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by

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Abstract

This paper highlights the legal, economic, and political background of Slovakia's foreign direct investment (FDI) screening regime. Slovakia, as a traditionally open economy, has recently introduced measures to screen and potentially ban foreign investment. These developments were primarily a response to perceived threats from Russia and, to a lesser extent, China. The country has attracted significant FDI, with the majority coming from EU member states. A broadly conceptualized FDI Screening Act was adopted towards the end of 2022 to establish a robust screening regime. The newly established screening regime came to effect in March 2023 and largely replaced a sectoral screening regime focused on critical infrastructure only. The act distinguishes between critical foreign investments and other foreign investments, with different parameters for initiating the screening procedure. The Ministry of Economy is responsible for carrying out the screening procedures and cooperating with other government agencies. The act also emphasizes the importance of beneficial ownership transparency and allows for inspections and judicial review of decisions. Potential challenges include the implementation of intra-EU investment screening and the possibility of politically motivated gatekeeping by the Ministry of Economy.

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1. Economic and political background

As a traditionally open economy, Slovakia is a newcomer to the idea of screening and potentially banning foreign investment. Recent developments in this area were mostly reactive and achieved mainly as a response to perceived threats posed by Russia and China to a lesser extent.

Per the data on foreign direct investment collected by the Slovak National Bank, Slovakia hosted EUR 52.4 billion of FDI as of 2020. Most of the FDI was sourced from the EU member states, accounting for 92% of all foreign investments. Major non-EU investors include South Korea (EUR 3.2 bil.), United Kingdom (EUR 1.7 bil.), Switzerland (EUR 946 mil.), United States (EUR 291 mil.), Singapore (EUR 139 mill.), or Norway (EUR 125 mil.). However, it must be noted that the statistics collected by the Slovak National Bank do not follow the ultimate controlling economy approach; the actual distribution of investing economies may differ. As far as recipient sectors, most investments are concentrated in manufacturing (32 %) – especially motor vehicle manufacturing, financial and insurance services (25 %), and real estate (9 %).¹

The National Council of Slovakia adopted the existing FDI screening mechanism in an expedited procedure to amend² the existing Act on Critical Infrastructure.³ The Minister of Economy publicly justified the need to rush the amendment through the legislative process due to the supposedly looming risk of Russian state-owned bank Sberbank taking over Slovenské elektárne, a partially state-owned electricity provider, since Slovenské elektárne

¹National Bank of Slovakia, Priame zahraničné investície [Foreign Direct Investments], [https://nbs.sk/statisticke-udaje/statistika-platobnej-bilancie/priame-zahranicne-investicie/#:~:text=Priama%20zahrani%C4%8Dn%C3%A1%20invest%C3%ADcia%20predstavuje%20kateg%C3%B3riu,ekonomike%20\(podnik%20priamej%20invest%C3%ADcie\).](https://nbs.sk/statisticke-udaje/statistika-platobnej-bilancie/priame-zahranicne-investicie/#:~:text=Priama%20zahrani%C4%8Dn%C3%A1%20invest%C3%ADcia%20predstavuje%20kateg%C3%B3riu,ekonomike%20(podnik%20priamej%20invest%C3%ADcie).)

² Act no. 72/2021 Coll. on amendment on Act no. 42/2021 Coll. on critical infrastructure as amended and on amendment on certain other acts, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2021/72/20210301.html>.

³ Act no. 41/2011 Coll. on critical infrastructure (as amended by Act no. 72/2021 Coll.), <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2011/45/20210301>.

had outstanding loan repayments. The entire legislative process took mere five days. Naturally, the short time frame meant no meaningful discussion could occur.⁴

However, at the time of the amendment's adoption, the Ministry of Economy was already preparing a bill setting up a robust and broad FDI screening regime. The new Act on Screening of Foreign Investment (FDI Screening Act) was adopted at the end of November 2022 and came into force on 1 March 2023.⁵ The adoption of the law came at a time when economic hybrid threats and negative impacts of corrosive capital were under increased scrutiny by the Slovak security community. Adopting an effective FDI Screening Regime has been labeled as the country's "strategic security interest" by the 2021 National Security Strategy.⁶ A follow-up document – the 2022 Action Plan on Coordinating the Combat against Hybrid Threats – calls for the adoption of an FDI screening regime, notes the vital role of the public as a potential source of information necessary for starting a screening procedure, calls for mandatory screening of investment into media, as well as linking the screening procedure with the registration of the screened investor in the publicly accessible beneficial ownership registry.⁷

2. Overview of the domestic legal framework

Slovakia's economy, and consequently the legal framework, is a relatively open one. Generally, all sectors of the economy are open to foreign investment, with only a few exceptions.

An outright ban on foreign investment exists only concerning purchasing arable land. This ban is based on the reciprocity principle. A plot of arable land may not be acquired by a foreign state, citizen of a foreign state, or a person / legal entity domiciled in a foreign state that does not allow natural persons or legal entities domiciled in the Slovak Republic to acquire arable

4 Matej Šimalčík, "New FDI Screening Law: Not What Slovakia Needs, but What it Deserves", CHOICE, 19 February 2021, <https://chinaobservers.eu/slovakias-new-fdi-screening-law-not-what-the-nation-needs-but-what-it-deserves/>.

5 Act no. 497/2022 Coll. on the screening of foreign investment, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/497/20230301>.

6 Bezpečnostná stratégia Slovenskej republiky [National Security Strategy of the Slovak Republic], 2021, https://www.mosr.sk/data/files/4263_210128-bezpecnostna-strategia-sr-2021.pdf.

7 Akčný plán koordinácie boja proti hybridným hrozbám (2022-2024) [Action Plan on Coordinating the Combat Against Hybrid Threats (2022-2024)], 2022, <https://www.nbu.gov.sk/wp-content/uploads/2022/08/AKČNY-PLAN-KOORDINACIE-BOJA-PROTI-HYBRIDNYM-HROZBAM.pdf>.

land. The ban does not apply to member states of the EU, EU, EEA, Switzerland, and countries where an international agreement provides for foreign ownership of arable land.⁸

2.1. Act on Critical Infrastructure

A proper investment screening regime, as the EU FDI-Screening Regulation⁹ understands it, has been in effect only since March 2021, when the parliament adopted an amendment to the Act on Critical Infrastructure.

The amendment set up a narrow screening regime for investment into certain elements of critical infrastructure in the energy industry sectors (incl. mining, electricity generation, gas utility, and oil processing), pharmaceutical industry, metallurgy, and chemical industry. Investment (both equity and asset deals) related to these critical infrastructure sectors must be mandatorily notified to the Ministry of Economy, which may decide to open a full screening procedure within the next 60 days. The same applies to various indirect dispositions with the ownership right – e.g., via foreclosures, the exercise of lien rights, or insolvency proceedings.

While narrow in scope, this screening regime also allows screening investments made by intra-EU investors.

Based on the findings of the screening procedure, the Ministry of Economy submits a draft of the decision to the Government, which either approves the investment, conditionally approves the investment, or bans the investment. The Government's decision is subject to an appeal by the Supreme Court.

Nevertheless, there has been no public record of any procedure that would have taken place under the Act on Critical Infrastructure.

2.2. FDI Screening Act

The narrow, sectoral screening regime under the Act on Critical Infrastructure is replaced by a robust cross-sectoral screening regime. The newly adopted FDI Screening Act,¹⁰ which came to force on 1 March 2023, presents a complete overhaul of the FDI screening regime.

8 Act no. 140/2014 Coll. on acquisition of ownership to agricultural land as amended, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2014/140/>.

9 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, OJ L 79/1.

10 Act no. 497/2022 Coll. on the screening of foreign investment, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/497/20230301>.

Generally, only investments by "foreign investors" are eligible to be screened. An investor is deemed a foreign investor, if they are not a citizen or do not have a registered office in the Slovak Republic or in another EU Member State. Citizens or companies with registered offices in Slovakia or in another EU Member States are considered to be foreign investors if:

- investment finance is provided by a non-EU public entity or an entity in which a non-EU public entity is a shareholder; or
- the entity's shareholder or ultimate beneficial owners are based in a non-EU state or are a non-EU public entity; or
- they act in concert with a non-EU person or a non-EU public entity.

All investments made by foreign investors may be subject to a screening procedure. However, the law distinguished between "critical" foreign investment and other foreign investment.

Investment by the intra-EU (i.e., not foreign) investors may be screened if they concern investment into the critical infrastructure sectors for which screening under the Critical Infrastructure Act was possible - in the sectors of energy industry (incl. mining, electricity generation, gas utility, and oil processing), pharmaceutical industry, metallurgy, and chemical industry).

Thus, under the FDI Screening Act, three sets of FDI screening regimes need to be distinguished, as they differ in their scope and parameters for initiating the screening procedure:

- screening of critical foreign investments (sectoral screening regime),
- screening of other foreign investments (cross-sectoral screening regime),
- screening of intra-EU investments into critical infrastructure.

2.3. Competence

Investment screening procedures are carried out by the Ministry of Economy.¹¹ In collecting the necessary information, the Ministry of Economy is authorized to cooperate with and collect data from other government agencies, especially the Ministry of Interior, Ministry of Defense,

¹¹ § 7(1) FDI Screening Act. See also Ministry of Economy of Slovakia. Screening of foreign direct investment. <https://www.mhsr.sk/podnikatelske-prostredie/preverovanie-zahranicnych-investicii?csrt=13060486456321255755>. Here, the Ministry also publishes relevant materials about FDI screening regime in Slovakia, as well as all the forms linked to disclosing a foreign investment subject to review.

Ministry of Foreign and European Affairs, Ministry of Finance, the police, or intelligence agencies.¹²

The Ministry of Economy may also rely on information collected from the member of the public. Any person is entitled to file a motion with the Ministry of Economy, in which they outline information which may give grounds to starting a screening procedure.¹³

While the competence to issue final decisions concerning the screened investment remains with the Ministry of Economy, it is not absolute. The Ministry has the authority to approve the investment, grant an approval conditional upon adoption of risk mitigation measures, or even to issue a notice of no-risk without starting a full screening process.

Should the Ministry conclude that the investment presents unmitigable risks which warrant banning the investment, it must first obtain a consent to do so from the Government of Slovakia.¹⁴ If the Government refuses to give its consent, the investment is automatically considered not to present any risks. Rather illogically, in this case the Ministry of Economy also loses the ability to issue a decision of conditional approval which would set at least some mitigating measures (and which would otherwise not even be subject to governmental consent) for an investment the Ministry originally considered to ban.

2.4. Critical foreign investment

A critical foreign investment is a foreign investment in connection with which, due to the importance of the target person or its activities from the point of view of maintaining the essential functions of the state, there is an increased risk of a negative impact on the security or public order of the Slovak Republic.

The Government (i.e. the cabinet) is vested with the competence to design which sectors are to be considered as critical investments by adoption of the Government decree.¹⁵ The Decree designates on the following sectors to be included in the critical foreign investment definition: production of weapons and military technology, dual-use technology, biotech in healthcare sector, critical infrastructure, providers of basic services under the Cybersecurity Act, providers

12 § 7(2) - § 7(6) FDI Screening Act.

13 § 63 FDI Screening Act.

14 § 20 FDI Screening Act.

15 Government Decree no. 61/2023 Coll. on designation of critical foreign investments.

of digital services in cloud computing, companies involved in the development of data encryption technology, certain categories of mass media and press services.

As the list of critical foreign investments is adopted as a government decree, its adoption and future amendments are not subject to parliamentary approval.

If the investment falls under the definition of critical foreign investment, an ex-ante screening procedure is obligatory if the investor:

- assumes a 10% or more significant share of the target company's equity or voting rights;
- equity/voting share in the target entity are to be increased over the 20%, 33%, and 50% thresholds;
- assumes another form of control over the target company (based on various contractual relations, such as shareholder agreements);
- assumes ownership or other disposition rights to critical assets of the company (i.e., assets necessary to carry out the activities of the target entity that are critical to the classification of the foreign investment as a critical foreign investment.).

2.5. Other foreign investment

Foreign investments which do not fall under the "critical" category may also be screened, regardless of the sector of the economy in which they occur.

The screening of other foreign investments differs from the screening of critical foreign investments in several crucial aspects:

- Ex ante screening is not mandatory. However, the investor may request an ex-ante screening (voluntary screening). Voluntary ex-ante screening can benefit the investor, as the pre-screening process may result in the adoption of a notice of no-risk, which precludes the initiation of a full screening procedure, provided that the investment is carried out within the next two years. Furthermore, if the Ministry of Economy does not initiate a full screening procedure or does not issue a notice of no-risk within 45 days after the ex-ante screening is requested, the non-existence of risks is presumed.
- Only equity investments are subject to screening; asset investments (acquisition of critical assets) are not subject to FDI screening if the investment is not deemed to be a critical investment.

- Equity investments may be subject to screening only if the investor acquires at least a 25% share of equity or voting rights (as opposed to only 10% in case of critical foreign investment)
- Re-screening of the investment must occur on the occasion of increasing the investor's share in the target company over the 50% share threshold (as opposed to 20%, 33%, and 50% thresholds in case of critical foreign investment).
- Since ex-ante screening is not mandatory, the Ministry of Economy has the authority to initiate a screening procedure within two years after the effective date of the investment (ex-officio screening).

2.6. Intra-EU screening

Even though the new FDI Screening Act is set to completely reform the screening regime and repeal the screening under the Critical Infrastructure Act, some aspects of the former regime will stay in place.

Similarly to the original version of screening under the Critical Infrastructure Act, intra-EU investment into certain critical infrastructure sectors may also be screened under the FDI Screening Act.

The law stipulates that such investments *may* be screened utilizing the procedures under the FDI Screening Act.

Thus, intra-EU and foreign investment into critical infrastructure differ in a key aspect. While foreign investments into critical infrastructure are subject to mandatory ex-ante screening, intra-EU investments are subject only to either voluntary or ex-officio screening.

Beyond this distinction, the brief provision on intra-EU screening remains silent as to the specifics of the intra-EU screening procedure (see also part 3 of this note).

2.7. Beneficial ownership transparency

The new FDI screening regime recognizes the idea of "weaponized transparency"¹⁶ as it is also explicitly linked to the robust corporate transparency regime which exists in Slovakia.

¹⁶ Matej Šimalčík, "Weaponizing transparency: Dealing with security risks of Chinese investments", Euractiv, 12 June 2020, <https://www.euractiv.com/section/competition/opinion/weaponizing-transparency-dealing-with-security-risks-of-chinese-investments/>.

Per the FDI Screening Act, all foreign investors whose investments were screened are obliged to register their ultimate beneficial owners (UBOs) in the Register of public sector partners.¹⁷ This publicly accessible register was established to combat corruption, abuse of public finance, and improve the transparency of shell corporations doing business with the state. Since its adoption, the registry has evolved to increase corporate transparency in a range of other sectors, where transparency of ownership is considered to be in the public interest (e.g., ownership of media or health care insurance providers, etc.).

While the regime is somewhat similar to UBO transparency under the 4th and 5th EU AML Directives (especially considering the definition of the UBOs), it goes beyond mere self-declaration of UBOs by the registered companies. Here, each registered company must employ an independent verification agent (e.g., notary, attorney, auditor, etc.) to verify who the company's UBOs are and to register them in the registry. The date must also be periodically reviewed in order to ensure its veracity.

Under the FDI Screening Act, foreign investors whose investments were reviewed must maintain the registration for a minimum of three years since the investment's effective date (in case of ex-ante screenings) or since the day the screening procedure was ended (in case of ex-post screenings). The Ministry of Economy may oblige the investor to be registered for a more extended period of time as a form of risk mitigation measure in case of conditional approval of the investment.¹⁸

If a false UBO declaration influenced the final outcome of the screening procedure, it is grounds for re-opening the screening, potentially leading to the investment veto.¹⁹

At the same time, the obligation to publicly declare the investor's beneficial owners may act as a deterrence against pursuing investment motivated by malign interests.²⁰

17 Publicly available at <https://rpvs.gov.sk/rpvs>.

18 § 30 FDI Screening Act.

19 § 26 FDI Screening Act.

20 Matej Šimalčík. "Oligarchs and Party Folks: Chinese Corrosive Capital in Slovakia and Czechia", 2021, Bratislava: Central European Institute of Asian Studies (CEIAS). <https://ceias.eu/chinese-corrosive-capital-sk-cz/>; Matej Šimalčík. "Weaponizing transparency: Dealing with security risks of Chinese investments", Euractiv, 12 June 2020, <https://www.euractiv.com/section/competition/opinion/weaponizing-transparency-dealing-with-security-risks-of-chinese-investments/>.

2.8. Inspection

Rather unusually from a comparative perspective, the Slovak FDI Screening Act provides the Ministry of Economy with rather broad inspection competences,²¹ which include the competence to conduct dawn raids.

The FDI Screening Act specifies, that in carrying out an inspection of compliance with the act's obligations, the regulator is entitled to:

- demand furnishing of evidence, including documents and verbal explanations,
- making copies of such documents or other information storage devices,
- taking custody of and withholding such documents or other information storage devices,
- enter the investor's and target company's premises.²²

At the request of the Ministry of Economy, the police force is obliged to provide protection and cooperation to inspectors during the performance of dawn-raid.²³

Conceiving such a broad inspection competence has the potential to become a key instrument for the regulator for obtaining evidence necessary for sanctioning serious breaches of the FDI Screening Act, especially when it comes the breaches of the stand-still obligation (in case of critical investments) or non-compliance with risk-mitigation measures per the decision on conditional approval of investment.

2.9. Administrative and judicial review

After a decision is adopted, parties to the proceedings may appeal against it within 15 days after its delivery to the investor/target company.²⁴ The appeal is considered by a review committee that submits the decision proposal to the Minister of Economy. The review follows the principle of the full appellation when the decision and underlying procedure are reviewed in their entirety, and if need be, new evidence may be submitted.

Decisions adopted under the screening procedure are also subject to judicial review. The action to review the administrative decision must be filed with the Supreme Administrative

21 § 31-33 FDI Screening Act.

22 § 33(4) FDI Screening Act.

23 § 33(3) FDI Screening Act.

24 § 25(1) - § 25(2) FDI Screening Act.

Court within 30 days of the decision's delivery to the party.²⁵ Rather unsystematically and unusually, the court action can be brought regardless of whether an administrative appeal was already lodged with and decided by the Minister of Economy. The Supreme Administrative Courts judgment may not be appealed and is not subject to cassation complaint.²⁶

Nevertheless, if there is a suspicion that the screening procedure, the administrative appeal, or the judicial review process caused a breach of fundamental rights, a complaint with the Constitutional Court may be filed within two months after the final administrative/court decision comes into force.²⁷

2.10. Relationship to EU Framework Regulation

The new Slovak FDI Screening Act is closely tied to the EU FDI-Screening Regulation. The relationship between the FDI Screening Act and the EU FDI-Screening Regulation can be understood under two separate rubrics.

First, the EU FDI-Screening Regulation acts like a point of reference for conducting security screenings under the national regime. The law specifically states that the screening of investment should be conducted especially with respect to factors listed in the art. 4 of the EU FDI-Screening Regulation.

Second, Ministry of Economy is appointed to act also as the national contact point for the purposes of the consultation mechanism established under the EU FDI-Screening Regulation.

The Ministry of Economy is also entitled to fine entities which act in a way that would hamper the ministry's ability to participate in the EU consultation mechanism as the national contact point.

3. Developments to follow

As the FDI screening regime in Slovakia remains untested by practice, there are several issues that warrant close observation.

As the FDI Screening Act also allows intra-EU investment screening, the exercise of this power may become a contentious issue, potentially running contrary to the EU law. This was recently

25 §25(8) FDI Screening Act.

26 A contrario § 438 Order of Administrative Court Procedure.

27 Art. 127 Constitution of Slovak Republic.

considered by the European Commission, which found that vetoing and intra-EU investment by the Hungarian Government breached the EU Merger Regulation.²⁸ Exercising the intra-EU investment screening competence by the Slovak Ministry of Economy risks running into the same pitfalls.

Given the respective provision's brevity, it also remains unclear whether intra-EU investment into certain critical infrastructure sectors will be screened in a regime akin to the screening of critical foreign investment (as foreign investment into critical infrastructure is considered to be critical investment) or whether they would be reviewed in the same manner as other (i.e., non-critical) foreign investment.

Observers should watch not only for extensive application of the screening procedure but also for politically motivated gatekeeping by the Ministry of Economy. Since foreign investment in non-critical sectors does not fall under the mandatory ex-ante review, their screening is mainly dependent on the exercise of (political) will by the Ministry of Economy. Both corruption or an inherent pro-investment mindset of the ministry officials could preclude the initiation of a screening procedure for a potentially risky, albeit not critical, investment. This risk can be partially mitigated by the inclusion of the public's right to file qualified motions with the Ministry of Economy, and the Ministry's obligation to respond to them, which may improve the Ministry's motivation to screen potentially hazardous investments.

28 Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area, case M.10102 – VIG/AEGON CEE, https://ec.europa.eu/competition/mergers/cases1/202209/M_10102_8196601_401_3.pdf.

Annex 1: Relevant laws, ordinances, regulatory guidelines

- Act no. 497/2022 Coll. on the screening of foreign investment. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/497/20230301>
- Government Decree no. 61/2023 Coll. on designation of critical foreign investments. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2023/61/20230301>
- Act no. 41/2011 Coll. on critical infrastructure (as amended by Act no. 72/2021 Coll.). <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2011/45/20210301>
- 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
- Act no. 162/2015 Coll. the Code of Administrative Court Procedure as amended. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/162/20221201>

Annex 2: Relevant administrative and court cases

There have been no relevant administrative or court cases on the subject of foreign investment screening in the Slovak Republic. None (so far, no FDI screening procedures have been conducted).

Annex 3: Relevant literature

- Dôvodová správa k Zákonu o preverovaní zahraničných investícií [Explanatory report to the FDI Screening Act]. <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=518284>
- Matej Šimalčík, Lucia Holländer, “Investície a národná bezpečnosť. Ako sa brániť pred bezpečnostnými rizikami čínskych investícií?” [Investment and national security: How to defend against security risks of Chinese investment?]. 2020, Bratislava: Central European Institute of Asian Studies (CEIAS), <https://ceias.eu/wp-content/uploads/2020/06/FDI-screening-PP.pdf>.
- Matej Šimalčík, “Oligarchs and Party Folks: Chinese Corrosive Capital in Slovakia and Czechia”, 2021, Bratislava: Central European Institute of Asian Studies (CEIAS). <https://ceias.eu/chinese-corrosive-capital-sk-cz/>.
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- Bezpečnostná stratégia Slovenskej republiky [National Security Strategy of the Slovak Republic], 2021, https://www.mosr.sk/data/files/4263_210128-bezpecnostna-strategia-sr-2021.pdf.
- Akčný plán koordinácie boja proti hybridným hrozbám (2022-2024) [Action Plan on Coordinating the Combat Against Hybrid Threats (2022-2024)], 2022. <https://www.nbu.gov.sk/wp-content/uploads/2022/08/AKCNYPAN-KOORDINACIE-BOJA-PROTI-HYBRIDNYM-HROZBAM.pdf>.

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The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under www.celis.insitute.

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CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

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