Regulatory proportionality of investment screening mechanisms

An exchange on policy experience

Agenda

18-19 May 2022

Logistical information	The event is held virtually over Zoom in two separate sessions on 18 and 19 May 2022, between 13:00 and 15:00 (Paris time). The sessions are scheduled and timed to allow participation from all time-zones. Participation is restricted to government experts from OECD Member countries, the European Union as well as Brazil, Bulgaria, Croatia, Peru and Romania. Prior registration for each session is mandatory. The webinar languages are English and French, with simultaneous translation.
Suggested reading	Guidelines for Recipient Country Investment Policies relating to National Security (2009) Acquisition- and ownership-related policies to safeguard essential security interests (2020) – oe.cd/natsec2020 Investment screening in times of COVID-19 and beyond (2020) – oe.cd/covidscreen Inventory of investment measures taken between 16 October 2020 and 15 October 2021 – oe.cd/INVINV2021-2E Investment policy developments in 62 economies between 16 October 2021 and 15 March 2022 – oe.cd/INVINV2022 Transparency, Predictability and Accountability for investment screening mechanisms, Research Note by the OECD Secretariat (2021) – oe.cd/natsec2021 Managing access to AI advances to safeguard countries' essential security interests (2021) – oe.cd/il/natsecbfo21 Further material is available at oe.cd/natsec
Recent OECD events in this policy area	Webinar on Transparency, Predictability and Accountability for investment screening mechanisms, 11 and 12 May 2021 Webinar on investment screening in times of COVID-19 – and beyond, 25 June 2020 Acquisition-and ownership-related policies to safeguard essential security interests – *New policies to manage new threats*, 12 March 2019
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More than a decade of experience in designing and implementing international standards of investment policies relating to national security

In 2009, OECD Member governments agreed on good policy standards for recipient country investment policies relating to national security in a Recommendation of the OECD Council (the 2009 Guidelines). These Guidelines contain a set of principles for policies designed to manage national security risks associated with foreign investment. They call for these policies to be non-discriminatory and transparent, for outcomes to be predictable, measures taken to be proportionate, and for accountability of implementing authorities.

In the more than ten years since the adoption of the Guidelines, a large number of OECD Member countries have established or reformed mechanisms to manage potential national security risks that can come with the opportunities of foreign investment. In 2009, only just over a third of today's OECD Member countries had an operational investment review mechanisms to protect their essential security interests; in early 2022, the share was almost twice as high, and further OECD Members are planning to introduce investment review mechanisms. Most of the mechanisms that OECD Members have introduced since 2009 take account of the recommendations for good policy design as agreed in the Guidelines.

A 2020 OECD report on this policy area that covers current and emerging trends and takes stock of observed designs and policy practices in all OECD Members shows that countries have devised different ways to implement the standards set out in the Guidelines. This situation provides for ample opportunities to learn from other countries' policies and practices.

In May 2021 a first webinar on procedural aspects of investment review mechanisms set out in the Annex of the Guidelines, item 2 – "*Transparency/Predictability*" – and item 4 – "*Accountability*" took place. The webinar allowed government experts from OECD Member countries to exchange experiences on the implementation of the Guidelines in policy and practice to better inform government reform efforts and foster peer-learning.

This second event continues this dialogue. It focuses on the "***Regulatory Proportionality***" of investment review mechanisms as mentioned in the Annex of the Guidelines, item 3. It focuses specifically on "*the availability and the use of tailored policy responses that are adequate and appropriate to address a national security concern*".

Information on policy practice is available in a recent OECD report, and an up-to-date research note specifically on policies and practices of mitigation measures will be circulated separately.

It is proposed that the webinar be **organised in two distinct sessions**: A first session, held on 18 May 2022, will be open to legal counsel from several OECD Members to provide an opportunity to share their experience and views on:

- clients' interests and constraints in the proposal and negotiation of mitigation measures;
- perceptions on the degree of constraints that different types of measures entail in the short and longer terms; and
- experience with different enforcement and follow-up mechanisms;

The second session, held on 19 May 2022, would be open only to government representatives from OECD Members and the European Union only. The session seeks to foster exchanges on government practices, specifically regarding:

- types of mitigation arrangements used in different countries;
- proceedings to define and scope specific arrangements;
- approaches to monitor compliance with mitigation measures;
- adaption or lifting of mitigation measures that are no longer necessary;
- enforcement of mitigation measures and government responses in cases of non-compliance.

The webinar seeks to facilitate open and informative exchanges among experts. Some experts will give introductory remarks on their countries' practice in a given area, but experts from all countries and the EU are invited to actively participate in the conversations.

18 May 2022

13:00 – 13:10	**Introductory remarks and overview of the objectives of the webinar**
	Ana Novik, Head, Investment Division, OECD.
13:10 – 13:20	**Current trends in investment policies related to safeguarding essential security interests**
	This session will offer a brief presentation by the OECD Secretariat on the most salient trends in current policy developments. **Joachim Pohl**, Investment Division, OECD.
13:20 – 14:50	**Mitigation measures as 'agreements': The role and experience of transaction parties and counsel in defining least restricting measures**
	Mitigation measures are often referred to as "mitigation agreements", suggesting that measures to safeguard essential security interests are indeed 'agreed' between parties to a transaction and governments. In many cases, transaction parties have an interest in proposing specific measures to mitigate a threat identified during an investment review. Transaction parties and their counsel will also know best which elements of a given transaction could be abandoned or which arrangements could be implemented without compromising the economic viability of the transaction. The active participation of transaction parties and counsel is thus an important component of proportionate measures that enable international investment to the largest possible extent. This session, open to government practitioners from OECD Member countries, the European Union and Brazil, Bulgaria, Croatia, Peru and Romania and specialized counsel for international M&A with an investment review component seeks to elucidate aspects of: – clients' interests and constraints in the proposal and negotiation of mitigation measures; – perceptions on the relative severity of constraints that different types of measures entail in the short and longer terms; and – experience with different enforcement and follow-up mechanisms. The purpose of the session is to familiarize government practitioners with insights of investors and counsel on types of mitigation measures. Selected counsel with broad experience in proposing and negotiating mitigation agreements in different jurisdictions will begin the conversation with brief interventions. Governments are invited but not primarily expected to intervene in this session.
Moderation	**Ashley Lenihan**, Georgetown University.
Panellists	**Farhad Jalinous**, Partner, White&Case (Washington DC, United States) **Bärbel Sachs**, Partner, Noerr (Berlin, Germany) **Edouard Sarrazin**, Partner, DLA Piper France LLP (Paris, France)
14:50 – 15:00	**Conclusion of the first session**

19 May 2022

13:00 – 13:05 Welcoming remarks

Ana Novik, Head, Investment Division, OECD.

13:05 – 14:40 Selecting, scoping, monitoring, adapting and enforcing mitigation arrangements

Proportionality of investment policies to legitimate public policy objectives is an essential precondition for international investment. The principle of proportionality also applies to policies and measures that seek to safeguard countries' essential security interests, as explicitly recognised in the 2009 Guidelines. The Guidelines call for policy responses to be tailored to the specific risks posed by specific investment proposals and that the policy response does not overshoot what is needed to address the risk.

Many countries achieve the objective through the use of mitigation measures, that is, measures that reduce the risk sufficiently to allow the transaction to be otherwise allowed.

While initially, legislation barely recognised mitigation measures, the instrument is now often explicitly mentioned as the primary response of the authorities; in these countries, prohibitions of individual transactions may only be ordered if mitigation measures are not sufficient to address an identified threat.

The substance of individual mitigation measures is typically unknown to anyone not involved in the transaction. Practices of identifying solutions, defining the scope of measures, as well as monitoring compliance and enforcement are hence also largely unknown beyond those involved in a given individual transaction. This – legitimate – secrecy about individual measures limits peer learning and transmission of good practice among governments.

This session, open only to government practitioners from OECD Member countries, the European Union and Brazil, Bulgaria, Croatia, Peru and Romania, provides a forum to share experiences and best practices on:

- types of mitigation arrangements used in different countries;
- proceedings to define and scope specific arrangements;
- approaches to monitor compliance with mitigation measures;
- adaption or lifting of mitigation measures that are no longer necessary;
- enforcement of mitigation measures and government responses in cases of non-compliance.

Practitioners from selected jurisdictions will begin the conversation with short presentations of their respective countries' practices. These short presentations would cover a given government's practice in general and provide a deeper description of a particular aspect where the respective government has developed specific practices or experiences that may serve as inspiration to other jurisdictions.

Moderator

Joachim Pohl, OECD Secretariat

Panellists

Pierre Martin, Deputy Head, Office *Foreign investments in France*, France

Amelia Henty, Assistant Secretary, Foreign Investment Division, Australia

Alessandra Taglieri, Investment Control Unit, Office of the President of the Council of Ministers, Italy

Yuki Sakurada, Director for Foreign Direct Investment Issues, International Bureau, Ministry of Finance Japan

Christian Glenz, Deputy Head of Division, Ministry for Economic Affairs and Climate Action, Germany

Jessica Ruzic, Office of Investment Security, Department of the Treasury, United States

Célia Chausse, Deputy Head of Division, Investment Control Division, Austria

14:40 – 15:00	**Conclusions, outlook and closing**
Moderator	**Ana Novik**, Head, Investment Division, OECD This brief session allows for feedback on the format and content of the webinar. It is also an opportunity to reflect on whether any further agreement on good policy would be beneficial for an area that is not addressed in any detail in the Guidelines – such as mitigation arrangements.

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