



FREEDOM OF INVESTMENT PROCESS

**Investment policy
developments in 62
economies between
16 October 2020 and
15 March 2021**

The “**Freedom of Investment**” (FOI) process hosted by the OECD Investment Committee monitors investment policy developments in the 62 economies that participate in the process.

The present report was prepared for the Freedom of Investment Roundtable 33 held on 30 March 2021. It follows on from earlier reports which are available at <https://www.oecd.org/investment/g20.htm>.

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About this note

1. Monitoring and exchange of information on investment policy developments has been a regular feature of the *Freedom of Investment* (FOI) Roundtables hosted by the OECD Investment Committee since the Roundtables' inception in 2006. To support policy dialogue on these developments among the 62 economies invited to the Roundtables, the OECD Secretariat establishes inventories of recent developments and makes them available to the public once participating governments have had an opportunity to verify the information.¹ Since March 2018, the full inventories are established annually for the Roundtables held in fourth quarter of the year, but some issues for discussion are proposed for each Roundtable.
2. The present note is part of the on-going response to this mandate. It uses the established methodology applied in earlier reports and covers developments that have been observed in the five months between 16 October 2020 and 15 March 2021. It focuses on policies or measures designed to manage threats to essential security interests associated with international investment.

¹ The reports can be found at: www.oecd.org/daf/investment/foi.

Investment Policy Developments between 16 October 2020 and 15 March 2021

3. Implications of international investment for recipient countries' essential security interests continue to drive policy making in advanced and emerging economies that participate in the OECD-hosted *Freedom of Investment* (FOI) Roundtables. The most recent data suggests that the attention to this area of investment policy making which began after 2016 remains strong² and confirms that the accelerated upward trend observed in 2020 is independent of concerns associated with the COVID pandemic and its economic fallout.³

Attention to acquisition- and ownership-related policies to safeguard essential security interests remains strong

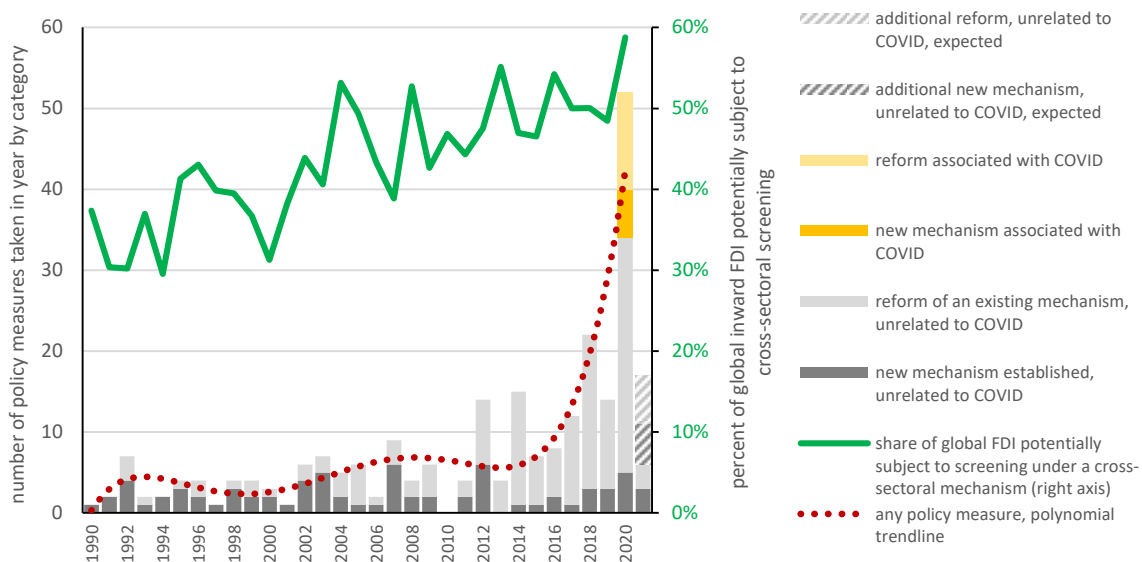
4. In the five-month reporting period between 16 October 2020 and 15 March 2021, seven of the 62 economies invited to participate in FOI Roundtables made changes to their investment policies related to essential security interests. Eleven changes have come into force in this period overall, one per fortnight on average.

5. The year 2021 has already witnessed a number of new policy measures. By 15 March 2021, five countries ([Australia](#), [P.R. China](#), [Russian Federation](#), [Slovakia](#) and [Sweden](#)) had adopted or brought into effect new acquisition- and ownership-related policies to safeguard their essential security interests, and the [Czech Republic](#) had scheduled the entry into force of its new mechanism for 1 May 2021. Further countries, especially in Europe, including [Belgium](#), [Denmark](#), [Estonia](#), [Germany](#), [Ireland](#), [Netherlands](#), [Sweden](#), [Switzerland](#), [Ukraine](#), the [United Kingdom](#), and, outside Europe, [Brazil](#) and [Chile](#) were considering the introduction or reform of acquisition- and ownership-related policies to safeguard essential security interests (Figure 1).

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

³ See on this earlier finding OECD (2020), "[Inventory of investment measures taken between 16 September 2019 and 15 October 2020](#)" and OECD (2020), "[Investment screening in times of COVID-19 and beyond](#)".

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



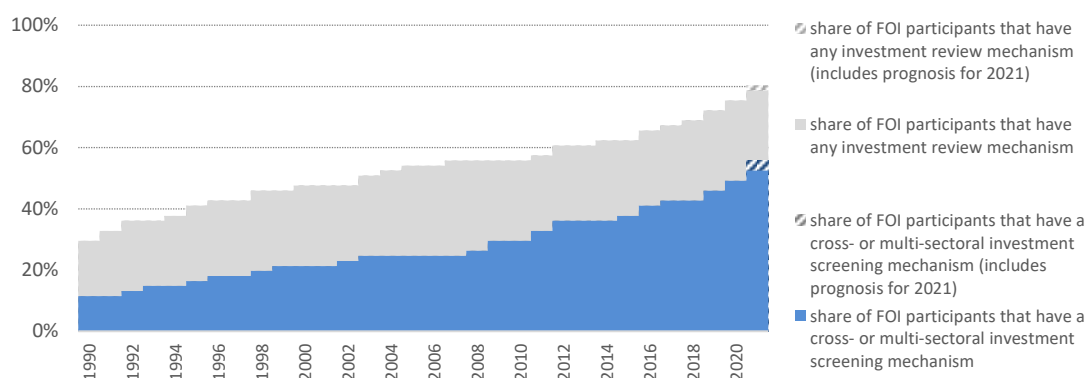
Note: Data cover the 62 economies that participate in the OECD-hosted Freedom of Investment Roundtable. A new mechanism or reform is “associated with COVID-19” if the government has explicitly justified its introduction, at least in part, with the pandemic or its fallout. Projections by the OECD Secretariat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

Source: OECD.

6. The countries that are now introducing or planning to introduce detailed and sophisticated acquisition- and ownership-related policies to safeguard essential security interests have, for the most part, not had such policies in the recent past. These countries include the [Czech Republic](#), [Slovakia](#) and [Sweden](#). Other countries where corresponding plans are underway are [Belgium](#), [Brazil](#), [Denmark](#), [Estonia](#), [Netherlands](#), [Ireland](#), [Switzerland](#), and [Ukraine](#). This development marks a difference to the previous decade starting after the financial and economic crisis of 2008/2009, when most action was observed in countries that already had advanced investment review mechanisms.

7. The introduction of entirely new mechanisms in countries that had not had such mechanisms in the recent past will further increase substantially the share of FOI Participants that have such mechanisms to at least 79% of FOI participants, up from 75% at the end of 2020 and from only 57% a decade ago (Figure 2).

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

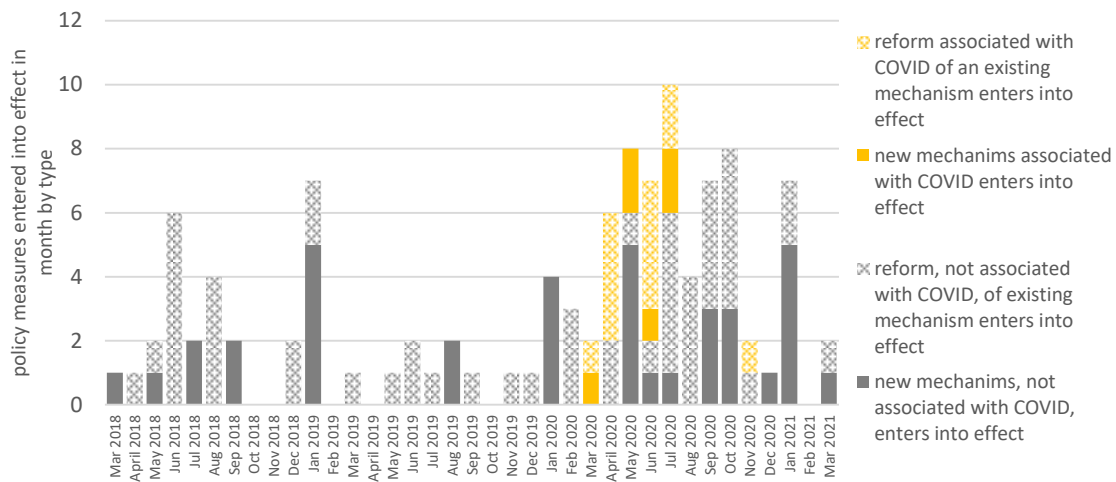


Note: Considers countries in which certain mechanisms are in force in given year, and, for 2021 are in force up to 15 March 2021. Planned measures that are expected to come into force in 2021 are shown separately.
Source: OECD.

8. Attention to this area of investment policy also found an expression in a significant number of implemented or ongoing reforms of existing mechanisms. In the reporting period, several countries continued to enhance their existing policies. [Germany](#), [Italy](#), [Lithuania](#), [Russian Federation](#) and [Spain](#) introduced changes to their existing mechanisms, and more or less substantial reforms of existing policies were under preparation in the reporting period in [Germany](#), [New Zealand](#), and the [United Kingdom](#).

9. Although the COVID pandemic continues to rage, no new measures or reforms were lately justified with imperatives associated with the pandemic. The month-by-month breakdown of the entry into force of policy measures related to the protection of essential security interests in Figure 3 shows that while the COVID pandemic justified a significant number of measures early on after the [WHO had declared a pandemic on 11 March 2020](#), these circumstances were no longer advanced by governments after July 2020, with one single exception. Two governments, those of [France](#) and [Hungary](#), extended the application of their temporary modifications to their mechanisms that they had introduced earlier in the face of the disruption brought about by the pandemic; both had a sunset-date when they were introduced early in the pandemic and its trajectory was unknown.

Figure 3. The COVID pandemic is no longer advanced to justify the introduction of new policy measures or reform of existing measures



Note: Columns show number of measures that entered into effect in given month by type. A measure is “associated with COVID” if the government has explicitly justified its introduction, at least in part, with the pandemic or its fallout. Data for March 2021 up to 15 March 2021.

Source: OECD.

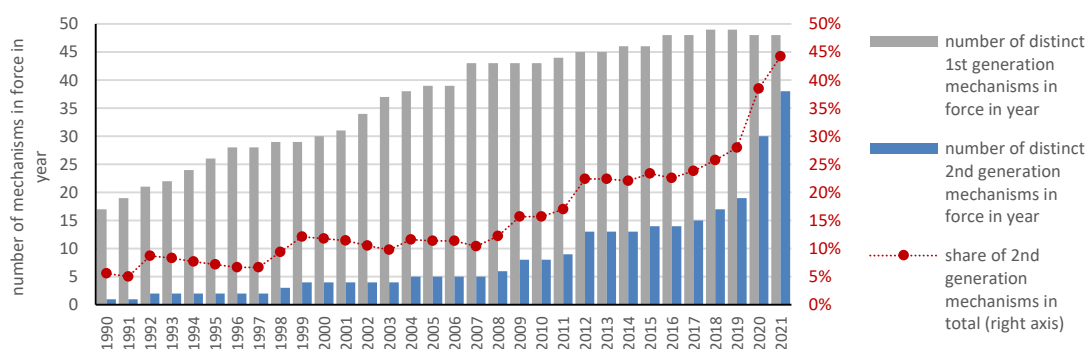
Introduction and reform of acquisition- and ownership-related policies to safeguard essential security interests lead to greater regulatory depth and clarity on policies

10. Newly introduced and reformed mechanisms feature generally a much higher degree of clarity and regulatory depth than older mechanisms. Mechanisms that only contain rudimentary rules such as assessment criteria, procedural rules and responsibilities (referred to here as 1st generation mechanisms) are increasingly abolished and replaced by mechanisms with more comprehensive rule-sets (referred to here as 2nd generation mechanisms).⁴ New mechanisms now systematically have comprehensive rule-sets.

11. As a result of this shift to more complete rule-sets for acquisition- and ownership-related policies, the share of such 2nd generation mechanisms in force in FOI Participants is steadily increasing, with a particular acceleration observed since 2020 (Figure 4). Despite this process, a large number of 1st generation mechanisms continue to remain in place and are applied side-by-side with newer mechanisms.

⁴ A more detailed explanation of these categories is available in OECD (2020), “[Acquisition- and ownership-related policies to safeguard essential security interests](#)”, section 1.3.1.

Figure 4. New policies and reform of older designs lead to more sophisticated mechanisms overall



Note: Data for 2021 do not include projections and cover only the period up to 15 March 2021.

Source: OECD.

12. In some cases, the coexistence of mechanisms can have implications for governments and would-be acquirers, especially if these mechanisms apply cumulatively to a given transaction or types of transactions. In particular, they may lead to undesirable precedence of a 1st generation mechanism⁵ or to parallel procedures under coexisting mechanisms regarding the same transaction.

Areas of concern appear to shift – again – to return to pre-pandemic priorities

13. While the COVID-19 pandemic led to a swift and unprecedented extension of investment review mechanisms to include health related sectors and health infrastructure,⁶ the focus of attention as regards sensitive industry sectors appears to shift back to its pre-pandemic trajectory. Many of the most recent mechanisms and reforms suggest that foreign investment in advanced technology is perceived as leading to exposure of essential security interests.

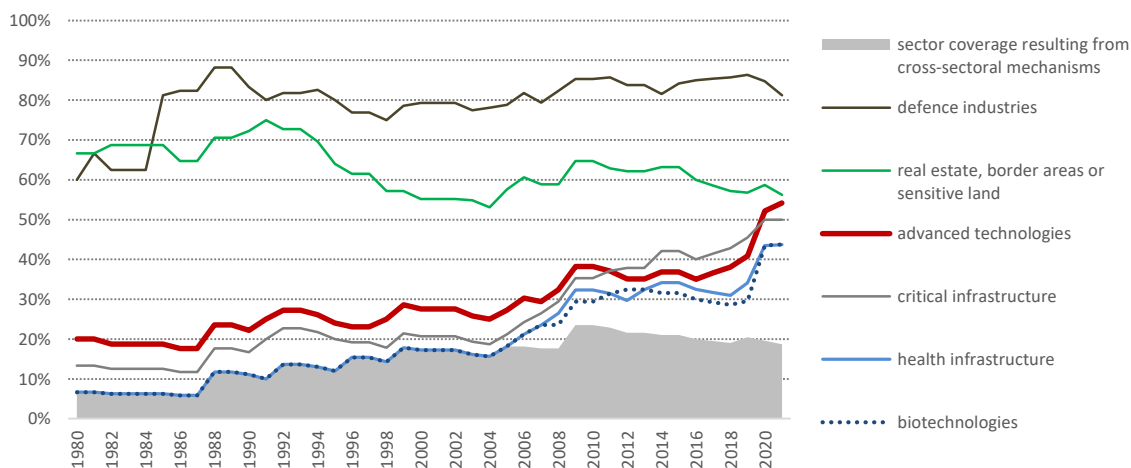
14. Foreign acquisitions of advanced technology had been in the focus of attention before the pandemic struck, and, in some economies, for quite some time: Already in the 1980s, before the end of the Cold War, advanced technology ranked third among the sectors covered by acquisition- and ownership-related policies to safeguard essential security interests. At that time, advanced technologies were a distant third, but policy changes show that more and more countries see this area as a priority. After a swift inclusion of health-

⁵ Germany abolished a [relatively recent stand-alone 1st generation mechanism related to satellite-imagery](#) as part of its [reform in mid-2020](#). The German authorities had noted that as *lex specialis* it took precedence over the more deeply regulated general investment review mechanism under the Foreign Trade and Payments Act (see [BtDrs 19/18700](#), p.21). The assets whose acquisition was to be reviewed under the abolished mechanism are now included in the list of the reformed, general review mechanism.

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

related sectors under the scope of acquisition- and ownership-related policies in early 2020, these sectors now plateau in relative importance, while advanced technologies continue the ascent in relative priority (Figure 5).

Figure 5. Relative importance of individual sectors under acquisition- and ownership-related policies to safeguard essential security interests (1980-2021)



Note: Coloured lines in the graph indicate the proportion of FOI economies whose investment review mechanisms in force in any given year cover the indicated sector, thus showing the relative importance attached to individual sectors in the context of investment screening for essential security interests. Each year in the time series reflects only those FOI economies that operated at least one review mechanism in that year.

Source: OECD.

15. The increasing concerns about advanced technologies is reflected in various initiatives at national and international levels. These include, at domestic level, initiatives to identify and anticipate future technologies that warrant foreign investment control or related measures,⁷ that re-categorise advanced technologies to include them into more

⁷ The United Kingdom and the United States have recently launched public consultations on which sectors generate particular concerns in relation to essential security risks. The United Kingdom held such a [public consultation](#) to select sectors which will require mandatory notification under the [National Security and Investment Bill 2019-21](#) between November 2020 and January 2021. In the United States, a consultation was held between August and October 2020 to inform “the definition of, and criteria for, identifying foundational technologies” that are essential to the national security of the United States (“[Advance notice of proposed rulemaking, Identification and Review of Controls for Certain Foundational Technologies](#)”, Federal Register Vol.85, No.167, 27 August 2020).

stringent review mechanisms⁸ or subjects them to specific rules and mechanisms altogether.⁹

16. Growing concerns about advanced technologies in a security context are also evidenced by recent initiatives to establish or strengthen international cooperation to regulate access to these technologies where there are links to essential security interests.¹⁰

⁸ In *Germany*, the forthcoming 17th Amendment Ordinance of the Foreign Trade and Payments Ordinance ([Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung](#)) will achieve this outcome by extending the list of items to which a lower screening threshold and notification obligations apply. In *Japan*, this reclassification occurred in mid-2020 through [amendments](#) to Japan's Foreign Exchange and Foreign Trade Act (FEFTA), its [implementing regulations](#) and lead to the application of lower trigger thresholds and notification requirements for certain transactions. *Spain* added critical technologies into the sectors where foreign investors need prior approval as part of reforms implemented through [Royal Decree-Law 34/2020](#) on 17 November 2020. The *United Kingdom* lowered trigger thresholds for transactions concerning artificial intelligence, cryptographic authentication technology, and advanced materials as part of reforms in July 2020 ([Enterprise Act 2002 \(Share of Supply\) \(Amendment\) Order 2020](#) and [Enterprise Act 2002 \(Turnover Test\) \(Amendment\) Order 2020](#)).

⁹ *Korea* maintains rules under its [Act on the Prevention of Divulgence and Protection of Industrial Technology](#) last amended in August 2020 by [Law N°16476 \(Partial Amendment of the Act on the Prevention of Divulgence and Protection of Industrial Technology\)](#) that contain a technology-specific mechanisms to manage foreign acquisitions of certain advanced technologies. *P.R. China* made amendments to the [“Catalogue of Technologies Prohibited and Restricted from Exporting in China”](#) with effect on 28 August 2020; while an export-control list, it may have implications for foreign investment in Chinese companies that hold technologies included in the lists. The *United States* introduced an [interim rule](#) on 19 January 2021 that would implement new rules under the [Executive Order 13873](#) of 15 May 2019; in substance, these rules would allow the Secretary of Commerce to identify, assess, and address certain information and communications technology and services transactions that pose an undue risk to critical infrastructure or the digital economy in the United States.

¹⁰ Proposals in this regard have been voiced within the European Union (see [European Commission High Representative of the Union for Foreign Affairs and Security Policy: Joint Communication to the European Parliament, the European Council and the Council: A new EU-US agenda for global change](#), 2 December 2020, JOIN(2020)22 final, which calls for a common focus on protecting critical technologies, including on issues such as investment screening). Similar calls have been made in the United States Senate (“Bipartisan Senators Introduce Legislation to Reassert Democratic Leadership in Technology Strategy&Development”, [press announcement](#) and [bill](#) of the *Democracy Technology Partnership Act*), 4 March 2021, which likewise calls for an international partnership with democratic countries to develop harmonised technology governance regimes, among other objectives. Similarly, a [Final report by the U.S. National Security Commission on Artificial Intelligence](#) published in March 2021 recommends (pp. 519-520) to build an “Emerging Technology Coalition” with allied democracies and partners to counter malign uses of emerging technologies.

Trigger criteria for acquisition- and ownership-related policies begin to rely to a greater extent on access of acquirers to sensitive assets rather than on formal proxies

17. Acquisition- and ownership-related policies to safeguard essential security interests contain a risk-roster that sets out which transactions are potentially injurious to essential security interests and thus subject to review or restrictions. Many mechanisms rely for this purpose on formal criteria, notably equity stakes or voting rights that the acquirer would have in the acquisition target once the transaction is implemented.¹¹ These thresholds typically correspond to specific shareholder rights in the target company under a given country's securities legislation, and the thresholds have been chosen by the legislator as these rights are held to imply potentially unacceptable risk if not controlled or mitigated.

18. While the use of formal voting rights has the advantage of clarity, governments appear to have observed circumvention or at least practices that undermine the value of these thresholds as proxies for certain shareholder rights.¹² In the most recent reforms, some countries introduce changes to their mechanisms to counter the results of these practices on the effectiveness of review mechanisms. Examples for these rules include arrangements between would-be acquirer and acquisition target that:

- attribute disproportionate rights compared to the nominal voting rights or equity stakes, in particular those that ensure a disproportionate representation in the management of the target, or grant access to sensitive, non-public information (included in a draft ordinance in Germany,¹³ draft legislation in New Zealand,¹⁴ draft legislation in the United Kingdom;¹⁵ and in legislation introduced in the United States in 2018¹⁶); or

¹¹ See OECD (2020), "[Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies](#)", section 2.1.1.

¹² The German government explains in the rationale for the planned 17th Amendment Ordinance of the Foreign Trade and Payments Ordinance ([Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung](#)), 21 April 2021, p.38, that side-agreements among shareholders are increasingly frequent practice.

¹³ [Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung](#), 21 April 2021, p.10. The criteria are framed as examples of "other" forms of gaining a meaningful participation in the management or control of the target company.

¹⁴ [Overseas Investment Amendment Bill \(No 3\)](#), Amendments to Overseas Investment Act 2005, [4—Section 6 amended \(Interpretation\)](#), (10), which defines the conditions for "disproportionate access to or control" of a target company as, among others, access to information or access to research, sensitive information, or involvement in substantive decision making.

¹⁵ [National Security and Investment Bill](#), Schedule 1 Section 10—Trigger Events: Holding of Interests and Rights.

¹⁶ [Foreign Investment Risk Review Modernization Act \(FIRRMA\)](#), Sec. 1703 (D), now introduced into Section 721(a) of the Defence Production Act of 1950 (50 U.S.C.4565(a)). The section defines as "other investments" those that, without fulfilling certain other criteria, afford a

- The possibility that representatives of a foreign acquirer attend meetings of the executive board or similar committees or make proposals to the target company's executive board or similar committees (indicated as practice in Japan's investment review mechanism).¹⁷

19. The direct reference to powers and possibilities of an incoming shareholder rather than the nominal shareholdings are still rare in policy practice but are emerging almost simultaneously in several countries. They may ultimately replace or at least complement the reference to formal criteria that dominate many countries' acquisition- and ownership-related policies to safeguard essential security interests today.

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foreign person access to any material non-public technical information in the possession of the acquisition target, membership or observer rights on the board of directors or equivalent governing body, the right to nominate an individual to a position on the board of directors or equivalent governing body, or involvement in substantive decision-making regarding the use, development, acquisition, safekeeping, or release of sensitive personal data of United States citizens maintained or collected by the acquisition target or the use, development acquisition, or release of critical technologies or the management, operation, manufacture, or supply of critical infrastructure.

¹⁷ [“Factors to be considered in authorities’ screening of prior-notification for Inward Direct Investment and Specified Acquisition under the Foreign Exchange and Foreign Trade Act”](#) Ministry of Finance media release, 8 May 2020.