

Transparency, Predictability and Accountability for investment screening mechanisms

Research note by the OECD Secretariat



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Context and purpose of this document

1. International investment is widely seen as a condition for prosperity in home and host economies. With the opportunities that international investment brings come occasionally risks, specifically risks for host-economies' essential security interests.
2. Geopolitical and geo-economic changes in recent years – especially the emergence of new actors as foreign investors, a more assertive stance of some emerging economies, and new technological developments – have sharpened governments' awareness of these risks. In response, governments mainly of advanced and some transition economies have nuanced their stance of hitherto unconditional openness to international investment and have introduced or plan to introduce mechanisms to manage threats that may be associated with international investment.
3. International investment policy disciplines developed at the OECD since the 1960s recognise the legitimacy of policies to manage risks to essential security interests¹ and contain corresponding carve-outs to provide countries' with the necessary policy space to regulate in this area. OECD Members have agreed in 2009 on Guidelines for how policies that operate in these carve-outs should be designed: The 2009 [Guidelines for Recipient Country Investment Policies relating to National Security](#) (the 2009 Guidelines) crystallize agreement on good policy design in this area.
4. Policymakers in many countries take guidance and inspiration from these Guidelines when they adopt or reform policies designed to manage threats for their essential security interests. There is broad agreement that the Guidelines have stood the test of time well despite changes in the geopolitical and geo-economic environment since their adoption. To further understanding of the Guidelines, promote their implementation in the 38 OECD Member countries and offer an opportunity for exchange of experience in policy design and implementation, the OECD hosted an experts meeting on selected aspects of the Guidelines on 11 and 12 May 2021 in a virtual format. The webinar addressed recommendations of the Guidelines related to transparency, predictability and accountability as set out in elements 2 and 4.
5. The OECD Secretariat had prepared the present note on policy-practice and design in the relevant areas, to provide webinar attendees with information on practices in other countries. It is based on and develops information contained in the [OECD report on acquisition- and ownership-related policies to safeguard essential security interests](#) released in May 2020. Following its initial purpose, information is organised in correspondence with the [agenda of the webinar](#). A glossary of terms as used in this note is available the Annex. The information contained in this note is up to date as of 3 May 2021.
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¹ The OECD [Code of Liberalisation of Capital Movements](#) and the [Code of Liberalisation of Current Invisible Transactions](#), both adopted in 1961, contain carve-outs for public order and essential security interests in their Articles 3. The OECD [Declaration on International Investment and Multinational Enterprises](#) (1976) contains a similar provision with regard to National Treatment.

Current trends in investment screening policies in OECD countries

7. Investment policies related to essential security interests attracted little policy attention for many years. This changed markedly in about 2016, when governments in many OECD Member countries began to consider whether their essentially unconditional openness to foreign investment would make them vulnerable in an evolving geopolitical environment.² For the most part, policy attention has resulted in reforms or introduction of acquisition- and ownership-related policies to safeguard essential security interests, most often in the form of investment screening mechanisms. This type of policy allows governments to prohibit the implementation of certain foreign investment proposals, to require their unwinding, or to impose mitigation measures.

8. Other investment policies related to the protection of essential security interests, in particular licensing requirements, public procurement restrictions and similar measures, have so far attracted less attention in most countries. These types of measures are not considered for the purpose of this note.³

9. The following short sections offer a brief overview of: the dynamic of policymaking in recent years in OECD Members countries; the outcome of this policymaking in terms of rules; and the evolution of caseloads under these mechanisms in selected economies.

Policy-making activity remains strong

10. Recent years have witnessed a gradual and then steep increase in government attention to threats to essential security interests⁴ that occasionally comes with international investment. This trend, evidenced by unprecedented policy-making activity since around 2016, is fuelled by a series of overlaying factors. Changes in the geopolitical and geo-economic environment, the entry of new, in particular state-owned or -controlled enterprises as international investors,⁵ technological changes and evolving investment patterns have contributed to the rising concerns. Most recently, undervaluation of potential acquisition targets resulting from economic disruption in the COVID-19 context and proposed foreign acquisitions in the health sector have further contributed to accelerating

² See for a broader analysis of the drivers of this trend OECD (2020), "[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)".

³ Information on these types of measures is less readily available at this time. The OECD Secretariat has begun research into these types of policy measures and plans to provide an up-to-date report later in 2021 or early 2022.

⁴ The Guidelines refer to "national security" rather than "essential security". The term "essential security" chosen here follows the language used in many other international investment instruments, in particular the OECD [Codes of Liberalisation](#) and the National Treatment instrument associated with the OECD [Declaration on International Investment and Multinational Enterprises](#). No position is taken as to the differences between these concepts.

⁵ See on this trend and some implications OECD (2016), "[State-Owned Enterprises as Global Competitors – A Challenge or an Opportunity?](#)"

the introduction of new or reform of existing policies to safeguard countries' essential security interests.⁶

11. This policy context led to an unprecedented level of policy-making activity in this area. In 2020 alone, 12 OECD Members introduced new acquisition- and ownership-related policies and 15 Members carried out reforms of existing mechanisms.

12. The most recent data suggests that the attention to this area of investment policy making will remain strong at least in the medium term: The accelerated upward trend observed in 2020 has shown to be independent of concerns associated with the COVID-19 pandemic and its economic fallout,⁷ and further EU Members are considering the introduction of investment screening policies in light of the [Regulation establishing a framework for the screening of FDI into the EU](#).

13. In the first four months of 2021 alone, four OECD Members ([Czech Republic](#),⁸ [Slovakia](#), [Sweden](#) and [United Kingdom](#)⁹) had adopted or brought into effect new acquisition- and ownership-related policies to safeguard their essential security interests.¹⁰ Further countries, especially in Europe ([Belgium](#), [Denmark](#), [Estonia](#), [Ireland](#), [Netherlands](#), [Slovakia](#), [Sweden](#), and [Switzerland](#)), and, outside Europe, [Chile](#) were considering the introduction of acquisition- and ownership-related policies to safeguard essential security interests in early 2021 (Figure 1).

⁶ OECD (2020), "[Inventory of investment measures taken between 16 September 2019 and 15 October 2020](#)" and OECD (2020), "[Investment screening in times of COVID-19 and beyond](#)".

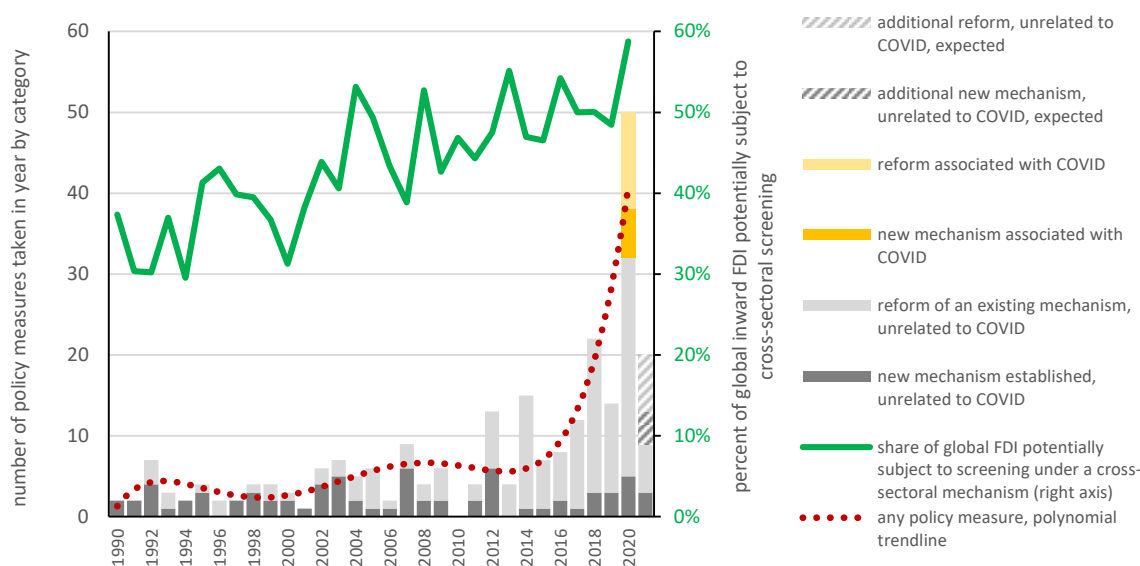
⁷ OECD (2021), "[Investment policy developments in 62 economies between 16 October 2020 and 15 March 2021](#)", p.8.

⁸ The new mechanism has entered in effect as scheduled on 1 May 2021.

⁹ The [National Security and Investment Bill received Royal Assent on 29 April 2021](#).

¹⁰ Non-Members have also taken measures, but these are not referenced in this note as it focuses on OECD Members alone. Reports referred to in footnotes 2, 6 and 7 contain information on recent trends in a broader set of 62 economies. This broader set of countries is occasionally included in aggregate data to document the broader context and developments.

Figure 1. Introduction and reform of acquisition- and ownership-related policies to safeguard essential security interests (1990 to early May 2021)

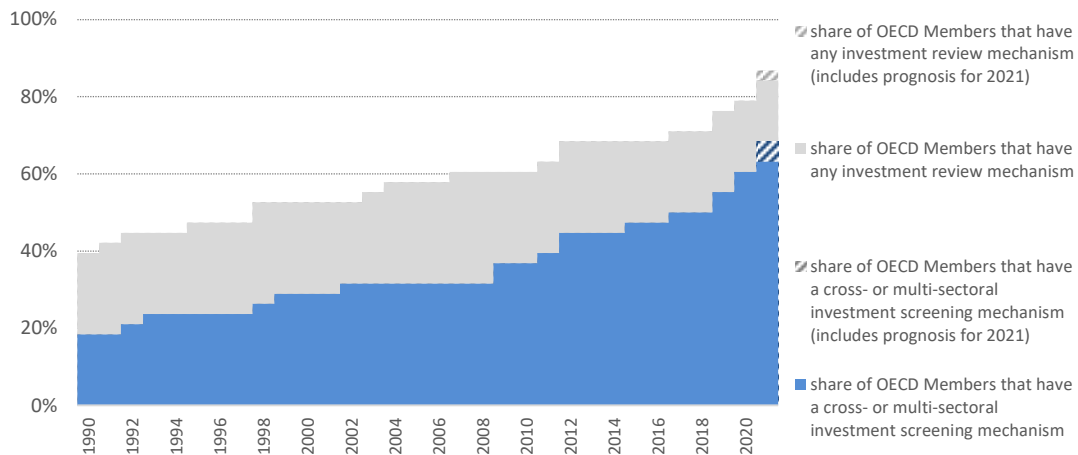


Note: Data cover the 62 economies that participate in the OECD-hosted Freedom of Investment Roundtable and reflect information as of 3 May 2021. A new mechanism or reform is “associated with COVID-19” if the government has explicitly justified its introduction, at least in part, with the pandemic or its fallout. Projections by the OECD Secretariat are based on public government statements. FDI flow data for 2020 are preliminary. *Source:* OECD.

14. Unlike in earlier years, when a limited number of countries were reforming and refining their existing policies, the most recent period has seen the adoption of new investment screening mechanisms in countries that had no such policies at all in the recent past or that only had policies that covered a very narrow part of their economy. These countries include the [Czech Republic](#), [Slovakia](#) and [Sweden](#), and other countries in this situation that consider introducing such policies include [Belgium](#), [Denmark](#), [Estonia](#), [Ireland](#), [Switzerland](#) and [Chile](#).

15. The introduction of entirely new mechanisms in countries that had not had such mechanisms in the recent past will further increase substantially the share of OECD Members that have such mechanisms to at least 87% of Member countries, up from 79% at the end of 2020 and from only just over 60% a decade ago (Figure 2).

Figure 2. Share of OECD Members that have investment review mechanisms with narrow or broad scopes (1990-2021)



Note: Considers countries in which certain mechanisms are in force in given year, and, for 2021 are in force up to 3 May 2021. Planned measures that are expected to come into force in 2021 are shown separately.
Source: OECD.

16. Attention to this area of investment policy also found an expression in a significant number of implemented or ongoing reforms of existing mechanisms. For example [Australia](#), [Germany](#), and [Italy](#) introduced changes to their existing mechanisms in 2021, and reforms of existing policies were under preparation in [New Zealand](#).

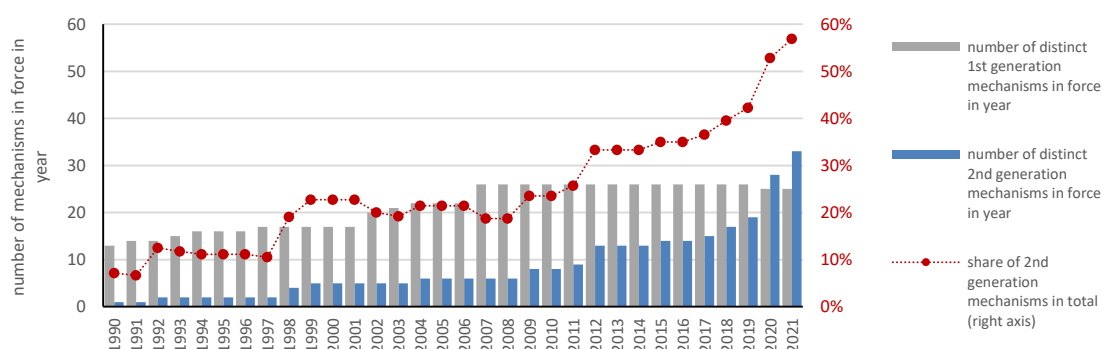
The regulatory depth and clarity of policies is growing

17. Policy making in this area has led to a greater number of economies that screen inward investment for threats to their essential security interests; has increased the fraction of FDI that is potentially subject to screening in global FDI; and has led to a higher degree of clarity and regulatory depth than was observed earlier. Newer mechanisms typically contain detailed rules such as assessment criteria, procedural rules and responsibilities (mechanisms with these features are referred to here as 2nd generation mechanisms). Some mechanisms that lack such detailed rules (referred to here as 1st generation mechanisms)¹¹ are now being abolished or replaced. New mechanisms now systematically contain comprehensive rules.

18. As a result of this shift to more complete rule-sets for acquisition- and ownership-related policies, the share of such 2nd generation mechanisms in force in OECD Members is steadily increasing, with a particular acceleration observed since 2020 (Figure 3). Despite this process, a large number of 1st generation mechanisms continue to remain in place and are applied side-by-side with newer, 2nd generation mechanisms.

¹¹ A more detailed explanation of these categories is available in OECD (2020), "[Acquisition- and ownership-related policies to safeguard essential security interests](#)", section 1.3.1.

Figure 3. New policies and reform of older designs lead to more sophisticated mechanisms overall



Note: Data include 38 OECD Members. Data for 2021 do not include projections and cover only the period up to 3 May 2021.

Source: OECD.

Case numbers under acquisition- and ownership-related policies are evolving

19. Several jurisdictions that publish data on the implementation of their mechanisms have reported an upward trend with respect to the *absolute* number of transactions that are subject to screening or are notified by would-be investors under screening mechanisms. This trend is particularly pronounced in European countries but is not observed in all jurisdictions (Figure 4).

20. Governments have identified several reasons for this observation where an upward trend was recorded. These include: the broader scope of mechanisms;¹² greater knowledge of notification obligations among enterprises and associated greater compliance;¹³ but also, most recently, exposure of some assets to foreign takeovers under the conditions of the COVID-19 pandemic.¹⁴

21. Despite the increase in absolute numbers of transactions that were notified or reviewed by authorities, the fraction of proposals that were subject to notifications or reviews in overall investment proposals into a given jurisdiction remains small. Finland

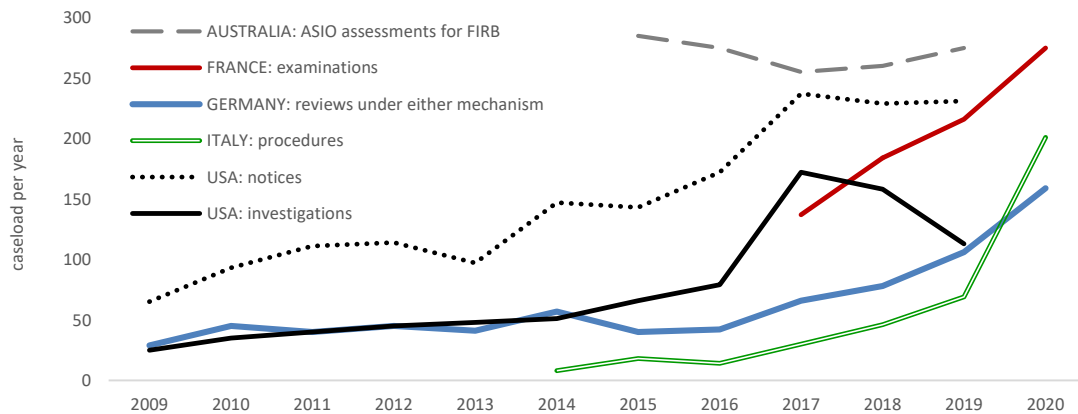
¹² This driver was identified in the context of reforms by the governments of France and Germany for instance. For France, *Fiche d'impact générale on the Décret relatif aux investissements étrangers soumis à autorisation préalable (ECOT18167RD)* (October 2018), for Germany in the context of the *draft 1st amendment of the foreign trade and payments act (AWG)* (2020). The Government of Italy noted that the inclusion of certain telecommunications assets under the scope of the review mechanism has contributed to the growth of the caseload (*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 (Anno 2019)*, p.18).

¹³ E.g. Italy (*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 (Anno 2019)*, p.19).

¹⁴ E.g. Italy, Presidenza del Consiglio dei Ministri, "*Relazione sulla politica dell'informazione per la sicurezza 2020*" (February 2021), p.47.

and France have reported on this parameter recently: In Finland, less than 10% of the overall inward transactions were subject to a confirmation process in 2019,¹⁵ while the share in France in 2019 was 15%.¹⁶ In both countries, the fraction of transactions subject to notifications or review in overall transactions had grown in comparison with those of earlier years.

Figure 4. Caseload under investment screening mechanisms (2009-2020)



Note: Time-series shown where official data is made available by governments by 3 May 2021. The indicators shown depend on data availability and are not comparable across jurisdictions. Data as reported for calendar years except for Australia, where data are reported from 1 July to 30 June; as an approximation, this data have been split evenly over semesters and attributed to calendar years.

Source: OECD based on data reported by governments.

¹⁵ Parliament of Finland, “[The Government's proposal to Parliament to amend the Act on the Monitoring of Foreign Acquisitions](#)” (2020), p.5.

¹⁶ Ministry of Economy and Finance, “[Les chiffres clés des IEF en 2019](#)”, 23 September 2020.

Codification, publication, prior notification and consultation

22. Openness, transparency, and predictability of investment policies are core values that underpin the OECD investment instruments and have inspired work of the investment policy community for decades.¹⁷ These values stem from a common understanding that a fair, transparent, clear and predictable regulatory framework for investment is a critical determinant of investment decisions and their contribution to sustainable development.¹⁸

23. The 2009 [Guidelines for Recipient Country Investment Policies relating to National Security](#) emphasize that these values can be reconciled with the particular requirements of investment policies related to essential security and operationalise these principles specifically for this area. The Guidelines note that “while it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes” and recommend specific actions related to codification and ease of access to rules. They also point to the importance of interested and affected parties being able to know about rule changes in advance, including through early engagement in stakeholder consultation (see Box 1 for an excerpt of the relevant clauses of the Guidelines).

¹⁷ Transparency of investment policy making has been a central strand of OECD work on international investment and is expressed in instruments, policy conversations and analytical work. The [OECD 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](#) (1986) calls explicitly for transparency of investment policies related to the protection of essential security interests. The 2015 OECD [Policy Framework for Investment](#) addresses this matter in the first section of the first chapter. Analytical work such as OECD (2003), [“Public Sector Transparency and the International Investor”](#) already emphasised this aspect, and the Freedom of Investment Roundtable, established in 2006 to host conversations on investment policies related to national security sought first and foremost to generate transparency about investment policies related to essential security interests, as documented in the [summary of the first Roundtable held in June 2006](#). The theme was again prominently discussed at the [sixth Roundtable held in December 2007](#), where government representatives noted that: “Transparency is the cornerstone of a well-functioning regulatory process. For the investment policy community, it is primarily understood to mean making relevant laws and regulations publicly available, notifying concerned parties when laws change and ensuring uniform administration and application. For an increasing number of practitioners, it may also involve offering concerned parties the opportunity to comment on new laws and regulations, allowing time for public review and providing means to communicate with relevant authorities. Procedural transparency and fairness refers to how clear policies are and how uniform in their application.”

¹⁸ The [OECD Recommendation on Regulatory Policy and Governance](#) (2012) sets out general good practice for transparency and public participation in the regulatory process. Information about the Recommendation and related work is available at <https://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>.

Box 1. Guidelines for Recipient Country Investment Policies relating to National Security – Transparency/Predictability (extract)

2. *Transparency/Predictability* – while it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes.[...]

- *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.
- *Prior notification.* Governments should take steps to notify interested parties about plans to change investment policies.
- *Consultation.* Governments should seek the views of interested parties when they are considering changing investment policies. [...]

24. OECD Members have adopted a range of approaches to implement these recommendations in their policy practice. The following sections present these policies and practices along the three aspects that the Guidelines address in this regard:

- The codifications of rules that govern investment policies related to the protection of essential security interests, including the *depth and detail* of the codification, the *comprehensiveness and completeness* of codification of all aspects of such policies, and the absence of practices outside codified rules;
- The availability of the rules to the norm-targets, principally foreign investors, in a *convenient and accessible form*; and
- The involvement of stakeholders in the design-phase of policies through consultation and their early information about planned or passed rules or rule changes.

Codification: detailed and complete sets of rules

25. The codification of the rules that govern investment policies related to essential security interests is the first and foremost step in ensuring transparency and predictability to foreign investors. While *some* rules in this regard are set in all OECD Members that are known to scrutinize foreign investment with respect to essential security implications, a practice that has been observed for some time,¹⁹ differences in policy practices are observed in three respects:

- The extent to which the rules provide detail and clarity that allows concerned individuals to understand and anticipate obligations and implications for their specific investment projects;
- The extent to which rules describe all aspects of procedures; and
- The extent to which practices are observed that affect foreign investors and are taken with the declared intention to protect essential security interests but that are taken outside these codified rules.

¹⁹ Sixth Roundtable on Freedom of Investment, National Security and “Strategic” Industries (13 December 2007), [Summary of Discussion](#), p.3.

Depth and detail of rules

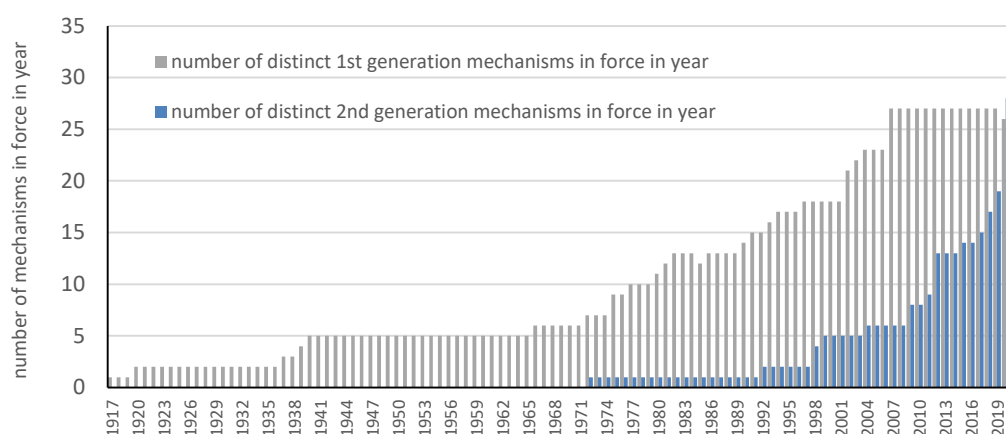
26. The purpose of codification is to offer norm-users an advance understanding of their obligations and the conditions under which certain consequences may apply to them. Even the most detailed and diligently drafted norms will not always bring absolute clarity as language is open to interpretation and implementing authorities will in most cases need to assess, appreciate and anticipate scenarios in situations of information-asymmetry. In addition, norm-setters cannot anticipate all potential future situations and constellations in the preparation of rules.

27. Investment policies related to essential security interests will thus reflect a balance between the depth and detail of rules and their adaptability that allows them to apply to different situations and the evolution of scenarios over time.

28. Policy practice in this regard in OECD Members varies on a relatively large spectrum. Most of this variety is correlated with the age of rules and frequency of potential later reforms. While recently adopted or reformed rules typically reflect a great level of detail, older rules, which are still common in this domain, are often rather rudimentary and lack clarity on concepts, responsible authorities, procedures, timelines and other factors that are important to potential investors.

29. Over the past decades, a significant stock of distinct mechanisms to manage acquisition- and ownership-related risks have accumulated; many of these mechanisms have not recently been reformed, exhibit rudimentary rule-sets (here referred to as 1st generation mechanisms), and are still in force (including cumulatively or alternatively with newer mechanisms in the same jurisdiction). While newly designed mechanisms often contain very detailed rules, the number of 1st generation mechanisms in force remains high; until 2019, half of the mechanisms in force were 1st generation mechanisms with limited depths of detail (Figure 5).

Figure 5. First and second generation policies in force: time-profile 1917-2021



Note: Data show mechanisms based on acquisition- and ownership-related rules. Numbers indicate aggregate of distinct mechanisms in OECD Members as of 3 May 2021. Data do not include projections of rules that are not yet in force.

Source: OECD.

30. In some countries, recent overhauls of older mechanisms have led to much more detailed regulation²⁰ or to the absorption of 1st generation mechanisms into new mechanisms that feature much more detailed rules.²¹

31. The sheer textual length of rules in legislation is an imperfect but telling sign of this trend. Where in some countries, the entire rule-set of a country's investment review mechanism fits on one or at most two pages of text, recent reforms have often led to a multiplication of the space needed to set out rules.²²

Complete and comprehensive rules

32. Completeness and comprehensiveness of norms refer to whether the rules regulate *all aspects* of administrative practice that occur in the administration of investment policies related to essential security interests. Here again, practices vary across OECD Members and are again typically correlated to the age of rules, with a notable trend towards establishing more complete rules and efforts to complete rule-sets in the course of ongoing reforms.

33. A practical example of such efforts are rules on the possibility and contents of mitigation agreements. Mitigation arrangements – obligations imposed on investors that reduce risks to an acceptable level and thus make an otherwise problematic transaction possible –²³ have long been employed in administrative practice in many jurisdictions. Often, no explicit rules had been set for this practice and some countries' legislation merely recognised the possibility of such arrangements.²⁴ Only recently have explicit rules in this

²⁰ Austria, France and Germany introduced significant overhauls in the course of 2020 that have considerably enhanced the level of detail of their respective rules.

²¹ Germany abolished a [relatively recent stand-alone 1st generation mechanism related to satellite-imagery](#) as part of its [reform in mid-2020](#). The German authorities had noted that as *lex specialis* it took precedence over the more deeply regulated general investment review mechanism under the Foreign Trade and Payments Act (see [BtDrs 19/18700](#), p.21). The assets whose acquisition stood to be reviewed under the abolished mechanism are now included in the list of the reformed general review mechanism.

²² Recent reforms in Austria, France and Germany and the United Kingdom are illustrative of this trend. For example, whereas the Austrian review mechanism introduced in 2011 fit into a single Article of a law and filled only just over two pages in the official journal ([Foreign Trade Act \(Außenwirtschaftsgesetz\) § 25a, 7 December 2011](#)), the successor legislation of 2020 is set out in a law of its own (the [Investment Control Act](#)) and fills over 15 pages of text in the official journal. Germany's mechanism fit, when first introduced in 2004, on [less than half a page](#), had grown to 1.5 pages [in 2013](#), but the [most recent reform](#), the fourth change in less than a year, [added 8 pages](#) of text to the existing rules.

²³ More detailed information on mitigation agreements practices is available in OECD (2020), "[Acquisition- and ownership-related policies to safeguard essential security interests](#)", section 2.2.1.

²⁴ In Canada, the power to impose conditions is mentioned ([Investment Canada Act](#), section 25.4 (1)(b)). In Slovenia, in the [Act determining the intervention measures to mitigate and remedy the consequences of the COVID-19 epidemic \(ZIUOOPE\)](#), Section 11 – *Screening of Foreign Direct Investments*, Article 74.1., and in Slovakia, [Act 45/2011 of 8 February 2011 on Critical Infrastructure, as amended](#), § 9b, the use of these arrangements is merely mentioned. The United States had codified such rules as early as 2007, but had reportedly used such arrangements before then (see Congressional Research Service (James JACKSON (2008), "[The Committee on Foreign Investment in the United States \(CFIUS\)](#)", p.14).

regard been established in some jurisdictions to complete rule-sets that govern investment review mechanisms.²⁵

Interventions into foreign investment proposals outside of the rules

34. A further – implicit – aspect of codification of investment policies related to essential security interests is the *exclusive use* of codified rules to achieve objectives in this area of policy. At certain times and in some countries, public statements by political leaders have been observed that might have had the intention of frustrating undesirable acquisitions before the codified procedures were even carried out or after codified procedures had not resulted in objections.²⁶

35. Many factors determine perceptions of whether such statements are legitimate expressions of opinions in the political process or whether they are intentional attempts to create obstacles not foreseen by laws governing investment review processes related to essential security interests.

Publication and dissemination: convenient access for norm-users

36. Beyond merely laying out the rules of investment policies related to essential security interests in legislation and regulation, the 2009 Guidelines call for the publication and dissemination of these rules to ensure convenient access. While OECD Members consistently publish legislation and rules, they employ different means to make these rules conveniently accessible. Specific efforts have been observed in three areas:

- The availability of consolidated texts of rules and legislation to norm-users, in particular in up-to-date translations of these rules into widely understood languages where countries' official languages are not commonly understood abroad;

²⁵ More detailed provisions on the matter were introduced in France in 2019 and early 2020 and are now in [Code monétaire et financier, Article L.151-3](#), and [Article R.151-8](#); rules on later amendments, at the initiative of the investor or the government, are, since early 2020, set out in [Article R.151-9](#). 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”. In the United States, 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 17 January 2020, ([31 C.F.R Part 800](#) and [31 C.F.R Part 802](#)). Changes strengthen requirements on the use of mitigation agreements, including the addition of compliance plans to inform the use of such agreements.

²⁶ This concern was already expressed at the first Roundtable on Freedom of Investment, OECD Roundtable “Freedom of Investment, National Security and ‘Strategic’ Industries” that the OECD hosted on 21 June 2006. The [Summary of Discussions](#) (p.2) record that “*rhetoric that often accompanies would-be takeovers, including at the highest political levels, can also have an inhibiting effect on foreign investment by raising fears among investors in highly publicised takeover cases that they will face an organised resistance by other means than the ones foreseen in statutory regulation. The extent governments actually resort to means outside the formal regulatory framework will have a significant bearing on the overall impact on foreign investment [...]*”.

- The accessibility of all relevant rules that govern an investment review framework as well as ancillary information that helps understand the application of these rules; and
- The active dissemination of new rules through information events.

The following sections set out some practices in OECD Members in these regards.

Availability of up-to-date consolidated texts in widely understood languages

37. Advanced systems of law in OECD Members require the publication of laws. However, not all countries publish *consolidated* legislation, that is, up-to-date, intelligible text that incorporates later changes into a document that displays the complete current legislation. This service of publishing consolidated texts of a country's legislation is provided to different degrees across OECD Members and with different degrees of delay with respect to the entry into force of amending legislation.

38. OECD Member countries have a wealth of language diversity among them, and issue legislation in at least 26 different official languages. Some of these languages are not widely understood abroad and may not be easily accessible to potential foreign investors who seek to grasp the gist of a given country's rules. While most investors will likely consult local specialised legal counsel when ideas mature into a specific project, an understanding of the basic principles in a language accessible to them is an important element of the publication and dissemination of rules on investment reviews.

39. Some countries that use official languages that are not widely spoken face a double challenge to provide up-to-date translations into widely understood languages of consolidated texts.

Accessibility of all relevant information to understand rules and their application

40. While the 2009 Guidelines only explicitly call for the publication of rules, circumstantial information that helps to understand these rules and their practical application may be just as valuable for prospective foreign investors. For example, flowcharts of processes and timelines can clarify the conduct of reviews; annual reports or other statistical material can provide insights into administrative practice; non-legally binding guidance notes or other explanatory material can offer overviews or insights in plain language; and information about planned reforms may provide clarity about the direction and content of future policy.

41. Some governments have created information hubs for these types of material on a single website featuring different and more or less comprehensive elements of information. [Australia](#) has compiled legislation, explanations, guidance notes and annual reports on the website of the Australian Foreign Investment Review Board (FIRB); [France](#) assembles some information on rules, explanations and statistics on a single website; Germany publishes [explanatory information](#) and [links to legislation and reform projects](#) on a set of sites; [Italy](#) has an information-hub that also links to reports on the implementation; [Spain](#) makes some information available on a single page; and the [United States](#) likewise provides comprehensive information on its CFIUS process. Most often, information is only available in official languages of these countries.

42. Many countries operate different review mechanisms that may apply cumulatively or alternatively. These rules may be rooted in different policy areas or under the responsibility of different authorities, and rules were often not created at the same time. In some cases, a single transaction may be subject to several reviews under different rule-sets

related to the protection of essential security interests in a single country.²⁷ Even where governments have established information hubs, these typically reference only one of the mechanisms or omit to mention coexisting rule-sets that may apply to individual cases.

Information events organised by authorities

43. Governments can expect that concerned audiences know applicable legislation, and in many countries, legal counsel contribute to providing information to potential clients. Some governments have nonetheless made efforts to disseminate information about new rules through training and information events²⁸ or through participation in information events organised by third parties.²⁹

Prior notification and consultation of interested parties

44. International investment projects are complex and their implementation often takes months. Certainty about applicable rules and the possibility to anticipate rule changes are thus important for investors and for potentially concerned economic actors in the country of the envisaged acquisition target. Comprehensive and advance knowledge of rules is also considered to enhance compliance.³⁰

45. The 2009 Guidelines emphasise the importance of notifying rule-changes and call on governments to consult stakeholders in the process of change. The rules set out in the Guidelines reflect a broader and longstanding understanding of the importance of these elements among OECD Members as documented by their inclusion in the 2012 OECD [Recommendation on Regulatory Policy and Governance](#), the 2015 OECD [Policy Framework for Investment](#), and earlier OECD work in this area.³¹

²⁷ For more detail on these coexisting rules see OECD (2020), “[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)”, section 2.9.1.

²⁸ As an example, the Czech authorities organised a [webinar](#) in April 2021, just prior to the entry into force of the country’s new screening mechanisms. A need to reach out to the business community had been [identified](#) in the preparation of the legislation.

²⁹ For example, officials responsible for the administration of the French review mechanism have spoken at events organised by [law-firms](#), and EU-officials have presented at [academic events](#).

³⁰ Italy has mentioned better knowledge of rules and obligations as a factor driving caseload under Italy’s “golden power” investment review mechanism (Senato della Repubblica, “[Relazione al Parlamento in materia di esercizio dei poteri speciali \(anno 2019\)](#)”, 22 June 2020, Doc. LXV No.2, p.19.

³¹ See e.g. OECD (2002), “[Public Sector Transparency and Accountability: Making it happen](#)”.

Rules and practices in ‘normal’ times

46. Some OECD Members have established general rules that require prior consultation³² or advance notification³³ of proposed legislative changes across all regulatory fields. Many other countries have adopted such practice for investment policy in recent years and have created awareness about planned changes in advance.³⁴

47. Rules and practices regarding consultation with interested parties and advance notification of new rules can be classified along several parameters, including:

- Whether the process is based on a legal obligation or is a mere administrative practice;
- Who can contribute in a consultation (e.g. specific stakeholders or the general public);
- At what time in the regulatory process the input is sought and, correspondingly, whether it is sought on a specific proposal or general aspects of regulation;
- Who leads the consultation process (e.g. the government³⁵ or an independent group of experts³⁶);
- Whether consultations are carried out in a punctual or rather permanent manner;³⁷ and
- Whether the input received in response to the consultation needs to be published.

48. The recent drive to establish and reform rules governing international investment in relation to security implications in OECD Members has provided ample opportunities to apply different models of consultation. Some countries have for example consulted on the

³² Examples include Canada ([Cabinet Directive on Regulation](#) – 4.1 Consultations and engagement), Korea ([Framework Act on Administrative Regulation](#), Article 9), and Spain ([Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas](#), Article 133).

³³ Examples include Australia ([Legislation Act 2003](#), Section 56) and the United States ([44 U.S.C 3554: Federal agency responsibilities, \(e\) Public Notice and Comment](#)).

³⁴ The EU’s [Regulation establishing a framework for the screening of FDI into the EU](#) became fully applicable 18 months after being published in the EU’s Official Journal on 19 March 2019. While this was in part to allow EU Member States sufficient time to make changes to their domestic legislation, it also provided investors considerable advance notice to adapt to the changes.

³⁵ On 1 April 2020, the Danish Minister of Justice [announced](#) the establishment of an inter-ministerial working group tasked to propose possible models for a future screening procedure to safeguard Denmark’s essential security interests.

³⁶ In August 2019, the Swedish government established an independent inquiry, the [Swedish Direct Investment Inquiry](#), to develop design proposals for a mechanism to review inbound investments to protect Sweden’s essential security interests.

³⁷ Some OECD countries have established entities that entertain continual dialogue with economic actors on international investment. In France, for example, the “[Service de l’information stratégique et de la sécurité économiques](#)” (SISSE) is tasked to sensitise economic actors about economic security issues ([Décret 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique](#), Article 2.3).

merits of certain legislation³⁸ and on specific regulatory proposals,³⁹ and some have explored collective intelligence on which sectors should be included under certain rules⁴⁰ or which documentation should be required under investment review processes.⁴¹

Challenges and constraints in exceptional times

49. While the merits of prior notification and consultation are rather obvious in normal times, exceptional circumstances may create urgencies that challenge governments' ability to deploy these practices in full. A large number of adjustments that countries made to their regulatory frameworks in early 2020 in response to the COVID-19 crisis and the economic upheaval that this crisis triggered illustrates these challenges. Many rather incisive and at times temporary changes were introduced swiftly as soon as the exceptional economic upheaval resulting from the pandemic became apparent.⁴²

³⁸ Between 24 April and 22 May 2020, the Irish government organized a [Public Consultation on Investment Screening](#) to seek views on whether to introduce an investment screening mechanism on the grounds of security and public order. New Zealand carried out a [public consultation](#) in 2019 on proposals to reform New Zealand's Overseas Investment Act 2005.

³⁹ E.g. Australian Treasury, "[Public Consultation of the Exposure Draft of the Regulations \(Protecting Australia's National Security\) and of the Exposure Draft Fees Regulations \(Fees Imposition\)](#)", public consultation (18 September 2020 to 2 October 2020); Australian Treasury, "[Public Consultation of the Exposure Draft of the Foreign Investment Reform \(Protecting Australia's National Security\) Bill](#)", public consultation (31 July to 31 August 2020); Germany has consulted stakeholders on its string of recent legislative and regulatory reforms and documents the input it received on a [website on the topic](#). The United States have carried out several public consultations on proposed rules in the context of implementing regulations related to FIRRMA, for example on a [Proposed Rule](#) regarding criteria for mandatory declarations for certain foreign investment transactions involving a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies" (consultation held between 21 May 2020 and 22 June 2020).

⁴⁰ The United Kingdom held a [public consultation](#) between November 2020 and January 2021 to identify sectors that would be included in the list of sectors that require mandatory notification under the [National Security and Investment Bill 2019-21](#). The United States held a consultation between August and October 2020 to inform "the definition of, and criteria for, identifying foundational technologies" that are essential to the national security of the United States ("[Advance notice of proposed rulemaking, Identification and Review of Controls for Certain Foundational Technologies](#)", Federal Register Vol.85, No.167, 27 August 2020).

⁴¹ France carried out a public consultation in mid-2019, among others, to help establish a list of documents that would need to be submitted for the screening process ("[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).

⁴² For more information on the policy environment and policy reaction, see OECD (2020), "[OECD investment policy responses to COVID-19](#)" and OECD (2020), "[Foreign direct investment flows in the time of COVID-19](#)". Policy responses to these circumstances specifically regarding investment screening are documented in greater detail in OECD (2020), "[Investment screening in times of COVID-19 and beyond](#)", OECD (2020), "[Inventory of investment measures taken between 16 September 2019 and 15 October 2020](#)", and OECD 2021, "[Investment policy developments in 62 economies between 16 October 2020 and 15 March 2021](#)".

50. Governments need to reconcile numerous constraints in their policymaking. Conflicting needs to respond to emergencies quickly and to consult and inform stakeholders document these constraints well. Many OECD Member governments have shown that the shock of regulatory change can be absorbed in part by additional efforts to communicate the rationale of changes; by limiting the temporal application of exceptional rules;⁴³ or by providing longer-term perspectives for the evolution of policies at early stages.⁴⁴

⁴³ Among the countries that have taken such measures are [Australia](#) (trigger threshold temporarily lowered to zero for all foreign investors), [France](#) (approval temporarily required for acquisitions of 10% interest instead of 25%), [Hungary](#) (lower and additional trigger thresholds apply temporarily), [Italy](#) (more exigent rules temporarily apply to EU and EEA investors), [Spain](#) (more exigent rules temporarily apply to EU and EEA investors) and [New Zealand](#) (transactions that are not normally reviewable were temporarily reviewable).

⁴⁴ Australian government press release, “[Major reforms to Australia’s foreign investment review framework](#)”, 5 June 2020.

Procedural fairness and predictability

51. The 2009 Guidelines are not only concerned with rule-making, but also with the administration of rules and mechanisms established to manage risk for essential security interests associated with international investment. The Guidelines call in particular for procedural fairness and predictability in recognition of the importance for investors to anticipate whether a transaction needs to be subjected to a review, how such a review would be conducted, how commercially sensitive information would be protected, how long the procedure would likely take, and what information would be requested or accessed. Procedural fairness and predictability are also essential to give investors and companies under acquisition confidence as they engage in the administrative process even though its outcome may be uncertain in some cases (see Box 2 for an excerpt of the relevant clauses of the Guidelines).

Box 2. Guidelines for Recipient Country Investment Policies relating to National Security – Transparency/Predictability (extract)

2. *Transparency/Predictability* – while it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes.

[...]

- *Procedural fairness and predictability*. Strict time limits should be applied to review procedures for foreign investments. Commercially-sensitive information provided by the investor should be protected. 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. [...]

52. Which aspects of procedural fairness and predictability matter most to a given would-be investor may depend on many factors and circumstances, and priorities may vary. That said, predictability of applicable criteria, process and timelines of review mechanisms are very likely to be of great interest to any would-be acquirer to anticipate the likelihood, implications, cost, length and likely outcome of a review and thus ultimately the viability of a planned transaction.

53. This section seeks to shed light on some aspects that are likely to be of interest to investors in most cases, but does not claim to be exhaustive or to rank the aspects in an assumed priority order.

54. Country practices are presented with respect to the following aspects:

- Clarity on which rules apply to a given transaction and certainty how specific evaluation criteria are be applied;
- How commercially sensitive information is protected against disclosure; and
- How long a review can take and what legal consequences result from a lapse of this time.

Clarity about applicable rules and interpretation of criteria

55. The principal call expressed in the 2009 Guidelines with respect to transparency and predictability is that governments make “regulatory objectives and practices [...] as

transparent as possible so as to increase the predictability of outcomes”. This element refers to transparency of the *material* objectives and practices in the implementation of rules; this transparency determines the degree of predictability of outcomes for investors. Other aspects raised in this section of the Guidelines are concerned with transparency and predictability over *procedural* aspects.

56. Regulatory objectives and practices in this regard refer, among others, to:

- the rules that are applicable to a specific transaction; and
- to the interpretation of the principle elements of these rules.

Clarity about whether and which rules apply to a given transaction

57. Legislation and rules on investment review mechanisms related to essential security interests set out criteria that activate the mechanisms and create obligations for would-be investors and the government. In most cases, investors will be able to understand whether their planned transaction fulfils these criteria based on the framing of the rules.

58. In some cases, determining whether and which rules apply may be more difficult:

- Sectoral descriptions may not always coincide with the acquisition target’s products or services, resulting in uncertainty as to whether or which rules apply to a certain transaction;
- Under economy-wide mechanisms, investors may find it difficult to assess the authorities’ likely views about the sensitivity of a given transaction; and
- Even rather straightforward criteria such as the size of equity-stakes may in certain cases lead to uncertainty as implementing authorities may consider some arrangements as circumvention tactics.

59. Much of this uncertainty is the unavoidable result of matching abstract general rules to specific facts in a given case. Such residual uncertainty is observed in most if not all areas of regulation and law more generally.

60. Many governments have undertaken steps to limit this residual uncertainty, and often express this objective in justifications of new rules or reforms explicitly.⁴⁵ Resulting more specific descriptions of criteria and their application, designed to achieve greater clarity for would-be investors and regulators, are the principal driver of the trend towards longer rule-sets observed in recent legislation in this policy area.

61. To further reduce residual uncertainty, some governments provide information about interpretation of rules and implementation practice to complement their efforts to regulate in greater detail. Some governments issue guidelines, explanatory notes and similar material through websites,⁴⁶ and increasingly comprehensive information on regulatory

⁴⁵ Examples include the [recent reform of the review mechanism](#) in force in Germany, in which the government justifies a large number of changes with a need for greater clarity of rules.

⁴⁶ Australia’s FIRB offers [general guidance](#) as well as “[Fact sheets](#)” and a significant number of “[Guidance Notes](#)”. A recent Guidance Note ([National Security Test \(Guidance Note 8\)](#)) issued by the FIRB, sets out recommendations as to what investments should be voluntarily notified on national security grounds. Canada has issued [Guidelines on the National Security Review of Investments](#) (24 March 2021) following an earlier document released in 2016. The United Kingdom has published a [draft statement](#) describing how the Secretary of State expects to use call-in powers,

objectives, concerns, meaningful implementation statistics and insights on administrative practice are included in cyclical reports on implementation.

62. Despite such efforts, the degree of clarity about scope and criteria of mechanisms remains uneven. Older rules in particular contain often only general and unspecific criteria. Some rules merely state that a transaction in a given sector that threatens the country's national security may be prohibited – without offering further clarifications on the material criteria that would be applied.⁴⁷ Limited circumstantial information on the interpretation or application of criteria and a typically low number of cases that could serve as reference points may limit investors' understanding of the application of rules to their case.

Interpretation of assessment criteria

63. Some uncertainty about the application of rules results from broad and evolving notions such of “national security” or “essential security”. Individual countries understand these concepts differently⁴⁸ and may have different concerns depending on geographical, historical, economic, or political factors. As many governments have emphasised in the course of recent reforms or documented through the introduction of review mechanisms lately, perceptions of vulnerabilities in advanced economies have evolved significantly in recent years and are expected to continue to evolve.⁴⁹

64. In order to attenuate the effects of this evolution on transparency and predictability for investors, governments have made efforts to express their concerns more explicitly. Different approaches include:

and in particular which risk factors would be considered, under the [National Security and Investment Bill \(Part.1, Chapter 1, Clause 3\)](#). Germany's Ministry of the Economy and Energy offers some information in FAQs (“[FAQ zu Investitionsprüfungen nach der Außenwirtschaftsverordnung \(AWV\)](#)”, 13 May 2019). Canada found that “Following the issuance of the 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).

⁴⁷ An example of such a rule was the now-abolished but relatively recent [review mechanism regarding enterprises that dealt with high-definition satellite imagery](#) in Germany. Introduced in 2007 and abolished in this form as part of its [reform in mid-2020](#) for lack of sufficient regulatory depth ([BtDrs 19/18700](#), p.21), the mechanism provided the government authority to prohibit certain transactions identified by the size of the stake within a month's time if this measure was considered necessary to protect significant security interests of Germany; no further rules had been set. Similarly framed rules still exist in other countries for other sectors.

⁴⁸ For an early inventory of the use of these terms see OECD (2009), “[Security-related terms in international investment law and in national security strategies](#)”.

⁴⁹ A summary of these developments is available in OECD (2020), “[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)”, section 1.4.

- A breakdown of broad concepts into specific public interests or descriptions of threats to specific public interests;⁵⁰
- Illustrative lists of considerations;⁵¹ or
- References to external legal sources and their interpretation.⁵²

65. Information on practice and past decisions only provides limited additional information, at least to outsiders, as most decisions and the reasons for these decisions are not publicly available. In some countries, retrospective information on reasoning is

⁵⁰ Lithuania's [Law on the Protection of Objects of Importance to Ensuring National Security, No IX-1132](#), Article 2, section 1.(7), specifies the notion of "national security interests" as follows: "protected vital and overriding national security interests as understood in the National Security Strategy, development of trans-European infrastructure and essential public interests as consacrated in the laws of the Republic of Lithuania, including the provision of essential services of common interest [...]". Poland ([Law on the control of certain investments](#), Article 11.1., item 2 states "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 ". Portugal's legislation ([Decreto-Lei 138/2014](#), Article 3(1)) mentions "...defence and national security..." alongside "...the Country's security of supply of services fundamental for the national interest."

⁵¹ Canada has provided an illustrative list of considerations in [Guidelines on the National Security Review of Investments](#) (as published in 2021), item 8. Japan has published a list of factors that are considered by Japanese authorities during the screening process ("[Factors to be considered in authorities' screening of prior notification for Inward Direct Investment and Specified Acquisition under the Foreign Exchange and Foreign Trade Act](#)" (May 2020)). 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. An early inventory of these practices is available in OECD (2008), "[Transparency and predictability for investment policies addressing national security concerns: A survey of practices](#)", p.3.

⁵² E.g. Portugal: [Decreto-Lei 138/2014 of 15 September 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."); Netherlands: [Telecommunications Act, Chapter 14a – Unwanted control in telecommunication parties](#), Art.14.a.1, "the interest of public policy or public security, as referred to in Articles 45, third paragraph, 52, first paragraph, and 65, first paragraph, under b, of the Treaty on the Functioning of the European Union and the essential interests of the security of the state, as referred to in Article 346, first paragraph, under a, of the Treaty on the Functioning of the European Union". Hungary: [Act No. LVIII of 2020 on the Transitional Rules related to the End of the State of Danger and Pandemic Preparedness](#), Section 283.1).b), "security of meeting fundamental social needs, in accordance with Article 36 and Articles 52 (1) and 65 (1) of the Treaty on the Functioning of the European Union".

included in annual reports on the implementation of the review mechanism, and can provide further guidance without binding a government for the future.⁵³

Protection of commercially sensitive information against undue disclosure

66. Fairness of review procedures implies that parties to a transaction – the would-be acquirer as well as the acquisition target, in particular – can trust that involved authorities handle commercially sensitive information with care and avoid any undue leaks or other disclosure to unauthorised persons. The protection of commercially sensitive information is not an absolute value but needs to be balanced with legal effectiveness and other public interests, such as accountability, among others.

67. Rule-makers may have different appreciations of which information may be intentionally disclosed to the public under or other countries' authorities. Some rules explicitly foresee the disclosure of information to different audiences, for example in a final decision, as part of accountability or reporting mechanism, or under rules on international cooperation.⁵⁴ A release of such information would thus be legal and legitimate even if commercially sensitive.

68. Rules on disclosure or confidentiality of sensitive information are occasionally found within the rules on the investment review mechanism,⁵⁵ or are laid down in general rules on the treatment of sensitive information and related penal and disciplinary law.

Predictable timeframes and certainty about consequences of their lapse

69. Commercial transactions are time-sensitive. Predictability of timeframes for review and approval processes, on which the involved parties have only limited influence, are thus an important component of fair and predictable investment review procedures as called for in the 2009 Guidelines. As involved parties have little leverage to ensure that these timelines are respected, the Guidelines suggest that the legislator determine the consequences of the lapse of defined timelines as a deemed unconditional authorisation.

70. Governments need to balance the ambition to provide short and predictable timeframes with imperatives of effective implementation in the interest of essential security interests. Authorities can face challenges in the form of limited resources, growing numbers of ever more complex transactions, and, increasingly, the need for internal and international consultation to assess implications of transactions comprehensively.

⁵³ For more information see material presented in the section on Disclosure of investment policy actions below.

⁵⁴ Such rules have recently been established in EU Member States to satisfy the requirements established by the [Regulation establishing a framework for the screening of FDI into the EU](#). Individual countries' rules in this regard are not discussed in this section.

⁵⁵ E.g. Austria: [Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen](#), Chapter 6 – *Treatment of Confidential Information Measures to protect confidential information*; Czech Republic: [Act No.34/2021 on Screening of Foreign Direct Investments](#) Title V – *Protection of Classified and Sensitive Information*. Korea: [Foreign Investment Promotion Act](#), Article 24.3; United States: [50 U.S. Code § 4565 – Authority to review certain mergers, acquisitions, and takeovers, \(c\) Confidentiality of information](#), United Kingdom, [National Security and Investment Bill](#), Part 4, Clause 57 – *Data protection*.

71. Governments have struck different balances of these interests in relation to the sensitivity of sectors or other characteristics and interests. The three principal parameters that reflect these different choices are:

- Whether and which timelines are laid down in rules;
- When the clock starts to run on these timelines; and
- Whether the lapse of time leads to a deemed decision.

Clearly set timelines

72. Many of the main mechanisms currently operated by OECD Members impose detailed timelines for the conclusion of investment review processes. Regulated timelines are not used systematically however, and are often at least partially absent in:

- Mechanisms that apply to the most sensitive sectors or transaction types; and
- Mechanisms that have been introduced early and have not been substantially reformed in recent years.

73. The absence of fixed timelines in mechanisms that apply to particularly sensitive sectors or transaction types typically reflects a conscious choice of authorities in their effort to balance effectiveness with interests of involved transaction parties.

74. The absence of timelines in older, unreformed mechanisms provides opportunities for reform, as this absence is most likely a result of a generally shallow level of regulatory depth rather than careful balancing of public interests.⁵⁶ This absence may have knock-on effects on mechanisms with such rules if several authorisations are required in the same country under concurrently applicable rules.⁵⁷

75. Some OECD countries have set relatively short timelines but allow for an extension should this be required in an individual case.⁵⁸ 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.

76. International cooperation in the implementation of review mechanisms may introduce challenges with respect to the length of timelines in light of additional coordination time and different delays set in involved countries. These potential new

⁵⁶ In Chile, [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. The Netherlands' [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.

⁵⁷ The interaction of several mechanisms in operation in a given country is not always obvious. The lapse of the delay under a dominant mechanism may remain without effect as long as an authorisation under a simultaneously applicable sectoral rule without such a provision is missing.

⁵⁸ E.g. Canada under the [Investment Canada Act](#), Section 25.3(7): two extensions are possible without the acquirer's consent, and further extensions are possible 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. Under [FIRRMA](#), the United States recently added the possibility to allow an investigation to be extended for an additional 15-day period under extraordinary circumstances.

uncertainties may be addressed through harmonisation⁵⁹ among involved jurisdictions and may be absorbed by the additional certainty that the coordinated review in multiple jurisdictions may offer to the involved transaction parties.

Start, stop and reset of the clock

77. Certainty about the expected end date of a process not only requires knowledge of the length of the procedure but also on when the clock starts to run and which events can halt or reset the clock. Rules in this regard can introduce some uncertainty when they rely on events that are subject to appreciation of the authorities.⁶⁰ A further issue in this regard may be the continued leverage of the implementing authorities over the behaviour of the would-be investor; in a scenario where time begins to run out, the authorities may suggest that the file be withdrawn and resubmitted, effectively leading to a reset of the clock.

Deemed decisions

78. The 2009 Guidelines suggest that governments consider, where possible, the introduction of “rules providing for approval of transactions if action is not taken to restrict or condition a transaction within a specified time frame”.⁶¹ Generating legal certainty through the lapse of time may speed up procedures, especially in sensitive cases where governments may have difficulties to resolve conflicting interests and thus delay their decision. Many OECD Members have introduced such deemed decisions or silence-means-assent rules into their investment policies related to essential security interests.⁶²

⁵⁹ Some alignment of timelines is observed among jurisdictions in geographic proximity, although no evidence appears publicly available on whether this results from an intentional effort. For example the review mechanisms of Japan and Korea (Japan, Article 27 §2 of the [Foreign Exchange and Foreign Trade Control Act of 1949](#); Korea [Enforcement Decree of the Foreign Investment Promotion Act, Art.5](#)); both set a 30-day timeline.

⁶⁰ Portugal, the [Decreto-Lei 138/2014 of 15 September 2014](#), Article 4 and 5 set the start of the delay at the moment when “the operation becomes publicly known”. In France, time starts to run “from the date of receipt of an application for authorisation” ([code monétaire et financier, article R.151-6](#)). Germany’s [AWG, § 14a](#), refers to the moment the authorities acquired knowledge of a transaction; the norm also allows the clock to halt if authorities request additional documents concerning the transaction.

⁶¹ The availability of such rules was already suggested at the 6th Roundtable on Freedom of Investment, National Security and ‘Strategic’ Industries (13 December 2007). The [Summary of Discussions](#) (p.3) records that “[...] *measures commonly used to enhance procedural transparency and fairness include time limits for consideration of cases, ‘silence means assent’ rules [...]*”.

⁶² Such fictions exist for example in Austria ([Federal Act on the Control of Foreign Direct Investments](#), § 7.3); Finland ([Act on the Screening of Foreign Corporate Acquisitions](#), section 5), for transactions outside the defence sector; Mexico ([Ley de Inversión Extranjera](#), Article 28); Germany ([AWG, § 14a](#)); Portugal ([Decreto-Lei 138/2014 of 15 September 2014](#), Articles 4 and 5); Lithuania ([Law on the Protection of Objects of Importance to Ensuring National Security, 10 October 2002 No IX-1132](#), Article 12(10)).

Disclosure of investment policy actions

79. The 2009 Guidelines call for a set of measures to ensure transparency of and accountability for investment policy actions. Transparency and accountability require first and foremost timely, accurate and authoritative information on policy actions. Incidentally, disclosure may also sharpen the understanding of rules and their application and may offer the authorities opportunities to explain policy practice, thus offering opportunities to enhance predictability (Box 3).

Box 3. Guidelines for Recipient Country Investment Policies relating to National Security – Transparency/Predictability and Accountability (extract)

2. **Transparency/Predictability** – while it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes. [...]

- *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. [...]

4. **Accountability** – procedures for internal government oversight, parliamentary oversight, judicial review, periodic regulatory impact assessments, and requirements that important decisions (including decisions to block an investment) should be taken at high government levels should be considered to ensure accountability of the implementing authorities.

- *Accountability to citizens.* Authorities responsible for restrictive investment policy measures should be accountable to the citizens on whose behalf these measures are taken. Countries use a mix of political and judicial oversight mechanisms to preserve the neutrality and objectivity of the investment review process while also assuring its political accountability. Measures to enhance the accountability of implementing authorities to Parliament should be considered (e.g. Parliamentary committee monitoring of policy implementation and answers or reports to Parliament that also protect sensitive commercial or security-related information). [...]

80. The Guidelines call for the disclosure of investment policy actions for three different purposes: To enhance *transparency* and thus *predictability*, and to serve as a *basis of accountability*. The Guidelines further mention some examples of avenues for disclosure (press releases, annual reports and reports to parliament), suggesting that information could report individual actions as ‘news’ or in aggregate form covering a period of time. The Guidelines further suggest that information be made available proactively and cyclically, or reactively upon demand, especially in the context of parliamentary monitoring to ensure neutrality and objectivity of such action. The Guidelines also repeatedly point to competing interests such as the protection of commercially-sensitive and classified information.

Large diversity in current practice

81. The diversity of objectives, avenues of disclosure, audience of information, and need to balance interests expressed in the Guidelines is reflected in a large variety of approaches to disclose investment policy action in OECD Member countries. Each country that carries out investment reviews has made a different choice along parameters such as:

- Whether information is provided under a dedicated disclosure mechanism at all;⁶³
- Whether this disclosure is based on a legal obligation,⁶⁴ or is mere administrative practice;⁶⁵
- Whether information is provided proactively or upon demand,⁶⁶ in particular upon demand by certain eligible audiences;⁶⁷
- Which audience receives information, e.g. the general public or, in light of security-sensitivity and confidentiality concerns, only a select group such as elected representatives in parliament,⁶⁸ or both, with different levels of detail,⁶⁹

⁶³ Some countries' legislation does not contain any dedicated disclosure mechanism or related administrative practice, a phenomenon observed in particular in European OECD Members (e.g. Finland, Germany, Hungary, Latvia, Lithuania, Poland and Portugal).

⁶⁴ Periodic disclosure of annual reports is required in countries including Australia ([Foreign Acquisitions and Takeovers Act 1975, No. 92, 1975, Part. 7. Div. 3. 124](#)). Canada ([Investment Canada Act Part VI. 38.1](#)), France ([Code monétaire et financier, article L.151-6](#)), and the United States ([50 U.S.C. 4565\(m\)](#)). Disclosure of individual decisions is in some countries only required when the transaction is prohibited (e.g. Korea ([Enforcement Decree of the Foreign Investment Promotion Act](#), Article 5.9) or it can be required for any final decisions regardless of their outcome (e.g. New Zealand ([Overseas Investment Act 2005, Section 129](#))).

⁶⁵ In Australia, 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.

⁶⁶ Finland's authorities have provided implementation data to research institutions or International Organisations upon demand. Copenhagen Economics (2018), "[Screening of FDI towards the EU](#)", p.40, cites some figures that appear to originate with government sources; an OECD report "[The Impact of Regulation on International Investment in Finland](#)" (2021) contains implementation statistics provided by the Finnish government to the OECD.

⁶⁷ In France, specific Parliamentary committees can request information from the executive with the exception of information that is classified as secret ([Code monétaire et financier, article L. 151-7](#)). The French Parliament also receives information proactively on an annual basis.

⁶⁸ France (see footnote 67). Korea ([Enforcement Decree of the Foreign Investment Promotion Act](#), Article 5). Iceland ([Act amending the Act on Foreign Investment in Business Operations, no. 34 March 25, 1991, as amended](#), Article 6). United States, ([50 U.S.C. 4565\(m\)](#)).

⁶⁹ In the United States, "All appropriate portions of the annual report [to Congress] may be classified. An unclassified version of the report, as appropriate, consistent with safeguarding national security and privacy, shall be made available to the public." ([50 U.S.C. 4565\(m\)\(4\)\(A\)](#)).

- Whether the information is provided in connection with specific policy actions⁷⁰ or at regular intervals, e.g. monthly⁷¹ or annually.⁷² Some countries disclose information both immediately and periodically;
- Which degree of detail is disclosed about individual⁷³ or aggregate policy actions,⁷⁴ which criteria are used for the aggregation⁷⁵ and whether and which context is provided;⁷⁶

⁷⁰ A legal obligation to release such information exists in several countries, e.g. Korea: Since 2008, according to the [Enforcement Decree of the Foreign Investment Promotion Act](#), Article 5.9 the Korean Minister of Trade, Industry and Energy, “shall give notice of disapproving or permitting the acquisition of stocks, etc. of the relevant foreigner, and shall publish the following matters excluding state secrets: 1. Whether it is a national security risk; 2. Reason for decision; 3. Contents of conditions (referred to only when conditions are attached pursuant to the latter part of Paragraph 8). New Zealand [Overseas Investment Act 2005, Section 129 - Minister must publish decisions on call-in transactions and transaction of national interest](#). Austria used to have a legal obligation to release information on individual cases ([Foreign Commerce Act of 2011 \(Section 25a\)](#)) but replaced this obligation with an obligation to issue annual reports as part of recent reforms in 2020.

In some countries, no legal obligation exists, but disclosure is current practice. The United Kingdom issues, under the [Enterprise Act 2002](#), detailed information on the [website of the Competition and Markets Authority](#); this information includes the fact that a “public interest intervention” has been made, the ultimate decision (including undertakings) and the reasons for the decision.

⁷¹ New Zealand makes case-specific information available through a webpage of [Land Information New Zealand](#); this information is released with a delay of around one month. Canada also provides [basic information on individual decisions](#) with a lag of about three months.

⁷² E.g. in [Australia](#), [Canada](#), [Italy](#), [France](#), [United States](#).

⁷³ Canadian legislation only allows disclosure of the investor’s name and their location, the name of the business being acquired or established and its location, and a description of the business activities of the Canadian business, for which [Canada refers to the NAICS or SIC industry categorisations](#) of the acquisition target. [New Zealand](#) and [Italy](#) also disclose the nationality of the investor and its shareholders.

⁷⁴ Some countries’ annual reports are rather succinct (e.g. annual reports in [France](#) are no longer than one page), while they are voluminous publications in other jurisdictions (e.g. in [Italy](#) or the [United States](#)).

⁷⁵ Countries use different categories in their aggregations, which may change over time. Some countries aggregate by nationality of the investor (e.g. the [United States](#)) or membership in a category of countries (e.g. [France](#) distinguishes between EU/non-EU investments). Some countries aggregate along industry sector lines (e.g. [France](#) reports numbers along “defense and security”, “non-defense”, and “mixed” categories; [Italy](#) distinguishes, in alignment with the areas of its Golden Powers regime, “defense and national security”, “5G technologies”, and “energy, transport, communication”).

⁷⁶ Some countries offer information on investment trends in individual sectors (such context is explicitly required, for the unclassified version in the United States ([50 U.S.C. § 4565 m \(4\)\(C\) – Note, Study and Report](#)); reports issued by France contain, [until 2019](#), the overall number of foreign investment projects in France in a given year. [Annual reports issued by Australia’s FIRB](#) contain information regarding the country’s foreign investment policies and priorities.

- Whether detail on the transaction is published – common practice where the information relates to a specific case – and to what extent information is anonymized before publication; and
- Whether information remains available in time.⁷⁷

82. Many countries that disclose investment policy action related to the protection of essential security interests use several parallel avenues to communicate relevant information. Where several parallel mechanisms exist in a given country, and, in particular when these are administered under different rule-sets and by different authorities,⁷⁸ more or less information – and in some cases no information – may be available for each of these mechanisms in a given jurisdiction.

83. Besides the release of information under rules specifically designed in the context of a review mechanism, information on investment policy action may be available from a host of different sources outside such dedicated disclosure channels. Information released elsewhere – in budgetary processes,⁷⁹ impact assessments,⁸⁰ legislative justifications,⁸¹ reports by specialized agencies involved in reviews,⁸² parliamentary inquiries,⁸³ or vacancy notices – contain occasionally more detailed and more up-to-date information than what is released under the dedicated channel associated with investment policies related to essential security interests. The public availability of this information, albeit in a less

⁷⁷ Information is most often available over longer periods, especially when released in cyclical reports or official parliamentary records. Canada makes basic information on individual decisions as old as 1985 on a [Canadian government website](#). Information on individual cases may become unavailable more quickly, for example in Australia, where the information on individual decisions is disclosed in press releases. Information on cases reported in Austria under the [now defunct rules introduced in 2011](#) became unavailable relatively quickly.

⁷⁸ More detailed information on the combination of mechanisms is available in OECD (2020), “[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)”, section 2.9.1.

⁷⁹ Up-to-date information on case-load for example can often be found in parliamentary processes in budgeting for Canada and the United States.

⁸⁰ E.g. France “[Fiche d’impact générale on the Décret relatif aux investissements étrangers soumis à autorisation préalable \(ECOT18167RD\)](#)” (October 2018).

⁸¹ Finland and Germany have released implementation data and projections outside the scope of formal obligations to report data: Finland in the context of the [presentation of the Law amending the Act on the Screening of Foreign Corporate Acquisitions \(HE 103/2020 vp\)](#), p.5. Germany in the context of the [draft 1st amendment of the foreign trade and payments act \(AWG\)](#) (2020), p.3 and the [17th amendment ordinance of the foreign trade and payments ordinance \(AWO\)](#) (2021), p.20.

⁸² The Australian Security Intelligence Organisation (ASIO) has for several years published the number of foreign investment reviews to which it had contributed (e.g. in the [ASIO Annual Report 2018-19](#), p.8); the most recent report [covering 2019-20](#) does not contain actual numbers.

⁸³ For Germany, for example, aggregate information on the implementation of its investment screening mechanisms was available relatively early through requests for information that members of the German Parliament brought under their rights to request information from the executive branch. Government responses are publicly available as part of the documentation of parliamentary processes. (e.g. in [BtDrs.18/10443](#), p.4 (25 November 2016); [BtDrs.19/1103](#), p.2 (7 March 2018); and [BtDrs.19/2143](#) (11 May 2018)).

convenient and accessible format, suggests that in some cases more information could be disclosed earlier without exposing sensitive information.

Limited dynamics of policy-evolutions in time

84. Individual countries' policies and OECD-wide trends with respect to the disclosure of investment policy actions have evolved slowly over the past decade.⁸⁴ Countries that have traditionally provided aggregate information to the public or parliaments tend to continue their practice.⁸⁵ Only a few countries – notably Canada⁸⁶ and Italy and most recently Austria, France and the United Kingdom⁸⁷ – have changed their approach compared to past practice and disclose or will disclose investment policy action in annual reports. Diverging depth of information that individual countries' authorities provide suggest different levels of enthusiasm for this change.

85. Several countries continue not to release information on their decisions at all, neither in aggregate nor regarding individual cases.

86. Information on the implementation of acquisition- and ownership-related policies has until recently been scarce in many countries. Part of the reason is that this policy area attracted little or no attention until relatively recently, case numbers were lower and demand for information was likely correspondingly lower. The changing policy landscape, reforms and establishment of new mechanisms, growing numbers of cases and overall greater public attention to this area have led to a greater demand for information.

⁸⁴ Surveys conducted by the OECD in 2008 shows that only very few countries disclosed investment policy actions at the time: OECD (2008), "[Transparency and predictability for investment policies addressing national security concerns: a survey of practices](#)", Table 3c; and OECD (2008), "[Accountability for security-related investment policies](#)", p.2.

⁸⁵ Countries with such longstanding traditions include Australia (since [1984](#)) and the United States (since 2007, introduced by a change that [FINSA](#) brought to Section 721 of the Defence Production Act of 1950. [FIRRMA](#), Section 1719, brought further modifications through an amendment of Section 721(m) of the Defense Production Act of 1950 ([50 U.S.C. 4565\(m\)](#))).

⁸⁶ Canada had been reporting on its investment review mechanisms ("net benefit test") since [2010](#), and began to include information on the parallel assessment of essential security aspects only in [2015](#), following [amendments](#) that require – [Investment Canada Act Part VI, 38.1 - Annual report](#) – that information regarding the administration of Part IV.1 on Investments Injurious to National Security of the Investment Canada Act be covered by the report.

⁸⁷ In Italy, the initial [Decree Law No.21 of 15 March 2012](#) (passed by the Executive), which establishes the Golden Powers, did not initially contain a clause on reporting; when the Parliament approved the Decree law to make it into permanent law through [Law No.56 of 11 May 2012, converted to law and added amendments](#), the reporting requirement was added in a new Article 3a. France introduced reforms as part of the [Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises](#) ("Loi PACTE") which requires the Ministry of Economy, under [Article L151-6 Code monétaire et financier](#), to disclose the main statistical data relating to the control by the Government of foreign investments in France annually. Austria introduced rules on annual reports as part of its 2020 reform ([Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen](#) – section 23). The United Kingdom requires annual reports as soon as the [National Security and Investment Bill](#) has come into force in its entirety; Section 61 of the Act requires annual reporting. The United Kingdom has not published aggregate information in the past.

Annex A. Glossary of terms and concepts

87. This glossary of terms explains how some concepts and terms are used in this note. These explanations are made for convenience and follow the terminology and concepts set out in a report issued by the OECD Secretariat in May 2020.⁸⁸

Acquisition- and ownership-related policies refer to rules that seek to protect essential security interests by managing the acquisition or ownership of certain sensitive assets. Acquisition- and ownership-related policies one type of investment policies related to essential security.

Investment policies related to national security are policies designed to manage risk that is occasionally associated with international investment. The OECD-hosted investment policy community has identified different policy instruments early on and inventoried their use by country as early as 1976,⁸⁹ and additional policies have developed since.

Essential security and **national security** are concepts used in international and domestic law. While many countries domestic law refers to “national security”, international instruments, including the OECD investment instruments refer to the concept “essential security”. The 2009 Guidelines refer to “national security” following findings of a contemporaneous OECD review of uses of terminology.⁹⁰ As the OECD investment policy community is not the specialised policy community to decide on the scopes of these concepts, they are used almost synonymously in this note.

Investment screening and **investment review** are specific acquisition- and ownership-related mechanisms to safeguard essential security interests. They describe mechanisms where competent authorities assess whether certain proposed transactions jeopardise essential security interests. They coexist with other, now more rarely found restrictions on acquisitions and ownership of certain sensitive assets such as sectoral caps. The terms “screening” and “review” are used interchangeably in this note.

Mechanisms and **policies** are terms used to describe rule-sets in the context of acquisition- and ownership-related controls. The term “mechanism” as used here refers to a complete set of self-standing rules implemented to pursue the objective of protecting against acquisition-related risk. Many countries have several such mechanisms in place simultaneously. This combination of “mechanisms” are referred to as a given countries’ “policies”.⁹¹ ■

⁸⁸ OECD (2020), “[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)”.

⁸⁹ The categories and corresponding measures taken by Adherents to the [OECD Declaration on International Investment and Multinational Enterprises](#) are recorded in the [List of Measures Reported for Transparency](#), established under the National Treatment instrument.

⁹⁰ OECD (2009), “[Security-related terms in international investment law and in national security strategies](#)”.

⁹¹ More information on this terminology and country practice is available in OECD (2020), “[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)”, section 2.9.1.