



# WHITEPAPER

**FOREIGN DIRECT INVESTMENT SCREENING:  
EU REGULATION ON FDI SCREENING & ALBANIA'S  
PERSPECTIVES IN THE FRAMEWORK OF EU ACCESSION**





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## **ABBREVIATIONS AND ACRONYMS**

ACA – Albanian Competition Authority

AIDA – Albanian Investment Development Agency

BIT – Bilateral Investment Treaty

CEFTA – Central European Free Trade Agreement

CIPE – Center for International Private Enterprise

CFIUS – Committee on Foreign Investment in the United States

EC – European Commission

ECAA – European Common Aviation Area

ECJ – European Court of Justice

EEA – European Economic Area

EFTA – European Free Trade Association

EU – European Union

FDI – Foreign Direct Investment

FET – Fair and Equitable Treatment

IIA – International Investment Agreement

INSTAT – Institute of Statistics in Albania

ISDS – Investor-State Dispute Settlement Mechanism

ISM – Investment Screening Mechanisms

MFN – Most Favorable-nation Treatment

MNEs – Foreign Multinational Enterprises

NATO – North Atlantic Treaty Organization

NCPs – National Contact Points

NT – National Treatment

OECD – Organization for Economic Cooperation and Development

SDGs – Sustainable Development Goals

TAP – Trans Adriatic Pipeline

UNCTAD – United Nations Conference on Trade and Development



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## I. Overview

This White Paper discusses the latest developments and trends in investment screening mechanisms (ISM) at the international level, with a particular focus at the EU level. The methodology followed is based on comprehensive desk research of the EU acquis and domestic primary and secondary legislation as well as international reports from reputable institutions dealing with Foreign Direct Investments (FDIs), such as UNCTAD, OECD, EU, etc. For the accuracy of the data herein included, references are made only to official documents, European Commission (EC) reports and reliable sources of information and study, such as the CELIS Institute Berlin and CIPE. This research has its limitations. It is based only on a theoretical approach, due to the lack of a formal screening mechanism for Albania. No published official administrative acts concerning potential screening of investments for concrete cases were found. However, such limitation does not impact the recommendations provided, as they reflect the best practices' examples on the implementation of the screening mechanisms in other jurisdictions. The analysis shows that the number of countries introducing new screening regimes and amending the existing regulations has been growing. This is mainly due to geoeconomic factors and the shift of the investment legislation from low barriers to national security issues related to FDIs. In addition, there is an increasing awareness among countries for hosting important investments not only in terms of numbers but also in terms of quality. The latter is often perceived as related more to the investor's country of origin and the sector of operation.

EU Regulation 2019/452 provides a comprehensive framework at the EU level for the screening of FDIs on the grounds of security or public order. Its adoption demonstrates the increased sensitivity of the EU to certain FDIs' impact on *national security* and *public order*. The regulation's aim is to provide an EU-wide cooperation framework between the Member States and the Commission and to establish common criteria for identifying risks related to the acquisition or control of strategic assets by foreign investors, which might threaten security or public order.

The regulation provisions and ISM as adopted in several EU Member States present an opportunity for the improvement of the legislation on FDIs even for Albania, which currently lacks a formal screening mechanism. In order to precede policy developments that shall address this lack, a list of recommendations is issued in order to provide for policy options:

- Setting the ground for a professional and transparent discussion on ISM at the national level;
- Developing an in-depth analysis of the potential geoeconomic factors and FDI trends that could trigger issues of "national security" and "public order" in the Albanian context;
- Developing an in-depth analysis of the current legal and regulatory framework on FDIs, including issues of governance, institutional capacities and coordination;
- Identifying best ISM practices at the EU level, building upon their experience and lessons learned;
- Government should assess the implications of the EU Regulation 2019/452 for domestic legislation and prioritize the interventions in line with the objectives of the accession negotiation process that provides for speedy and full acceptance of the EU acquis;
- Empowering the Business Associations and Chambers of Commerce in their role to influence effectively policymaking and shape the debate on FDIs and ISM.

Finally, FDIs are vital for the Albanian economy. As such, navigating the legislation on FDIs and screening, both from the perspective of government and foreign direct investors, should be an exercise that ensures good margins of legal certainty and predictability to foreign investors without prejudice. To achieve this goal, any intervention in the FDI legislation requires sustainable and resilient models that are already provided for in other jurisdictions with a long tradition in attracting and retaining foreign investors. It is important that such models are tailored to the features of the FDIs in Albania and that the potential risks of inward investments are assessed in advance. To ensure this, public consultation through public-private platforms of dialogue is indispensable.

## II. Introduction to FDI Screening Mechanisms

Investments host countries have various policy instruments at their disposal to exercise their sovereign right to regulate the entry and establishment of foreign investments on their territory.<sup>1</sup> Such instruments include business registration and approval requirements as well as the full or partial prohibition of foreign investments in certain sectors of the economy. These restrictions may, *inter alia*, reflect national security concerns of the host countries,<sup>2</sup> be they explicit or implied.

Most policy attention and activity related to the protection of essential security interests is currently concentrated on acquisition- and ownership-related policies, and in particular ISM.<sup>3</sup> These instruments address exposures, especially those linked to espionage, sabotage, single-supplier dependency and similar risks related to inward investment.<sup>4</sup>

### 2.1 The History of ISM

Restricting the inflow of FDIs with the rationale of protecting national interests has been an increasing trend also due to geoeconomics.<sup>5</sup> The OECD Code of Liberalization of Capital Movements provided for restriction of FDIs *for the maintenance of public order and protection of its essential security interests*<sup>6</sup> since 1961. Investment screening essentially refers to instruments and mechanisms to control whether an investment project conforms with the country's strategic

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<sup>1</sup>UNCTAD, "Investment Policy Monitor: National Security-Related Screening Mechanisms for Foreign Investment", December 2019. <https://investmentpolicy.unctad.org/publications/1213/investment-policy-monitor-special-issue---national-security-related-screening-mechanisms-for-foreign-investment-an-analysis-of-recent-policy-developments>. Last accessed on 06.12.2023.

<sup>2</sup> Ibid.

<sup>3</sup> <https://www.oecd.org/investment/investment-policy/investment-policy-national-security.htm>. Last accessed on 06.12.2023.

<sup>4</sup> OECD, "Investment Policy Developments Between 16 October 2020 and 15 October 2021", November 2021. <https://www.oecd.org/investment/investment-policy/investment-policy-monitoring-October-2021-ENG.pdf>. Last accessed on 06.12.2023.

<sup>5</sup> The term commonly stands for the presumed tendency in international relations to use economic policy instruments to pursue foreign policy goals related to security or geopolitics. Blackwill, R. D., & Harris, J. M. (2016), "War by other means: Geoeconomics and Statecraft", Harvard University Press; J. Hillebrand Pohl "Geoeconomic Risks Associated with Foreign Investments", paper presented at CELIS Institute Symposium 2021.

<sup>6</sup> OECD (2023), OECD Code of Liberalisation of Capital Movements, [www.oecd.org/investment/codes.htm](http://www.oecd.org/investment/codes.htm). Last accessed on 06.12.2023.

The Code of Liberalisation of Capital Movements was born with the OECD in 1961. Under this document, adhering countries have accepted legally binding obligations in the area of capital flows. In its Article 3, "Public order and security" it is stated that:

*The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:*

*i) the maintenance of public order or the protection of public health, morals and safety;*

*ii) the protection of its essential security interests;*

*iii) the fulfilment of its obligations relating to international peace and security.*

interests. FDI screening mechanism and the definition of national interest<sup>7</sup> as its cornerstone have been evolving and expanding, resulting in several new economic sub-sectors being considered strategic.<sup>8</sup> Reasons for this trend shall be further discussed below. In the landscape of countries that have established investment screening mechanisms, the U.S. has a long tradition.

### Box 1

#### ISM in the United States

The U.S. government has been screening foreign investments since 1975. The checks are carried out by the Committee on Foreign Investment in the United States (CFIUS).<sup>9</sup> If CFIUS assesses that an investment could undermine the national security, it can refer the case to the U.S. President for decision. The President's decision is binding and not legally contestable. The main legal framework for foreign investment screening instrument was improved in 2018 with "The Foreign Investment Risk Review Modernization Act."<sup>10</sup> It strengthened and modernized CFIUS to address national security concerns more effectively, including broadening the authority of the President and CFIUS to review and take action to address any national security concerns arising from certain non-controlling investments and real estate transactions involving foreign persons.<sup>11</sup> On September 15, 2022, President Biden issued [Executive Order 14083](#) reflecting the evolving national security threat landscape and underscoring the critical role of the Committee on Foreign Investment in the United States in responding to new and emerging threats and vulnerabilities in the context of foreign investment. The Executive Order elaborates and expands on the existing list of factors that CFIUS considers, as appropriate, when reviewing transactions for national security risks, and describes potential national security implications in key areas.<sup>12</sup> In addition to the screening of *inward* investments, in a recent development, the U.S. has introduced a new program, *Outbound Investment Program*, to scrutinize and prohibit also certain *outbound* U.S. investments.<sup>13</sup> Presidential Executive Order 14105 of August 9, 2023, declares a national emergency to address the threat to the United States posed by certain countries of concern, which seek to develop and exploit sensitive or advanced technologies or products critical for military, intelligence, surveillance or cyber-enabled capabilities.<sup>14</sup>

Other countries have continued to adopt rules related to FDI screening, that allow for necessary actions to restrain investments considered to be against national interest.<sup>15</sup> The number of countries introducing new screening regimes has been steadily growing during the previous decade and the pandemic did not change this trend but rather accelerated it. According to UNCTAD, from 1995 to 2022 in total, at least 37 countries introduced new regulatory frameworks

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<sup>7</sup> Although there are several nuances and terminologies used in multiple jurisdictions, national interest generally refers to and/or implies issues related to public order, national security, critical infrastructure, strategic sectors, etc. According to UNCTAD investment screening rationale is driven by "public order" as the main screening criterion for 11 countries, while "national security" and "national interest" are offered as the key rationale in 6 and 5 countries, respectively.

<sup>8</sup> UNCTAD, "Investment Policy Monitor: The Evolution of FDI Screening Mechanisms", February 2023. Last accessed on 06.12.2023.

<sup>9</sup> CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real-estate transactions by foreign persons, to determine the effect of such transactions on the national security of the United States.

<sup>10</sup> <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance>. Last accessed on 05.30.2023

<sup>11</sup> <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>. Last accessed on 05.30.2023

<sup>12</sup> Ibid.

<sup>13</sup> [U.S. Presidential Executive Order no. 14105 date August 9, 2023. Last accessed on 06.12.2023](#)

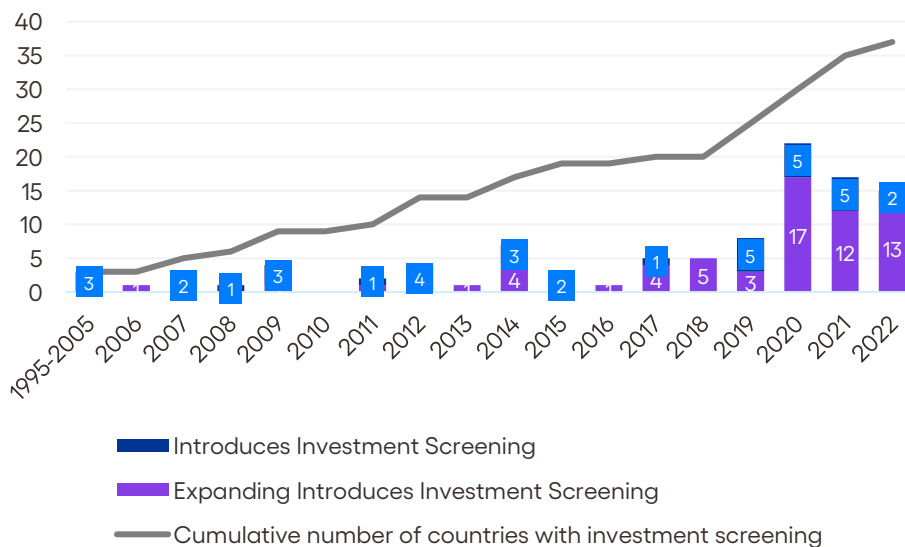
<sup>14</sup> <https://home.treasury.gov/policy-issues/international/outbound-investment-program>. Last accessed on 06.12.2023.

<sup>15</sup> France improved its legislation in 2005. In 2006, China adopted legislation authorizing the government to prevent investments that could affect the national security negatively.

for the screening of investments that include national security considerations. Out of the 37 countries that have established investment screening for national security, during the reviewed period, 22 were developed European economies. In other regions, these regulations are used only by a few developed and developing countries (nine countries in Asia, two in North America, two in Oceania, one in Latin America and one in Africa).<sup>16</sup>

The peak of regulatory activity came in 2020, when the world economy faced risks associated with the COVID-19 pandemic (Chart 1). This momentum resonates with the approval of the EU Investment Screening Regulation fully applicable from October 11, 2020.

**Chart 1 - Introduction of ISM**



**Source: UNCTAD’s Investment Policy Monitor**

### III. INVESTMENT SCREENING IN THE EU

#### 3.1. Background and Context

##### 3.1.1. The need to address geoeconomic risk

On September 13, 2017 the Commission published a proposal for a regulation establishing a legal framework for the screening of FDI inflows into the EU. The proposal contained, *inter alia*, the following:

- (i) to create an enabling legal framework that embraces the diversity of the Member States’ approaches to FDI screening and their exclusive responsibility for national security, while taking into account the EU’s competence for FDI;
- (ii) to reaffirm that Member States may maintain, amend or adopt FDI screening mechanisms on grounds of security or public order under the conditions of the proposed Regulation,

<sup>16</sup> UNCTAD, “Investment Policy Monitor: The Evolution of FDI Screening Mechanisms”, February 2023. Last accessed on 06.12.2023.

that Member States would not be obliged to create an FDI screening mechanism and that they retain their final decision-making power on FDI;

- (iii) to introduce a new Commission competence to screen FDIs and issue a non-binding opinion, if (i) an FDI in a Member State may affect the security or public order of projects or programs “of Union interest”; (ii) an FDI in a Member State may affect the security or public order of other Member States;
- (iv) to create a cooperation mechanism between Member States and the Commission that aims to enhance the coordination of screening decisions taken by the Member State/s concerned and to increase the awareness of Member States and the Commission about planned or completed FDI that may affect security or public order by way of exchanges of information;
- (v) to introduce transparency and information requirements for screening and non-screening Member States linked to this new cooperation mechanism.

In addition, the Commission is committed to assessing the state of play of FDIs in the Union. The summarized outcomes of this assessment were<sup>17</sup> the following: (i) The “traditional” main investors in the EU, advanced economies, such as the U.S., Switzerland, Norway, Canada, Australia, Japan – remain well ahead and still control more than 80% of all foreign-owned assets; (ii) “New investors” are emerging. The diversity of countries of origin has been increasing, through several acquisitions with a surge in the number of deals over the last years as, for example, by China in aircraft manufacturing and specialized machinery, or by India in pharmaceuticals. In addition, the presence of Russia and United Arab Emirates through a number of acquisitions; (iii) “Offshore investors” was a striking finding of the study; they controlled 11% of foreign-owned EU companies and a significant share of foreign-owned assets (4%) in the EU.

These developments embodied an increased sensitivity of several governments in the EU to penetration in strategic sectors by third-country players controlled and subsidized by states rather than by private companies and to the lack of adequate screening mechanisms in some other EU countries.

In February 2017, through a public letter, France, Germany and Italy asked the EC to rethink rules on foreign investment into the EU, amid concerns that technological know-how is leaking abroad. Earlier in 2016, Germany faced such issues when the Chinese company Midea purchased its national champion in robotics, Kuka, for \$5.3 billion.<sup>18</sup> In another example dating back to 2016, German authorities reviewed the takeover by Chinese investors of the German-based Aixtron SE, a German semiconductor firm.<sup>19</sup> Later that year, President Obama issued an Executive Order<sup>20</sup> blocking the proposed acquisition of Aixtron, Inc., a California-based U.S. subsidiary of Aixtron. The Committee on Foreign Investment in the United States (CFIUS) had recommended that the transaction be blocked. Seemingly, some sort of cooperation occurred among countries for such a decision, even though it was officially stated that reviews were independent.<sup>21</sup>

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<sup>17</sup> Commission Staff Working Document, “On Foreign Direct Investment in the EU,” following up on the Commission Communication “Welcoming Foreign Direct Investment while Protecting Essential Interests” of 13 September 2017, Brussels, 13.3.2019 SWD (2019) 108 final. [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2019\)108&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2019)108&lang=en). Last accessed on 05.31.2023.

<sup>18</sup> <https://www.reuters.com/article/kuka-ma-midea-group-germany-idCNL5N18G482>. Last accessed on 05.30.2023.

<sup>19</sup> [Frankfurter Allgemeine Zeitung](https://www.reuters.com/article/kuka-ma-midea-group-germany-idCNL5N18G482). Last accessed on 06.12.2023.

<sup>20</sup> <https://obamawhitehouse.archives.gov/the-press-office/2016/12/02/presidential-order-regarding-proposed-acquisition-controlling-interest> Last accessed on 06.12.2023.

<sup>21</sup> [Reuters Website](https://www.reuters.com/article/kuka-ma-midea-group-germany-idCNL5N18G482). Last accessed on 06.12.2023.

The letter referred to a growing number of non-EU investors that were buying up European technologies for the strategic objectives of their home countries, and to the fact that EU investors often face barriers when they try to invest in other countries, by underlying as such the lack of reciprocity by third countries.<sup>22</sup>

*"Yes, Europe is open for business. But there must be reciprocity. We have to get what we give.... Let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to purchase a European harbor, part of our energy infrastructure or a defense technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed."*<sup>23</sup>

Through this speech addressed to the EC by Jean-Claude Juncker at that time President of the EC, a policy process for screening inward FDI in Europe was formally launched.

### 3.1.2. Shifting the focus of investment legislation

Such developments marked a strong shift in the trend of policies and approaches toward FDI - from the liberal investment regimes that focused on investors and low barriers, to investment screening mechanisms that center the focus on the government sensitivity to protect their countries from potential national security harms that could accrue from foreign ownership of sensitive industries and assets.<sup>24</sup> As a matter of fact, according to the Commission, in 2019, the EU was one of the world's most open investment regimes, as acknowledged by the OECD in its investment restrictiveness index. The EU is the main destination for FDI in the world: FDI stocks held by third-country investors in the EU amounted to €6,295 billion at the end of 2017, providing Europeans with 16 million direct jobs.<sup>25</sup> Determinants for the support toward ISM in general, and in the EU case in particular, are a combination of commercial, economic, institutional and national security factors.<sup>26</sup> As a matter of fact, they are driven by the increased concerns from both domestic investors and governments on the acquisition by foreign investors of domestic technology and know-how, such as artificial intelligence, robotics, semiconductors, cloud computing, 5G, quantum technology, computing hardware, nanotechnologies, biotechnologies or satellites and aerospace. Among several reasons that may explain such developments according to UNCTAD, the following seems directly related to national security/interests: *"...extending the scope of screening is in part also a reaction to the increasing investment activities of foreign State-owned or -controlled enterprises and sovereign wealth funds. There are concerns that these activities might result in foreign state control over key companies or critical infrastructure."*<sup>27</sup>

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<sup>22</sup> European Parliamentary Research Service, EU framework for FDI screening, Brussels, European Parliament, April 2019. [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/633165/EPRS\\_ATA\(2019\)633165\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/633165/EPRS_ATA(2019)633165_EN.pdf). Last accessed on 05.31.2023.

<sup>23</sup> Jean-Claude Juncker, State of the Union Address 2017. Brussels: European Commission, September 13. [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_3165](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165) Last accessed on 05.31.2023.

<sup>24</sup> "Shaping Investment Security Policy: A Guide for Business Associations", Sarah Bauerle Danzman, Center for International Private Enterprise (CIPE), 2023. <https://www.cipe.org/resources/shaping-investment-security-policy-a-guide-for-business-associations/>. Last accessed on 05.29.2023.

<sup>25</sup> European Commission press release, 10 April 2019. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2088](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2088). Last accessed on 05.31.2023.

<sup>26</sup> "Behind the screen: Understanding national support for a foreign investment screening mechanism in the European Union", Zenobia T. Chan & Sophie Meunier. *Review of International Organizations*. Published: 13 July 2021, <https://link.springer.com/article/10.1007/s11558-021-09436-y#citeas>. Last accessed on 05.29.2023.

<sup>27</sup> UNCTAD, "Investment Policy Monitor: National Security-Related Screening Mechanisms for Foreign Investment", December 2019. <https://investmentpolicy.unctad.org/publications/1213/investment-policy-monitor-special-issue---national-security->



Several studies show that not all EU states have supported the EU-wide ISM. Evidence shows that “*cit. the technological level of the country is the most important determinant of national preferences for FDI screening. Countries with higher technological levels are more concerned about unreciprocated international transfer of technologies, especially the strategic ones*”<sup>28</sup> However, geopolitics, geonomics and factors related to the economic diplomacy all played a role, considering that different countries within the EU have/had different views about investments from countries like China or Russia.

**Table 1 - Initial National Preferences for EU-wide ISM**

Oppose	Somehow oppose	Neutral	Somewhat support	Support
Cyprus	Belgium	Bulgaria	Denmark	Austria
Estonia	Czechia	Croatia	Lithuania	France
Greece	Finland	Slovakia	Spain	Germany
Hungary	Latvia	Slovenia		Italy
Ireland	Luxemburg			Poland
Malta	Netherlands			
Portugal	Romania			
United Kingdom	Sweden			

**Source: “Behind the screen: Understanding national support for a foreign investment screening mechanism in the European Union”**

### 3.2. Regulation 2019/452 in a Nutshell<sup>29</sup>

#### 3.2.1. Premises and legal ratio

Before the entry into force of the regulation, there was no comprehensive framework at the EU level for the screening of FDIs on the grounds of security or public order, while the major trading partners of the Union had already developed such frameworks. The regulation’s objective is to balance the EU’s openness to FDI through appropriate screening tools to safeguard security and public order. The legal basis of the regulation is the Article 207(2) of the Treaty on the Functioning of the European Union<sup>30</sup> on the measures defining the framework for implementing the common commercial policy.<sup>31</sup> The EC has several times clarified that the regulation does not target any specific country. Concerns relating to security and public order can potentially arise from anywhere. Non-discrimination among foreign (non-EU) investors is a key principle of the

[related-screening-mechanisms-for-foreign-investment-an-analysis-of-recent-policy-developments](#). Last accessed on 06.12.2023.

<sup>28</sup> “Behind the screen: Understanding national support for a foreign investment screening mechanism in the European Union”, Zenobia T. Chan & Sophie Meunier. *Review of International Organizations*. Published: 13 July 2021, <https://link.springer.com/article/10.1007/s11558-021-09436-y#citeas>. Last accessed on 05.29.2023.

<sup>29</sup> 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 [2019] OJ L79I/1 (Regulation on the screening of FDI into the EU) <https://eur-lex.europa.eu/eli/reg/2019/452/oj>. Last accessed on 06.12.2023.

<sup>30</sup> “Regulation on the screening of FDI into the EU”, recital. <https://eur-lex.europa.eu/eli/reg/2019/452/oj>. Last accessed on 06.12.2023

<sup>31</sup> Cit. “*The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy*”.



regulation and the sole grounds for screening a foreign investment are risks to security and public order assessed on a case-by-case basis, regardless of the foreign investor's origin.<sup>32</sup>

The regulation constitutes a legal act of the EU and is binding and directly applicable in all Member States, however, there is bias with regard to its effectiveness, considering that the regulation does not impose on the Member States the setting up of an investment screening mechanism. The notification and opinion sharing system does not apply to Member States that do not have their own national mechanism. The regulation confirms that the decision on whether to set up a national screening mechanism and design its scope and process, or, where a national screening mechanism is in place, whether to screen a particular foreign direct investment remains the exclusive responsibility of the Member State where the investment is planned or completed. While there is no legal obligation to do so, all Member States are invited to have a fully-fledged screening mechanism.<sup>33</sup> The regulation entered into force on April 10, 2019 and became fully operational on October 11, 2020.

### 3.2.2 Screening mechanism definition

Screening mechanism means an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorize, condition, prohibit or unwind FDIs on grounds of security or public order. Correlated also with the provision in Article 1, paragraph 1<sup>34</sup>, it should be specified that the regulation applies therefore solely to FDI and transactions that may raise concerns only about security and public order.

### 3.2.3 Security and public order definition

The regulation does not expressly provide a definition for “security” and “public order”. Their interpretation and definitions are left to the discretion of the Member States. Rather it provides for a non-exhaustive list of sensitive sectors and other relevant factors (screening factors) that the Member States and the Commission may focus on when determining whether an FDI is likely to affect security or public order.

### 3.2.4 Screening factors and the interaction of the regulation with the national legislations

Art. 4 (1) provides the list of factors that might be scrutinized by Member States. It makes reference to criteria, such as: (i) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure; (ii) critical technologies and dual-use items including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies; (iii) supply of critical inputs, including energy or raw materials, as well as food security; and (iv) access to sensitive information, including personal data or the ability to control

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<sup>32</sup> FAQs on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, 21 June 2021. <https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfec5283/library/7c76619a-2fcd-48a4-8138-63a813182df2/details>. Last accessed on 06.12.2023.

<sup>33</sup> EC Guidance 2020. [https://www.skadden.com/-/media/files/publications/2020/03/covid19-early-effects-on-foreign-investment/pdf\\_tradoc\\_158676.pdf?rev=1814f7de4aee48908e63280cce0b3912&hash=5C8EA4EEFF2B216F62214A52D7D30EA6](https://www.skadden.com/-/media/files/publications/2020/03/covid19-early-effects-on-foreign-investment/pdf_tradoc_158676.pdf?rev=1814f7de4aee48908e63280cce0b3912&hash=5C8EA4EEFF2B216F62214A52D7D30EA6). Last accessed on 06.12.2023.

<sup>34</sup> “1. This Regulation establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments”.

such information or the freedom and pluralism of the media. The non-binding and non-mandatory character of such factors for the Member States can be extrapolated from the formulation of the Article 4(2). The Member States have high discretion to allow their internal legislation to provide for additional factors to assess. Art. 4(2) while allowing for the same discretion for the Member States, further provides that in determining whether an FDI is likely to affect security or public order, the Member States and the Commission may also take into account whether the foreign investor is directly or indirectly controlled by the government of a third country, including through significant state-backed funding rather than direct ownership.

### 3.2.5 No minimum threshold

The regulation, contrary to many Member States' legislation, such as Germany and France, does not impose any minimum threshold for the screening of FDI, neither based on the total amount nor in regard to the corporate stake.

### 3.2.6 Establishing a cooperation mechanism and enhancing transparency within the EU

Under the regulation, Member States must notify the EC on any ongoing investigation and are invited to indicate whether a notified investment risks affecting the security or public order of another Member State. Other Member States are then given the opportunity to provide comments and state whether the investment at issue may affect their security or public order. Similarly, the Commission may issue reasoned opinions in the instances when an investment threatens the security or public order of more than one Member State.

In addition, it is possible for Member States and the Commission to comment on foreign investments planned or completed in another Member State, but which have not (yet) been reviewed.<sup>35</sup> By March 31st of each year, Member States shall submit to the Commission an annual report covering the preceding calendar year, which shall include aggregated information on FDIs that took place in their territory, on the basis of information available to them, as well as aggregated information on the requests received from other Member States.<sup>36</sup>

The cooperation on FDI screening between Member States and the Commission covers any foreign direct investment. On the contrary, portfolio investments<sup>37</sup> are not part of the scope of the regulation. EU Member States have generally been positive about the EU FDI screening mechanism, as it has: (i) helped to make the case for the introduction of FDI regimes; (ii) helped Members States to adjust their approaches to the screening of individual transactions; and (iii) made it easier for them to explain and defend having a more robust FDI screening regime.<sup>38</sup>

### 3.2.7 Final decision after the screening process

The final decision on whether a foreign investment undergoing screening is authorized remains with the Member State where the investment takes place. While other Member States or the Commission may raise concerns, they cannot block or unwind the investment in question. When a Member State receives comments from other Member States or an opinion from the Commission, it shall give such comments or opinions due consideration. This can be done

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<sup>35</sup> Articles 6 & 7.

<sup>36</sup> Article 5.

<sup>37</sup> The Court of Justice has described "portfolio investments" as "the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking". See Judgment of 28 September 2006, Commission v. Kingdom of the Netherlands, joined cases C-282/04 and C-283/04, ECLI:EU:C:2006:608, para. 19.

<sup>38</sup> "Foreign Investment screening: international cooperation - the secret weapon to better protect national interests?", Linklaters, <https://www.linklaters.com/en/insights/blogs/foreigninvestmentlinks/2023/may/foreign-investment-screening-international-cooperation-protecting-national-interests>. Last accessed on 05.30.2023.

through, where appropriate, measures available under its national law or in its broader policymaking, in line with its duty of sincere cooperation.<sup>39</sup> The regulation does not provide for cases where Member States fail to duly consider the comments of other Member States or the opinion of the Commission or even completely fail to duly inform other Member States likely to be affected by the FDI.

### 3.2.8 Direct Commission Review Powers

The regulation gives the Commission under Article 8 power to screen FDIs likely to affect projects or programs of “Union interest,” in particular projects and programs involving a substantial amount or a significant share of EU funding, or which are covered by the EU legislation regarding critical infrastructure, technologies or inputs. These include, among others, Galileo, Copernicus, Eurocontrol and European electricity and gas transmission networks. The projects or programs of Union interest are set out in the regulation’s annex, which the Commission has updated once until now.<sup>40</sup> Where the Commission considers that an investment is likely to affect projects or programs of Union interest on grounds of security or public order, the Commission may issue an opinion to the relevant Member State or States, with copies to the other Member States. Member States shall take “utmost account” of these opinions and explain any failure to comply. The Commission lacks power to prohibit or impose conditions on a transaction, however, any action recommended by the Commission must be implemented under Member State laws.

### 3.2.9 Further reviews

By October 12, 2023 and every five years thereafter, the Commission should evaluate the functioning and effectiveness of this regulation and present a report to the European Parliament and to the European Council. The report should include an assessment of whether or not this regulation requires an amendment. Where the report proposes amending this regulation, it may be accompanied by a legislative proposal.

## 3.3. Screening Mechanisms of Member States – Data and Developments

Under the regulation, Member States may maintain their existing screening mechanisms, adopt new ones or remain without such national mechanisms. The Commission calls on those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant FDI transactions or do not allow screening before investments are made, to urgently set up a comprehensive FDI screening mechanism. In the meantime, it calls on such Member States to use other suitable legal instruments to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU.

The Commission publishes the list of screening mechanisms notified by the Member States at the EU level.<sup>41</sup> Based on such notifications,<sup>42</sup> it appears that until February 2, 2023 the following 18 Member States have a screening mechanism in place: Austria, Czech Republic, Denmark,

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<sup>39</sup> FAQs on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, 21 June 2021. <https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/7c76619a-2fcd-48a4-8138-63a813182df2/details>. Last accessed on 06.12.2023.

<sup>40</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R2126>. Last accessed on 06.12.2023.

<sup>41</sup> [https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en). Last accessed on 06.12.2023.

<sup>42</sup> Pursuant to Article 3.7 of the Regulation, Member States shall notify the Commission of their existing screening mechanisms by 10 May 2019. Member States shall notify the Commission of any newly adopted screening mechanism or any amendment to an existing screening mechanism within 30 days of the entry into force of the newly adopted screening mechanism or of any amendment to an existing screening mechanism.

Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain.

The regulation requires the Commission to submit a report on the implementation of the regulation to the European Parliament and the Council on an annual basis. Currently, the EC has published its second Report on the Screening of Foreign Direct Investments adopted on September 1, 2022 with relevant data and information on the developments of FDI screening in the EU Member States during 2021.<sup>43</sup>

According to these official data, 25 out of 27 Member States either: (i) had a national FDI screening mechanism in place; or (ii) adopted a new national FDI screening mechanism; or (iii) amended an existing mechanism; or (iv) initiated a consultative or legislative process expected to result in the adoption of a new mechanism or amendments to an existing one. Table 2 gives an overview of all 27 Member States' legislative situation and developments in 2021.

**Table 2**

EU Member States Legislative Developments on ISM

National FDI Screening mechanism in place	Austria, Finland, Malta, Poland, Portugal, Slovenia, Spain
Have amended an existing mechanism	France, Germany, Hungary, Italy, Latvia, Lithuania
Have a consultative or legislative process expected to result in updates to an existing mechanism	The Netherlands, Romania
Have adopted a new national FDI screening mechanism	Czechia, Denmark, Slovenia
Have a consultative or legislative process expected to result in the adoption of a new mechanism	Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg, Sweden
No publicly reported initiative underway	Bulgaria, Cyprus

**Source:** EC

Most amendments to national legislation revolved around three topics: upgrading screening procedures, expanding covered sectors and prolonging the validity of national mechanisms.

**Box 2**

**Examples of legal developments on ISM in some EU countries**

**France** lowered the threshold at which investments of non-EU investors are screened. The new regulation lowers the thresholds triggering mandatory investment reviews, from 33.33% to 25%. Furthermore, it broadens the sectoral scope of the mechanism by adding print and digital media, food safety and critical technologies (e.g., cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies and energy storage).

**Germany** introduced a variety of procedural changes (e.g. the addition of 16 new case groups related to emerging/sensitive technologies), applied new thresholds on the acquisition of capital and voting rights that require a notification and introduced new requirements for investors.

**Italy** extended the applicability of its existing screening mechanism<sup>44</sup> and later in September 2022 amended the “Golden Power” regulations by introducing a number of

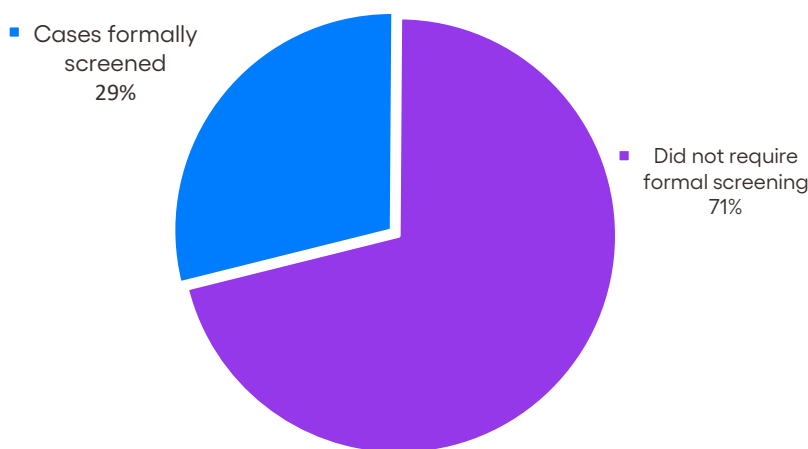
<sup>43</sup> [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2022\)433&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)433&lang=en). Last accessed on 06.12.2023. The third annual report on FDI Screening in EU covering 2022 is expected to be published by September 2023.

<sup>44</sup> [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2022\)433&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)433&lang=en). Last accessed on 06.12.2023.

measures to coordinate and streamline better the activities of the Italian government’s departments responsible for examining transactions, and a very long-awaited voluntary pre-notification procedure.<sup>45</sup>

In the **Netherlands**, general investment screening/FDI control<sup>46</sup> rules adopted in 2022 came into force on June 1, 2023. This does not only mean that future, qualifying investments in critical infrastructure or sensitive technology will have to be notified to the Dutch Minister of Economic Affairs, but also that the Minister may also require parties to submit a notification within eight months of the law’s entry into force whether an investment made after September 8, 2020 could pose a risk to national security.

**Chart 2 - Member States’ FDI Screening Activity**



**Source: EC**

As a final note, it is worth mentioning that according to the Commission, only 1% of the transactions were blocked by the Member States (compared to slightly more in the first report, i.e., 2%), confirming that the EU remains open to FDIs and Member States only deny cases that pose very serious threats to security and public order. While blocking FDIs is an exception in most Member States, in other jurisdictions, some investors may choose to abandon their transactions rather than have authorities block them. The EU Annual Report disclosed that 3% of transactions were withdrawn. According to the report, 23% of the decisions involved an approval with conditions or mitigating measures.

The ISMs as adopted by the 18 Member States provide for a diversity of features and approaches toward FDIs. The diversity of screening mechanisms adopted by the Member States is evidenced *inter alia* in the following: (i) whether they provide for mandatory or voluntary filings, or ex officio intervention rights of the government; (ii) which industries are viewed as “critical” and may hence trigger a filing obligation and/or government intervention; (iii) where filing

<sup>45</sup><https://www.cliffordchance.com/insights/resources/blogs/antitrust-fdi-insights/2022/09/recent-amendments-to-the-italian-golden-power-regime-the-pre-notification-procedure.html> Last accessed on 05.30.2023.

<sup>46</sup> The Netherlands has introduced two FDI screening mechanisms: The General FDI Screening Mechanism and the Act Undue Influence Telecommunications. The General FDI Screening Mechanism enters into force on 1 June 2023, and it is partly retroactive from 8 September 2020. The Act Undue Influence Telecommunications, however, has already entered into force in October 2020.

requirements exist, whether there is a threshold related to the percentage of voting rights or shares acquired; (iv) whether the government has a right to intervene below the thresholds; (v) the duration and structure of the proceedings, etc. This is mainly due to the fact that Regulation 2019/452 established only the premises and the overall framework on ISM together with the cooperation mechanism at the EU level, rather than a mandatory approach to be applied by the Member States.

### 3.4. Examples of FDI Screening Applications

#### Box 3

##### Port of Hamburg – Germany

A recent example of screening FDIs in Germany concerns the partial prohibition of the proposed investment by the Chinese state-owned company COSCO Shipping Group in a container terminal in the Port of Hamburg. While the investment originally was 35%, the German Chancellor only authorized the acquisition of a stake below 25%, which represents a minority stake in the operator of a container terminal, on the basis of concerns that a larger buy-in might pose a national security risk. The government said it would stick to a compromise agreed to last year barring COSCO Shipping from acquiring more than 24.99% of the Tollerort terminal of Hamburg port logistics company HHLA. COSCO also holds stakes in several other European ports, including Greece's main port of Piraeus.<sup>47</sup>

#### Box 4

##### Transfer of Technology – Italy

Italy's Prime Minister vetoed a transfer of technology and software to China in a deal involving industrial robot maker EFORT Intelligent Equipment's effort to raise its stake to 49% from 40% in the Italian firm ROBOX. The latter designs and manufactures electronic components for robotics and motion control systems. In addition to the increased ownership stake worth €2 million (\$2.14 million), the deal envisaged that ROBOX would authorize EFORT to use some of its source codes. Italy reserves the right to use its anti-takeover legislation "Golden Powers" to ward off undesired bids in industries deemed of strategic importance, such as banking, energy, telecoms and health. As reported in the media, with the addition of the ROBOX case, Rome has stopped foreign interests in Italy seven times since the introduction of the "Golden Powers" in 2012. Six of these episodes concerned Chinese bids.<sup>48</sup>

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<sup>47</sup> AP News, 23 May 2023, <https://apnews.com/article/germany-china-hamburg-port-investment-cosco-0036bf44045321f3a2a35b1c941ef6a9>. Last accessed on 05.30.2023

<sup>48</sup> Reuters News, 7 June 2022. <https://www.reuters.com/technology/italys-pm-draghi-vetoes-technology-transfer-china-2022-06-07/>. Last accessed on 05.30.2023.

### 3.5. What to Expect Next?

As stated above, the regulation is subject to an evaluation by the EC by 12 October 2023, following which a report will be presented to the EU Parliament and Council. Several analyses and reports already provide suggestions for improvement in the regulation. In a report launched in 2022, OECD provides a thorough assessment on effectiveness and efficiency of the ISM at the EU level.<sup>49</sup> Key issues identified by the report were:

- (1) Absence of screening in some Member States. Member States that have no screening mechanism have few or no effective means to manage foreign investment risk, do not build institutional capacity and cannot benefit fully from information exchanges with their peers in other Member States and the EC.
- (2) The sectoral scope of Member States screening mechanisms is set very differently. Only a few Member States can screen transactions in any sector of their economy, while others operate based on lists of sectors or individualized assets.
- (3) Not all Member States have explicit competencies to act on comments from other Member States. There is no accountability mechanism that would require a Member State to assist another in preventing adverse security or public order outcomes beyond the duty of sincere cooperation.
- (4) Timelines for screening decisions in some Member States is too short to incorporate input from the cooperation mechanism effectively. These may elapse before comments, opinions and other information provided under cooperation mechanisms have arrived.

Pursuant to Article 12, the EC is assisted by a group of experts on the screening of FDIs into the European Union, providing advice and expertise to the Commission. On that premise they continue to discuss issues relating to the screening of FDIs, share best practices and lessons learned and exchange views on trends and issues of common concern relating to FDIs. The EC shall also consider seeking the advice of that group on systemic issues relating to the implementation of this regulation. The discussions in that group according to the regulation are kept confidential.

It is certain that at the current stage the EC is monitoring implementation of the Regulation as well as the concerns raised in the reports by the experts, academia, investors and Member State institutions as well as from the jurisprudence at the EU level. The level of reaction of the EC in the upcoming months as related to the regulation cannot be predicted. However, it seems that on many issues, a unified approach is being consolidated among the experts on the need to have a more unified approach while implementing ISM and the respective remedy actions through improvements of the current regulation. The level of such improvements might also change the current paradigm of ISM at the EU level.

At the Member States level, as noted above, the enactment of the regulation coupled with the call of the Commission, the geopolitical trends and the challenges that arose from the COVID-19 pandemic have prompted many states to embrace or significantly expand FDI screening mechanisms. Notable examples include Estonia and Slovakia.

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<sup>49</sup> OECD 2022, Framework for Screening Foreign Direct Investment into the EU. <https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf>. Last accessed on 06.12.2023.



## Box 5

### Expanding FDI screening mechanisms in more jurisdictions

#### Estonia

While in the preliminary discussions for the drafting of the regulation Estonia was one of the countries with an opposing stance, recently it has changed its approach. On January 25, 2023, the Estonian Parliament adopted the Foreign Investment Reliability Assessment Act (Välisinvesteeringu usaldusväarsuse hindamise seadus), which introduced an FDI screening regime. The new legislation applies to non-EU foreign investments in strategic and sensitive areas that are of importance to the functioning of the State (energy, transport, communications, etc.) or to specific companies, for example, providers of vital services, public undertakings, media companies, managers of state operating reserves and transport infrastructure operators. The act entered into force on September 1, 2023.<sup>50</sup>

#### Slovakia

As regards Slovakia, which was a neutral state during the discussion of the enactment of a pan-European screening mechanism, its National Council adopted on November 29, 2022, Act no. 497/2022 Coll. on Screening of Foreign Direct Investments for the protection of the security and public order, which establishes for the first time a full-fledged foreign direct investment legislation and significantly expands the scope of the FDI screening regime. Such legislation became effective as of March 1, 2023.<sup>51</sup>

A discernible trend has emerged within the EU Member States, characterized by the introduction of new FDI screening regimes or substantial expansions of existing ones. This development highlights a growing emphasis on safeguarding strategic sectors and critical assets from potential risks associated with foreign investment.

### 3.6. FDI Screening Regimes and the Western Balkans Countries

Within the context of their integration process into the European Union, the Western Balkan countries (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia) present an intriguing aspect worthy of consideration: the evolving paradigm of FDI screening regimes.

Accession talks are underway with Montenegro and Serbia. As of 2020, the Council agreed to open accession negotiations with North Macedonia and Albania. Bosnia and Herzegovina and Kosovo are potential candidates for EU membership.<sup>52</sup> All Western Balkans partners have Stabilization and Association Agreements with the EU, aligning the region with the EU standards.<sup>53</sup>

As these states strive to align their economic and regulatory frameworks with the EU standards, the question arises as to how they will navigate the complex landscape of foreign investment and potential risks. While the Western Balkans have traditionally been attractive destinations for

<sup>50</sup>UNCTAD, "Estonia: Introduces an FDI screening regime", 25 January 2023", <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4207/introduces-an-fdi-screening-regime>. Last accessed on 06.12.2023.

<sup>51</sup>UNCTAD. "Slovakia: Expands its FDI screening regime", 29 November 2022", <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4172/expands-its-fdi-screening-regime>. Last accessed on 06.12.2023.

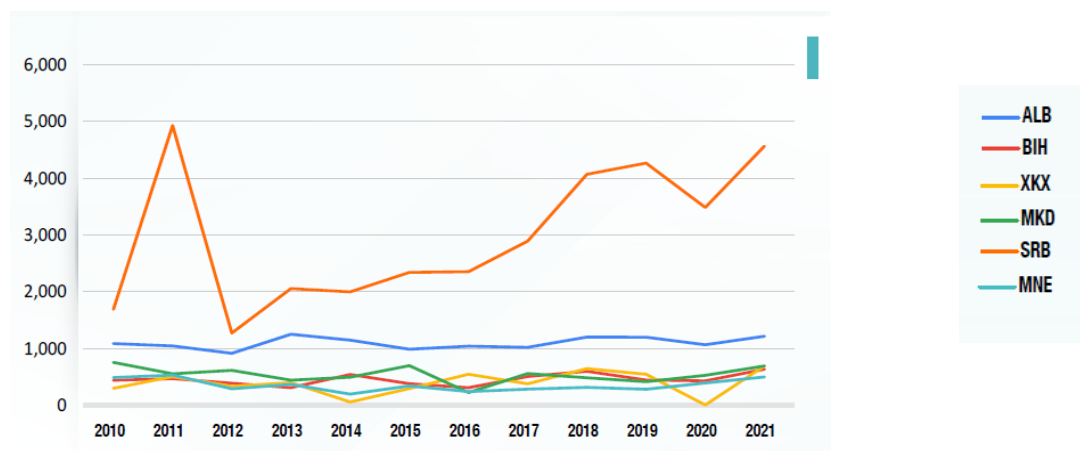
<sup>52</sup> [https://www.eeas.europa.eu/eeas/western-balkans\\_en#9519](https://www.eeas.europa.eu/eeas/western-balkans_en#9519); Last accessed on 06.12.2023.

<sup>53</sup> Ibid.



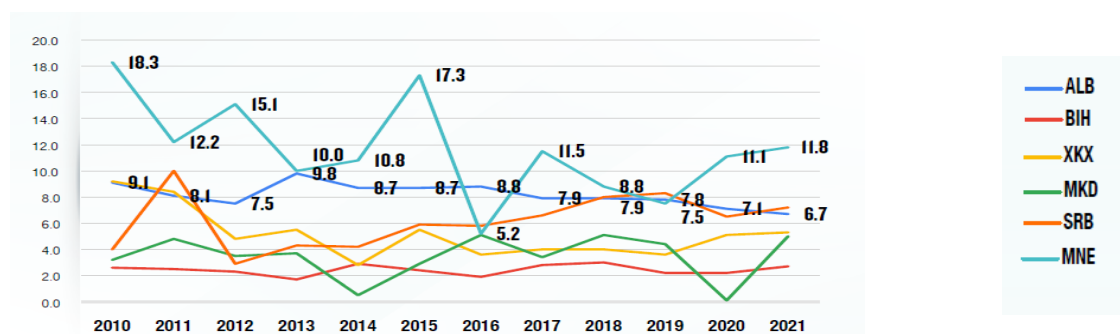
FDI due to their strategic location and economic potential, as shown by Charts 3 & 4, so far none of the Western Balkans countries have adopted a FDI screening mechanism.<sup>54</sup>

**Chart 3 - FDI inflows in Western Balkans countries in Million USD**



**Source:** Albania Investment Council, 2023<sup>55</sup>

**Chart 4 - FDI inflows as % of GDP in Western Balkans countries**



**Source:** Albania Investment Council, 2023

The shifting dynamics surrounding FDI screening in the EU necessitate a thoughtful examination of how these countries will address concerns related to national security and public order.

As the region progresses toward EU membership, it becomes imperative to assess the extent to which FDI screening mechanisms will be adopted or enhanced, ensuring the alignment of their investment frameworks with the evolving norms and practices of the European Union.

To date, substantive discussions have taken place regarding various Western Balkan states, yet a comprehensive evaluation specifically dedicated to Albania has been absent. Such a systematic assessment necessitates a comprehensive analysis of FDI-related economic indicators and the existing legal and regulatory framework for investments, providing a holistic understanding of the context and guiding the most effective path forward.

<sup>54</sup> Center for Civic Initiative, "Foreign Direct Investment Screening Mechanism: An outlook for Bosnia and Herzegovina", 2022;  
<sup>55</sup> Secretariat of the Albania Investment Council, "An overview of Albania's Economic Development Indicators", 2023, ([https://www.investment.com.al/wp-content/uploads/2023/05/EN\\_Albania-Economic-Outlook-2022.pdf](https://www.investment.com.al/wp-content/uploads/2023/05/EN_Albania-Economic-Outlook-2022.pdf)); Last accessed on 06.12.2023;

## IV. FDI IN ALBANIA

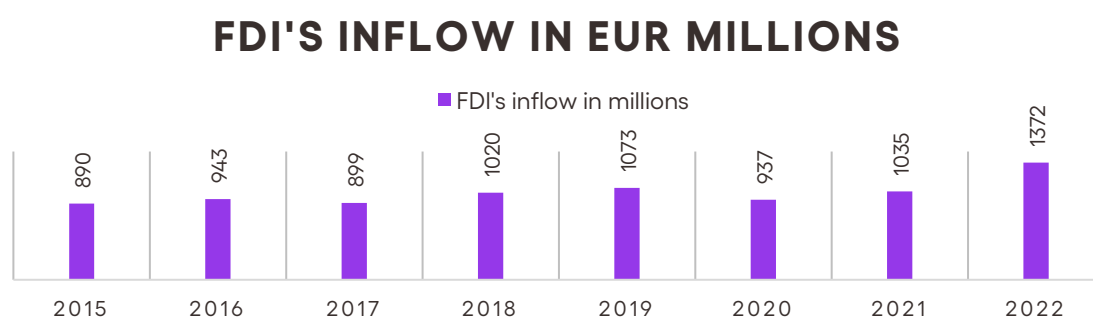
### 4.1. FDI as a Contributor to the Economy of Albania: Flow, Stock and Origin

FDIs have emerged as a vital and continuously expanding component of the Albanian economy, playing a pivotal role in its growth and development. Over the years, Albania has witnessed a substantial influx of foreign capital, technologies and expertise through FDI inflows.

#### 4.1.1. FDI flow

Based on official data provided by the Bank of Albania, FDI inflows into Albania reached unprecedented levels in 2022, representing the most recent full-year statistics available. The recorded FDI inflow for 2022 amounted to €1.372 billion, indicating a significant growth rate of approximately 32.5% compared to the previous year. Notably, reinvested profits accounted for 53% of this inflow, demonstrating a continuous upward trend.<sup>56</sup> While there were slight declines in FDI inflows in 2017 and 2020, as shown in Chart 5 below, the overall trajectory has shown a consistent increase since the inception of recorded data. FDI in Albania has rebounded strongly and surged to historical record levels, underlining the country's attractiveness to foreign investors.

**Chart 5 – FDI inflow in Albania 2015-2022, in EUR millions**



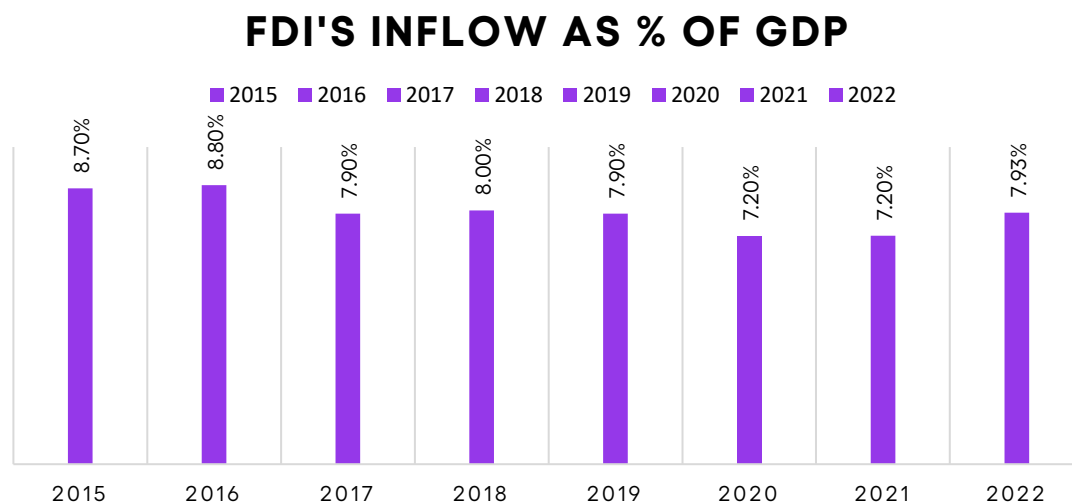
**Source: Bank of Albania, 2023**

This consistent upward trend continued even during the first quarter of 2023. The amount of FDIs recorded was €308 million with 1.65% growth compared to the corresponding period of the previous year. This marks a new record-high level for this period. The composition of these investments reveals that reinvested profits constituted the predominant component, albeit the flow of new FDIs also witnessed a significant increase.<sup>57</sup>

FDIs play a paramount role in contributing to the Gross Domestic Product (GDP) of Albania, as shown in Chart 6, often surpassing the impact of public investments (as demonstrated visually by Chart 7 below).

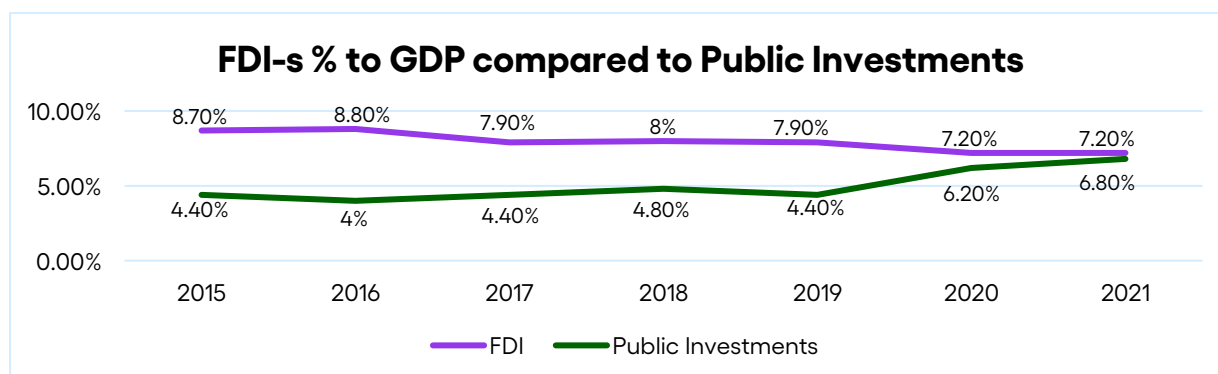
<sup>56</sup> The Secretariat of the Albania Investment Council, "An overview on the indicators of the economic development of Albania (2022)", 2023, ([https://www.investment.com.al/wp-content/uploads/2023/05/EN\\_Albania-Economic-Outlook-2022.pdf](https://www.investment.com.al/wp-content/uploads/2023/05/EN_Albania-Economic-Outlook-2022.pdf)); Last accessed on 06.12.2023; <sup>57</sup> <https://www.monitor.al/investimet-e-huaja-direkte-arriten-rekord-te-ri-ne-tremujorin-e-pare-te-vitit/>; Last accessed on 06.12.2023; The Secretariat of the Albanian Investment Council, "An overview of Albania's Economic Development Indicators (Available data January – June 2023)", 2023, ([https://www.investment.com.al/wp-content/uploads/2023/07/EN\\_Albania-Economic-Outlook-2023-H1.pdf](https://www.investment.com.al/wp-content/uploads/2023/07/EN_Albania-Economic-Outlook-2023-H1.pdf)); Last accessed on 31.08.2023;

**Chart 6 – FDI inflow in Albania as % of GDP 2015-2022, in EUR millions**



**Source:** Bank of Albania, Albania Investment Council<sup>58</sup>

**Chart 7 – FDIs to Albania's GDP compared to Public Investments % of GDP**



**Source:** Albania Investment Council, 2023

In 2022, the real estate activities sector emerged as the primary recipient of FDI inflows, accounting for approximately 21.1% of the total.<sup>59</sup> This represents a notable shift in the recent trend, as the energy sector had been the dominant sector for FDI inflows since 2018.<sup>60</sup>

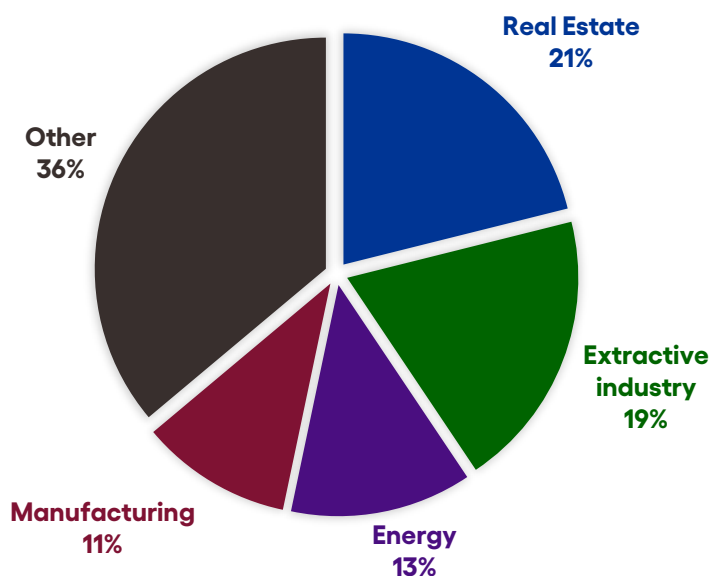
In addition to real estate, other sectors that experienced significant FDI inflows in 2022 included the extractive industry (19.5%), energy (12.7%) and manufacturing (10.6%), as shown in Chart 8.

<sup>58</sup> The Secretariat of the Albania Investment Council, "An overview on the indicators of the economic development of Albania (2022)", 2023, ([https://www.investment.com.al/wp-content/uploads/2023/05/EN\\_Albania-Economic-Outlook-2022.pdf](https://www.investment.com.al/wp-content/uploads/2023/05/EN_Albania-Economic-Outlook-2022.pdf)); Last accessed on 06.12.2023;

<sup>59</sup> Albanian Investment Development Agency, Foreign Direct Investments (<https://www.aida.gov.al/sq/biznes-ne-shqiperi/investime-te-huaja-direkte>); The Secretariat of the Albania Investment Council, "A view on the indicators of the economic development of Albania (2022)", April 2023.

<sup>60</sup> Albanian Investment Development Agency, "Booklet Invest in Albania 2022", 2022. (<https://www.aida.gov.al/sq/te-reja-publikime/publikime/1235-booklet-invest-in-albania-2022>) Last accessed on 06.12.2023;

**Chart 8 – FDI inflow in sectors as % of total inflow for 2022**

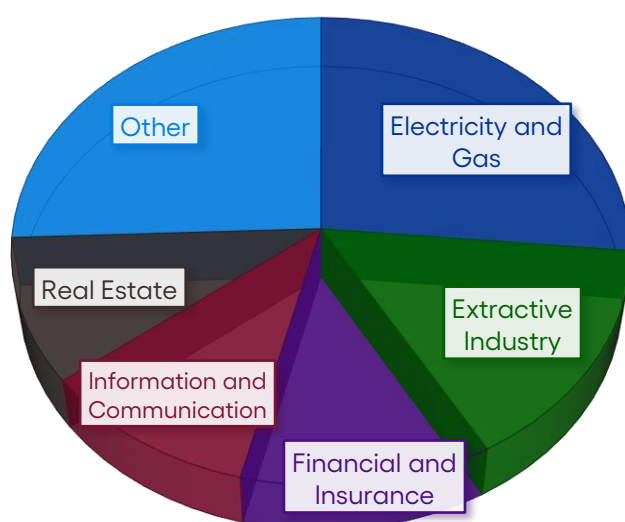


**Source: Albanian Investment Development Agency, 2023**

As per the first quarter of 2023, the trend appears to have shifted and the main sector receiving FDIs in Albania was the extractive industry with around 21%, mostly related to the oil industry.<sup>61</sup>

In terms of FDI stock, as shown in Chart 9 below, the electricity and gas supply sector constituted the largest source, comprising 26.5% of the total stock. Other sectors making substantial contributions to the FDI stock include the extractive industry (15.3%), financial and insurance activities (12%), information and communication (10.6%) and real estate-related activities (10%).<sup>62</sup>

**Chart 9 – FDI stock in economic sectors in Albania for 2022**



**Source: Albanian Investment Development Agency, 2023**

<sup>61</sup> See ref. 57.

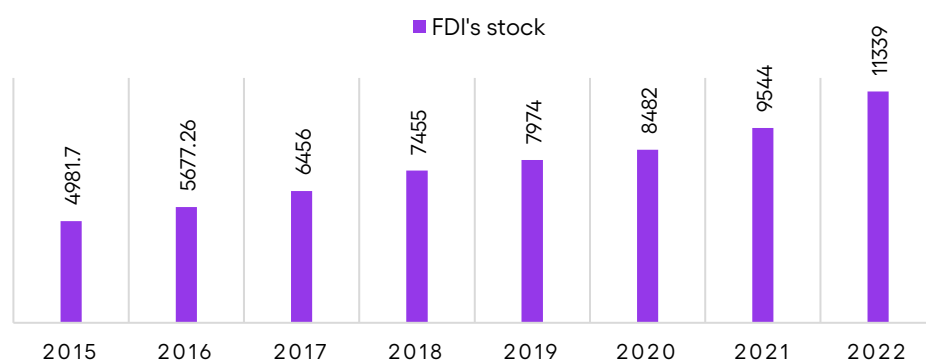
<sup>62</sup> See ref. 60.

These figures highlight the diverse sectors that attract foreign investments, reflecting the evolving landscape of the Albanian economy.

#### 4.1.2. FDI stock

The indicator for FDI stock in Albania reached a record high of €11,399 million in 2022, representing a notable increase of approximately 18.8% compared to the previous year. Chart 10 below represents the FDI stock values as recorded by the Bank of Albania since 2015 up to the latest full year for which data is available.

**Chart 10 – FDI stock in Albania 2015-2022, in EUR millions**

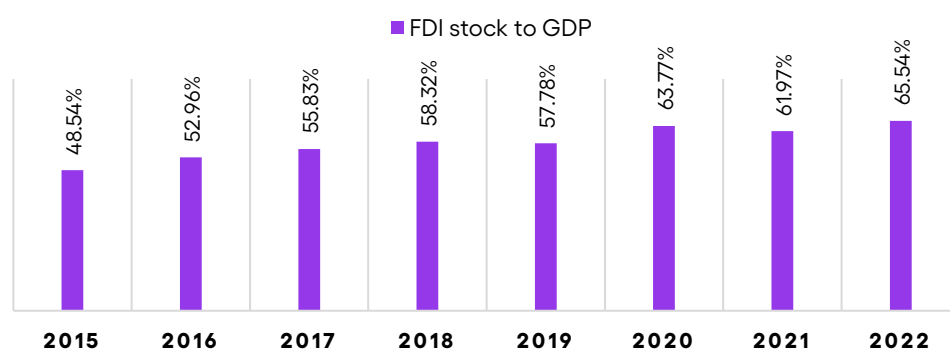


**Source:** Bank of Albania

The growth trend of the FDI stock continued even in the first quarter of 2023, recording a significant 19.6% increase compared to the same period of the previous year.

The FDI stock ratio to GDP as indicated by Chart 11 shows that FDIs have always played an important role in the country's economy.

**Chart 11 – FDI stock ratio to Albania's GDP 2015-2022**



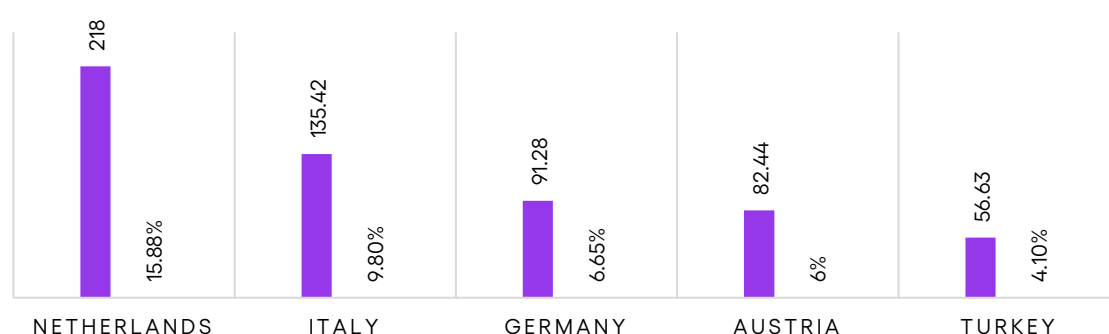
**Source:** Albania Investment Council based on data by INSTAT, Ministry of Finance and Economy, Bank of Albania

### 4.1.3. FDI Country of Origin

The Netherlands emerged as the primary source country for FDI inflows into Albania, contributing approximately €218 million or 15.88% of the total inflows in 2022. This follows a similar pattern observed in 2021, where the Netherlands also held the highest share of FDI inflows, accounting for around 23% of the total amount of FDI's. In the first quarter of 2023 however, the Bank of Albania data shows a small shift in this trend. While still of paramount influence, the Netherlands are not apparently anymore the country from which the largest part of FDI's inflows stem from, but rather has left its leading place to other countries, which BoA retains confidential.

In addition to the Netherlands, other significant source countries for FDI in 2022 as shown in Chart 12 included Italy, contributing approximately €135.42 million or 9.8%, Germany with around €91.28 million or 6.65%, Austria with €82.44 million or 6% and Turkey with €56.63 million or 4.10%.

**Chart 12 – Top 5 contributor countries for FDI flows in 2022 into Albania, in EUR millions**

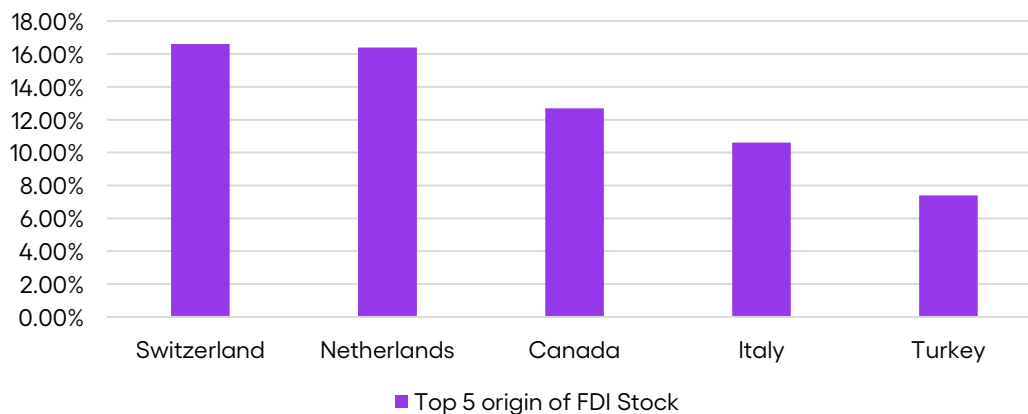


**Source:** Bank of Albania

The analysis of the FDI stock origin in Albania reveals that the primary countries of origin include Switzerland, the Netherlands, Canada, Italy and Turkey, as presented in Chart 13 below. The significant FDI stock from Switzerland is likely attributed to the investment in the Trans Adriatic Pipeline (TAP), a joint venture involving companies, such as Socar, BP, Snam, Fluxys, Enagas. While the TAP company is registered in Switzerland, it represents the interests of companies operating across multiple states.

Similarly, Canada's substantial FDI stock is likely connected to Bankers, the largest oil producer in Albania. It is noteworthy that Bankers has been under the ultimate control of Chinese companies since 2016, although it has historical ties to Canada. The FDI stock data indicates the diverse range of countries contributing to the investment landscape in Albania, reflecting both the multinational collaborations and the strategic interests of various states in the country's economy. In addition, it may point out the necessity to diversify the methodology of BoA for recording FDI's countries of origin by including also ultimate control in its record data.

**Chart 13 – Top 5 Countries of Origin of FDI Stock into Albania (As % of total stock)**



**Source:** Bank of Albania, 2023

## 4.2. Legal and Regulatory Framework

### 4.2.1. From a centralized economy to an open regime

*Albania's foreign trade regime has been liberalized since 1990 and is in compliance with the guidelines set by the EU and the WTO.*

Since opening its market to foreign investors for the first time 30 years ago, Albania's economic growth has increased significantly due to FDIs. They have contributed to diversifying the domestic production in Albania, creating employment and supplying technology, knowledge and management skills. The presence of foreign companies has also enhanced the local business environment's competitiveness and quality. Foreign direct investments

are beneficial to Albania in many ways, but the openness should not be unconditional; it must be balanced by instruments to safeguard its security and public order.

The transition from a state-owned and centralized economy to a market-based, decentralized economy has presented significant economic challenges for Albania. In the past, Albania has made endeavors to enhance its investment climate and attract foreign direct investment through a variety of initiatives and reforms. The most notable initiatives entail:

**Law on Foreign Investments<sup>63</sup>:** The Law no. 7764 "On Foreign Investments" passed in November 1993, establishing a welcoming investing environment by ensuring equal treatment for domestic and foreign investors. Thus, Albania adopted a liberal legal framework *regarding foreign investments*.

- World Trade Organization (2000)
- Central European Free Trade Agreement (2006)
- European Free Trade Association (2009)
- EU Stabilization Association Agreement (2009)
- North Atlantic Treaty Organization (2009)
- Albania presented its application for membership in the European Union (2009)
- EU Candidate Status for Albania (June 2014)
- Accession negotiations with the EU (July 2022)

<sup>63</sup> Law no. 7764, dated 2.11.1993 "On foreign investments" as amended.

The friendly investment climate of Albania is further corroborated by OECD's FDI Restrictiveness Index, which estimates that Albania is less restrictive to FDIs than the average OECD economy.<sup>64</sup>

#### Box 6

##### Why is Albania considered to be a friendly investment country?

- (i) No preliminary authorization is needed.
- (ii) No sector is closed to foreign investment.
- (iii) No limitation on the percentage share of foreign participation in companies (with the exception of some specified sectors).
- (iv) Free repatriation of capital and profits.
- (v) Albania's tax system does not distinguish between foreign and domestic investors.
- (vi) Foreign investments may not be expropriated or nationalized directly or indirectly (except for public purposes determined by law).
- (vii) Equal treatment of foreign and domestic investments and investors.
- (viii) Investors in Albania are entitled to judicial protection of legal rights related to their investments.

**Privatization Program:** During the 1990s and early 2000s, Albania implemented a large-scale privatization program to transfer state-owned enterprises to private ownership. This program aimed to attract both domestic and foreign investors and promote market-driven economic growth.

**Establishing a dedicated institution on FDIs:** The Albanian Investment Development Agency (AIDA) was established and operates under Law no. 10303, dated 15.07.2010, "On the establishment and organization of the Albanian Investment Development Agency" as a government institution responsible for promoting investments in Albania. AIDA provides information and assistance to potential investors, facilitates investment procedures and promotes Albania as an investment destination.

**Fiscal and administrative incentives:** The Albanian government has implemented various fiscal incentives to attract investments, *inter alia*, tax exemptions or reductions and preferential treatment for strategic projects or export-oriented businesses. Albania has signed treaties for the avoidance of double taxation with 43 countries.<sup>65</sup>

**BITs and Trade Agreements:** In 1995, the United States and Albania signed the Bilateral Investment Treaty (BIT), which ensures that U.S. investors receive national and most-favored-nation treatment and provides for dispute settlement.<sup>66</sup> Furthermore, Albania has concluded bilateral investment treaties with 45 countries<sup>67</sup> and has signed free-trade agreements with the EU, Central European Free Trade Agreement countries (North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, Kosovo and Moldova), European Free Trade Association countries (Switzerland, Liechtenstein, Norway and Iceland) and Turkey.

<sup>64</sup> OECD, "Competitiveness in Southeast Europe 2021, A policy outlook: Albania".

<sup>65</sup> The list of the treaties can be found at <https://www.tatime.gov.al/c/6/125/marreshje-nderkombetare.%C2%A0>.

<sup>66</sup> The Bilateral Investment Treaty can be found at <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/>.

<sup>67</sup> The list of the BITs can be found at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/2/albania>.



It is important to note that the effectiveness and impact of the afore-mentioned initiatives as well as their success in attracting investments is contingent upon various factors, such as the overall economic situation, political stability, rule of law, infrastructure development and investor confidence.

**Law on Strategic Investments:** In 2015, the Parliament of Albania introduced Law no. 55/2015 “On Strategic Investments” with the objective of attracting both foreign and domestic investors in key sectors. Law 55/2015 provides a range of incentives, favorable conditions and streamlined procedures for strategic investors operating in Albania.

#### **Box 7**

The Law on Strategic Investments classifies as strategic the following economic sectors:

- (i) Energy and Mining;
- (ii) Transport, Electronic Communications Infrastructure and Urban Waste;
- (iii) Tourism (tourist structures);
- (iv) Agriculture (large agricultural farms) and Fisheries;
- (v) Economic Zones;
- (vi) Development Priority Areas.

The main purpose is to promote and attract both domestic and foreign investments in the afore-mentioned strategic sectors by introducing favorable, easy and expedited administrative procedures for investors. Law 55/2015 lacks provisions for any type of control based on grounds of national security and public order.

Initially intended as a temporary and short-lived regime, Law no. 55/2015's effectiveness has been extended several times and is now scheduled to remain in effect until the end of 2023. While the enactment of Law no. 55/2015 held high expectations, its full potential in terms of foreign investments has yet to be realized. Law no. 55/2015 has predominantly benefited domestic investors rather than foreign ones.

#### **Box 8**

According to an inquiry conducted by Euronews Albania,<sup>68</sup> 7 years from the adoption of the law, 17 investments ran by Albanian-owned companies were designated as “strategic” compared to only 2 investments ran by foreign-owned companies. The data collected from the inquiry reveals that the Albanian companies invested a total of €435 million, while foreign companies invested around €64 million. The tourism sector has attracted the highest level of investment, accounting for approximately 85% of the total investments. These investments have primarily been directed toward the construction of new resorts. In contrast, around 15% of the investments have been allocated to the agriculture and energy sectors. It should be noted that the data provided by Euronews Albania does not include the Durrës & Yachts Marina project, a joint endeavor between the Albanian state and a United Emirates-based company. Preliminary estimations suggest that this project alone could surpass €2 billion in investment value.

In conclusion, although Law 55/2015 was implemented with the intention of attracting both foreign and domestic investors to key sectors, the law's impact on foreign investments has been

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<sup>68</sup> <https://euronews.al/en/85-of-strategic-investors-are-albanians/>; Last accessed on 06.12.2023;

relatively limited. The majority of investments have come from Albanian-owned companies, particularly in the tourism sector.

Other laws that have been implemented entail Law no. 10 303, dated July 15, 2010 “On the establishment and manner of organization and operation of the Albanian Investment Development Agency (AIDA)”, Law no. 9789, dated 19.07.2007 “On the establishment and functioning of economic zones”, as amended.

#### 4.2.2. Institutional framework and governance

Various government entities and agencies are responsible for developing and implementing policies, regulations and initiatives to attract and facilitate investments. FDIs are promoted, supported and facilitated by the following Albanian key institutions:

**Ministry of Finance and Economy:** responsible for developing economic policies, including those pertaining to investments. It plays a crucial role in creating a favorable investment climate, implementing investment promotion measures and policies and overseeing investment-related regulations, creating this way a favorable business climate and attracting FDIs.

**Ministry of Infrastructure and Energy:** responsible for overseeing energy-related investments and providing support to investors in the energy sector. It focuses on economic development, trade policies and energy sector investments. It plays a role in formulating strategies to attract investments, creating a business-friendly environment and implementing relevant regulations and policies.

**Ministry of Tourism and Environment:** focuses on attracting investments in the tourism industry and promoting sustainable environmental practices. It plays a significant role in attracting FDIs in the tourism sector and promoting sustainable environmental practices.

**Albanian Competition Authority (ACA)<sup>69</sup>:** responsible for enforcing competition laws and ensuring a fair and competitive business environment. It plays a role in preventing anti-competitive practices and promoting a level playing field for all investors.

**AIDA:** the primary government agency dedicated to attracting, promoting and facilitating FDIs in Albania. It provides information, assistance and support to potential investors, including investment project evaluation and promotion. It serves as a one-stop-shop for potential investors, providing information, facilitating investment procedures and offering support services throughout the investment process. AIDA works closely with other government entities to attract and retain investments. The direct contribution of AIDA to the economic development of the country is emphasized through (i) facilitation and support of FDIs in Albania, (ii) growth and competitiveness of Small and Medium Enterprises, (iii) promotion and provision of assistance for exports of goods and services.

**Regional Development Agencies<sup>70</sup>:** Albania has several regional development agencies at the local level. They work to promote regional investment opportunities, attract investments to specific regions and support local economic development. These institutions collaborate to establish an ecosystem hospitable to FDIs, promote investment opportunities, streamline investment procedures and provide investors with the necessary support throughout their investment journey experience in Albania. Besides these institutions, numerous laws, regulations and policies govern investments in Albania. Among these are the company law, tax law, labor

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<sup>69</sup> Law no. 9121, dated 28.7.2003 “On the protection of competition” as amended.

<sup>70</sup> [https://rdatirana.al/?page\\_id=23](https://rdatirana.al/?page_id=23).

law, environmental regulations and sector-specific laws. The government constantly examines and revises these regulations to enhance the investment climate and ensure conformity with international standards.

### 4.3. ISM in Albania

#### 4.3.1. Is there any trace of FDI screening?

No provision of Law 7764 “On Foreign Investments” shall, however, prevent the Republic of Albania from taking any action it deems necessary to maintain the public order, to meet its international commitments related to the maintenance or establishment of international peace and security, or to safeguard national security or defense interests. Therefore, for reasons related to national security and public order, foreign investments could be restricted or even prohibited. However, the law does not provide for situations that could put both national security and public order in jeopardy. As a direct consequence of this, it can be argued that the competent public authorities retain a significant level of discretion in determining how public order and national security should be interpreted.

The Albanian legislation lacks definition for national security and public order, nonetheless, they are embedded as cornerstone principles in numerous laws. It should also be noted that there is no internationally recognized definition of national security and public order. It is common that international agreements acknowledge the rights of sovereign nations to implement measures, notwithstanding the obligations undertaken in a particular agreement, to protect their essential security interests. However, the clarification related to public order and essential security interests makes clear that measures taken for economic, cultural or other reasons, for example, should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests.<sup>71</sup>

It is important to note that the European Court of Justice (ECJ) has ruled that derogations on public security and order grounds should be narrowly interpreted by the Member States and purely economic reasons are not sufficient to justify such restrictions. The ECJ has acknowledged that reasons of an economic nature in the pursuit of an objective in the public interest or the guarantee of a service of general interest may constitute an overriding reason in the public interest capable of justifying an obstacle to one of the fundamental freedoms enshrined in the EU Treaties.<sup>72</sup> Despite the fact that Member States are still, in principle, free to determine the requirements of public policy and public security in light of their national needs, those grounds must, in the EU context and, in particular, as derogations from a fundamental freedom enshrined in the Treaty on the Functioning of the European Union, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends.<sup>73</sup>

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<sup>71</sup> OECD, National Security Measures (Note by the Secretariat), 21 November 1995, DAFFE/MAI (95) 7.

<sup>72</sup> Court of Justice of 13 July 2023, 22 October 2013, Essent and Others, C 105/12; Court of Justice of 13 July 2023, Xella Magyarország Építőanyagipari Kft., C-106/22.

<sup>73</sup> Court of Justice of 14 March 2000, Église de scientologie, C 54/99; Court of Justice of 13 July 2023, Xella Magyarország Építőanyagipari Kft., C-106/22.

Albania currently lacks a formal screening mechanism that enables the restriction or prohibition of an FDI that might have implications for security or public order. There is no requirement for foreign investments to be pre-approved or screened by a regulatory body, even though foreign investors must comply with the Albanian law when entering the Albanian market, dependent on the type of activity to be conducted (financial, energy and mining, transportation, electronic communications infrastructure, etc.). Even though the applicable legislation controls and applies restrictions, the laws do not *per se* provide for control on grounds of national security and public order.

**Box 9**

**Example of sectorial screening**

Law no. 7746, dated 28.07.1993 “On hydrocarbons (exploration and production)”, as amended, provides that due to national security concerns, the responsible ministry may reject the entry into or transfer of hydrocarbon sharing agreement.

In practice, some developments that can also be related to the need for investment screening have occurred. For example, in 2020 Albania joined a U.S. State Department initiative called “The Clean Network” that aims to address long-term threats to data privacy, security and human rights<sup>74</sup>. The network excludes members from utilizing any 5G services from “untrusted IT vendors” including Huawei and ZTE. The 5G Clean Path is described as an “end-to-end communication path that does not use any transmission, control, computing or storage equipment” from any of these companies.”<sup>75</sup>

	Air transport	Fishing
Albania	49%	49%

**4.3.2. Are there any sectoral restrictions?**

Albanian legislation provides for *de jure* foreign ownership limitations in selected sectors.

**Air transport<sup>76</sup>:** an undertaking (air carrier) shall be granted an operating license by the competent licensing authority (e.g. Albanian Civil Aviation Authority) provided that (i) it is owned by more than 50% and effectively controlled by the state of Albania and/or nationals of Albania, except as provided for in an agreement with a third country to which Albania is a party; or (ii) it is owned by more than 50% and effectively controlled by one or more states party to the European Common Aviation Area Multilateral Agreement or citizens thereof, except as provided for in an agreement with a third country (outside of the European Common Aviation Area) to which Albania or the European Community is a party.

**Fishing activity<sup>77</sup>:** foreign citizens may not own more than 49% of the capital of ships bearing the Albanian flag or commercial companies engaged in commercial fisheries.

**Land:** No foreign citizen or foreign incorporated company may purchase agricultural land, though land may be leased for up to

	Ownership of construction land	Ownership of agricultural land
Albania	Yes	No, only lease

<sup>74</sup> <https://exit.al/en/albania-joins-us-the-clean-network-pledges-not-to-use-huawei-5g/>

<sup>75</sup> <https://20172021.state.gov/thecleannetwork/#:~:text=5G%20Clean%20Countries%20and%20Clean,to%20develop%20its%20G%20infrastructure>

<sup>76</sup> Law no. 96 dated 23.07.2020 “On the Air Code of the Republic of Albania”.

<sup>77</sup> Law no. 64/2012 “On fishing”, as amended.

99 years.<sup>78</sup> It should be noted that Law no. 93 dated 27.07.2015 “On tourism” encourages potential investors to invest in touristic resorts by offering state-owned land through the “*Albania 1 Euro scheme*” for a period of 99 years. State or private construction land can only be purchased by foreign investors if their investment is three times the price of the land.

Foreign investors who carry out or are presently involved in investments in Albania possess the eligibility to purchase land for the purpose of investment. This include both land owned by the state and private entities, as well as land that is linked to completed or ongoing investment. However, in order to proceed with the acquisition, the investment value must be at least three times the value of the land.<sup>79</sup>

**Audiovisual media:** In 2013, the Albanian Parliament adopted Law no. 97/2013 “On audiovisual media in the Republic of Albania” abolishing Law no. 8410/1998 “On public and private radio and television in the Republic of Albania.”

Law no. 97/2013 provided that no natural or legal person, domestic or foreign, could own more than 40% of the total share capital of a joint stock company that held a national audio or audiovisual broadcasting license.

This restriction was applied to both domestic and foreign subjects until 2016 when the Constitutional Court (Decision no. 56, dated 27.07.2016) concluded that media ownership restriction is unconstitutional.

#### **Box 10**

##### **Media ownership restriction is unconstitutional**

The Association of the Albanian Electronic Media took the case to the Constitutional Court to repeal paragraph 3 of Article 62 of Law no. 97/2013 “On audiovisual media in the Republic of Albania”, as amended.

The Constitutional Court concluded that: “55. [...] *the means chosen by the legislator to limit the ownership of companies operating in the media field do not bear a reasonable and proportionate relationship with the legitimate aim of the legislator regarding the pluralism of information. Consequently, the Court considers that the lawmaker’s initiative is not in accordance with the principle of proportionality, therefore paragraph 3 of Article 62 of the Media Law should be repealed.*”

The Constitutional Court has also conducted a comparative analysis of the situation in Albania and the neighboring countries, such as Montenegro, North Macedonia and Kosovo, whose economic, political and structural developments are comparable to Albania’s. None of these countries have enacted a restriction akin to that stipulated by the Albanian audio-visual media law. In addition, EU nations, such as Croatia, Romania and Italy have not implemented a restriction similar to paragraph 3 of Article 62 of the Media Law, whereas France, Austria and Poland have restrictions of up to 49 percent of the shares, but only for foreign natural or legal persons who are shareholders of a media company that holds a national license.

#### **4.3.3. Adopting a unified law on investments**

Albania, much like many other countries, acknowledges that investments, whether private or public, are considered to be the main engine for ensuring long-term and sustainable economic

<sup>78</sup> Law no. 8337, dated 30.04.1998 “On the transfer of ownership of agricultural land, forests, meadows and pastures”.

<sup>79</sup> Law no. 7980, dated 27.07.1995 “On the sale and purchase of land”.

growth of the country. Moreover, the reorientation of the economy toward an investment-based (and export-oriented) model lays the foundation for sustainable development in the medium and long term.<sup>80</sup> Thus, it is of the utmost importance to enhance the current legal framework by bringing it in line with with regional changes and the most effective current practices.

The Ministry of Finance and Economy has published the draft law “On Investment” as of 2019. This proposed legislation intends to repeal the existing laws (e.g. Law no. 7764 of November 2, 1993 “On Foreign Investments” and Law no. 55/2015 “On Strategic Investments in the Republic of Albania”).

The drafting commenced in January 2017, in view of the implementation of the Decision of the Council of Ministers no. 579, dated August 3, 2016 “On the approval of the investment policy guide of the Albanian Government”, under which a new investment law is among the reforms to be implemented. It is conceived as a direct application of the constitutional principles, namely as equality of rights and fundamental freedoms between Albanian citizens and foreign citizens or citizens of no/without nationality in the territory of Albania (i.e., stateless citizens)<sup>81</sup>, equality in front of the law, prohibition of discrimination<sup>82</sup>, right to private property<sup>83</sup> and right to due process<sup>84</sup> of the constitution of the republic of Albania.<sup>85</sup> Furthermore, the Albanian government’s commitment to strengthen the investment climate was expressed in its political program for the period 2017-2021.<sup>86</sup> During 2019, the Albania Investment Council in cooperation with the Ministry of Finance and Economy and the International Financial Corporation organized several rounds of consultations on the published draft law “On Unified Investment Law” with a large pool of stakeholders who provided a number of recommendations.<sup>87</sup> Since then, there have not been any updates from the government on the status of the draft law. Seemingly, this process has been postponed since the government’s approach was to prolong the duration of the implementation of the current Law no. 55/2015 “On Strategic Investments” via consecutive amendments.

The need to create a draft law on investments arose because the existing legislation in the Republic of Albania provided enhanced protection to foreign investments while domestic investments lacked similar safeguards. Consequently, a distinct legal framework was introduced for strategic investments. In addition, the current legislation is regarded as insufficient because it provides only superficial and declarative protection to foreign investors, without incorporating international best practices and standards in the field. Under these circumstances, it was anticipated that drafting a unified investment law that protects both domestic and foreign investments, with the entire law permeated by the principles of transparency, equality and non-discriminatory treatment of investors would enhance the reliability of investors.

***A unified investment law is beneficial as it provides investors with a clear and consistent framework, reduces bureaucratic hurdles and promotes transparency, predictability and accountability.***

<sup>80</sup> National Strategy for Development and Integration document (NSDI 2015-2020, page 33).

<sup>81</sup> Article 16 of the Law no. 8417, dated 21.10.1998 “Constitution of the Republic of Albania”, as amended.

<sup>82</sup> Article 18 of the Law no. 8417, dated 21.10.1998 “Constitution of the Republic of Albania”, as amended.

<sup>83</sup> Article 41 of the Law no. 8417, dated 21.10.1998 “Constitution of the Republic of Albania”, as amended.

<sup>84</sup> Article 42 of the Law no. 8417, dated 21.10.1998 “Constitution of the Republic of Albania”, as amended.

<sup>85</sup> Law no. 8417, dated 21.10.1998 “Constitution of the Republic of Albania”, as amended.

<sup>86</sup> The Albanian Government’s political program 2017-2021, page 5, [https://kryeministria.al/wp-content/uploads/2021/10/Programi\\_Qeverises\\_2021-2025.pdf](https://kryeministria.al/wp-content/uploads/2021/10/Programi_Qeverises_2021-2025.pdf)

<sup>87</sup> <https://www.investment.com.al/2019/06/27/on-draft-unified-investment-law-consultation-with-business-stakeholders/>



The draft law, according to the explanatory report, is the result of a comprehensive analysis of the 44 BITs and seeks to fulfil the obligations outlined in the bilateral investment treaties to which Albania is a signatory.

The investments draft law aims to:

- (i) update the existing investment legislation in line with the highest international standards;
- (ii) establish a new unified and competitive legal framework to attract both domestic and foreign investments;
- (iii) ensure compliance with domestic legislation and international agreements;
- (iv) establish an efficient mechanism for the prompt and fair resolution of disputes in the field of investments.

In 2017 (the time of drafting of the law), the EU indicated that Member States were not required to implement a screening procedure; consequently, the Albanian legislator did not mandate any ex-ante or ex-post screening of FDIs. As of today, no initiative to implement a screening mechanism has been introduced. Note that despite the draft law being proposed in 2019, it has not yet been adopted.

#### 4.4. Embracing of a comprehensive and systematic approach for the legal and policy framework for investments

Amidst ongoing discussions for the introduction of a new comprehensive law on investments that would significantly alter the investment-related landscape and in the face of emerging trends for the establishment of state-level screening mechanisms, it may be prudent to consider already established frameworks to inform the deliberations and guide the way forward.

##### 4.4.1. FDI quality indicators

FDIs undoubtedly hold significance in quantitative terms, but a clear framework is lacking for precisely measuring their qualitative impact. While there are presumed advantages associated with FDIs, such as injecting funds, knowledge transfer and technology diffusion, it is important to acknowledge that they can also be utilized intentionally to pursue non-market-oriented objectives or unintentionally have adverse effects on the economy. This initiative recognizes the need for a comprehensive assessment that goes beyond mere monetary measures, allowing for a more nuanced understanding of the impact of FDIs on various dimensions of the economy.

In line with its commitment to the Action Plan on Sustainable Development Goals (SDGs) and in recognition of the need for a deeper comprehension of the nexus between FDIs and SDGs, the OECD introduced the FDI Qualities Initiative in 2018. The primary objective of this initiative is to equip policymakers with a pragmatic instrument to mobilize FDIs that maximizes inclusive and sustainable growth while concurrently advancing progress toward the SDGs.<sup>88</sup>

The FDI Qualities Initiative concentrates on the potential of foreign investors, in addition to their financial contributions, to promote sustainable development through knowledge dissemination. Underpinning the FDI Qualities Initiative are the FDI Qualities Indicators, which endeavor to elucidate how foreign investments interrelate with specific dimensions of sustainable

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<sup>88</sup> OECD, "FDI Qualities Indicators: Measuring the sustainable development impacts of investment", 2021.

development in host countries. The indicators are structured around the three core dimensions of the 2030 Agenda, commonly referred to as the “three Ps”: prosperity, people and planet. These encompass economic, social and environmental sustainability. The FDI Qualities Indicators presently concentrate on five clusters derived from the three Ps: productivity and innovation, employment and job quality, skills, gender equality and carbon footprint. Within each cluster, multiple outcomes have been identified and utilized to generate indicators that establish linkages between these outcomes and FDI or the activities of foreign multinational enterprises (MNEs). Through the examination of these indicators, policymakers are enabled to scrutinize sustainability trade-offs within and across clusters, thereby gaining valuable insights into the potential contributions of FDI to sustainable development. By taking into account the unique contextual factors of their respective countries, policymakers can employ the FDI Qualities Indicators as a tool to evaluate the alignment of FDI with national policy objectives, identify challenges and pinpoint areas that necessitate policy interventions. The FDI Qualities Initiative represents a critical stride in addressing the knowledge gap and enhancing comprehension of the effective role that FDI can play in fostering sustainable development. By providing policymakers with a comprehensive instrument for assessing the qualitative aspects of FDI, the initiative has the potential to equip them with the tools to harness foreign investments in support of national SDGs, identify areas for enhancement and foster evidence-based policymaking to achieve sustainable long-term growth.<sup>89</sup>

**Table 3: FDI qualities by sustainability cluster and outcomes<sup>90</sup>**

<b>Cluster</b>	<b>Objective</b>	<b>Outcomes</b>
<b>1. Productivity &amp; Innovation</b>	Provide information on the extent to which foreign MNEs and their linkages with domestic firms enable productivity growth and enhance innovation capacity through knowledge and technology transfer.	Labor productivity, labor productivity growth, product innovation, process innovation, R&D expenditures and use of foreign technologies.
<b>2. Employment &amp; Job quality</b>	Explore how FDI relates to employment and job quality in host countries. Job quality is essential to ensure that employees can work productively.	Job creation per unit of FDI, employment growth, wages, job security (temporary work) and worker safety (injuries).
<b>3. Skills</b>	Investigate to what extent foreign MNEs invest in human capital and skills, directly through in-house worker and manager trainings and indirectly through knowledge transfers to domestic firms.	Skill intensity, on-the-job training and technical skill shortage/surplus.
<b>4. Gender equality</b>	Examine how FDI is associated with gender equality in host economies.	Gender employment gap, gender wage gap, female top managers (female empowerment) and women entrepreneurship.

<sup>89</sup> OECD “FDI Qualities Indicators: 2022”, 2022.

<sup>90</sup> OECD “FDI Qualities Indicators – Highlights”.



<b>5. Carbon footprint</b>	Study the extent to which FDI relates to carbon footprint and how FDI is contributing to the low-carbon energy transition.	CO2 emissions, energy efficiency and renewable energy.
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#### 4.4.2. OECD guidelines for MNE-s

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct are a set of recommendations and principles designed to promote responsible behavior by MNEs in a global context. Developed by the OECD, these guidelines provide voluntary standards and guidelines for MNEs to follow in their business operations.<sup>91</sup> The guidelines cover a wide range of areas, including human rights, labor, environment, bribery and corruption, consumer interests, and more. They aim to address the potential risks and negative impacts associated with MNEs' activities and encourage companies to contribute positively to sustainable development and economic growth.

By adhering to the OECD Guidelines, MNEs commit to respecting international standards and best practices, fostering transparency and engaging in dialogue with relevant stakeholders. The guidelines emphasize the importance of due diligence, risk assessment and effective grievance mechanisms to ensure accountability and responsible conduct throughout the supply chain.<sup>92</sup> The OECD Guidelines are not legally binding, but they serve as a reference framework for governments, businesses and civil society organizations worldwide.

National contact points (NCPs) are established in each member country to promote and facilitate the implementation of the guidelines. One of the responsibilities assigned to the NCPs includes providing assistance with a dispute resolution mechanism known as "specific instances". This procedure is utilized when an alleged failure to adhere to one or more of the recommendations outlined in the Guidelines is brought to the attention of an NCP. In such cases, the NCP takes on the role of facilitating the resolution process by offering access to consensual and non-adversarial procedures, thereby assisting the involved parties in addressing the raised issues.

This collaboration framework between the business and the public authority may offer several advantages:

- Strengthen the dialogue between different stakeholders on the importance of responsible business conduct;
- A closer and concrete cooperation between public-private sector focusing on the improvement of the business climate in Albania;
- Support increase of trust of the enterprises currently operating in Albania;
- Increase opportunities to attract more responsible foreign investments in Albania;
- OECD Guidelines for MNEs being an instrument that would help promote the country as an attractive destination to invest and trade;
- A mechanism of added value in Albania's path to the EU integration.

In this context, during this crucial phase regarding the investment framework in Albania, OECD Guidelines for MNEs and the establishment of the NCPs could be taken in consideration toward the promotion of a sustainable investment climate in Albania.

<sup>91</sup> OECD (2023), OECD Guidelines for Multinational Enterprises.

<sup>92</sup> Ibid.

#### 4.4.3. Corrosive and constructive framework for constructive capital

CIPE has taken an initiative in developing a comprehensive framework for analyzing foreign investments, with a particular focus on distinguishing between the contrasting terms of corrosive and constructive capital.<sup>93</sup> This framework serves as a tool in examining and understanding the impact of foreign investments on host countries, shedding light on the potential risks and benefits associated with such capital flows.<sup>94</sup>

The concept of corrosive capital refers to foreign investments that are detrimental to the economic, social and political stability of the host country. Such investments often involve exploitative practices, lack transparency and undermine good governance. Corrosive capital can lead to negative consequences, including the erosion of democratic institutions, increased corruption and the concentration of economic power in the hands of a few. CIPE's framework allows for a systematic analysis of these harmful aspects of foreign investments, enabling policymakers and stakeholders to identify and mitigate potential risks associated with corrosive capital.<sup>95</sup>

In contrast, constructive capital refers to foreign investments that contribute positively to the host country's economic development and societal well-being. These investments adhere to ethical business practices, respect the rule of law and promote sustainable development. Constructive capital can lead to various benefits, including job creation, technology transfer, knowledge sharing and the enhancement of local industries.<sup>96</sup>

**Table 4 – Corrosive & Constructive Capital**

Corrosive Capital	Constructive Capital
Opaque capital flows lacking market orientation with motives to exploit governance gaps to influence economic, political, and social development in recipient countries.	Well-governed investment flows that serve transparent, market-oriented, and accountable purposes at both funding sources and destinations.

**Source: Center for International Private Enterprise, 2023**

When examining foreign investments, it is crucial to consider indicators that distinguish between corrosive and constructive capital. Several indicators can help identify corrosive capital. Firstly, a lack of transparency and accountability characterizes corrosive capital, as it often operates in opaque and non-transparent ways, hindering effective scrutiny and oversight. Additionally, terms associated with corrosive capital may yield adverse impacts on local business communities, such as unfair competition, monopolistic practices or predatory pricing, which can undermine the viability of local enterprises.

Moreover, the awarding of contracts without public tender or competitive bidding is another indicator of corrosive capital. This practice not only undermines fair and open market competition but also increases the potential for corruption and favoritism. Furthermore, contracts that do not adhere to local environmental standards and result in ecological damage signify corrosive capital, as it prioritizes short-term profits over sustainable development and

<sup>93</sup> CIPE, "A framework for constructive capital: Investment, Integrity, Impact", April 2022; CIPE official website of Corrosive & Constructive Capital: <https://corrosiveconstructivecapital.cipe.org>

<sup>94</sup> <https://corrosiveconstructivecapital.cipe.org/>;

<sup>95</sup> "Corrosive Capital: Known unknowns", Adam Goldstein & Eric Hontz, CIPE, 2021.

<sup>96</sup> See ref. 70.

environmental stewardship. The involvement of actors with a history of corruption in these contracts further reinforces the corrosive nature of such capital.

In contrast, indicators of constructive capital include transparent terms and entry into the market. Transparent capital investments operate in a manner that allows for scrutiny and evaluation by relevant stakeholders, fostering accountability and reducing the potential for exploitative practices. Constructive capital is also accountable to a wide array of local stakeholders in the recipient country, including the government, local communities and civil society, ensuring that the investment aligns with the interests and needs of the host country. Additionally, constructive capital justifies its investments based on market principles, demonstrating a commitment to fair competition, efficiency and long-term sustainability.

**Table 5 – Indicators of corrosive and constructive capital**

Indicators of corrosive capital	Indicators of constructive capital
Lack of transparency and accountability	Transparent terms and entry into the market
Contracts awarded without public tender or competitive bidding	Accountable to a wide array of local stakeholders in the recipient country
Terms yielding adverse impacts on local business communities	Justification is based on market principles
Contracts that do not meet local environmental standards and cause ecological damage	
Contracts involve actors who have previously engaged in corruption	
Projects that contribute to democratic backsliding over time	

**Source:** Center for International Private Enterprise

#### 4.5. Screening Mechanisms and Albania’s Obligations under International Treaties

As previously stated in this white paper, there is a global trend toward the implementation of ISM. It should be noted that Albania currently lacks any ISM or proposal for the adoption of one. However, given Albania’s obligation to harmonize its legislation with that of the EU, particular attention must be given to potential conflicts that may occur between the implementation of ISM and existing international investment agreements (IIAs).

IIAs, commonly in the form of bilateral investment treaties or multilateral investment treaties, are legally binding treaties aiming to promote and safeguard foreign investments by establishing a framework of rules and standards for the treatment of foreign investments in the host country.

The main pillars of these protections include, without being limited to, clauses, such as non-discrimination comprising both national treatment (NT) and most favorable-nation treatment (MFN), fair and equitable treatment (FET) and just, prompt and adequate compensation in case of expropriation. States are bound by the obligations taken pursuant to BITs and investors may invoke the afore-mentioned set of protections in case of action or omission by the state.

Albania has entered into 45 BITs out of which 41 are in force. 23 from 45 BITs are concluded with the EU Member States.<sup>97</sup> Considering the time when Albania became a party to the majority of BITs, most of them appear to be of the “old style” and largely not reflecting recent developments in international investment law.<sup>98</sup> These BITs enshrine the most common protection clauses for non-discrimination, FET and expropriation.

The interplay between FDI screening mechanisms and BIT protection clauses may be complex, as these legal instruments’ apparent purposes may put them in contradiction with each other. While FDI screening mechanisms are regulatory tools used by host countries to assess and potentially restrict FDIs on national security or public interest grounds, BITs aim to encourage and promote foreign investment.

As elaborated, screening mechanism can encompass both pre-establishment and post-establishment of FDIs. In assessing the potential clash between FDI screening mechanisms and BIT clauses a difference should be made between the pre-establishment and post-establishment phases.

Most of the BIT clauses, especially those of the “old-fashion” type, such as the ones entered into predominantly by Albania, usually refer to investments already made and do not necessarily capture the pre-establishment phase. For example, the NT and MFN clause in the bilateral investment treaty between Albania and Greece reads as follows “*Neither Contracting Party shall subject **investments** in its territory, owned or controlled by investors of the other Contracting Party, to treatment less favorable than that which it accords to investments of its own investors or to investment of any third State*”.<sup>99</sup>

In a similar fashion, the Albania-South Korea BIT provides that “*Each Contracting Party shall in its territory accord to **investment** and returns of investors of the other Contracting Party treatment which is fair and equitable and no less favorable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favorable to investors*”<sup>100</sup> and defines an investment as “*every kind of asset **invested** by the investors of one Contracting Party in the territory of the other Contracting Party....*”<sup>101</sup>

Indeed, most of the BITs entered into by Albania contain a general clause that provides that the promotion and protection of foreign investments performed by the host state does not preclude the compliance with the host state’s internal legislation when admitting FDIs, implying thereof the opportunity to establish and apply a domestic screening mechanism. For example, the Albania-China Treaty provides that “*Each Contracting State shall encourage investors of other Contracting State to make investments in its territory and **admit such investments in accordance with its laws and regulations***.”<sup>102</sup>

It follows from the wording of BIT-s that the application of the screening mechanism in the pre-establishment phase would most probably not fall under the scope of the BITs, albeit due

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<sup>97</sup> The Ministry of Development, Economy, Tourism, Trade and Entrepreneurship, “Chapter 30: External Relations, Albania’s Bilateral Investment Treaties, Mapping and Analysis”, December 2016.

<sup>98</sup> Ibid.

<sup>99</sup> Article 3, point 1 of the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the encouragement and reciprocal protection of investments, signed on 01.08.1991 and entered into force on 04.01.1995.

<sup>100</sup> Article 3, point 1 of the Agreement between the Government of the Republic of Korea and the Council of Ministers of the Republic of Albania for the promotion and protection of investments, signed on 15.12.2003 and entered into force on 18.05.2006.

<sup>101</sup> Article 1, point 1 of the Agreement between the Government of the Republic of Korea and the Council of Ministers of the Republic of Albania for the promotion and protection of investments, signed on 15.12.2003 and entered into force on 18.05.2006.

<sup>102</sup> Article 2, point 1 of the Agreement between the Government of the People’s Republic of China and The Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investments, signed on 13.02.1993 and entered into force on 01.09.1995.

consideration should be given to the wording of each specific BIT before coming to conclusions; on the other hand, the situation is quite different when it comes to the post-establishment phase.<sup>103</sup>

The application of the screening mechanisms after an investment has taken place would most probably constitute grounds for the foreign investor to invoke the BIT protection clauses.

The so-called retroactive application of the screening mechanisms can affect obligations undertaken pursuant to BITs in several ways:

*i) NT and MFN Clauses*

National treatment clauses require host countries to treat foreign investors and their investments no less favorably than domestic investors and their investments. If a host country applies a screening mechanism that discriminates against foreign investors, it may violate the national treatment obligation under an IIA.

MFN clauses require host countries to extend the best treatment they provide to any third country to the investors of the other IIA parties. If a host country exempts certain investors from screening requirements, but does not extend the same treatment to investors from the IIA parties, it can be challenged under the MFN provision.

*ii) FET Standard*

Many IIAs include a FET standard, which obligates host countries to provide foreign investors with fair and equitable treatment. If a foreign investment screening mechanism is implemented arbitrarily or discriminatorily, it could be considered a violation of this standard.

*iii) Expropriation Clauses*

IIAs typically include provisions on expropriation, requiring host countries to compensate foreign investors for direct or indirect expropriation of their investments. If a foreign investment screening mechanism results in *de facto* expropriation, it may lead to a violation of the expropriation clause.

*iv) Investor-State Dispute Settlement (ISDS) Mechanism*

Many IIAs provide for the ISDS mechanisms, allowing foreign investors to bring claims against host countries for alleged violations of the treaty's provisions. If a foreign investor believes that a screening mechanism has adversely affected their investment and violates the IIA, they can initiate an ISDS arbitration against the host country.

In general, BITs entered into by states provide exception clauses from the BITs obligations, which may take any of the following forms:<sup>104</sup>

- a) Explicit exclusion of screening;
- b) Lists of non-conforming measures;
- c) Exclusion of particular sectors that may be subject to screening;
- d) Security exceptions;
- e) General exceptions.

Should Albania decide to implement screening procedures even in post-establishment phase, a thorough assessment of current BITs in force is necessary to observe any potential grounds for

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<sup>103</sup> Ömer Büreyde Erdal, "Investment Screening Mechanism and its Interplay with Investment Treaty Obligations", Uppsala Universitet, 2022.

<sup>104</sup> Tania Voon & Dean Merriman, "Incoming: How International Investment Law Constraints Foreign Investment Screening", *Journal of World Investment & Trade* 24 (2023) 75-114.

exceptions or, alternatively, establish the need to proceed with adapted amendments to avoid any potential violations.

## V. CONCLUSIONS

The number of countries introducing new screening regimes and/or amending the existing regulations has been growing. This is mainly due to geoeconomic factors and to the shift of the investment legislation from low barriers to national security issues related to FDIs. In addition, there is an increasing awareness of the countries for hosting important investments not only in terms of numbers but also in terms of quality. The latter is often perceived as related more to the investor's country of origin and the sector of operation.

The EU Regulation 2019/452 provides a comprehensive framework at the EU level for the screening of FDIs on the grounds of security or public order. The regulation's provisions and investment screening mechanisms as adopted in several EU jurisdictions are an opportunity for the improvement of legislation on FDIs even in Albania, which currently lacks a formal screening mechanism.

Since the long-term objective of Albania is to join the EU, its legal and regulatory framework must be aligned with the EU standards and requirements. Although not yet an EU Member State, Albania has the obligation to approximate its internal legislation with the EU acquis. On such basis, any upcoming legislative developments for a new law on investments (unified investment law) should also take note of the Regulation 2019/452 provisions on screening mechanism, EC recommendations, best practices and lessons learned of the Member States from this evolving piece of legislation. The goal should be to adopt a mechanism that creates checks and balance between the genuine need to protect national security and the possibility of creating a tool that increases the power of the executive branch on one side, but which limits at the same time arbitrary decisions. To this end, the developing jurisprudence of the ECJ<sup>105</sup> can serve to establish *the high legal standards on the basis of which the foreign investments are blocked*.

To proceed to this step, a set of actions to prepare for effective interventions are required in advance. They include increasing awareness of the screening mechanisms among the stakeholders in the country, assessing effectively potential risks arising from FDIs, conducting an in-depth analysis of implications of introducing such mechanisms in the internal legislation, conducting an in-depth analysis of administrative capacities to govern such specific legislation, identifying best practices and finally streamlining its implementation in line with clearly defined milestones. Albania can aim for the assistance and cooperation of the EC on the premises of Article 13 "International Cooperation" of the regulation according to which "*Member States and the Commission may cooperate with the responsible authorities of third countries on issues relating to the screening of foreign direct investments on grounds of security and public order.*" The incorporation of a screening mechanism though, should not undermine the principles of the FDI legislation: equal treatment and non-discrimination among foreign (non-EU) investors as well as the provision of effective measures of protections both at the administrative and judiciary level.

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<sup>105</sup> On July 13, 2023, the Court of Justice of the European Union held that the decision by the Hungarian government to block the planned acquisition of a Hungarian sand and gravel quarry under its national foreign investment screening laws was incompatible with EU Treaty rules and in particular in violation of the freedom of establishment.

The current national investment policy is founded on the principle of non-discrimination between foreign and domestic investors. It is generally accepted that legislation wise, Albania is considered to be a friendly investment country for the following reasons: (i) no preliminary authorization is needed; (ii) no sector is closed to foreign investment; (iii) no limitation on the percentage share of foreign participation in companies; (iv) free repatriation of capital and profits; (v) Albania's tax system does not distinguish between foreign and domestic investors; (vi) foreign investments may not be expropriated or nationalized directly or indirectly (except for public purposes determined by law); (vii) equal treatment of foreign and domestic investments and investors; and (viii) foreign investors in Albania are entitled to judicial protection of legal rights related to their investments.

Finally, FDI is vital for the Albanian economy. As such, navigating the legislation on FDI and screening, both from the perspective of government and foreign direct investors should be an exercise that ensures good margins of legal certainty and predictability to foreign investors without prejudice. To achieve this goal, any intervention in the FDI legislation requires sustainable and resilient models, which are already provided for in other jurisdictions with a long tradition in attracting and retaining foreign investors. It is important that such models are tailored to the features of the FDI in Albania and that the potential risks of inward investments be assessed in advance.

## VI. RECOMMENDATIONS

### 6.1. Toward Smart Solutions on ISM

- *Setting the grounds for the professional and transparent discussion on investment screening mechanisms at the national level.*

As a first step it is imperative increasing more awareness and generating interest among the stakeholders on investment screening mechanisms. To achieve this, there is need for introducing the EU Regulation 2019/452 provisions and facilitating the understanding of their impact in the current and future domestic legislation on FDI. The adoption of such mechanisms, which are still new in many jurisdictions, should be preceded by introduction of EU Regulation purposes along with the benefits that emerge by the alignment of domestic legislation with the EU acquis and the potential adverse effects if not transposed accurately. Therefore, key stakeholders, such as businesses, chambers of commerce and business associations, private-public policy dialogue platforms, policymakers, lawyers and FDI experts, civil society organizations and think tanks, government agencies, public and independent institutions with cross-cutting functions related to FDI and media & academia should be onboard well before, through early and proactive engagement activities and getting acquainted with the concept.

- *Developing an in-depth analysis of the potential geoeconomic factors and FDI's trends that could trigger issues of "national security" and "public order" in the context of Albania.*

This is indispensable to identify the benefits and risks of inward FDI on economic security as per the economic sectors, subsectors and assets, in order to tailor later the ISM to mitigate the corresponding threats by avoiding unintended consequences, such as extensive barriers to legitimate competition and unfair treatment of investors.

- *Developing an in-depth analysis of the current legal and regulatory framework on FDIs including issues of governance, institutional capacities and coordination.*

The analysis can result in the development of a proposal for a national FDI screening concept, identifying current gaps and shortcomings and the need for legislative and administrative changes that allow for better incorporation of investment screening in the national legal and institutional framework.

- *Identification of best practices of investment screening mechanisms at the EU level, building upon their experience and lessons learned.*

The EC provides thorough information, reports, analysis and expertise at the technical level on different dimensions and practical issues that Member States have faced or are still facing while implementing investment screening mechanisms. Albania should be able to benefit from their accumulated experience and technical expertise, while crafting an efficient screening mechanism that corresponds to its economy size and its limited administrative resources.

- *Government to assess the implications of the EU Regulation 2019/452 for domestic legislation and prioritize the interventions in line with the objectives of the accession negotiation process that provides for speedy and full acceptance of the EU acquis.*

From this perspective it is important to adopt a roadmap of actions and streamline clearly defined milestones in order to:

- keep the public in general and the business community in particular well informed on the policy interventions, their goals and the expected impact;
- benefit from a qualitative prior consultation process of the policy proposed through Investment Council, National Economic Council, and other relevant public consultation platforms etc.;
- expect key points of confrontation among stakeholders and propose specific remedies on policy and practical implementation;
- prepare the ground for legal, institutional, procedural and administrative arrangements as solid premises for sustainable interventions;
- benefit from the practical and technical assistance by EU, NATO, OECD, etc. while developing inclusive and transparent legislation on investment screening;
- introduce the screening mechanism as part of the new law on investments (unified law) which for years now is expected to improve the legal landscape governance on FDIs,
- raise awareness in the business community on critical threats that can allow them to adapt their internal due diligence.
- *Business Associations and Chambers of Commerce shall be empowered in their role to effectively influence policymaking and shaping the debate on FDIs and investment screening legislation. In particular they should be able to:*
  - Understand the threats and benefits of FDI for the home economy and have a clear view of the vulnerabilities;
  - Engage early and proactively with policymakers in order to facilitate the information bridge to their members;



- Engage in dialogue with counterparts across the EU and other major economies.

## 6.2. Toward a Unified and Contemporary Legislation on FDIs

How can a unified investment law in Albania improve the country's economic climate?

**Streamlined procedures:** A unified law would harmonize and simplify investment procedures by eliminating redundant requirements and reducing administrative burdens, thereby attracting more investors.

**Clarity and Transparency:** A unified law would bring clarity and transparency to the legal framework regulating investments. It can define investment procedures, requirements and obligations, thereby reducing ambiguity and promoting parity among investors. Additionally, clear regulations can aid in preventing corruption and fostering good governance.




**Investor Protection:** A unified law can ensure the protection of investor rights and provide legal mechanisms for dispute resolution. It can establish clear rules on property rights, contract enforcement, intellectual property protection and investor-state dispute settlement, creating a secure and predictable investment environment.

**Incentives and Benefits:** A unified law can define the government's investment incentives and benefits to attract both domestic and foreign investors. These incentives may consist of tax exemptions, grants, subsidies or preferential treatment for particular industries or regions. These provisions can encourage investment and promote economic expansion.

**International Competitiveness:** A unified law consistent with international standards and best practices can increase Albania's investment destination competitiveness. It can demonstrate the country's commitment to a favorable business environment, encourage local entrepreneurs to invest in their own economy and attract FDIs.

The drafting and implementation of a unified law on investments is a complex process that necessitates careful consideration of numerous factors, such as the legal system, economic conditions, political environment and consultations with interested parties. Involving key stakeholders, such as investors, business associations, legal experts and government entities is essential for drafting laws that address adequately the requirements and concerns of all parties.

## APPENDIX 1 - FDI Screening Mechanisms in Several Jurisdictions

	 European Union	 US	 China
	Framework for the screening of foreign direct investments into the Union <sup>1</sup>	The Committee on Foreign Investment in the United States (CFIUS) and since 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) <sup>2</sup>	Foreign Investment Law <sup>3</sup>
To be used on the basis of a potential threat to national security	● ● ●	● ● ●	● ● ●
Dedicated team proactively mapping inflow of investments without waiting for notification from enterprises/member states	● ● ●	● ● ●	● ● ●
Compulsory notification of inbound FDI that might pose a threat to national security	● ● ●	● ● ●	● ● ●
Possibly to apply the regulation to already concluded investment transactions	● ● ●**	● ● ●	● ● ●
Power to block investments	● ● ●***	● ● ●	● ● ●
System of sanctions in case of missed notification (if compulsory)	● ● ●****	● ● ●	● ● ●
Ad-hoc independent agency in charge of screening and evaluating (notified) transactions	● ● ●	● ● ●	● ● ●

\*In the case of the US and China, companies must notify these inbound FDIs to CFIUS and a Working Office led by the Ministry of Commerce (MOFCOM) and China's National Development and Reform Commission (NDRC) respectively. In the EU, member states notify the Commission.

\*\*Not if happened before April 10, 2019.

\*\*\*Possible on national level

\*\*\*\*Responsibility of EU member states

Sources: <sup>1</sup> European Parliament and Council of the EU: <https://eur-lex.europa.eu/eli/reg/2019/452/oj>;

<sup>2</sup> US Treasury: <https://www.treasury.gov/resource-center/international/Documents/Summary-of-FIRRMA.pdf>;

<sup>3</sup> SAMR: [http://www.samr.gov.cn/djzcj/zcfg/fl/202003/20200312\\_312860.html](http://www.samr.gov.cn/djzcj/zcfg/fl/202003/20200312_312860.html)

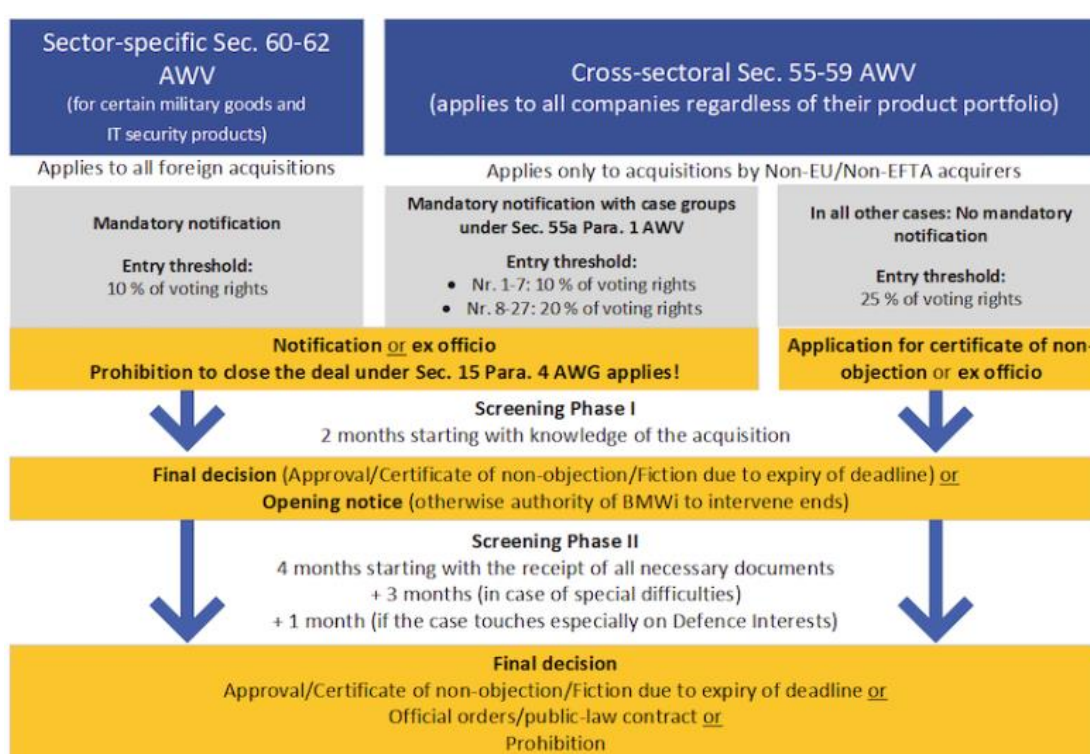
## APPENDIX 2 - German Model

Germany amended its rules on the screening of foreign direct investment by expanding the sectors covered and lowering the thresholds of shares required to activate the screening mechanism.<sup>106</sup>

The Federal Ministry for Economic Affairs and Climate Action may review the acquisition of German firms by foreign buyers on a case-by-case basis. The [Foreign Trade and Payments Act](#) and the [Foreign Trade and Payments Ordinance](#) provide the legal basis for this.

Germany has adopted both a cross-sectoral and sector-specific screening mechanism. The screening thresholds are as low as 10% of the voting rights depending on the sector, such as the sectors of critical infrastructure or defense. Furthermore, media enterprises have been added to the list of sectors where even a 10% voting rights shareholding can be screened.

### Investment screening procedure



**Source:** Federal Ministry for Economic Affairs and Climate Action

### Cross-sectoral screening

In principle, any acquisition of a company by investors located outside the territory of the EU or the EFTA region, whereby investors acquire ownership of at least 25% of the voting rights of a company resident in Germany, can be subject to such review. If the direct buyer is resident in the territory of the EU, such a review may be performed if there are indications of an abusive approach or a circumvention transaction.

The review considers whether the respective acquisition poses a threat to the public order or security of the Federal Republic of Germany, e.g. whether the acquisition represents a sufficiently serious and present threat that affects a fundamental interest of society. The text of the Act

<sup>106</sup> M Kontak, "Evaluation of the EU Screening Mechanism and the Question of Reciprocity with China" (2021) 17 CYELP 203. <https://www.cyelp.com/index.php/cyelp/article/view/451>. Last accessed 05.29.2023.

therefore refers directly to the EU legislation and the case law of the ECJ. To date, the ECJ has acknowledged that public order or security may be affected by acquisitions related to issues, such as security of supply in the event of a crisis, telecommunications and electricity or the provision of services of strategic importance.

#### Sectoral screening

Special rules for investment reviews apply to the acquisition of companies that operate in sensitive security areas. This includes manufacturers and developers of war weapons and other key military technologies, especially designed engines and gearboxes for military tracked armored vehicles and products with IT security features that are used for processing classified government information. Any acquisition of a company by foreign investors whereby these acquire ownership of at least 10% of the voting rights of a company resident in Germany can be subjected to such review.

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