed in 2014 and 2019 increased or are expected to increase the number of reviews quite

488 Articles L.151-1 to L.151-4 of the Financial and monetary code and Articles R.151-1 to R.151-17 of the Financial and monetary code.

489 Article L.430-7-1 du Code de commerce and Article L.430-8 du Code de commerce. The law explicitly mentions "public interest".

490 Among the most recent reforms were those passed on 1 January 2020 (Décret n°2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France). As part of this reform, the trigger threshold for reviews is lowered to 25%, down from 33% previously, additional sectors – printed press and electronic media, production, transformation or distribution of certain agricultural products, and critical technologies – are added to the list of sectors in which certain transactions much be notified, and procedural modifications were made. A further administrative decision (Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France) provides detailed rules for the implementation of the rules under this mechanism. These reforms have been notified to the OECD in DAF/INV/RD(2020)1.

France has also taken measures to adapt its framework to the particular situation of the COVID19 pandemic, part of which are temporary and set to expire at the end of 2020. With the entry into effect of the Arrêté du 27 avril 2020 relatif aux investissements étrangers en France, biotechnologies were permanently included in the list of critical technologies under the screening framework. Separately, the trigger threshold for the screening for sensitive listed companies was lowered temporarily until the end of 2020 to 10%, down from 25%; this does not apply to EU/EEA investors.

491 A major reform in 2014 (Décret n°2014-479 du 14 mai 2014 relatif aux investissements étrangers soumis à autorisation préalable, often referred to as "décret Montebourg"), was passed in the context of a planned foreign acquisition of engineering company *Alstom*. A parliamentary inquiry on the same transaction – *Rapport de la Commission d'enquête chargée d'examiner les décisions de l'État en matière de politique industrielle, au regard des fusions d'entreprises intervenues récemment, notamment dans le cas d'Alstom, d'Alcatel et de STX, ainsi que les moyens susceptibles de protéger nos fleurons industriels nationaux dans un contexte commercial mondialisé* – contributed to triggering a major reform in 2018, which was passed through the Décret n°2018-1057 du 29 novembre 2018 relatif aux investissements étrangers soumis à autorisation préalable and the Loi "Pacte", passed in May 2019.

significantly.[492] According to official figures, 184 reviews were handled in 2018, corresponding to 14% of the overall transactions recorded in France in that year.[493]

437. In response to the economic conditions that resulted from the COVID pandemic, France announced on 29 April 2020 temporary adjustments to its FDI screening framework.[494] These adjustments, justified with the volatility of financial markets and sharp fall of valuations of companies, including in sensitive sectors, include the addition of biotechnologies to list of critical technologies[495] and a temporary lowering of the shareholding threshold to 10%, down from 25%, for listed companies, until the end of 2020.

438. France also controls or owns a significant portfolio of companies in sectors traditionally considered sensitive, such as transport or utilities; some holdings are explicitly justified with essential security considerations.[496] In 2019, it strengthened its means to manage risks to its essential security interests through State-holdings when it introduced the possibility to associate a *golden share* to certain holdings. This share affords the possibility to influence decisions in these companies beyond the level that its shareholdings would normally allow.[497]

Germany

439. Germany operates three review mechanisms, two of which are based on the Foreign Trade and Payments Act, § 4, and established in the Foreign Trade and Payments Ordinance, an executive decree related to the Act; both sets of rules have been modified multiple times since their initial introduction[498] and comprise:

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492 The decree passed in 2014 has resulted in a fivefold increase of inquiries or authorisation requests between 2013 and 2015 (French government (unidentified) Fiche d'impact general, related to the *Décret relatif aux investissements étrangers soumis à autorisation préalable*, 24 October 2018, p.12); according to the same document, the reform of 2018 was expected to generate a further 250 cases per year – calculated on estimates for costs for enterprises –, which would constitute an increase by 235% from the number of cases reported for 2018.

493 Ministère de l'Économie et des Finances (2020), "*Foreign Direct Investment screening in France*", 30 April 2020, p.5. This number represents the total of notifications received in that year; it may not correspond to the number of cases that were actually subject to the screening procedures under the mechanism. In 2017, the corresponding number of registered notifications was 137, according to "*Les chiffres clés des IEF en 2017*", French Treasury website, 10 September 2019.

494 "*Covid-19 – Update of the foreign direct investment screening procedure in France*", French Treasury website, 30 April 2020. In mid-May 2020 when this report was finalised, not all rules implementing the decisions had been issued.

495 Arrêté du 27 avril 2020 relatif aux investissements étrangers en France.

496 Agence des Participations de l'État, "*Rapport d'activité 2017/2018*", undated.

497 Article 31-1 of the Ordonnance n°2014-948 (telle que modifiée par la Loi n°2019-486 du 22 mai 2019 relative à la croissance et à la transformation des entreprises (loi PACTE)) organises this regime. The annex of the Décret n°2004-963 du 9 septembre 2004 portant création du service à compétence nationale « Agence des participations de l'État » après modification par le décret n° 2019-160 du 1er mars 2019 contains a list of enterprises in which such golden shares could be created; the list itself is not exhaustive.

498 The Foreign Trade and Payments Act had contained an authorisation for exceptions on investment for decades; in 2004, a specific delimitation of this power was introduced, but replaced in 2013 by a more general authorisation to introduce controls.

- A sector specific review, established in 2004 is related to acquisitions by foreigners of companies that produce certain products including war weapons, tank engines and crypto technology in § 60 AWO; and
- A cross-sectoral mechanism, initially introduced in 2009, covering all sectors of the economy in § 55 AWO.[499]

440. A further mechanism has been established in 2007; it consists of a notification and review mechanism for foreign acquisitions of holdings of 25% or more of enterprises that generate high-quality earth data from space.[500] The mechanism, in the law's § 10, has limited regulatory depth but, as *lex specialis*, takes precedence over the application of the cross-sectoral mechanism according to the German government; a reform tabled in parliament on 21 April 2020 hence seeks to absorb the mechanisms into the cross-sectoral mechanism under § 55 AWO and abolish the self-standing rules.[501]

441. The sector-specific mechanism, and indeed acquisition-related policies to safeguard essential security interests as a whole, was first established in Germany in 2004. It initially consisted an authorisation requirement for foreign investment in companies that produce war weapons and crypto-technology;[502] companies that produce tank engines and gearboxes were added in 2005,[503] and further product lists were added in 2017.[504]

442. The cross-sectoral mechanism, which applies to non-EEA acquirers, was introduced in 2009 with a separate rule-set[505] and has since been subject to several reforms; at the end of April 2020, three further sets of changes had been announced. As a result of a series of reforms, the cross-sectoral mechanism has now effectively two branches with different rules, while formally remaining under the same heading:[506] For some industry sectors, in particular in advanced technology and critical infrastructure, a 10% trigger threshold applies, along with a notification

499 An order of 22 March 2019 – Allgemeinverfügung des Bundesministeriums für Wirtschaft und Energie, BAnz AT 11.04.2019 B2 – sets out which information an acquirer needs to communicate under the mechanism.

500 Law on the protection against threats for the security of the Federal Republic of Germany that are transmitted through the dissemination of high-quality earth data generated from space (Satellitendatensicherheitsgesetz–SatDSiG) of 23 November 2007.

501 BtDrs 19/18700.

502 The legislative proposal and justification are available in BtDrs 15/2537.

503 In force since 9 September 2005, and introduced with the 71st Ordinance to modify the Foreign Trade and Payments Ordinance; justification and text available in BtDrs 15/5994.

504 BtDrs 18/13417 contains the text of the amendment and the justification for the change provided by the government.

505 13th Law to amend the Foreign Trade and Payments Law and the Foreign Trade and Payments Ordinance, 18 April 2009. A consolidated version of the Foreign Trade and Payments Law was issued shortly after.

506 The branching is the result of two separate reforms: the first has been in force since 18 July 2017, and had specified areas in which a threat of Germany's essential security interests could arise in particular; it also introduced an unsanctioned (BtDrs.19/9681, 24 April 2019, response to question 7) obligation to notify acquisitions in certain listed business sectors. A second reform, which accentuated the branching further, came into effect on 29 December 2018; it lowered the trigger threshold for certain sectors from 25% to 10% and added certain media-companies to this branch.

(but not authorisation) requirement; for sectors that are not explicitly listed, a 25% threshold applies and there is no explicit notification requirement.

443. The mechanisms generate a steadily increasing number of reviews – 106 reviews were reported for 2019 – and only one transaction has ever been formally rejected.[507]

444. On 2 April 2020, Germany announced forthcoming amendments to the Foreign Trade and Payments Act, that would adapt the mechanisms to the exigencies of EU Framework for the screening of FDI into the EU and make further changes.[508] Specifically, the legislative reform would: lower the threshold for the assessment of risk; expand the protected interest beyond Germany's own interests to include other EU Member States' interests and interest of projects and programmes of European Union interest; expand the application of the rule that the legal effect of non-notified transactions is suspended; and establish a national contact-point for the EU-wide cooperation mechanism. Further reforms of the decree related to the legislation – in particular clarifications regarding the scope of "critical technologies" – were announced simultaneously and were initially planned to follow the changes in the law.[509] However, some changes were brought forward as part of a reform announced on 27 April 2020[510] to remedy perceived shortcomings identified in the context of the COVID-pandemic. This reform would move health-related sectors into the branch to which the 10% trigger threshold and the notification requirement apply, and simultaneously remedies other issues: It clarifies that asset-deals are covered by the rules;[511] mentions explicitly acquirer-related criteria for the risk-assessment; and includes further communications-related sectors and industries that process critical ores under the branch of the cross-sectoral mechanism to which the 10% threshold applies.

445. Germany also keeps some assets under government control, in particular in the infrastructure and energy sectors; it has used a State-owned fund in 2018 to absorb assets from the market to avoid an acquisition by a foreign bidder.[512]

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507 Statistics on implementation of the mechanisms are not systematically published, but are publicly available in government responses to parliamentary requests, in particular in BtDrs.18/10443 (25 November 2016); BtDrs.19/1103 7 March 2018); and BtDrs.19/2143 (11 May 2018). The most recent aggregate numbers were communicated in the context of a legislative reform proposal that was formally introduced in parliament on 21 April 2020. The referenced formal rejection occurred in August 2018 and concerned the acquisition of *Leifeld Metal Spinning*. On 23 April 2020, the Germany Minister for the Economy referred in a speech to parliament to "*several hundred transactions that had been proposed and reviewed [in 2019]*" (BtDrs 19/19156, p.19329), which does not appear to correspond to the numbers published two days earlier in the reform proposal BtDrs 19/18700.

508 Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes, bill as of 21 April 2020.

509 „*Stärkung des nationalen Investitionsprüfungsrechts – Kerninhalte des ersten Teils der Novelle des Außenwirtschaftsrechts*", Federal Ministry of Economy and Energy, 31 January 2020.

510 Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, Project by the Ministry of Economy and Energy.

511 More information on the treatment of asset-deals is available in section 2.1.1 in the subsection addressing Asset-related parameters (2): Resulting volume of equity stake, voting rights, other forms of control, overall assets of a person in the country or overall share of foreign ownership in a company.

512 In mid-2018 the State-owned German development bank KfW acquired a 20% stake in a company that operates electricity grids, 50Hertz.

Greece

446. Since 1990, Greece authorities operates a mechanism to manage acquisition- or ownership-related risks to its essential security interests that are related to some foreign acquisition or ownership of real estate in border areas. Established under Νόμος 1892/1990, article 25, the mechanism requires an authorisation for the acquisition of direct or indirect ownership of real estate in border areas or property rights related to such assets. For Greek and EU/EFTA Member State nationals, the authorisation process is handled by locl authorities, while the Ministry of Defence is in charge for acquisitions by third-country nationals. Νόμος 3978/2011 of June 2011, Article 114, specifies the areas that are deemed "border areas" for the purpose of the law.

Hungary

447. Hungary introduced its first explicit policy to manage threats to essential security interests associated with acquisition- or ownership of assets on 1 January 2019, when the Law on the Control of the Foreign Investments that Violate the National Security of Hungary came into effect.[513] The law establishes a sector-specific, mandatory notification, review and authorisation mechanism for the establishment of a new enterprise or acquisition of interest in an existing enterprise by a person from outside the European Economic Area of shareholding or control (10% or 25%) in companies operating in sectors of defence and dual-use goods; production of intelligence tools; provision of financial and payment systems services; and services related to electricity, natural gas, water, and telecommunications.

448. Hungary also keeps significant parts of its economy in State ownership; relatively recent acquisitions in energy firms, public utilities and banks have contributed to the current stock of State-owned assets in Hungary.

Iceland

449. Iceland manages risk to its essential security interests related to the acquisition and ownership of certain assets through a set of four mechanisms laid down in Act N° 34/1991 on Investment by Non-residents in Business Enterprises:

- Ownership restrictions apply to: hydropower and geothermal power as well as energy production and –distribution, which are restricted to nationals, residents or residents of EEA countries – Article 4 (2) of the Act);
- Aggregate ownership of individual businesses by non-residents – not counting ownership of EEA residents – is capped at 49% (Article 4 (3) of the Act)
- Investment in Icelandic enterprises by foreign States, local authorities or other foreign authorities are prohibited unless exceptionally authorised by the Minister of Commerce (Article 4 (4) of the Act); and
- The Minister of Commerce may prohibit a particular investment that she or he considers a threat to national security, public order, public safety or public health (Article 12 of the Act).

513 An unofficial translation of the law and the related Government Decree No. 246 of 2018 - On the Implementation of Act LVII of 2018 on Controlling Foreign Investments that Violate the National Security of Hungary is available in Hungary's notification of the policy to the OECD in DAF/INV/RD(2019)2/REV1.

450. The rules, including those on investment that may threaten Iceland's essential security interests, were amended repeatedly, in particular by the amendments passed in 1996 and 2014.[514]

India

451. India allows foreign investment under the "automatic route" – that is, without individual government approval process – in individual sectors up to certain equity ceilings. Instead or beyond these equity limits, foreign investment may be authorised under the "government route", equivalent to an individual assessment and approval process. India's mechanism to manage risks to its essential security interests associated with acquisition or ownership of certain assets operated as part of approvals under the government route or through equity caps. Ceilings for "automatic" or "government" route in individual sectors are currently set out in the Foreign Exchange Management Act (FEMA-20) of 1999 and documents based upon the Act, in particular the "Consolidated FDI Policy", a Circular issued and updated by the Ministry of Commerce and Industry.[515]

452. Details on the rules that apply to such reviews do not appear to be publicly available; it is known however that the Ministry of Home Affairs carries out the reviews, and that it had established a new *National Security Clearance Policy* in 2015.[516] The reviews appear to cover foreign investment in defence, telecommunications, ports, power projects in border areas, civil aviation; it appears that the Ministry of Home Affairs has some leeway over the scope of policies.[517] Over 1000 proposals have reportedly been cleared annually recently.

Indonesia

453. Indonesia manages threats to its essential security interests that may result from acquisitions or ownership of certain assets through ownership caps and related reviews in sectors specified in a Presidential Regulation of the Republic of Indonesia Number 44/2016 (so-called "negative list"). The negative list applies to foreign investment only and prohibits or prescribes conditions for acquisitions of assets by foreigners in certain business fields. They may be based on different considerations that are not made explicit in the Presidential Regulation 44/2016; however, conditions, especially foreign ownership caps, are observed in a series of sectors which are traditionally considered sensitive for essential security interests, such as businesses in the energy sector; defence production; transport by land, air and sea; and communications. In most of these areas, foreign-ownership caps at 49% or, more rarely, 67%, apply.

Ireland

454. As of mid-May 2020, Ireland did not appear to have specific policies in place to manage acquisition- or ownership-related risks to its essential security interests.[518] However, in December

514 Act No 46 of 22 May 1996 and Act No 57 of 27 May 2014.

515 The version in force in mid-May 2020 was issued on 28 August 2017. It is supplemented and amended by occasional "press notes" which accumulate until a new consolidated circular is issued.

516 Ministry of Home Affairs, Response to parliamentary question No.1013, 25 July 2015.

517 Documented for example in Ministry of Home Affairs, Response to parliamentary question No.2318, 4 August 2015 and Ministry of Home Affairs, Response to parliamentary question No.3472, 11 August 2015.

518 An earlier OECD Review of Foreign Direct Investment – Ireland of 1994 and a more recent publication on foreign investment regulation on Ireland suggest that Ireland prohibited and still

2019, Ireland established a unit within the Ministry of Business, Enterprise and Innovation that is dedicated to investment screening and has begun examining the options and legal basis for such screening. In this context, the Irish government launched a Public Consultation on Investment Screening on 24 April 2020 to seek views on whether to introduce in Ireland an Investment Screening mechanism on inward investments from third countries on the grounds of security and public order.

455. Ireland maintains at least partial State-ownership over electricity and gas operators. Some public transport providers, airports and other infrastructure assets are likewise State-controlled, hence rendering acquisition- and ownership related policies in regard to these assets redundant.[519]

Israel

456. Israel did not have dedicated acquisition- and ownership-related mechanisms in place to safeguard its essential security interests[520] until Israel announced the establishment of an "Advisory Committee on Foreign Investment" by the Security Cabinet on 30 November 2019.[521] The Committee, which is not established by legislation, is operational as of 1 January 2020. It is headed by the Ministry of Finance and involves several other Ministries. It is mandated with examining national security aspects in the process of approving foreign investment. The Committee would only consider investments that require government approval, in the fields of finance, communications, infrastructure, transport and energy, and only upon voluntary referral by the respective responsible regulators; investors or acquisition targets are not subject to any notification obligation.

457. Israel has several mechanisms in place that could to some extent substitute acquisition- and ownership-related mechanisms to manage risk to certain areas of its economy:

- Acquisitions of real estate that lead to ownership are only possible for around 7% of Israel's landmass, as the remainder is administered by the Israel Land Authority and allocated through long term-leases rather than sales; essential security interests are considered in the context of the allocation of land under leases.[522]
- The government may hold "special shares" in enterprises that have resulted from the privatisation of previously government-owned companies, as provided for under the Government Companies Law, 5735-1975, section 59(b)A.(3a); also, since an amendment passed in 2003, an enterprise that results from a privatization may be subject to an "essential interest" order asset out in Government Companies Law, 5735-1975, section

prohibits private any investment in the defence industry. The legal basis for this reported prohibition could not be identified as yet, however.

519 A list of State-controlled entities as of 2018 is available in Central Statistics Office (2019), "Register of Public Sector Bodies 2018", in particular Chapters 3 and 4.

520 Israel has rules on foreign government participation in broadcasting under the Communications (Telecommunications and Broadcasting) Law 5742–1982, Section 6H3(4). This restriction operates through a licensing procedure required for broadcasters and is hence not an acquisition- and ownership-related mechanism as defined for the purpose of this report. Also, it is not certain whether the mechanism is based on considerations of essential security interests. The policy is nevertheless discussed in relation to security interests in the context of Israel's accession to the OECD (OECD (2009), "*Accession of Israel to the OECD: Review of international investment policies*", p.15).

521 "*Statement by the Ministerial Committee on National Security Affairs*", Prime Minister's office, 30 October 2019.

522 OECD (2009) "*Accession of Israel to the OECD: Review of international investment policies*", p.13.

59h which may limit later acquisitions of control by other parties with a view to protect Israel's essential security interests.[523] In addition, Israel maintains State-ownership or control in about 50 individual enterprises outright,[524] including in enterprises that operate in sectors that are often object of acquisition- and ownership-related mechanisms to safeguard essential security interests.

Italy

458. Italy safeguards its essential security interests against acquisition-related threats through two related but distinct review mechanisms. Each of these mechanisms establishes rules for acquisitions of enterprises operating in specified industry sectors that are considered strategic and include: defence and national security related industries; and energy, transport and communication.

459. The mechanisms were established in Decree Law 21/2012 that was later converted, with amendments, into law by the Law of 11 May 2012, n. 56 and became operational on 3 October 2014. They explicitly replaced a now defunct "golden share" arrangement that had been in place since 1994; in reference to this origin, the current mechanisms are commonly referred to as "golden powers".[525]

523 An explanation of these regimes is available in OECD (2009) "*Accession of Israel to the OECD: Review of international investment policies*", p.15.

524 A list of government companies is available through a website of Israel's Ministry of Finance.

525 The golden share arrangement, established by Decree-Law No 332/1994 had been declared incompatible with the European Union law in 2009 (*Judgment of 26 March 2009, Commission/Italy (C-326/07, ECR 2009 p. I-2291) ECLI:EU:C:2009:193*). An overview of the legislative developments is available in the report by the President of the Council of Ministers to the Senate in the implementation of the mechanisms between July 2016 and December 2018, "*Relazione al Parlamento in materia di esercizio dei poteri speciali*", 1 April 2019, p.4. Since then, further rules were introduced through decree-law 21 September 2019, n.105, converted into law, with amendments, by law 18 November 2019, n.133.

460. Seven decrees provide for details and rules on implementation of the special powers,[526] and since its inception, the mechanisms have been subject to repeated adjustments, most recently in December 2019.[527]

461. In substance, the rules require prior authorisation of transactions in the strategic sectors independent of value; acquirer and owner of the asset under acquisition are subject to the notification requirement. The mechanism related to defence and national security applies to all foreigner acquirers, while reviews of transactions in the other strategic sectors only apply to foreigners from non-EU and non-EEA countries.

462. Statistical information on the implementation of the mechanisms, shows a steady growth of notifications and procedures between 2014 and 2018, from 8 procedures in 2014 to 46 in 2018.[528]

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526 Presidential Decree 35/2014 of 19 February 2014, which sets out the competence and procedures for the exercise of the special powers to review and restrict foreign investment in the defence and national security sector; Presidential Decree 85/2014 of 25 March 2014, which identifies the assets of strategic importance in the fields of energy, transport and communications; Presidential Decree 86/2014 of 25 March 2014, which sets out the procedures for the activation of the special powers in the fields of energy, transport and communications; Ministerial Decree 108/2014 of 6 June 2014, which identifies the activities of strategic importance for the system of national defence and security; Ministerial Decree of 6 August 2014, which sets out the organisational and procedural aspects of the preparatory aspects for the exercise of the special powers such as the setup of an inter-ministerial coordination committee; Decree of the Secretary General of 18 February 2015, which sets out the model for notifications for transactions in the strategic sectors. A government website of the President of the Council of Ministers now aggregates the rules and provides centralised access to filing forms and information on the implementation of the policies. The report on the implementation of the mechanisms, "*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*", to the Senate in April 2019, 18th Parliament, Doc.LXV no.1, also contains a list of normative acts on the powers as well as a description of their interaction and operation.

527 Changes to the main legislation were brought into effect by decree-law of 16 October 2017, No.148 and confirmed as law without modification by the law of 4 December 2017, no.172; these changes are contained in article 14 of the decree-law and were motivated at least in part by a transaction involving *TIM S.p.A.* and *Vivendi S.A.* reported in July 2017. The changes add certain advanced technology sectors – in particular data treatment, financial infrastructure, artificial intelligence, robotics, semiconductors, dual-use technology, space and nuclear technology – to the list of sectors where threats could arise. The changes also enhance the sanctions mechanisms for failure to notify a transaction in relation to defense and national security. Details of the reform are set out in the parliamentary document "*Disposizioni urgenti in materia finanziaria e per esigenze indifferibili*" D.L.148/2017–A.C.4741 of November 2017, p.208. Further changes were made by Decree Law No. 22/2019 of 25 March 2019, confirmed as law without modification by the Law of 20 May 2019, n.41; these changes include components and contracts related to 5G telecommunications to the scope of the special powers. On 12 July 2019, the now defunct Decree Law No. 64/2019 of 11 July 2019, among others, extended the review period for the exercise of the special powers, specifies what constitutes non-EU acquirers and the consequences of shareholder coordination, and broadens powers to prohibit a transaction. As this Decree Law was not converted into law within six months, its provisions have lapsed on 10 September 2019. As of end April 2020, the most recent amendments had been brought through the decree-law 21 September 2019, n.105, converted into law, with amendments, by law 18 November 2019, n.133.

528 See "*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*", report to the Parliament, 17th Parliament,

463. In response to the economic circumstances that resulted from the COVID-19 pandemic, Italy made temporary modifications to the "golden powers" mechanism with effect from 9 April 2020.[529] The changes temporarily expand the scope of the powers to cover additional sectors that are declared strategic; enables the authorities to open reviews ex-officio where companies do not fulfil the notifications obligations; and expand the scope of the powers to acquisitions from within the EU and lower the trigger threshold for acquisitions from outside the EU to 10%.

Japan

464. Japan has had controls over inward investment since at least 1950, when the Foreign Investment Law of 1950 (Law No.163) came into effect.[530] The roots of Japan's current acquisition- and ownership-related mechanisms emerged in 1980, when rules on inward investment were transferred to and merged with the Foreign Exchange and Foreign Trade Control Act of 1949 (Law N°228) (FEFTA) and complemented by the Cabinet Order N°261/1980 and the Order on Inward Direct Investment N°1/1980 establishes two distinct mechanisms.[531] The law and its related Orders have been amended repeatedly since 1992.[532]

465. The mechanisms include:

- A review mechanisms that requires advance notification for certain investments concerning either specific business areas or involving foreign nationals from particular countries (FEFTA, Art. 27(3)). Changes introduced in 2017 have extended the review mechanism to cover transactions of non-listed companies' shares between foreign investors (Art. 28); introduced a post-acquisition monitoring mechanisms to ensure the acquirer's compliance (Art. 29); and strengthen the sanctions regime in case of non-compliance with the rules (Art. 70).[533] An amendment adopted in late 2019 that was not yet fully implemented as of mid-May 2020 will lower the trigger threshold to 1%[534] of

Doc. CCXLIX, no.1 and "*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*", Report to the Senate, April 2019, 18th Parliament, Doc. LXV no.1

529 Decreto-legge 8 Aprile 2020, n.23, Articles 15-17. The amendments apply until 31 December 2020.

530 For the historical developments of Japan's legislation in this area see Misao TATSUTA (1981), "*Restrictions on foreign investment: Developments in Japanese law*", Journal of Comparative Corporate Law and Securities Regulation 3, p.159.

531 In addition, Japan operates, since the initial passing of FEFTA in 1949, a mechanism to control outward direct investment made by a resident that could compromise "world peace and international security" or "would create a barrier to the maintenance of public order" (Foreign Exchange and Foreign Trade Act, art. 23(4)(ii)).

532 In total, six changes to the mechanism were made since 1992 alone: FEFTA itself was amended in 1992 (through Act No.40/1992), 2017 and 2019, Cabinet Order N°261 of 1980 was modified in 1992, 2007, 2009, 2017 and 2019; and the Order on Inward Direct Investment N°1 of 1980 was amended in 1992, 2007, 2009, 2014, 2017 and 2019.

533 More detailed information is available in Japan's notification of 2017, DAF/INV/RD(2017)4.

534 Shareholders who hold at least 1% of shares are allowed, under Japanese securities rules, to propose items for the agenda of the general shareholders meeting.

assets operating in certain sectors[535] and introduce a prior notification requirement for acquisitions in these sectors, among other changes;[536] and

- A review mechanism concerning the conclusion, renewal, or modification of any "technology contract" between a resident and a non-resident (Art. 30) that could "compromise national security, create a barrier to the maintenance of public order, or interfere with the preservation of public safety" (Art. 30(3)(i)).

466. Relatively little is known about the implementation practice and case-load that these mechanisms generate; now outdated case-statistics on 2004 to 2006 show that 250 cases annually on average were handled in this period, which almost exclusively resulted in approvals.[537]

Jordan

467. Jordan manages acquisition- and ownership related risk to its essentials security interests through foreign ownership caps in certain sectors, based on the Investment Law No.30/2014, Article 10 and the Regulation on non-Jordanian Investments No.77/2016.[538] The rules establish exceptions to the principle of foreign ownership in Jordan for individually listed sectors, some of which may be motivated by essential security considerations.[539] The rules also contain a general exception to the principle based on essential security concerns, without however providing indications about the scope or procedure for implementation of this exception.

535 On 8 May 2020, the Ministry of Finance issued a list of publically listed companies classified by categories to assist acquirers in assessing whether an acquisition of a shareholding required prior notification or whether only post-acquisition reporting is required. The list identifies 518 listed companies in Japan that are conducting business activities in "core sectors" and where acquisitions are thus subject to prior notification. The list identifies 9997 listed companies in total and categorises them with respect to the sensitivity of their business. For would-be investors that are non-accredited SOEs or those that have been found to have breached rules of FEFTA, the prior notification requirement applies to 2102 of the listed companies.

536 Law that partially revises the Foreign Exchange and Foreign Trade Law. A press release issued by the Ministry of Finance on 8 May 2020 sets out the factors that authorities consider when assessing prior notifications of inward direct investment and specified acquisition under the Foreign Exchange and Foreign Trade Act.

537 A 2008 METI report does mention that "around 760 investment plans were submitted under the FEFTA in the past 3 years [2004, 2005, 2006], and all but 1 proposal were approved within the statutory period of 30 days. The screening period was minimized to 2 weeks or less for about 95% of the investment proposals submitted." (see here).

538 An unofficial English language translation is available through the website of the American Chamber of Commerce in Jordan.

539 Foreign ownership is capped at 50%, 49% and 0% in a list of sectors, but the rationale for the inclusion of individual sectors under the caps is not made explicit. Foreign ownership caps at 0% exist for security-related activities and those related to weapons and ammunition, areas that are often associated with the protection of essential security interests. At the time of Jordan's adherence to the OECD Declaration on International Investment and Multinational Enterprises, it did not notify any policy as being based on essential security consideration (see OECD (2013), "OECD Investment Policy Reviews: Jordan", Annex A. No notification was lodged since the reform of the legal framework for investment in 2014, cf. the list of measures reported for transparency under the National Treatment instrument).

468. Jordan maintains State-ownership in enterprises in sectors including electricity generation and distribution, airlines and telecommunications,[540] sectors that are widely considered sensitive, making specific acquisition- and ownership-related policies redundant in respect to these sectors or enterprises.

Kazakhstan

469. Kazakhstan operates two distinct mechanisms to manage acquisition- and ownership-related threats to its essential security interests:

- It reviews acquisitions of "strategic objects", a category of publicly listed assets, under rules of the Law on National Security № 527-IV (as amended), article 22; and
- It restricts foreign ownership or lease of agricultural land in a 3km-wide stretch along the border under the Land Code N°442-II of June 2003;[541]

470. Kazakhstan also holds a significant part of its economy in State-ownership, substituting any need for acquisition- and ownership-related mechanisms in the sectors or enterprises under State control. Around 35 to 40% of the national economy were estimated to be State-controlled.[542] In many areas, including oil and energy transmission, railways, ports and airports, and other utilities, Kazakhstan maintains public or State monopolies, spanning over 1,000 companies.[543] Where companies in these sectors are not already State-owned, the monopolies allow the government to manage risk to essential security interests through concession processes.

Korea

471. Korea operates three distinct mechanisms to manage different acquisition-related threats to its essential security interests:

- A scrutiny mechanism, established under the Foreign Investment Promotion Act and the related Enforcement Decree of the Foreign Investment Promotion Act, Presidential Decree (as amended in April 2020) and the Regulations on Foreign Investment (as amended in June 2018). The mechanism had a string of predecessors:[544] It can be traced back to earlier rules in the Foreign Capital Inducement Act Law N°1802 of 3 August 1966, which, at least since 1984 after the amendment by Law N°3691 of 1983, contained prohibitions of foreign investment in specified sectors, at least some of which were based on essential security concerns.[545] In 1998, it was replaced by the Foreign Investment

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[540] OECD (2013), "*State-Owned Enterprises in the Middle East and North Africa: Engines of Development and Competitiveness?*", p.117.

[541] According to the Law "On the State Border of the Republic of Kazakhstan", Article 2, § 28, a border zone is a part of the territory of the Kazakh Republic adjacent to the borderland within the territory of administrative districts.

[542] "*OECD Investment Policy Reviews – Kazakhstan 2017*", p.67.

[543] "*OECD Investment Policy Reviews – Kazakhstan 2017*", p.83.

[544] More information on the history of Korea's rules is available in Chan-Jin KIM (2003), "*Foreign Investment Law of Korea: Past and Present*", Korean Journal of International and Comparative law L1, p.114.

[545] Article 10 of the law, as amended, established four categories of sectors in which foreign investment was prohibited and which received more detailed regulation in the Enforcement Decree of the Foreign Capital Inducement Act; these include, in Art. 10(1) item 1, sectors that are typically

Promotion Act and the possibility to control business in which foreign investment could threaten Korea's essential security interests.[546] The rules governing this review were repeatedly amended, in particular in 2008, when procedural detail provided clarity on how the mechanism was to be administered.[547]

- A further mechanism is specific to acquisitions concerning the defence industry, established under the Foreign Investment Promotion Act, Article 6, in conjunction with the Defence Acquisition Programme Act. The mechanism requires, since its introduction in 1998, that foreign investors obtain prior government approval to invest in defence industry companies.
- A mechanism to review national security sensitive acquisitions in designated, government co-funded national core technologies under the Act on the Prevention of Divulgence and Protection of Industrial Technology. The mechanism became effective in January 2012[548] and establishes a government review system over inward investment concerning assets that hold national core technology whose development was co-funded by the government. A reform passed in August 2019 and in force since February 2020 extended the scope of this mechanisms.[549]

Latvia

472. Latvia manages acquisition- and ownership-related risks to its essential security interests through a mandatory review systems under its National Security Law and a related implementing regulation.[550] The mechanism became effective on 29 March 2017 and requires a mandatory prior review of ownership transactions in certain assets, independent of the acquirer nationality. The assets whose transfer need prior approval by the Cabinet include "enterprises and facilities with significance to national security" – currently 26 individually identified companies in telecommunications, broadcasting, and energy generation or transmission sectors – as well as national-level critical infrastructure and European critical infrastructure.[551]

considered sensitive for essential security interests such as telecommunications, water, and railway transport; and, in Art. 10(1) item 4, news publishing and radio broadcasting.

546 The last version of the list of categories of business in which foreign investment is restricted for security reasons was released in 2018 and is contained in Regulation on Foreign Investment, Annex 2, Notice of the Ministry of Trade, Industry and Energy 2018-137. No English-language version of this list could be found.

547 Enforcement Decree of the Foreign Investment Promotion Act, 22 February 2008, Article 5.

548 The rules in the Act are complemented by an Enforcement decree of the Act on Prevention of Divulgence and Protection of Industrial Technology. This mechanisms has had a predecessor in the Foreign Capital Inducement Act Law N°1802 of 3 August 1966, Article 9 (at least since 1984), and the related Enforcement Decree of the Foreign Capital Inducement Act, Article 9, under which foreign investment in projects specifically supported by the government was restricted.

549 Law N° 16476, Partial Amendment of the Act on the Prevention of Divulgence and Protection of Industrial Technology.

550 Regulation N° 606 on the amount of information to be submitted by the institution specified in the National Security Law. Latvia has notified this mechanism to the OECD in DAF/INV/RD(2018)1.

551 A statement of the Parliament of Latvia of 26 September 2019 on the National Security Concept calls for a strengthening of the regulatory framework in this area.

473. Latvia also keeps a significant number of enterprises in sectors traditionally sensitive – such as energy, telecoms, and transport – in State ownership. As of 1 July 2018, Latvia held 159 enterprises in State ownership, of which it fully owned 66.[552]

Lithuania

474. Lithuania manages acquisition- and ownership-related risk to its essential security interest through two mechanisms:

- Since 1995, it maintains sectoral restrictions on activities guaranteeing State security and defence under the Law on Investment N°VIII-1312; and
- Since 2009, it operates a review mechanism regarding certain specified enterprises and facilities under the Law on Enterprises and Facilities of Strategic Importance to National Security and other Enterprises of Importance to Ensuring National Security.

475. The rules on sectoral restrictions on foreign investment are contained in the Law on Investment N°VIII-1312, Article 8.[553] They prohibit any foreign investment in sectors associated with State security and defence, with an exception for investors from countries associated with European and Transatlantic integration; these exceptions are granted by the National Defence Council. No detailed rules appear to have been passed as to the conditions and procedure under which such exceptions may be granted.

476. Rules under the Law on Enterprises and Facilities of Strategic Importance to National Security and other Enterprises of Importance to Ensuring National Security and its preceding legislation since 2002[554] identify individual assets that are important for Lithuania's essential security interests and associates these assets, or acquisitions of these assets, with specific legal regimes.[555] All assets are listed individually and fall into one of five categories, which are energy,

552 KPMG Baltics SIA (2019), "*State ownership policy review in Latvia – Final report*". An overview of Latvia's SOE-related policies and major SOEs is available in OECD (2015), "*OECD Review of the corporate governance of State-owned enterprises – Latvia*".

553 The restrictions was first introduced in the law Foreign Capital Investment in the Republic of Lithuania (1995), Article 8. This law was replaced in 1999 by the Law on Investment of the Republic of Lithuania N°VIII-1312 (official English translation as of the version of 1999), which introduced, for the section of interest here, an exemption for investors from countries associated with Lithuania's from countries meeting the criteria of European and Transatlantic integration. Later amendments in 2014 and 2018 adjusted the provision to accommodate the rules on strategically important sectors of national security in the territory of protected areas of companies, installations and property important for national security under the other mechanism mentioned in this section.

554 The initial Law on the Protection of Objects Important to the National Security of 2002 merely listed entities which had to be kept in State ownership and in which foreign capital from investors from countries that meet the criteria of European and Transatlantic integration could be allowed. Rules on a review mechanism proper were introduced through reforms in 2009.

555 An unofficial translation of the legislation and the related annexes is available in Lithuania's notification of the mechanism to the OECD in DAF/INV/RD(2018)6. The notification reflects the situation of 2018 and does not include the Resolution on the Rules of Procedure of the Commission approved by the Government, No.1540, which came into effect in 2019. The notification also does not contain later changes such as the inclusion of railway infrastructure to the lists of assets – introduced in a Resolution passed in late 2018 and that came into effect on 1 June 2019; and changes to the *List of Facilities and Property of Importance to Ensuring National Security* which were introduced in the Resolution on the Determination of the Protection Zones of Importance to National Security approved by the Government, No.1252.

transport, information technologies and telecommunications, other high technologies, finance and credit, and defence equipment. Some transactions related to such assets require mandatory prior approval, while other transactions may be subject to screening post-closure; a screening can be initiated voluntarily.

477. Lithuania also keeps some enterprises in sectors traditionally sensitive – such as defence, energy, telecoms, and transport – under State control and ownership; some of these enterprises, identified as belonging to Group 1B, are explicitly held by the State to safeguard Lithuania's essential security interests; as of December 2014, 63 enterprises belonged to this group.[556]

Luxembourg

478. As of mid-May 2020, Luxembourg did not appear to have put in place specific mechanisms to protect its essential security interests against risks associated with the acquisition or ownership of certain assets.

479. Luxembourg holds some assets, especially in energy and rail transport,[557] in State-ownership, making acquisition- or ownership-related policies related to these assets redundant.

Malaysia

480. As of mid-May 2020, Malaysia managed acquisition- and ownership-related risk to its essential security interests through the possibility to refuse registration of a new company or the possibility to rescind a registration of an existing company registered in Malaysia. The mechanisms are rooted in parallel legislation and can be traced back to the Registration of Businesses Act 1956; its Article 5c (1.) mandates the Registrar to refuse registration of a business if "the Registrar is satisfied that the business is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with the security of the Federation, public order or morality". A registration may be revoked under similarly framed grounds on the basis of Article 5c(2.) of the same Act.

481. The Companies Act 2016, Article 16(2.) appears to regulate the same matter and uses almost identical wording with regards to the refusal of registration; it does not contain a clause on revocation of an existing registration.[558] The relationship between the two regimes is not obvious. No formal procedure appears to be established for the assessment by the Registrar for a decision under either rule, and no information appears to be available on the practical application of the rules.

482. Mechanisms that would address risk that could result from the acquisition or ownership of parts or the entirety of an existing company – which do not appear to fall under the abovementioned mechanisms related to registrations –did not appear to exist by mid-May 2020.

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556 For more details see OECD (2015), "*OECD Review of the corporate governance of State-owned enterprises – Lithuania*".

557 Information on State-ownership in Luxembourg is available in: European Commission (2016), "*State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context*", Institutional Paper 031, July 2016, in particular p.30.

558 A similar clause had existed in the Companies Act 1965, Article 16 (8.); while the mechanism of refusal of registration by the Registrar is identical as the one described in both the Companies Act 2016 and the Registration of Businesses Act 1956, the list of public interests was framed slightly differently in the Companies Act 1965. For a similar mechanism in operation in Singapore, see the section on Singapore below.

483. Sector-specific equity limits apply to foreign investments in some limited sectors, but the ceilings are high (e.g. 70% foreign participation is allowed in telecommunications) and do not appear to be motivated by concerns over essential security.

Mexico

484. Mexico addresses national security concerns associated with the acquisition- or ownership of specific assets through two mechanisms, which are both set out in the Ley de Inversión Extranjera:

- A foreign ownership cap at 49% in enterprises that manufacture or commercialise explosives, firearms, cartridges, and ammunitions and fireworks;[559] and
- A prior approval requirement for foreign shareholdings beyond 49% in companies operating in certain sectors including education, construction and operation of general railways and overseas shipping. This mechanism only applies however to target enterprises whose total assets exceed a value determined annually by the authorities. The review of transactions is carried out by the *Comisión Nacional de Inversiones Extranjeras* (*CNIE*), which weighs essential security concerns that may arise in the context of the proposed transaction.[560]

Morocco

485. As of mid-May 2020, Morocco did not appear to have put in place specific mechanisms to protect its essential security interests against risks associated with the acquisition or ownership of certain assets.

486. Morocco holds some enterprises in sectors traditionally sensitive – such as energy, telecoms, transport and infrastructure – in State ownership thus eliminating the need State controls in these areas. [561]

Netherlands

487. As of mid-May 2020, the Netherlands operated two mechanisms – under the Electricity Act 1998 (article 86f) and the Gas Act (article 66e) – to safeguard their essential security interests in relation to acquisitions in these areas.

488. There have been a series of considerations recently on the merits of introducing such policies for the telecommunications sector or for broader areas of the Dutch economy: A mechanism regarding *"unwanted control of telecommunications*" was the most advanced initiative by mid-May 2020. Initially triggered by the reported attempt by a foreigner to acquire KPN in 2013 and subsequent other take-overs, and following a public consultation in May 2017, the proposal to parliament later in the same year[562] and an announcement of forthcoming legislation in April 2018, a bill to amend the telecommunications act was introduced in Parliament

559 Ley de Inversión Extranjera¸ Article 7.

560 See Ley de Inversión Extranjera¸ Article 30.

561 OECD (2013), "*State-Owned Enterprises in the Middle East and North Africa: Engines of Development and Competitiveness?*", p. 118

562 Brief van de Minister van Veiligheid en Justitie aan de Voorzitter van de Tweede Kamer der Staten-Generaal, 22 May 2017.

on 5 March 2019;[563] if passed into law, it would establish a notification requirement for acquisitions in the telecommunications sector and allow the government to prohibit or unwind such transactions if they would jeopardize national security or public order. Companies in the sector include those that provide mobile, fixed telephony and internet as well as internet nodes, data centres, hosting and certification services.

489. The introduction of broader mechanisms to prevent acquisitions that may threaten the Netherlands' essential security interests had been pondered since at least 2014,[564] and was still under consideration in mid-May 2020.[565] In parallel, a bill to implement the European Union Regulation establishing a framework for the screening of FDI into the EU was being prepared since 2019.[566]

New Zealand

490. New Zealand has had a cross-sectoral acquisition-control mechanisms related to certain assets since at least 1964, when the Overseas Take-overs Regulations 1964 became effective. This mechanism is the first cross-sectoral review mechanism for purposes including essential security interests observed in the 62 countries covered by this report.

491. The rules governing this mechanism were repeatedly transformed (notably by the Overseas Investment Act 1973 and the related Overseas Investment Regulations 1973; the Overseas Investment Regulations 1995; and the current Overseas Investment Act 2005 and the Overseas Investment Regulations 2005), and each iteration underwent multiple amendments. While the rules have significantly evolved over the span of over half a century, the structural elements in force today can still be traced back to the Regulations of 1964.

492. At present, New Zealand manages acquisition-related risks to its essential security interests as part of its broader review mechanism under the Overseas Investment Act 2005 and the Overseas Investment Regulations 2005. These rules allow the New Zealand government to prohibit acquisitions or greenfield investment that may threaten the country's essential security interests, among others, where these acquisitions either concern "sensitive land" or "significant business assets", the latter being currently set at 25% ownership or control interests in an enterprise or the investment exceeding a value of NZD 100 million.[567]

493. In 2018, New Zealand began to reform its investment review framework in two steps:[568] A first set of amendments to the overall review mechanism became effective in 2018. The second step was being prepared early 2020 and ongoing when work on this report was closed. As the corresponding Overseas Investment Amendment Bill (No. 2), introduced in Parliament on

563 Information on the Bill is available on the parliamentary file 35 153.

564 A report "*Between naivety and paranoia*", published in April 2014 by the National Coordinator for Anti-terrorism and Security considered national security concerns in the context of foreign takeovers of enterprises in vital sectors.

565 The Parliamentary document 30 821, no.97 of 29 November 2019 sets out the government's intention as of end 2019. It builds on an earlier Parliamentary document, 30 821, no.72 of 23 April 2019, which sets out the wider frameworks and threat analysis prepared by the Dutch government.

566 A consultation on a proposal was carried out between December 2019 and mid-January 2020, "*Uitvoeringswet screeningsverordening buitenlandse directe investeringen*",

567 Higher trigger thresholds apply for acquirers or investors from certain countries.

568 The sequencing of the reforms was set out in October 2018 in "*Second phase of overseas investment rules review*", Land Information New Zealand media release, 17 October 2018.

19 March 2020, indicates, this second step seeks to introduce instruments that address risk to essential security interests through a new "National security and public order risk management regime" which can be triggered for transactions that do not meet all of the conditions set for the national-interest test under the Overseas Investment Act.[569]

494. In response to the economic conditions that resulted from the COVID pandemic, New Zealand announced on 13 May 2020 that the reform was being brought forward so that parts of the planned reforms were in force by mid-June 2020.[570] Simultaneously, the government announced temporary powers to review foreign investments regardless of value that result in 25% ownership interest or increase such interest to or above certain thresholds; the power is complemented by a notification requirement.

Norway

495. Norway has introduced an acquisition- and ownership-related mechanisms to safeguard its essential security interests on 1 January 2019, when the Lov om nasjonal sikkerhet (*sikkerhetsloven* or *Law on National Security*) and a related implementing decree came into effect.[571] The law addresses a host of threats to Norway's essential security interests, with acquisition-related reviews, established under Chapter 10 of the law, being one of its components. The law replaces legislation on security matters dating back to 1998, which did not include an acquisition-related review mechanism.[572]

496. In substance, the new mechanism establishes a prior notification requirement for acquisitions of qualified ownership positions – a third of the share capital or control or comparable power over management – in a company or in an asset that is identified as essential for national security, independent of the nationality of the acquirer.[573]

Paraguay

497. Paraguay manages acquisition- and ownership-related threats to its essential security interests in relation to the acquisition of land in border areas. The mechanism, introduced in 2005 in Ley n°2.532/05 Que establece la zona de seguridad fronteriza de la República de Paraguay, requires nationals of Paraguay's immediate neighbour-countries – Argentina, Bolivia, and Brazil – to obtain government approval for acquisitions of real estate in the "border security area" – a 50km-wide strip of land along Paraguay's international borders. The regime applies to natural and legal persons from the three neighbour countries and to enterprises that are majority-owned

569 Additional information on the considered or planned changes is available through the consultation webpage hosted by the Treasury.

570 "*New measures to protect New Zealand's national interest during COVID-19 crisis*", New Zealand government media release, 13 May 2020.

571 Forskrift om virksomheters arbeid med forebyggende sikkerhet of 20 December 2018. More detailed information on the measure is available in Norway's notification of the policy to the OECD in DAF/INV/RD(2020)2.

572 Act on Preventive Security Service (the Security Act) of 20 March 1998.

573 Companies or assets subject to this procedure are those identified by §10-5 of the Act as a company that: "a) processes security-rated information; b) has information, information systems, objects or infrastructure that are essential for basic national functions; c) conducts activity that is crucial to basic national functions.

by foreigners from these countries. Ownership positions established before the introduction or the rule are not affected by the regime.

498. Paraguay also keeps some enterprises in sectors traditionally sensitive – such as energy and telecommunications – in State ownership.[574]

Peru

499. As of mid-May 2020, Peru managed acquisition- and ownership-related risk to its essential security interests with respect to foreign ownership of real estate and related resources in border areas. The rules can be traced back to the Constitución Política del Peru de 1920, Article 39, and is now anchored in the Constitución Política del Peru de 1993, Article 71. The Decreto Legislativo nº757, 8 November 1991, article 13, provides further detail on the rule. The mechanism prohibits any acquisition or ownership by foreign natural or legal persons or by foreign controlled domestic legal persons of land and associated resources (water, forest and energy) in a 50km-wide stretch of land along Peru's borders. Exceptions can be decided by a Supreme Decree, approved by the Council of Ministers, for cases of public necessity.[575]

500. Peru manages private and foreign participation in the arms industry through a licensing system under Decreto Legislativo nº757 and keeps some enterprises in sectors traditionally sensitive – such as defence, energy, telecoms, and transport – in State ownership.[576]

Poland

501. Poland manages acquisition- and ownership-related risk to its essential security interests through four mechanisms:

- An ownership cap in certain enterprises identified and listed under the Act on control of certain investments of 24 July 2015;[577]
- A review mechanism related to the acquisition by foreigners of real estate under the Act on the Acquisition of real estate by foreigners of 24 March 1920;
- Restrictions on the establishment and management of airports under the Aviation Law of 3 July 2002; and

574 A partial list of Paraguayan SOEs under the State oversight is available in World Bank (2014), "*Corporate Governance of State-Owned Enterprises in Latin America – Current Trends and Country Cases*", p.104.

575 There is limited public information on the practice with regard to these rules. It is however known that Peruvian authorities have declared investment in mining to be a public necessity (Supreme Decree n°011-2018-PCM of 25 January 2018) and have subsequently authorized a mining company with foreign shareholders to acquire mining rights within the 50km-wide border zone.

576 A non-exhaustive list of Peruvian SOEs is available in World Bank (2014), "*Corporate Governance of State-Owned Enterprises in Latin America – Current Trends and Country Cases*", p.164.

577 The Act of 24 July 2015 on Control of Certain Investments was announced in the Journal of Laws of the Republic of Poland on 31st August 2015 under item 1272 and entered into force on 1 October 2015. Since the initial adoption, several amendments were made Act, none of which changed its structural design and approach. An unofficial translation of the *initial* version of the act is available Poland's notification of the mechanism to the OECD DAF/INV/RD(2016)1 and DAF/INV/RD(2016)1/REV1. Poland provided further information to the OECD Freedom of Investment Roundtable in September 2016; this information is set out in DAF/INV/RD(2016)19.

- An ownership-related mechanism that subjects certain decisions of companies that own or manage an airport of regional or national importance to dissolve, divest, or transfer its registered office outside of Poland, likewise based on the Aviation Law of 3 July 2002.

502. The Act on control of certain investments of 2015 introduced caps applicable to any – including domestic – acquirers who obtains ownership or control over specified enterprises that are identified by the Council of Ministers as sensitive to Poland's essential security interest and identified in a regulation. In mid-May 2020, nine individual enterprises operating in the energy, mining, petrochemical and fertilizer sectors were included in the list[578]. The act establishes notification requirements, an assessment procedure, and sanctions for non-compliance with the obligations established by the Act.

503. Foreigners from outside the European Economic Area need to obtain prior approval for acquisitions of real estates under the Act on the Acquisition of real estate by foreigners of 24 March 1920 as amended. The permit can be denied if the Minister of Defence raises an objection to the acquisition with regard to threats to Poland's essential security interests (Article 1a(1) of the Act).

504. Under the Aviation Law of 3 July 2002, the establishment of airports (Article 55) or acquisition of a company that establishes or manages an airport (Article 64 and 64a) requires a prior permission, which may only be obtained by legal persons established in the European Economic Area or natural persons resident in this area. The permission may be refused on the ground that it threatens Poland's essential security interests.

505. The Aviation Law of 3 July 2002 (Article 64b) also establishes the possibility for the Transport Minister to render ineffective certain major business decisions of the management or owners of airports or regional or national importance – individually identified in a list of companies – to safeguard Poland's essential security interests. The Minister may in particular suspend decisions to divest, change the business purpose of the enterprises, or transfer the headquarters abroad.

Portugal

506. Portugal manages risk to its essential security interests related to the acquisition or ownership of certain assets through a cross-sectoral screening mechanism introduced in 2014.[579] The mechanism was introduced after rules on the privatisation of assets set in Lei 11/90 had been amended by Lei 50/2011 and explicit safeguards for the national strategic interest were called for in the law.

507. The mechanism, contained in Lei n°9/2014 of 24 February 2014 and the related Decreto-Lei nº138/2014 of 15 September 2014, addresses threats associated with the acquisition of any form of control over a Portuguese strategic asset by investors from outside the European Economic Area. "Strategic assets" for the purpose of the law include main infrastructures and assets assigned to defence and national security or to the supply of essential services in the areas of energy, transports, and communications.

508. There is no standing institutional arrangement for the reviews and no prior authorisation requirement. The respective ministry associated with the asset is responsible for the review, which

578 The list of enterprises as of 1 January 2020 is available in the *Decree of the Council of Ministers of 23 December 2019 on the list of protected entities and their competent control authorities*.

579 This mechanism was notified to the OECD as DAF/INV/RD(2019)7. An unofficial translation of the law and the decree-law into English as of the time of the notification is available in the notification.

has to be initiated within 30 days of the operation becoming publicly known or taking place, whichever happens last.

Romania

509. Romania operates two distinct mechanisms to protect its essential security interests against acquisition- and ownership-related threats.

510. Since 2011, it operates a review mechanism attached to and built on top of Romania's merger control regime for competition purposes under the Competition Law, Article 46(9). Established by Law 149/2011, the mechanism can only be activated in merger cases through a communication to the Supreme Council for National Defence (CSAT). CSAT has set out sectors in which mergers could trigger such risks.[580]

511. In February 2020, Romania established a second, self-standing mechanism for the petroleum sector that is explicitly motivated by essential security concerns. The mechanism, enshrined in the Emergency Order No 27 of 4 February 2020 requires an administrative authorisation for transactions that would result in the transfer of concession rights in the oil sector to foreigners.

512. Finally, Romania keeps a significant range of assets, especially enterprises operating in the infrastructure sectors, in State-ownership, thus potentially substituting policies that would otherwise have covered these enterprises to address potential risk resulting from acquisition- or ownership of these assets. At the end of 2013, around 1,400 central-government or local government-owned enterprises of various sizes existed in Romania.[581] Some of these enterprises are under a regime of permanently assured State ownership under the Emergency Order 109/2011 on the corporate governance of public enterprises.

Russian Federation

513. The Russian Federation manages acquisition- and ownership-related risk to its essential security interests through a review mechanism under the Federal Law No.57-FZ on "Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security", as amended, which was initially established in 2008 and is administered by the Government Commission for Control over Foreign Investments; the Commission's decision is prepared by the Federal Antimonopoly Service (FAS). In addition, the Russian Federation operates several other instruments to manage such risk associated with certain investment in specific sectors or locations.

514. The mechanism established by Federal Law No.57-FZ is composed of several components: It requires prior approval of transactions that lead to foreign control of an enterprise in strategic areas – 47 such areas exist as of mid-May 2020[582] –, the acquisition of certain property of such enterprises, or an acquisition of stakes in any enterprise beyond the strategic areas upon a government decision; and prohibits acquisitions in certain enterprises beyond 25%-stakes by

580 Supreme Council for National Defence Decision, 27 September 2012. More details about the process are available in OECD (2014), "Competition Law and Policy in Romania: A Peer Review", p.39.

581 Helena MARREZ (2015), "*The role of state-owned enterprises in Romania*", ECFIN Country Focus, European Commission, Vol 12, No.1, 2015, p.2.

582 The areas include activities related to natural resources, defence, media, broadcasting, extraction of water, and publishing, among others.

foreign government investors and by investors that do not reveal their beneficial owner. Several decrees and implementation notices supplement the law.

515. Since its enactment in 2008, the mechanism established under Federal Law No.57-FZ has been amended several times, both regarding its sectoral scope[583] and the scope and concept of persons and entities whose acquisitions are limited or subject to control under the law.[584]

516. In addition to this mechanism, foreign ownership restrictions exist in several areas. While the legislation does not determine for certainty the reasons for these restrictions, some of them may be motivated by concerns about essential security interests. The restrictions include:

- A prohibition established under the Federal Law N°136-FZ of 2001 – "Land Code", Article 15(3), for foreigners to acquire land near international borders, in sea ports and in certain territories specified by and stipulated by an order of the President of the Russian Federation;
- A control mechanism for foreign investment in Law on "Closed Administrative-Territorial Zones", established under the Law on Closed Administrative-Territorial Zones (No. 3297-1 as amended in 2018). The location and extent of these zones are designated by the President and are a State-secret; they accommodate industrial facilities for the development, production, storage and disposal of weapons of mass destruction, processing of radioactive and other materials, military or other sites that have a special security regime. Foreign or stateless persons and foreign organisations, foreign non-profit non-governmental organisations or their branches, as well as international organisations may not be established or operate in these zones. Enterprises with foreign capital may be established in closed zones but are subject to special requirements set out in the Government act on Registration and Activity of Entities with Foreign Investments on the Territory of Closed Administrative-Territorial Unit (No. 302 as amended in 2019).
- Foreign capital participation in an aviation entity may only be allowed up to 49% of the aviation entity's authorised capital;[585]

583 Changes have repeatedly modified the lists of strategic activities. For example, the Amendments to the Federal Law on "Procedures of Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security", introduced specific exclusions from the list of strategic activities, particularly in relation to cryptographic operations of banks in December 2011; in February 2014, reforms introduced security assessment and surveillance of infrastructure and means of transportation to the list of strategic activities, followed by further additions effective as of 6 December 2014.

584 Reforms passed in 2017 – in Federal Law N°155-FZ of July 2017 "On Amendments to Article 5 of the Federal Law on Privatisation of State and Municipal Property and to the Federal Law On Procedures for Foreign Investment in Business Entities of Strategic Importance for National Defence and State Security" and Federal Law N°165-FZ of 18 July 2017, "On Amendments to Article 6 of the Federal Law on Foreign Investment in the Russian Federation and to the Federal Law On the Procedure for Foreign Investment in Business Entities of Strategic Importance for National Defence and State Security", the concept of "offshore investors", which describes the entities typified as carrying risk and hence being subject to the policies under the mechanism was broadened to include foreign States or international organization – or entities controlled by them. Federal Law N°122-FZ of 31 May 2018 "On Amendments to Certain Legislative Acts of the Russian Federation regarding the clarification of the concept 'foreign investor'" which became effective on 12 June 2018, replaced this framing and replaces it by entities that refuse to reveal controlling persons, and beneficial owners. Simultaneously, Russian citizens who also have another nationality and entities controlled by Russian citizens were removed from the scope of investors for the purpose of the mechanism.

585 Aviation Code of the Russian Federation No 60-FZ, Article 61.

- Electronic trading platforms for the procurement of goods and services for state and municipal entities may be foreign owned only up to 25%;[586] and
- Foreign natural persons or legal persons with foreign participation may not be involved in television broadcasting entities, unless allowed under an international agreement, and may not have any form of control over such entities.[587]

Saudi Arabia

517. Saudi Arabia manages acquisition- and ownership-related risks to its essential security interests through prohibitions of foreign participation in several sectors of its economy. The closed sectors are set out in a "negative list" under the Foreign Investment Law of the Kingdom of Saudi Arabia of 2000.[588] Under the law, non-Saudi nationals and legal entities that are not entirely owned by Saudi nationals are excluded from any ownership in companies operating in these sectors. The sector list can be amended by the Board of Directors of the Saudi Arabia General Investment Authority (SAGIA) and the Supreme Economic Council.

518. The Foreign Investment Law itself does not reveal the motivation for excluding foreign participation in these sectors, but some of the listed sectors are typically associated with essential security interests, such as manufacturing explosives, defence equipment, and security-related activities.[589]

519. In many other sectors of the Saudi economy, licensing procedures exist which give the authorities means to manage risk that is managed by acquisition- and ownership-related mechanisms in many other economies.[590] In addition, Saudi Arabia keeps parts of its economy in sectors traditionally sensitive – such as infrastructure, energy, telecoms, and transport – in State ownership.[591]

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586 Federal Law No.44-FZ of 5 April 2013 "On the Contract System for State and Municipal Procurement of Goods, Work, and Services", Article 3.

587 Federal Law No.2124-1 of 27 December 1991 "On Mass Media", Article 19.1.

588 The SAGIA "*Services Manual*", 7th Edition (January 2019), Annex 1, contains a current English-language translation of the negative list.

589 A reform of the Foreign Investment Law of the Kingdom of Saudi Arabia of 2000 was under consideration in 2019, as suggested by a public consultation on a proposed replacement of the law that was ongoing in mid-2019. The proposed new text, in article 4, sets the negative list on a new footing insofar as it is explicitly motivated by the need to protect non-competitive domestic companies; concerns about essential security concerns are addressed through a carve-out in article 17 and subject to rules in separate legislation.

590 The SAGIA "*Services Manual*", 7th Edition (January 2019) provides more information on the licensing procedures.

591 OECD (2013), "*State-Owned Enterprises in the Middle East and North Africa: Engines of Development and Competitiveness?*", p.118.

Singapore

520. Singapore has several mechanisms in place to manage risks for essential security interests related to acquisition or ownership of certain assets.[592]

521. Since 2006, a review mechanism under the Electricity Act applies to acquisitions and ownership positions in licensed electricity providers to safeguard security of supply as well as the public interest.[593] The mechanism is nationality-neutral and requires companies or investors to seek approval for ownership-changes that lead to equity interest holdings beyond certain thresholds. The approval may be revoked at any time, and conditions may be imposed.

522. Singapore has further mechanisms for media companies under the Singapore Newspaper and Printing Presses Act and the Singapore Broadcasting Authority Act that refer to the "national interest".[594]

523. Since 2005,[595] a sector-specific mechanisms for the telecommunications sector allows the Minister, under the Telecommunications Act, Section 69B, to issue written orders to any person – regardless of nationality – who has acquired assets or business of a telecommunication licensee if this ownership position is not in the national interest.

524. In addition, under powers established by the Companies Act, Singaporean authorities may refuse to register a company or order a company to be wound up for national security considerations (Sections 20(2)(b)[596], 360(2)(b) and 254(1)(m)).[597] The mechanism thus combines aspects of control over the establishment of an enterprise – rather than acquisition of existing enterprises – as well as control to end certain economic activities through applications to the Court to wind up an enterprise, to manage ownership-related risk.

525. Further, Singapore's merger regime under the Competition Act, specifically Sections 57(3), 58(3) and 68(3), allows a merger to proceed despite it being deemed detrimental to competition, based on public policy considerations. This mechanism was introduced in 2007[598] and somewhat mirrors public interest considerations observed in other countries' legislation where it can either

592 Beyond the mechanisms mentioned here, Singapore also employs contractual levers in other sectors to protect Singapore's interests, e.g., defence procurement contracts require vendors to seek approval for changes in board representations or ownership.

593 The mechanism was established by the Electricity (Amendment) Act 2006 and is contained in article 30B. (Control of acquisition of equity interest in designated electricity licensee, etc.) of the Electricity Act. An amendment to its functioning was introduced in 2018 through the Electricity (Amendment) Act 2018.

594 Both mechanisms had initially ownership caps that applied independent of nationality (Singapore Newspaper and Printing Presses Act (1975) and Singapore Broadcasting Authority Act (1994)); both mechanisms were reformed simultaneously and in a similar manner in 2002.

595 The mechanisms was introduced through the Telecommunications (Amendment) Act 2005 and was amended with effect from early 2012.

596 For a similar mechanisms in Malaysia see the section on Malaysia above.

597 The provisions were not included in the Act as initially passed as Act 42 of 1967; it appears – from Sara ZWART (1987), "*A Favorable Climate for Foreign Investment in Singapore: Recent Changes in the Companies Act Hold Directors to Strict Standards of Accountability*", The International Lawyer 1987, p.367 – that they were first introduced with the Companies (Amendment) Act 1984 (Act 15 of 1984).

598 The mechanisms was introduced as part of the Competition (Amendment) Act 2007 (No.23 of 2007).

be used to allow for anti-competitive mergers or to prohibit mergers that do not harm competition based on those considerations.[599] In the first ten years of the mechanism's existence, no use had been made of the mechanisms in relation to essential security interests.[600]

Slovak Republic

526. As of mid-May 2020, the Slovak Republic did not have a dedicated mechanism in place to manage acquisition- and ownership-related risk to its essential security interests. The Slovak government had however taken several initiatives to change this situation recently: Legislation to establish a screening mechanism was being prepared in late-2019, and the government has reportedly announced its intention to make greater use of State-ownership and -control to address potential future risks in strategic industries, in particular energy. The Slovak Republic already owns controlling stakes in a number of companies, especially in the energy and energy infrastructure sectors.[601]

Slovenia

527. As of mid-May 2020, Slovenia did not have dedicated mechanism in place to manage acquisition- or ownership-related risks to its essential security interests.

528. State control over parts of Slovenia's economy attenuate the implications of this situation; Slovenia has one of the highest levels of State ownership in Europe,[602] and the country's essential security interests are a stated purpose of these holdings.[603] In companies that are categorised as strategic – in sectors including infrastructure and energy, among others – Slovenia holds stakes of at least 50% plus one vote.[604]

South Africa

529. South Africa has established a mechanism to manage risks to its essential security interests associated with the acquisition of certain enterprises in March 2019. The rules were incorporated in the Competition Act No.89 of 1998 through the Competition Amendment Act 2018[605] and had not entered into force by mid-May 2020, not least pending the adoption of implementing rules.

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599 For a similar mechanism in Sweden see the section on Sweden below.

600 "*Public Interest to Considerations in Merger Control – Note by Singapore*", (2016), issued as DAF/COMP/WP3/WD(2016)27, p.2.

601 Slovakia holds a 34% stake in the biggest electricity utility *Slovenske Elektrarne*, 51% stakes in gas transit company *SPP distribúcia* and in three regional suppliers and distributors (*ZSE*, *SSE*, *VSEH*). Slovakia also fully owns transmission system operator *Slovenská elektrizačná prenosová sústava*, and *Slovenský plynárenský priemysel*, the country's biggest gas supplier.

602 European Commission, State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context, 2016.

603 Sovereign Holding Act (Official Gazette RS, No. 25/2014), Article 11. Slovenian Sovereign Holding, "*Annual Asset Management Plan for 2019*", November 2018, p.18.

604 Sovereign Holding Act (Official Gazette RS, No. 25/2014), Articles 11 and 14.

605 Competition Amendment Act, 2018, Act No. 18 of 2018, Government Gazette Vol. 644, 14 February 2019, No.175. The mechanism, set out in Article 14 of the Competition Amendment Act, would insert a new Article 18A into the Competition Act.

530. The mechanism is institutionally and materially unrelated to merger reviews for competition purposes, despite its legislative basis in the Competition Act.

531. Once into force, the rules would allow a Committee appointed by the President to assess whether the acquisition of an enterprise would jeopardise essential security interests from among interests specified in a yet-to-be published list. The law also mandates the issuing of regulations that will govern access to information, including confidential information, and the process, procedures, and timeframes associated with the review. Decisions under the review mechanism will be made publicly available.

532. South Africa owns and controls a series of enterprises that operate in areas traditionally considered sensitive for essential security interests. In particular, in addition to transport and energy companies, South Africa is the sole owner of the largest defense manufacturer in the country.[606]

Spain

533. As of mid-May 2020, Spain operated six distinct acquisition- and ownership-related mechanisms to safeguard its essential security interests. These include two cross-sectoral mechanisms rooted in two different policy areas, as well as and four sector specific mechanisms, which are all based on distinct legal sources.

534. The two cross sectoral review mechanisms operate as follows:

- One mechanism, introduced in 1999 and based on the Real Decreto 664/1999 – Sobre inversiones exteriores of 23 April 1999, establishes the possibility to review and, if necessary, prohibit acquisitions of any asset by non-residents when these threaten the country's essential security interests. From 8 March 2020, a new instrument (Real Decreto-Ley 8/2020, Disposición Final Cuarta) has extended the requirement to obtain prior approval to the transactions taking place in sectors based on the Regulation establishing a framework for the screening of FDI into the EU. It also addresses a number of situations of potential risk associated to the acquirer of the asset. Finally, an additional instrument (Real Decreto-Ley 11/2020, Disposición Transitoria Segunda y Disposición Final Tercera) clarifies some aspects of the Decree and sets the conditions for the transitional period until a new regulation, expected to become effective around mid-2020, replaces the mechanism as established by Real Decreto 664/1999.
- Since the entry into effect of the Ley 15/2007 – de Defensa de la competencia of 4 July 2007, a further mechanisms is available. Based on Spain's merger review regime for competition purposes, it opens the possibility that the Council of Minister prohibit a merger based on general interest reasons, which include, according to Ley 15/2007, Article 10, public security and public order.

535. In addition to these mechanisms, four sector-specific mechanisms are in place to manage risk for Spain's essential security interests resulting from acquisitions or ownership positions in specific sectors:

- A mechanisms to manage risk related to acquisition- or ownership of real estate in sensitive areas, established in 1975 under Ley 8/1975 de zonas e instalaciones de interés para la Defensa Nacional and the related Real Decreto 698/1978, 10 February 1978;
- A mechanisms related to operations in the mining sector that are carried out by foreign States, established in 1986 by the Real Decreto Legislativo 1303/1986 of 28 June 1986, Article 90;

606 The Department of Public Enterprises oversees some of these enterprises.

- A mechanism for the defence sector, established in 1981 and updated in 1993 by the Real Decreto 137/1993, and the Real Decreto 664/1999, Article 11; and
- A mechanism specific to the energy sector, established in 2013 under the Law of 5 June 2013, Article 7.

Sweden

536. As of mid-May 2020, Sweden did not have dedicated acquisition- and ownership-related mechanisms to safeguard its essential security interests. Sweden did have such mechanisms in the past – for the acquisition, ownership or management of a property near strategic sites by foreigners,[607] and in relation to foreign acquisitions in the defence industry[608] – but abolished both regimes in 1992. A review mechanism may however be introduced in the near future: On 3 March 2020, an interim report on options to implement the new EU regulation on investment screening in Sweden and potential designs of an investment screening mechanism was issued.[609]

537. Sweden has an almost unique provision related to the acquisition of assets and implications for essential security interests under its merger review regime under the Competition Act. Under its provisions – specifically Chapter 4 Section 1 –, a merger that increases concentration may be allowed *despite* its negative effect on competition if it allows to achieve objectives of national security or supply interests.[610] No supplementary rules or information on practice in this regard are available.

538. Somewhat against current trends, the Säkerhetsskyddslagen (2018:585) (Protective Security Act),[611] which entered into effect on 1 April 2019, does not contain elements of acquisition- and ownership-related mechanisms. In November 2018 a government committee had proposed[612] the introduction of preventive measures in connection with transfers of ownership of security-sensitive activities and property of importance for Sweden's security.

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607 Until December 1992, Sweden had rules in place that regulated foreign acquisition, ownership or management of property near strategic sites under the Lag (1982:618) om utländska förvärv av fast egendom m.m. (Act on the Right to Ownership of Foreign Property), in particular its section 8, which empowered the Swedish authorities to prohibit acquisitions when these were contrary to the country's defence or security interests.

608 Likewise until end-1992, acquisitions of companies operating in the defence industry were subject to restrictions. These rules were replaced by the provisions of the Lagen om krigsmateriel (1992: 1300) (Military Material Act), in force since the beginning of 1993, which operate through licences in the sector; the licenses may be accompanied by conditions relating to foreign ownership, nationality of management and domicile.

609 "*Mikael Damberg and Anna Hallberg received interim report on inquiry into foreign direct investment*", Swedish government media release, 6 March 2020. The report had been mandated on 22 August 2019 "*Ett system för granskning av utländska direktinvesteringar inom skyddsvärda områden*", and a final report is due by November 2021.

610 For a similar mechanism in effect in Singapore see the section on Singapore above.

611 The Säkerhertsskyddsförordningen (2018:658) (Protective Security Ordinance) complements the Act.

612 Swedish Government (2018), "*Supplements to the new Security Protection Act*", Report on the Inquiry on certain security protection issues.

Switzerland

539. As of mid-May 2020, Switzerland did not have a dedicated mechanism in place to safeguarding its essential security interests associated with the acquisition or ownership of certain assets. In early 2019, the Swiss government reaffirmed its assessment that there was currently no need for such policies, given that sufficient other mechanisms were in place to address potential threats.[613]

540. Nonetheless, a number of parliamentary initiatives had been taken since 2016 to call for an explicit acquisition- or ownership-related mechanism. [614] In March 2020, the two houses of the Federal Assembly adopted a motion to establish a mechanism that would allow control over foreign direct investments in Swiss companies through an authority responsible for monitoring and approving transactions.[615] By mid-May 2020, this motion had not led to publicly documented legislative or regulatory action.

541. While ownership restrictions for foreigners do exist in Switzerland for instance in relation to real estate, these restrictions are explicitly based on other grounds than safeguarding Switzerland's essential security interests. Rules on acquisitions of real estate by foreigners for instance, explicitly seek to avoid "too much" foreign ownership of the home soil.[616]

542. Switzerland retains certain assets, especially infrastructure assets and related companies, in State-ownership, thus eliminating the need for acquisition- and ownership controls in these areas.

Thailand

543. As of mid-May 2020, Thailand did not have a dedicated acquisition- or ownership-related mechanism to safeguard its essential security interests. Rather, Thailand addresses such risk through licensing arrangements in sectors in which other countries would typically apply acquisition- and ownership-related mechanisms to safeguard their security interests.

544. Under the Thai mechanism, set out in the Foreign Business Act B.E. 2542 (1999), only majority-Thai-owned businesses may obtain licenses to manufacture, distribute or maintain firearms, ammunition and defence material or to operate domestic transportation by land, water or air. The prohibition to license foreign-majority-owned businesses in these sectors is explicitly based on essential security ground and listed as "Businesses concerning national safety and security" in List Two, Chapter 1 of the law. United States investors are exempted from many of these restrictions due to a preferential treatment based on the *Treaty of Amity and Economic Relations between the United States of America and the Kingdom of Thailand* (1966).

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613 "*Federal Council decides against investment controls for time being, but supports monitoring procedure*", media release, State Secretariat for Economic Affairs, 13 February 2019. The full report is available as Conseil fédéral (2019), "*Investissements transfrontaliers et contrôles des investissements*".

614 Earlier initiatives are listed in Daniel DAENIKER (2018), "*Qualcomm v. Broadcom*", Zeitschrift für Gesellschafts- und Kapitalmarktrecht 3/2018, p.371 (376); the three most recent initiatives brought in the Federal Parliament in 2018 are documented in Schweizer Bundesrat (2019), "*Grenzüberschreitende Investitionen und Investitionskontrollen*".

615 Motion 18.3021, Protéger l'économie suisse en contrôlant les investissements, 3 March 2020.

616 Bundesgesetz über den Erwerb von Grundstücken durch Personen im Ausland, Art.1.

Tunisia

545. Tunisia manages risks to its essential security interests associated with acquisition or ownership of certain assets through an authorisation requirement for investment in specifically identified sectors. These sectors are set out in Government Decree N°417 of 11 May 2018. The decree is based on Tunisia's Investment Law 2016, Article 4, which explicitly justifies the imposition of an authorisation requirement with essential security interests. The sectors in which authorisations are required include: transport by land, sea and air; banking and insurance; certain dangerous or polluting industries; health; education; and telecommunications.

546. Tunisia also keeps certain assets, for example in the energy sector, in State ownership, thus eliminating the need for acquisition- and ownership controls in these areas.[617]

Turkey

547. Turkey has had an acquisition- and ownership-related mechanism to manage risks to its essential security interests since at least 1982. The mechanism, established by Kanun N°2565, allows Turkish authorities to review acquisitions by foreigners of real estate located near military or civilian security zones. The legislation distinguishes two types of zones: higher risk "military prohibited zones" and lower risk "security zones", to which different sets of rules apply.

548. Turkey also has a "golden share" arrangement in place for *Türk Telekom*, a private entity in which Turkey holds a minority stake. The explicit purpose of the special share, which is managed by the Ministry of Treasury and Finance, is to protect Turkey's national interests relating to national security.[618] The arrangement was established in 2001 by Kanun N°4673.

Ukraine

549. Ukraine manages acquisition- and ownership-related threats to its essential security interests through a prohibition of acquisition or ownership of participations in television and radio broadcasting or related services. As of mid-May 2020, individuals from the "aggressor-State", based on the Law of Ukraine on Television and Radio Broadcasting No. 3759-XII of December 1993, Article 12.3 were prohibited from holding interests in enterprises in these services.[619] The prohibition applies to legal entities and residents of the "aggressor-State", as well Ukrainian legal entities whose shareholders or ultimate beneficiaries are residents of the "aggressor-State".[620] A

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617 OECD (2013), "*State-Owned Enterprises in the Middle East and North Africa: Engines of Development and Competitiveness?*", p.119.

618 Articles of Association of *Türk Telekom*, Article 6, cited after *Türk Telekom*, "*Interim activity report as of 30.06.2018*", July 2018, p.3.

619 An "aggressor-State" is a State that undertook an armed aggression against Ukraine and occupied a part of Ukrainian territory. In January 2015, the Ukrainian Parliament identified the Russian Federation as an aggressor-state (Parliamentary Resolution No. 129-XIX adopted on 27 January 2015).

620 The mechanism corresponds to the objective to "prevent the penetration of capital from the "aggressor-State" in strategic sectors of the economy" as expressed in the National Security of Ukraine Strategy, Article 7 as approved by Presidential Decree 287-2015, in May 2015.

broader prohibition for any foreign interest in this sector existed in the same law in article 12.2 until 1 October 2015.[621]

550. Ukraine used to have a further sectoral prohibition for foreign investment in the manufacturing of weapons and in space facilities, based on the Law of Ukraine "On Property" (697-12) and a related Parliament Resolution No. 35/1992 on the property right of specific items, adopted in June 1992.[622] The current status of this mechanism is uncertain, as the Law of Ukraine "On Property" (697-12) was abrogated in 2007 without an immediately identifiable successor legislation.[623] It would appear that the Parliament Resolution No. 35/1992 on the property right of specific items remains in effect regardless.[624]

551. On 6 May 2020, the Ministry of the Economy of Ukraine issued a draft bill for public consultation[625] that would, if adopted, add a requirement to obtain the prior approval from the *Commission for the Assessment of the Impact of Foreign Investments on the National Security of Ukraine* in the context of a merger review that affects one of the estimated 400 Ukrainian enterprises of strategic importance.[626] The change would remedy, according to the information provided in the context of the consultation, the current absence of a review mechanism for the purpose of safeguarding Ukraine's essential security interests,[627] and would fill the perceived gap left after the registration system for foreign investment had been abolished in 2016.[628]

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621 The modification was introduced by the Law Amending Some Laws of Ukraine on Ensuring Transparency of Media Ownership and Implementation of State Policies in Television and Radio Broadcasting of 3 September 2015 and became effective on 1 October 2015.

622 The sectors in which foreign participation is prohibited are listed in its Appendix 1.

623 Law "*On Amendments and Recognition of Some Legislative Acts of Ukraine in connection with the Adoption of the Civil Code of Ukraine*", Section III.

624 The Ukrainian authorities reported the mechanism for transparency under the National Treatment instrument when the Ukraine adhered to the OECD Declaration on International Investment and Multinational Enterprises in 2017.

625 *Draft Law of Ukraine "On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for the National Security of Ukraine"*, Ministry for the Development of the Economy, Trade and Agriculture website, 6 May 2020. The draft law was developed in response to the Decision of the National Security and Defense Council of Ukraine of 18 February 2020, paragraph 2, on key indicators of the state defense order for 2020 and 2021, 2022, enacted by Presidential Decree of 27 February 2020 № 59/2020.

626 Estimate provided in *Analysis of regulatory impact on the draft Law of Ukraine "On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for the National Security of Ukraine"*, Ministry for the Development of the Economy, Trade and Agriculture website, 6 May 2020.

627 *Explanatory note to the draft Law of Ukraine "On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for the National Security of Ukraine"*, Ministry for the Development of the Economy, Trade and Agriculture website, 6 May 2020.

628 Rationale set out in *Analysis of regulatory impact on the draft Law of Ukraine "On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for the National Security of Ukraine"*, Ministry for the Development of the Economy, Trade and Agriculture website, 6 May 2020. Until the abolition of the mechanism in mid-2016 with the entry into force of the Law № 1390-VIII "On Amendments to Certain Legislative Acts of Ukraine to Abolish State Registration foreign investment", the registration mechanism was contained in the Law "On the Foreign Investment Regime" and the associated procedure for state registration of foreign investments and its cancellation, approved by the Cabinet of Ministers of Ukraine on 6 March 2013 №139.

United Kingdom

552. The United Kingdom has two mechanisms at its disposal to manage threats to its essential security interests associated with the acquisition or ownership of assets:

- A review mechanism that is integrated in its merger review regime established under the Enterprise Act 2002, which replaces and follows on from a broader public interest review mechanism established by the Fair Trading Act 1973;[629] and
- A mechanism under the Industry Act 1975, which allows the Government to prohibit the transfer of a manufacturing industry asset or acquire the assets itself if the planned transaction is deemed against the national interest.

553. Under the Enterprise Act 2002 an acquisition can be reviewed with respect to its impact on national security if at least one of two conditions is met: the *turnover* of the enterprise being acquired (the threshold turnover value depends on the sector in which the target enterprise operates); and the share of supply of goods and services in the United Kingdom or parts of the United Kingdom (if the acquisition either leads to a share of supply of or beyond 25% or if the enterprise under acquisition already has a share of supply at or beyond 25%).[630] Between its establishment in 2002 and mid-May 2020, the mechanism had been invoked 12 times on national security grounds, with a considerable upward trend recently: five out of the twelve occurrences happened in 2019.[631] None of the interventions on grounds of essential security interest have ever resulted in a blocking of a transaction, while acquirers have accepted undertakings to mitigate the identified security issues in at least some cases.[632]

554. Little is known about the mechanism established by the Industry Act 1975, in particular about its practical use.[633] No implementing guidelines seem to exist for the application of the

629 The Fair Trading Act 1973 contained a broad "public interest" review mechanisms in the context of merger reviews (Art.69 of the Act), with a broad and open-ended notion of "public interest". The Enterprise Act 2002, as explained in the Explanatory Notes released on 7 November 2002 by the Department of Trade and Industry (paragraph 91 and following), limited the application of the broader "public interest" test to defined public interest considerations, including in particular national security.

630 Changes in 2018, documented in the notification by the United Kingdom to the OECD in DAF/INV/RD(2018)7, have lowered the turnover value for certain sectors – development and production of military or dual-use goods, design and maintenance of computer hardware, and quantum computing – from GBP 70 million to GBP 1 million and have removed the previous requirement that the acquisition lead to an increase in share of supply.

631 This figure was reported in the Background briefing notes to the Queen's speech of 19 December 2019, p.105. Two months earlier, on 14 October , the figure stood at 10 (Background briefing notes to the Queen's speech of 14 October 2019, p.72), and at 7 two years earlier, in October 2017 (United Kingdom Government, "*National security and infrastructure investment review – The Government's review of the national security implications of foreign ownership or control*", October 2017.

632 "*National security and infrastructure investment review – The Government's review of the national security implications of foreign ownership or control*", October 2017, paragraph 21.

633 In an early OECD survey of the matter, the United Kingdom reported that "the powers could be applied for reasons of public order or essential security interest" but that they had never been used in practice, IME(80)10 (1st Revision) (November 1980), p.7.

broadly framed powers that the Act establishes. A government review of the national security implications of foreign ownership or control of 2017 describes the arrangement as "untested".[634]

555. These two mechanisms to manage acquisition- or ownership-related threats to the United Kingdom's essential security interests are complemented by special arrangements for around two dozen individual companies.[635] Some of these arrangements were introduced in the context of privatisations in earlier decades and include foreign ownership caps and special shares held by the United Kingdom government.[636] Golden share arrangements continue to be established: The United Kingdom government for instance holds a "golden share" in a nuclear power plant under construction and has announced its intention in 2016 to include such arrangements in all future nuclear new build projects. The use of golden shares was also discussed in the context of a recent planned takeover of a defence manufacturer.[637]

556. Recently, the United Kingdom Government signalled its intention to profoundly overhaul its mechanisms to manage acquisition- and ownership-related risk to its national security with the publication of a consultation on new legislation in July 2018.[638] While no specific legislation had been tabled by mid-May 2020, the Queen's speech of 19 December 2019 indicates the outline and key features of the envisaged mechanism. It suggests that an economy-wide notification system would replace the current rule of government initiative; and that it would include an anti-circumvention mechanism that would also cover the acquisition of intellectual property in lieu of the business holding this property.[639]

634 "*National security and infrastructure investment review – The Government's review of the national security implications of foreign ownership or control*", October 2017, p.26.

635 No permanent list of such arrangement appears to be made public. In between March and May 2003, for example, between 12 (House of Lords, Minutes of Evidence, 12 March 2003) and 25 (House of Commons Hansard, 22 May 2003) companies were reported to have such arrangements.

636 The Articles of Association of BAE Systems plc include a requirement that no foreign person, or foreign persons acting in concert, can have more than a 15% voting interest in the company, a provision that cannot be amended without the consent of the holder of the Special Share, the Secretary of State for Business, Innovation and Skills, according to the BAE company website. The Articles of Association of Rolls Royce plc – article 18 specifically – also establish a Special Share for the benefit of the United Kingdom government that allows it to block certain corporate changes. A similar arrangement is reportedly in place for a nuclear power plant under construction.

637 In 2018, it was suggested that this mechanism be used in relation to a planned acquisition of *GKN* by *Melrose* during discussions in the United Kingdom Parliament (House of Commons Hansard, 15 March 2018).

638 UK Department of Business, Energy and Industrial Strategy, *White Paper 'National Security and Investment: proposed legislative reforms'*, July 2018. This "white paper" follows on from a "green paper" ("*National Security and Infrastructure Investment Review – The Government's review of the national security implications of foreign ownership or control*", October 2017), that was used for a public consultation. The "white paper" summarises the outcome of the consultation and sets out the conclusions that have been drawn from the process. The two documents, together with the National Security and Investment, Draft Statutory Statement of Policy Intent, July 2018 set out in great detail the design of the system under the Enterprise Act and related legislation and the considerations for reform.

639 Background briefing notes to the Queen's speech of 19 December 2019, p.104. The description corresponds by and large to a similar announcement detailed in the Background briefing notes to the Queen's speech of 14 October 2019, p.71.

United States

557. The United States manages national security risk posed by foreign direct investment through the Committee on Foreign Investment in the United States (CFIUS). Established initially in 1975,[640] CFIUS is chaired by the U.S. Department of the Treasury and an interagency body that can review certain transactions within CFIUS jurisdiction.[641]

558. CFIUS has undergone several major reforms, most notably in 1992,[642] 2007,[643] and 2018.[644] The rules, set out in 50 USC § 4565 and in detailed implementation rules,[645] ultimately empower the President of the United States to prohibit (block) or force a divestiture (unwind) acquisitions of United States businesses and certain assets if they are deemed to threaten United States national security and fall within CFIUS jurisdiction. CFIUS carries out an analytically rigorous analysis on each transaction that comes before it. CFIUS, under its traditional "control" jurisdiction can clear a transaction with no mitigation, clear a transaction with mitigation, or issue a recommendation to the President to block or unwind a transaction.

559. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), a reform of 2018, has broadened jurisdiction, introduced mandatory filings for certain transactions, established jurisdiction, and introduced fees, among other changes. Regulations implementing these reforms became effective on 13 February 2020.[646] FIRRMA broadens CFIUS's jurisdiction over certain non-controlling investments into certain United States businesses involved in critical technology, critical infrastructure, or sensitive personal data. It also establishes CFIUS's jurisdiction over certain real estate transactions.

640 From James JACKSON (2019), "*The Committee on Foreign Investment in the United States (CFIUS)*", Congressional Research Service, RL33388, p.6 it appears that even before 1988, the United States government had and used means to prevent foreign acquisitions in certain cases; these interventions were not based on CFIUS rules, but relied on investigations carried out by CFIUS.

641 A detailed description of the legislative history of the rules on which CFIUS is based is available in James JACKSON (2019), "*The Committee on Foreign Investment in the United States (CFIUS)*", Congressional Research Service, RL33388.

642 The so-called "Byrd amendment" introduced the requirement that transactions in which a foreign government was involved be reviewed by CFIUS.

643 Foreign Investment and National Security Act of 2007 (FINSA); a consolidated version of the Defence Production Act (1950), § 721 is available from the Treasury website.

644 Foreign Investment Risk Review Modernization Act (FIRRMA), signed into law on 13 August 2018, as part of the National Defence Authorization Act 2018. This legislation reforms CFIUS by significantly expanding jurisdiction to non-controlling foreign investments and certain real property, and by mandating filings of certain covered transactions. Final regulations implementing FIRRMA – Provisions Pertaining to Certain Investments in the United States by Foreign Persons (31 C.F.R. part 800) and Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States (31 C.F.R. part 802) – came into effect on 13 February 2020.

645 Code of Federal Regulations, Title 31, chapter VIII, subtitle B, Part 800.

646 These include the Provisions Pertaining to Certain Investments in the United States by Foreign Persons and the Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States.

560. The new regulations exempt certain transactions by certain foreign persons based on their ties to countries identified as "excepted foreign states," and other conditions. Initially, Australia, Canada, and the United Kingdom have been designated as "excepted foreign states."[647]

561. In addition, two broadly framed mechanisms that *could* be employed to manage acquisition- and ownership-related risk are included in the International Emergency Economic Powers Act 1977 (IEEPA, 50 USC § 1701) and in the rules on Trading with the Enemy (50 USC § 4305) without having been used in the past decades in this context. These rules offer further mechanisms to intervene in investment transactions. Both rule-sets offer wide-ranging powers to the executive under certain conditions.

Uruguay

562. Uruguay manages acquisition- and ownership-related risk to its essential security interests in relation to certain acquisitions of agricultural land with the ultimate goal to preserve Uruguay's sovereignty over its natural resources. The mechanism, introduced in September 2014 through Ley n°19283 – Declaración de interes general la preservación y defensa de la plena soberanía del Estado Uruguayo en la relación con los recursos naturales y la tierra, restricts the acquisition of rural properties and agricultural exploitations by foreign States, sovereign funds, and corporations that have sovereign shareholders. Acquisitions executed in violation of these rules are void, but holdings that precede the entry into force of the rules remain valid.

563. Repeated initiatives, beginning at least in 1993,[648] to establish restrictions on foreign acquisitions of land in border areas to safeguard Uruguay's essential security interests had not born fruit by mid-May 2020.

564. Uruguay also keeps some enterprises in sectors traditionally sensitive – such as energy, telecommunications, and infrastructure (port administration) – in State ownership.[649]

European Union

The European Union introduced a mechanism to manage acquisition- and ownership-risk on grounds of security and public order on 11 April 2019. The rules, contained in the Regulation establishing a framework for the screening of FDI into the EU, maintain the management of such risk with Member States, but allow the European Commission and Member States to send requests for information and to express opinions and comments addressed to the Member State, in which the foreign direct investment is planned or has been completed; while the comments and opinions are not binding, the concerned Member State is obliged to take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed, when the opinion deals with a project or programme of Union interest.[650]

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647 CFIUS Excepted Foreign States.

648 Proyecto de ley de Tenencia de la Tierra – Carpeta n°493/91.

649 A partial list of Uruguayan SOEs under the State oversight is available in World Bank (2014), "*Corporate Governance of State-Owned Enterprises in Latin America – Current Trends and Country Cases*", p.134.

650 In a Communication published on March 2020, in the context of the COVID-19 pandemic, the European Commission stressed that a foreign acquisition, which is likely to affect projects or programmes of Union interest, will be subject to closer scrutiny by the Commission, and that specific "attention will be paid to all Horizon 2020 projects related to the health sector, including future projects in response to COVID 19 outbreak".