

## **Regional FDI Screening Standards of the Western Balkans Six**

### **Preamble**

AFFIRMING the common ambition of the Western Balkans Six to create a democratic and prosperous region that promotes open societies founded on the shared values of pluralism, solidarity, and justice, underpinned by a strong rule of law;

RECALLING one of the main goals of the Berlin Process to enhance regional economic cooperation and lay the foundations for sustainable growth;

ACKNOWLEDGING that the Common Regional Market is a key instrument to boost economic integration within the Western Balkans Six based on EU rules and standards;

RECOGNISING the main aim of the Regional Investment Area, as one of the four key areas of the Common Regional Market, to align investment policies of the region with EU standards and best international practices while promoting the region to foreign investors;

IN LIGHT OF the commitment of the Western Balkans Six, as laid down in the Common Regional Market, to develop regional guidance criteria and procedures for screening and quick reaction to Foreign Direct Investment (FDI) concerns based on emerging EU standards and policies, while taking into account individual and regional policy priorities;

ACKNOWLEDGING the right of each Western Balkans Six to regulate investment activities in accordance with their individual policy objectives and to promote sustainable development goals;

BEING AWARE OF the importance of cooperation and information sharing with the EU to enhance the effectiveness of the screening mechanisms;

TAKING NOTE of the significance of EU support in facilitating the creation of FDI screening mechanisms in the region;

ENCOURAGING Western Balkans Six to develop within reasonable period of time, but without undue delay, their own FDI screening mechanisms as instruments to address security or public order concerns;

RELYING on the EU framework for the screening of FDI into the Union and most common practices of mechanisms in EU Member States;

HAVE AGREED to the following (non-binding) Regional FDI Screening Standards that aim to serve as the main guiding principles for Western Balkans Six when developing their respective individual FDI screening mechanisms:

## General considerations

FDI screening mechanisms are to be governed by the following overarching considerations:

- Balance between openness to FDI as a major source of growth and jobs and addressing security or public order concerns, ensuring that restrictions on investment or conditions on transactions do not exceed what is necessary;
- Balance between the level of regulatory discretion to address constantly evolving challenges in the area of security and ensuring an acceptable level of legal certainty and predictability for foreign investors;
- Ensuring transparency of rules and procedures, non-discrimination among foreign investors, and due process in all procedures, including recourse.

### 1. Scope

The scope of FDI screening procedures is determined by the interaction of key legal definitions, sectoral coverage and notification requirements.

#### 1.1. Key definitions

- ‘Foreign investment’ means an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links with the host economy. Foreign direct investment also means investment within the host economy with foreign control, which enables effective participation in the management or control of a host economy target;
- ‘Foreign investor’ means a natural person of a third economy or an undertaking of a third economy, intending to make or having made a foreign direct investment;
- ‘Screening’ means a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investment;
- ‘Screening mechanism’ means an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, that set out the terms, conditions and procedures for the screening of foreign investments on the grounds of security or public order.

#### 1.2. Sectoral coverage

FDI screening is to apply to specific sectors or economic activities and be based on a specific criteria. To this end:

- Targeted sectors are to be listed in one or more annexes to the relevant legislative act or a supplementing ministerial regulation;
- Sector-specific screening requirements, when deemed necessary, need to be defined where applicable.<sup>1</sup>

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<sup>1</sup> See also ‘Thresholds’.

### 1.3. *Authorisation and notification requirements*

Investment screening mechanisms are to be based on a prior authorisation model (*ex ante* screening, before completion of the transaction) and meet the following requirements:

- The obligation to apply for authorisation lies primarily with the foreign investor, while a subsidiary notification obligation can be imposed on other persons involved in the investment, in particular, the target company itself;
  - Information to be contained in the application/notification are to be determined and included at a minimum: (1) information on the ownership structure of the foreign investor and target company; (2) a precise description of the business activities of the foreign investor and target company; (3) the value of the investment; and (4) the funding of the investment and its source;
- A possibility of *ex officio* screening allows the competent authority to assess transactions, which, in violation of the rules, have not been notified;
- Legal transactions requiring authorisation shall be deemed concluded under the dissolving condition that the authorisation is granted.

## 2. Effectiveness

The effectiveness of FDI screening procedures depends on the thresholds triggering the screening procedure, the applicable decision criteria and the measures in place to prevent circumventions.

### 2.1. *Thresholds*

Thresholds that trigger investment screening procedures are to be determined and can be expressed in percentages or fractions of shares or voting rights. In addition:

- Rules or guidance on the calculation of shares or voting rights are to be provided, addressing at least: (1) the effects of shares held by group-affiliated companies or persons closely related to the investor; and (2) the effects of agreements on the joint exercise of voting rights;
- Staggered thresholds may be provided for, allowing the competent authority to also screen subsequent (re-)investments by the same investor;
- Sector-specific thresholds may be defined where deemed necessary.

### 2.2. *Decision criteria*

Criteria for assessing whether an investment is likely to affect public order or security are to be defined based on:

- Investor-related criteria, including: (1) involvement in past activities negatively affecting security or public order or in illegal or criminal activities; (2) direct or indirect control by a foreign government (public authorities or armed forces), including through ownership structure or significant funding; and (3) indications that the investor has tried to circumvent FDI screening procedures;
- Company-related criteria, including: (1) area of activity; (2) directly and indirectly affected sectors; and (3) dual-use technologies.

### 2.3. *Prevention of circumventions*

Circumventions of FDI screening procedures are to be prevented by:

- A broad definition of foreign investment;<sup>2</sup>
- Sanctions and/or penalties for infringements of screening-related obligations;
- The possibility for the competent authority to request a filing for authorisation after the transaction is completed.

## 3. **Governance**

Key points for the operationalisation of FDI screening procedures to be determined include the specification of the competent authority, design of the screening procedures, and safeguarding of confidentiality, as well as rules on accountability and democratic legitimacy.

### 3.1. *Competent authority and procedural architecture*

The competent authority is to be specified and contact points are to be clearly defined and made accessible.

FDI screening procedures are to follow a two-tier structure, with determined timeframes, to increase procedural efficiency and help to minimise the length of proceedings:

- Pre-screening procedure determining whether an investment is subject to the authorisation procedure;
- Authorisation procedure determining whether (1) authorisation is granted; (2) authorisation is granted subject to conditions or mitigation measures; or (3) authorisation is refused;
- The screening mechanism should provide transaction parties the right to be heard.

### 3.2. *Confidentiality*

Confidentiality of trade secrets and sensitive business information is to be ensured and penalties for infringements are to be prescribed.

### 3.3. *Reporting and accountability*

Democratic legitimacy is to be ensured through parliamentary oversight by way of regular reporting regarding investment screening procedures.

### 3.4. *Recourse*

Investors are to be provided the right to recourse.

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<sup>2</sup> See 'Definitions' above.