

There is no Author Query !

Balancing Risks: Investment Screening Mechanisms, Essential Security Definitions, and Standards of Evidence

Sarah Bauerle Danzman

Email : sbauerle@indiana.edu

Affiliationids : Aff1, Correspondingaffiliationid : Aff1

Gabriella Couloubaritsis

Email : gcouloub@iu.edu

Affiliationids : Aff2

Aff1 Indiana University, Department of International Studies, Bloomington, IN, USA

Aff2 Indiana University, Kelley School of Business, Bloomington, IN, USA

Abstract

As governments reach more toward essential security exceptions to govern their economic regulatory environment, definitions of national security and related concepts become increasingly consequential. Most OECD countries now have investment screening mechanisms (ISMs) to review inward investment for potential security concerns, but there remains substantial variation in how essential security is delineated and the standards of evidence required to mitigate or block a transaction. This article advances the literature in four ways. First, it provides a descriptive overview of how countries' ISMs conceptualize investment security, creating a typology of country risk profiles. Second, it develops an explanation for why countries systematically vary in their approach to security risks. Third, it uses the case of Germany to discuss how dynamics around critical technologies are pushing some countries to decrease their standards of evidence requirements. Finally, it discusses the implications of countries' security concepts for economic outcomes.

1. Introduction

In recent years, many advanced economies have developed new or strengthened existing investment screening mechanisms (ISMs). In contrast to economic benefit-oriented screening regimes that were prevalent in the mid-twentieth century, the new generation of ISMs is focused on reviewing inward investment for potential concerns related to essential security. However, governments differ in the language they use to construct their screening concepts. This, in turn, influences the standards by which transactions are evaluated, approved, or prohibited.

This chapter contributes to the understanding of ISMs, their politics, and their effects by providing descriptive and comparative data on blocking language and by developing a typology of this language that helps categorize countries by their conception of what rationales are appropriate, and according to what evidence, to block an inward investment. This conceptual and empirical exercise is important because it helps scholars make sense of how countries develop parameters over what kinds of risks constitute essential security consequences and how much risk economies should tolerate before acting. The self-judging nature of essential security exceptions gives governments wide latitude to act expansively if they so choose—at least with respect to their international legal obligations. Therefore, understanding not only the legal language of blocking but also the political and policy motivations behind developing blocking rationale can provide scholars with a path toward better explaining how and why countries develop their understandings of security risks in a global environment where

clear distinctions between security and economic issues have rapidly deteriorated.

We develop these concepts with reference to the PRISM dataset, which maps the characteristics of ISMs—including blocking language—across OECD countries from 2007 to the current day.¹ We supplement a largely static mapping of blocking language into type with a more detailed case of the German blocking language, which underwent a subtle but significant change in 2020. This exercise helps to illustrate how many countries have attempted to keep blocking language relatively constrained across two dimensions—standards of breadth and standards of evidence. However, growing concerns over the proliferation of an **expanding growing** set of dual-use technologies have made the maintenance of narrow blocking concepts challenging. As countries increasingly see a national security imperative in denying advanced technology capabilities to adversaries, they face increasing pressure to both expand the breadth of essential security concepts and lower the standards of evidence necessary to act. These forces could substantially impede cross-border investment in technology companies unless the ‘techno democracies’ collaborate to standardize relatively narrow definitions of critical technology and proactively work to ensure foreign investments from ‘likeminded’ countries will continue to be viewed as low risk and growth-promoting.

2. Essential Security Concepts and Investment Screening Mechanisms

Appeals to essential security fit squarely into broader international trade law that allows governments to deviate from treaty commitments when adherence to such promises would interfere with countries’ security interests.² Article XXI of the General Agreement on Tariffs and Trade (GATT) states, ‘Nothing in this Agreement should be construed. ... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests’.³

The Multilateral Agreement on Investment, if passed, would have included a similar clause.⁴ Many bilateral investment treaties and preferential trade agreements have similar carve outs.⁵ Appeals to essential security concerns in ISMs can be interpreted as applying consistent standards to how inward investment is reviewed. This ensures that ISMs do not violate countries’ treaty obligations. Constraining investment review to essential security concerns also allows governments to credibly claim that these investment control mechanisms are compatible with a broadly liberal investment regulatory regime and with OECD guidelines regarding the appropriate use of national security exceptions in investment policy.⁶

While essential security interests can be thought of as an umbrella term, countries vary a good deal with respect to the ‘blocking language’ they adopt. Blocking language refers to the legal standard used to justify prohibiting or mitigating an investment through an ISM. Some of the differences among countries relate to their legal traditions. For instance, EU member states are more likely to appeal to concepts of public order and public security, while common law countries tend to favor national security or national interest rationales. In the EU, interpretations of public order, *ordre public*, and public security have developed through jurisprudence in both domestic courts and the European Court of Justice (ECJ). A legal studies approach to the evolution and differentiation among these concepts is beyond the scope of this chapter, as we are not legal scholars.

However, the shifting use and meanings of these terms can also shed light on the political choices reflected in ISM design and implementation. What counts as national security, public order, and public security in the context of investment review is not always straightforward. These terms, to varying degrees, are usually not defined in law. The purposeful vagueness of these terms allows the interpretation of security concerns to shift over time as governmental priorities and interpretations of security risks change.

The blocking language governments implement, therefore, set the outer bounds of what actions a state can take against an investment it deems problematic. Importantly, governments may choose to interfere less than their blocking language allows. This chapter focuses on the legal authorities the government has to intervene, not the extent of their use. For instance, the typology developed below characterizes Italy as reserving substantial powers for its government to intervene. In practice, Italy has not blocked a substantial number of transactions. Its rather expansive blocking language, however, could support more government action against inward investments if it so chooses.⁷

Blocking language varies systematically over two dimensions: *standards of breadth* and *standards of evidence*. *Standards of breadth* refers to the capacity of the blocking rationale. Countries that provide their ISM with the authority to intervene in transactions that present unqualified national security, public order, or security threats retain a great deal of flexibility over

how, precisely, to interpret what amounts to such a threat. Still others, such as Japan, reserve a right to intervene if a transaction would adversely affect 'the smooth management of the economy'. This is a more expansive blocking rationale because it makes explicit the government's authority to intervene for macroeconomic policy purposes. In contrast, some countries have adopted blocking language that circumscribes action to more narrowly defined concerns. For instance, Finland's mechanism can intervene when a transaction jeopardizes 'the organization of national defense, the control and safeguarding of territorial integrity, border control, border security, or security of supply'. This blocking language effectively reduces action to a clearly defined subset of national security concerns. Table 1 provides standards of breadth categories for OECD countries with ISMs.⁷

Table 1

Standards of breadth (low to high) across 27 OECD ISMs

National Defense or Narrow Security	National Security, Public Order	Broader National Security	Broader National Interest
Estonia	Austria	Canada	Australia
Finland	Czech Republic	Germany	France
Spain	Denmark	Italy	Hungary
	Ireland	Poland	Japan
	Latvia	Portugal	New Zealand
	Lithuania	Slovak Republic	South Korea
	Mexico	United Kingdom	
	Netherlands	United States	
	Norway		
	Slovenia		

Standards of evidence refer to how certain a government must be that a transaction would impede security before it can act. In other words, what is the risk threshold that must be crossed before a government can prohibit a transaction? The OECD's *Guidelines for Recipient Country for Recipient Country Investment Policies relating to National Security* emphasizes the importance of specifying standards of evidence to facilitate a rigorous, fact-based,

⁸ and transparent risk assessment of reviewed transactions. Identifying a potential security risk to a transaction is usually not enough to block the transaction. Instead, ISMs develop assessments of the *vulnerabilities* to state interests that the target business exposes, the *threat* that the acquirer would exploit these vulnerabilities, and the *consequence* to (national) security that would arise if the transaction was finalized. This consequence is a function of vulnerabilities, threats, and some assessment of the likelihood that the 'threat actor' would successfully exploit these vulnerabilities. While most governments talk about assessments of harm through the language of *risk*, the likely consequences of most transactions are highly

⁹ *uncertain*. That is, it is difficult to assign a probability of negative consequences to transactions because they each reflect unique circumstances involving different actors and different vulnerabilities.

ISMs differ in terms of how strict the standards of evidence they require to block a transaction. At one extreme, governments have the authority to block covered transactions that *threaten* the state along *which every the standards* of breadth to which the mechanism adheres. This is a standards of evidence concept that provides the state with great latitude because it does not qualify the threat standard. A threat, at any degree of probability, could justify a government action in this framework. For instance, Australia's Treasurer, through the Foreign Investment Review Board, can intervene in a transaction if it is found to

¹⁰ be 'contrary to the national interest'. There is no legal circumscription of a risk threshold that must be met to act on a threat. Such blocking language could allow for quite attenuated risk scenarios in which a security-relevant consequence is *possible* due to the transaction but not *probable*.

At the other extreme, some countries employ much higher risk thresholds. For instance, Austria's ISM only allows government action against a transaction when it creates 'actual, serious danger to the public order and security of Austrian society'.¹¹ *Actual, serious danger* creates a standard of evidence where governments must demonstrate a high likelihood that the threat identified will actualize. That means that attenuated risk scenarios will likely not be tolerated by the investment

review authorities because the ISM requires clear evidence not only of a threat and a vulnerability but also documented evidence that indicates a high probability that the threat actor will act to exploit the target's vulnerability.

Intermediate categories have threat thresholds that fall short of the immediacy of an 'actual, serious danger' threshold but are more exacting than a general appeal to threats to the state. For instance, many countries place their risk threshold at 'likely to effect' or 'significant risk'. These concepts allow for some uncertainty of outcome but demand a rather high bar of evidence that a transaction is likely to create negative national security consequences. The United States, Poland, and Germany all have standards of evidence language that fall into this category. Finally, some countries set their risk thresholds at transactions that have the 'potential' to or 'capability' of generating a threat. For instance, the Czech Republic's threshold for action is 'capable of compromising security and public order'.¹² Table 2 provides standards of evidence categories for OECD countries with ISMs.

Table 2

Standards of Evidence (Low to High) Across 27 OECD ISMs

National Security Considerations	Capable of Creating a Threat	Likely To Affect or Significant Risk	Actual Threat or Danger
Australia	Canada	Denmark	Austria
Estonia	Czech Republic	Germany	Finland
Mexico (never been used)	France	Ireland	Hungary
New Zealand	Italy	Japan	Latvia
	Netherlands	Lithuania	Portugal
		Norway	South Korea
		Poland	Slovak Republic
		Spain	Slovenia
		United Kingdom	
		United States	

3. Explaining Different Approaches to Risk, Standards of Breadth, and Standards of Evidence

What might explain the variation across countries with respect to their blocking languages' standards of breadth and evidence? Fundamentally, the standards set for intervention reflect countries' risk profiles. Do political leaders see foreign investment as having a high potential for threatening the state? Or do they worry more about the potential for a strong ISM to repel benign investment? Governments' risk profiles will depend on the structure of their economy—and therefore the relative political power of different interest groups—as well as the source of their external threats. Because economic structure and beliefs over the sources of external threats change over time, governments' risk profiles can also adapt to new circumstances.

Taking the two dimensions of blocking language described in Sect. 2, we can develop ideal types based on combinations of these two characteristics. While Tables 1 and 2 demonstrate intermediate categories for both standards of breadth and standards of evidence, simplifying each dimension to low/high categories helps crystallize the key differences between types. Table 3 develops the resulting four ideal type categories.

Table 3

Categorizing Country Approaches to Blocking Language

	Evidence		
Breadth		Low	High
	Low	Targeted Intervener	FDI Booster
	High	Economic Securitizer	Tech Leader

First, *Targeted Interveners* have narrow concepts of what constitutes a threat while requiring minimal standards of evidence to justify intervention into these narrow categories. Countries that fit into this category may have particular vulnerabilities associated with their energy sectors or concerns about undue influence from rivalrous neighbors. For instance, prior to its recently passed broad ISM, the Netherlands confined national security review to oil, gas, and electricity. Estonia screens real estate investments, mostly to prevent Russian-linked persons from buying property on Estonia's land and islands closely

¹³ proximate to Russia. Other countries could become *targeted interveners* to address the security of supply, especially after COVID-related supply chain disruptions revealed problematic dependencies in many critical capabilities. Additionally, growing concerns about the unique risks posed by entities with foreign government control or influence (FGCI) may lead to regimes that approach presumptions of denial for FGCI transactions in certain industries. Over time, we could see a growth in targeted intervention, even as a subset of broader screening regimes that usually require higher levels of evidence before intervening.

FDI booster countries have both narrow concepts of threats and high standards of evidence for intervention. Most countries that have only erected ISMs recently fit into this category, especially EU member states that feel pressure from the

¹⁴ Commission to develop a mechanism after the implementation of its framework for screening FDI in October 2020. These countries have traditionally been more skeptical of investment screening and more concerned about the potential for ISMs to negatively affect benign, growth-promoting investment in their economies. However, the rise of non-traditional sources of FDI from non-market economies and prominent examples of Chinese investments that seemed to strip technology from

¹⁵ home markets have made these countries more willing to erect narrowly scoped ISMs with high bars for action.

Additionally, *FDI booster* countries in the EU may view developing narrow ISMs as a way to prevent more stringent EU regulation over investment security in the future. Examples of FDI boosters include Austria, Denmark, and Ireland.

The relationship between national security and economic security concerns has become increasingly blurred with the elevation of the People's Republic of China (PRC) to the level of strategic competitor with Europe and the United States. The PRC's economic model, which makes clean distinctions between state-owned and private entities difficult to maintain, adds to these concerns. The PRC's policy of military-civil fusion and its focus on obtaining indigenous technology autonomy through acquiring foreign entities also generates consternation in many capitals. Furthermore, many governments are concerned about unfair subsidization of these PRC-linked companies and how industry consolidation could create security of supply issues and underinvestment in research and development in host countries.

There are two ways that countries have dealt with these concerns while developing blocking language. First, some countries, mainly those with more history of state management of development priorities, have blocking language with broad notions of threats and low barriers to intervention. These *economic securitizer* types, such as France, are willing to interpret national security quite broadly and in ways that mix economic competitiveness concerns. Australia is another example of this type, as it allows action for national interest purposes, which could be interpreted quite broadly, and has **more permissive/weaker** language regarding the evidence needed to act.

Other countries are less comfortable with combining national security and economic competitiveness considerations for the purposes of **investment screening ISM**. At the same time, they have advanced technology that may be more clearly targeted by threat actors for strategic acquisition. Concerns about advanced technology acquisition inherently broaden review breadth. Many of these critical technologies—a term that itself is hard to define—are dual-use in nature. That is, they have both legitimate commercial purposes and more problematic military, **policing**, and intelligence uses. For instance, five nanometer (nm) semiconductor chips can be used in the latest cell phone, **tablet, and server technology** or in a precision-guided missile. Top of the line NAND memory chips (otherwise known as flash chips) can be used both in personal computing devices and in Artificial Intelligence (AI) applications that facilitate wide-scale surveillance and repression.

Accordingly, countries with advanced technology sectors have an increasingly challenging task of determining what kinds of foreign investments in dual-use technologies are **entirely/sufficiently** commercial in nature and which create unacceptable security risks. These risks stem either from the proliferation of technology that can be used for military purposes or from reducing domestic technological capabilities and superiority over military rivals. *Technology leaders* are countries that might otherwise be *FDI Boosters* but have felt pressure to broaden the scope of investment review to amorphous sets of critical technologies.

Technology leaders attempt to balance this expansion by retaining high standards of evidence requirements. However, as the

case of Germany illustrates below, it is not clear if this category can be long lasting. Risks that emanate from critical infrastructure are relatively easily addressed in a high standards of evidence environment. Even if the government establishes a foreign acquirer's malintent after the transaction is finalized, the risks associated with critical infrastructure ownership dissipate substantially as soon as a threat actor is required to divest from the asset. In contrast, national security risks associated with advanced technology lend themselves to prevention strategies rather than **response strategies**. Once an adversary gains access to a critical technology, it can replicate the technology even after a required divestment. A great deal of the national security consequence happens *at the moment of transfer*. The toothpaste is out of the tube, so to speak. The temporal dynamics of technology risks mean that governments will face pressure to decrease standards of evidence over time to *prevent* critical technology transfers rather than merely *respond* to them.

4. Germany's Change in Blocking Language

The above exercise (see Table 4) provides a sense of how we might categorize countries' approaches to blocking standards at a single moment in time. However, changes in standards for review and action also reveal important underlying concerns. In this section, we provide a brief overview of Germany's decision to change its review language. The German case helps illustrate why governments may face pressure to relax the standards of evidence they require for review to allow for more preventive action. It also speaks to the role of the EU in shaping attitudes toward risk.

Table 4

Comparison of Breadth and Evidence Across 27 OECD ISMs

Targeted Interveners (Low, Low)	FDI Boosters (Low, High)	Economic Securitizers (High, Low)	Tech Leaders (High, High)
Czech Republic	Denmark	Australia	Germany
Estonia	Ireland	Canada	Hungary
Mexico	Latvia	France	Japan
Netherlands	Lithuania	New Zealand	Poland
	Norway	Italy	Portugal
	Slovenia		Slovak Republic
	Spain		South Korea
	Austria		UK
	Finland		US

In June 2020, the German Bundestag adopted a revision of the Foreign Trade and Payments Act to align the country's ISM ¹⁶ with the EU FDI Screening Regulation.¹⁷ While the EU regulation on investment screening does not require member states to adopt the strictest version of reviewing language within Article 4 of the FDI Screening Regulation, Germany did.¹⁸ In doing so, Germany's investment review language changed from 'immediate danger to security or public order of Germany' to 'likely to affect security or public order of Germany, any other EU member, or projects and programs of EU interest'. The new **test** standard lowered the degree of risk **the government needed to find in order to justify an investment prohibition** from an actual and severe threat to an anticipated, probable impairment.

The explanatory text that accompanied the amendment articulated a view that Germany's screening body needed dynamic language to reflect the broadened understanding of an investment review. The German government justified this change as necessary to harmonize its blocking language with EU standards, which is an important illustration of the ways in which the EU's investment screening work program has helped shape the conversation about balancing risk and openness in the context of investment. The amendment's explanatory text specified that an investment review can 'go beyond (national) security, public utilities, and critical infrastructure'.¹⁹ Individual cases related to critical technologies can represent 'an impairment of the community that is subject to a ban, without there necessarily having to be a pronounced connection to the above-mentioned basic interests of the community'.²⁰ The European Court of Justice itself conceded that 'the concept of public order or security must be interpreted dynamically, adapted to developments over time'.

Before the amendment, Germany's best course of preventing ~~sales of critical technology companies to foreign entities~~ was using the state-owned, national shareholding instrument Kreditanstalt für Wiederaufbau (KfW) to purchase stakes in German firms ~~to and~~ avoid potential acquisitions. In June 2020, the Bundesministerium für Wirtschaft und Energie (BMWi) announced that the KfW would acquire 23% of CureVac, a biopharmaceutical company that develops vaccines for infectious diseases such as COVID-19 and drugs to treat cancer and rare diseases, to avoid its potential acquisition by any foreign investor.²¹ However, sometimes 'golden shares' arrangements were not possible, such as in the high-profile case of Chinese investor Midea's 2016 acquisition of robotics company Kuka.²²

Arguably, the lowered degree of risk and broadened definition of an investment review have allowed the German government to block deals that may have previously not been captured by the 'actual threat' standard. In April 2022, the Bundesministerium für Wirtschaft und Klimaschutz (BMWK, renamed from BMWi in 2021) retroactively blocked the acquisition of German medical products manufacturer Heyer Medical AG by the Chinese Aeonmed Group, which had taken place 2 years prior during the restructuring of Heyer Medical AG in late March 2020.²³ A veto proposal sent to the German cabinet acknowledged ~~the potential for foreign~~ political influence, saying that Aeonmed seems to receive 'support measures by the Chinese state', and Heyer's 'protected assets' would face 'serious danger' in the event of a full takeover.²⁴ The economic conditions surrounding the COVID-19 pandemic also heightened the priority of the healthcare sector and supply chain ~~security independence~~ more generally. Regarding the prohibition, the BMWK representative shared that 'During the COVID-19 pandemic, it became apparent that Germany needs to maintain its own manufacturing and production capacities to be able to supply itself with ventilators independently of non-European manufacturers.'²⁵

In other words, an expansion of German understanding of what should be considered a national security threat has generated pressures to lower risk thresholds and standards of evidence. As governments continue to develop deeper concerns over the security risks associated with critical technologies and critical supply chains, we may see more governments adopting less strict evidentiary standards for action. In the particular context of the EU, the desire to stave off reviews of intra-EU investments may also lead governments to converge around this lower standard of evidence to demonstrate to members that national-level screening is robust enough to prevent problematic investments from entering the common market.

5. Conclusion and Implications

This chapter has provided a comparative assessment of blocking language in the investment screening regimes of OECD countries. We do so to further explore how concepts of essential security differ in subtle but important ways across country contexts. While some of this variation has to do with legal families and jurisprudence, our contribution highlights the political choices that governments face. The structure of the economy, problematic borders, histories of subjugation by expansionary neighbors, and state-business relationships all influence the types of assets and activities governments view as essential security interests and the degree to which their standards of evidence requirements allow for speculative risk scenarios.

We develop four ideal types of blocking language positions and assess countries' current positionality to these types. This exercise can help uncover which ISMs are likely to be more willing to intervene in a larger number of transactions (*Economic Securitizers*), which ISMs will erect especially narrow but high walls around a small set of domestic vulnerabilities (*Targeted Interveners*), and which ISMs will likely have the least impact on investment flows (*FDI Boosters*).

Our fourth category—*Technology Leaders*—provides conceptual clarity along two dimensions. First, it helps explain much of the dynamism among these categories in recent years. As the importance of dual-use items increases in the information and technology economy, states that specialize in advanced technologies increasingly must contend with messy questions around the line between national security and economic competitiveness. While countries with strong histories of statism have responded by embracing economic security rationales, those closest to the *Technology Leaders* ideal type have somewhat reluctantly expanded the breadth of review without ~~substantially~~ relaxing their standards of evidence for action.

Second, *Technology Leaders* will likely face challenges retaining these high standards of evidence. The nature of essential security risks associated with critical technologies requires preventive rather than responsive action to threats. An aphorism commonly used to describe this problem is that requiring too much evidence of malintent before blocking a transaction with critical technology is akin to closing the barn door after the horse has bolted. In other words, critical technology-related

reviews may increasingly belong to the category of low probability, high consequence transactions. For this reason, and as the German case illustrates, governments will likely face increased pressures to lower evidentiary standards for action, at least around investments in advanced technology sectors. The degree to which these pressures lead to a substantial curtailing of cross-border investment in technology companies will depend on how broadly or narrowly critical technology is defined and whether the **techno democracy** states will continue to see foreign investments from **likeminded** countries to be growth-promoting and benign.

Appendix: Blocking Language

Australia

Key phrase: Australia's ability to protect its strategic and security interests.

Source: 2022 FIRB Foreign Investment Policy Description <https://firb.gov.au/general-guidance/australias-foreign-investment-policy>

Austria

Key phrase: An actual and sufficiently serious threat to public policy and public security.

Source: Investment Measure Relating to National Security Notification of Adopting the Austrian Foreign

Trade Act of 2011, DAF/INV/RD(2013)3, page 5

Canada

Key phrase: That could be injurious to national security.

Source: Investment Canada Act as of November 2022, <https://laws-lois.justice.gc.ca/eng/acts/I-21.8/>

Czech Republic

Key phrase: Capable of threatening the security of the Czech Republic or internal or public order.

Source: The Foreign Investments Screening Act 2021, https://www.mpo.cz/assets/en/foreign-trade/investment-screening/legislation/2022/11/Act-on-FDI-Screening_unofficial-translation_1.pdf

Denmark

Key phrase: May pose a threat to national security or public order.

Source: Act on screening of certain foreign direct investments, etc., in Denmark (the Investment Screening Act), ACT no. 842 of 10/05/2021, https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159712.6.pdf

Estonia

Key phrase: National defense reasons.

Source: Estonian Act on Restrictions on Acquisition of Immovables (2012)
<https://www.riigiteataja.ee/en/eli/523102017002/consolide>

Finland

Key phrase: Potential conflicts with a key national interest (which means securing national defense or safeguarding public order and security in accordance with Articles 52 and 65 of the Treaty on the Functioning of the European Union, should the fundamental interests of society be under actual and adequately serious threat)

Source: Act on the Monitoring of Foreign Corporate Acquisitions in Finland (172/2012),
<https://tem.fi/documents/1410877/2132272/Act+on+the+Monitoring+of+Foreign+Corporate+Acquisitions+in+Finland/60021eda-c318-4e6c-b12e-eb15f02f46d2/Act+on+the+Monitoring+of+Foreign+Corporate+Acquisitions+in+Finland.pdf>

France

Key phrase: Likely to jeopardize public order, public safety, or national defense interests

Source: French Ministry of Economy and Finance, Guidelines, 8 September 2022,
<https://www.tresor.economie.gouv.fr/Articles/2022/09/08/publication-des-lignes-directrices-relatives-au-controle-des->

[investissements-étrangers-en-france#:~:text=La%20publication%20de%20lignes%20directrices,'attractivit%C3%A9%20de%20la%20France%20%C2%BB.](#)

Germany

Key phrase: Likely to affect security or public order of Germany, any other EU member, or projects and programs of EU interest

Source: Draft of a First Law To Amend the Foreign Trade Law and Other Laws, German Bundestag, 19/18700

<https://dserv.bundestag.de/btd/19/187/1918700.pdf>

Hungary

Key phrase: Violates the security interests of Hungary

Source: LVII of 2018 Law On The Control Of Foreign Investments That Harm The Security Interests Of Hungary,

<https://njt.hu/jogszabaly/2018-57-00-00>

Ireland

Key phrase: Affects or would be likely to affect the security or public order of the State

Source: Screening of Third Country Transactions Bill 2022,

<https://data.oireachtas.ie/ie/oireachtas/bill/2022/77/eng/initiated/b7722d.pdf>

Italy

Key phrase: Poses a serious threat or would be capable of compromising defense and national security interests

Source: Decree-law Converted With Amendments By Law 11 May 2012, N. 56 (In Official Gazette 14/05/2012, N. 111). (Last Update To The Deed Published On 08/05/2022) <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2012-03-15&atto.codiceRedazionale=012G0040&tipoDettaglio=originario&qId=&tabID=0.9861907600069377&title=Atto%20originario&bloc>

Japan

Key phrase: May impair national security, disturb public order, or adversely affect the smooth management of the economy

Source: Cabinet Order Concerning Inward Direct Investment, etc. (Cabinet Order No. 261 of 1980, Revised by Cabinet Order No. 37 of 2022) <https://elaws.e-gov.go.jp/document?lawid=355C0000000261>

Latvia

Key phrase: Threatens interests of national security

Source: Regulation No. 606, <https://investmentpolicy.unctad.org/investment-laws/laws/242/latvia-regulations-to-the-national-security-law>

Lithuania

Key phrase: May pose a real threat to national security interests

Source: Investment Policy Related To National Security Notification By Lithuania,

[https://one.oecd.org/document/DAF/INV/RD\(2018\)6/en/pdf](https://one.oecd.org/document/DAF/INV/RD(2018)6/en/pdf)

Mexico

*As of 2022, the national security test has never been used before.

Key Phrase: Reasons for national security

Sources: Foreign Investment Law, <https://investmentpolicy.unctad.org/investment-laws/laws/136/foreign-investment-law>

Netherlands

Key phrase: Is possible to lead a risk to national security

Source: Law of 18 May 2022,

https://www.eerstekamer.nl/behandeling/20220419/gewijzigd_voorstel_van_wet_3/document3/f=/vlsai3pa5fjk_opgemaakt.pdf

New Zealand

Key phrase: Is contrary to New Zealand's national interest

Source: 2021 Foreign Investment Policy and National Interest Guidance, <https://www.treasury.govt.nz/sites/default/files/2021-06/for-invest-pol-nat-interest-guidance-jun21.pdf>

Norway

Key phrase: May entail a not insignificant threat to national security interests

Source: Norway ISM, [https://one.oecd.org/document/DAF/INV/RD\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/INV/RD(2020)2/en/pdf)

Poland

Key phrase: May threaten safety, order and public health

Source: The Act Of 19 June 2020 On Subsidies On Interest On Bank Loans Granted To Entrepreneurs Affected By COVID-19 And On The Simplified Procedure For The Approval Of Arrangements In Connection With COVID-19, https://trade.ec.europa.eu/doclib/docs/2020/september/tradoc_158930.pdf

Portugal

Key phrase: Real and sufficiently serious manner to national security and defense or the country's supply of services deemed to be fundamental for the national interest.

Source: Portugal ISM, [https://one.oecd.org/document/DAF/INV/RD\(2019\)7/en/pdf](https://one.oecd.org/document/DAF/INV/RD(2019)7/en/pdf)

South Korea

Key phrase: Interferes with maintenance of national safety and public order, harms public health or environmental preservation, is significantly contrary to public morals, or is in violation of the laws of the Republic of Korea

Source: Foreign Investment Promotion Act, <https://www.law.go.kr/LSW/lsInfoP.do?efYd=20200401&lsSeq=213079&ancYd=20191231&nwJoYnInfo=Y&ancYnChk=0&ancNo=16859&chrClsCd=010202&efGubun=Y#0>

Slovak Republic

Key Phrase: Disrupts the public order or national security of the Slovak Republic or another Member State of the European Union or the interests of the European Union.

Source: Critical Infrastructure Act, https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159517.pdf

Slovenia

Key Phrase: Poses a threat to security or public policy of the Republic of Slovenia

Source: Act Determining The Intervention Measures To Mitigate And Remedy The Consequences Of The COVID-19 Epidemic, https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc_158966.6.2020.pdf

Spain

Key phrase: There is a serious risk that the foreign investor will carry out criminal or illegal activities affecting public security, public order, or public health in Spain

Source: Spanish ISM, as of Royal Decree 12/2021 of 24 June 2021,

<https://www.uria.com/documentos/circulares/1463/documento/12597/UM-note.pdf?id=12597&forceDownload=true>

United Kingdom

Key Phrase: May give rise to national security risks

Source: National Security and Investment: Market Guidance Notes July 2022,

<https://www.gov.uk/government/publications/national-security-and-investment-nsi-act-market-guidance-notes/national-security-and-investment-market-guidance-notes-july-2022>

United States

Key phrase: Threatens to impair national security

Source: Notes on The Committee on Foreign Investment in the United States (CFIUS),

<https://sgp.fas.org/crs/natsec/RL33388.pdf>

References

Bauerle Danzman S, Meunier S (2023) Mapping the characteristics of foreign investment screening mechanisms: the new P RISM dataset. *Int Stud Q* 67(2). <https://doi.org/10.1093/isq/sqad026>

Estonian Act on Restrictions on Acquisition of Immovables (2012). <https://www.riigiteataja.ee/en/eli/523102017002/consolidate>

Freshfields (n.d.) Midea-Kuka: A Blueprint for Chinese Outbound Investment. <https://www.freshfields.com/en-gb/what-we-do/case-studies/midea-kuka-case-study/>

German Bundestag's Draft of a First Law To Amend the Foreign Trade Law and Other Laws, 19/18700, <https://dserver.bundestag.de/btd/19/187/1918700.pdf>

Government of Australia (2020) Foreign Investment Review Board: Guidance 2, Key Concepts. <https://firb.gov.au/guidance-notes>

Government of Austria (2020) Investment Control Act. https://trade.ec.europa.eu/doclib/docs/2020/september/tradoc_158955.pdf

Government of Czechia (2021) Act No. 34/2021 Coll. on Screening of Foreign Investments. https://www.mpo.cz/assets/cz/zahraniční-obchod/proverování-zahraničních-investic/2021/4/sb0017-2021-1_.pdf

Heinrich K, Wienke TM (2021) Foreign Direct Investment Reviews 2021: Germany. White & Case. <https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2021-germany>

Knight FH (1921) Risk, uncertainty, and profit. Hart, Schaffner & Marx; Houghton Mifflin Company, Boston, MA

Mayer-Kuckuk (2022) Three years later: Germany Prevents Acquisition of Heyer Medical. China.Table. April. <https://tablemedia.china/en/professional-briefing/heyer-medical-takeover-failed-borgward-scrap-metal/>

OECD (2007) International Investment Perspectives 2007: Freedom of investment in a changing world. Paris

OECD (2009) Guidelines for Recipient Country Investment Policies Relating to National Security. Paris

Orrick (2020) Orrick Advises China's AEONMED Group on Acquisition of German Medical Device Manufacturer Heyer Medical AG. April. <https://www.orrick.com/en/News/2020/04/Orrick-Advises-AEONMED-Group-on-Acquisition-of-German-Medical-Device-Manufacturer-Heyer-Medical>

Pinchus-Paulsen M (2020) Trade multilateralism and U.S. national security: the making of the GATT security exceptions. *Mich J Int Law* 41:109

Wittenbrink F (2022) Federal Government Stops Chinese Takeover of Ventilator Manufacturer. *Franffurter Allgemeine*. April. <https://www.faz.net/aktuell/wirtschaft/bund-stoppt-chinesische-uebernahme-von-beatmungsgeraete-hersteller-17989193.html>

¹ Bauerle Danzman and Meunier ([2023](#)).

² Pinchus-Paulsen ([2020](#)).

³ General Agreement on Tariffs and Trade art. XXI(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁴ OECD ([2007](#)), p. 96.

⁵ OECD ([2009](#)), p. 6.

⁶ OECD ([2009](#)).

⁷ All data on OECD ISMs and their characteristics come from Bauerle Danzman and Meunier ([2023](#)).

⁸ OECD ([2009](#)) Annex Part 3.

⁹ This discussion draws on a Knightian conception of risk and uncertainty. Knight ([1921](#)).

¹⁰ Government of Australia ([2020](#)), p. 52.

¹¹ Government of Austria ([2020](#)), section 3.

¹² Government of Czechia ([2021](#)).

¹³ Estonian Act on Restrictions on Acquisition of Immovables ([2012](#)).

¹⁴ EU Regulation 2019/452.

¹⁵ Midea's acquisition of Kuka Robotics is an often-used example of such a transaction, although others would counter that other potential European buyers such as Siemens were ultimately not interested in the transaction for financial reasons. See Freshfields ([n.d.](#)) for legal counsel's overview of the transaction.

¹⁶ German Bundestag's Draft of a First Law To Amend the Foreign Trade Law and Other Laws, 19/18700, <https://dserver.bundestag.de/btd/19/187/1918700.pdf>.

¹⁷ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, PE/72/2018/REV/1 OJ L 79I, 21.3.2019, p. 1–14, <https://eur-lex.europa.eu/eli/reg/2019/452/oj>.

¹⁸ German Bundestag's Draft of a First Law To Amend the Foreign Trade Law and Other Laws, 19/18700, Number 4 of Part B Special Part On Article 1 (Amendment to the Foreign Trade Act), pg. 18 <https://dserver.bundestag.de/btd/19/187/1918700.pdf>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Heinrich, Kuhn, and Wienke. "Foreign Direct Investment Reviews 2021: Germany." White & Case, [2021](#) <https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2021-germany>.

²² Freshfields ([n.d.](#)) Midea-Kuka: A Blueprint for Chinese Outbound Investment. <https://www.freshfields.com/en-gb/what-we-do/case-studies/midea-kuka-case-study/>.

²³ "Orrick Advises China's AEONMED Group on Acquisition of German Medical Device Manufacturer Heyer Medical AG." April [2020](#). Orrick. <https://www.orrick.com/en/News/2020/04/Orrick-Advises-AEONMED-Group-on-Acquisition-of-German-Medical-Device-Manufacturer-Heyer-Medical>.

²⁴ "Federal Government Stops Chinese Takeover of Ventilator Manufacturer." *Frankfurter Allgemeine*. April [2022](#). <https://www.faz.net/aktuell/wirtschaft/bund-stoppt-chinesische-uebernahme-von-beatmungsgeraete-hersteller-17989193.html>.

²⁵ Mayer-Kuckuk. "Three Years Later: Germany Prevents Acquisition of Heyer Medical." *China.Table*. April [2022](#). <https://table.media/China/en/professional-briefing/heyer-medical-takeover-failed-borgward-scrap-metal/>.