Review of national rules for the protection of infrastructure relevant for security of supply

Final Report

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Review of national rules for the protection of infrastructure relevant for security of supply

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Directorate-General for Energy
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Contents

1. INTRODUCTION TO THE STUDY 1
1.1. Context of the study 1
1.2. Project objectives 2
1.3. Methodology and challenges 2
1.4. Terminology 3
2. COMPARATIVE ANALYSIS AND MAIN FINDINGS 4
2.1. Comparative analysis and main findings in Member States 4
2.1.1. Typology of electricity and gas infrastructures relevant for security of supply 4
2.1.2. Legislation and practices to control foreign investment 12
2.1.2.1. Investment screening law 13
2.1.2.1.1. Nature of the review 17
2.1.2.1.2. Ex-ante/ex-post transaction review 17
2.1.2.1.3. Competent authority 18
2.1.2.1.4. Elements that trigger the screening procedure 19
2.1.2.1.5. Screening circumvention rules 22
2.1.2.1.6. Risk assessment 22
2.1.2.1.7. Time-limit 23
2.1.2.1.8. Outcome of the decision and appeal 25
2.1.2.1.9. Confidentiality rules 26
2.1.2.1.10. Publicity of the decision 27
2.1.2.2. Ownership restrictions 27
2.1.2.3. Golden shares 31
2.1.2.4. Other practices 32
2.1.3. Opinion of stakeholders on Member States measures 35
2.1.4. Cases of non-EU foreign investment in the energy sector in Member States 38
2.2. Selected third countries legal approaches on the control of foreign investments 42
2.2.1. Introduction 42
2.2.2. Policy context on foreign investment restrictions in third countries 42
2.2.3. Legislation and practices to control foreign investment 45
2.2.3.1. Investment screening laws 45
2.2.3.2. Ownership restrictions 51
2.2.4. Opinion from foreign investors in third countries 52
3. POTENTIAL GOOD PRACTICES 54

EXECUTIVE SUMMARY

This report draws on information from national reports in 28 Member States and in five selected third countries (Australia, Canada, China, United States and Russia). It also includes information obtained from interviews with foreign investors. Subsection 2.1 focuses on the Member States legal approaches to control foreign investments in electricity and gas infrastructures (e.g. screening mechanisms, ownership restrictions) and includes a description of relevant electricity and gas infrastructures for security of supply in Member States and their related ownership control. Subsection 2.2 focuses on the selected five third countries and identifies differences and/or similar trends in their legal approaches to control foreign investment in electricity and gas infrastructures. Finally, Section 3 sets some potential good practices on investment screening mechanism based on the review of such mechanisms adopted in Member States and five non- EU countries as well as the review of policy and academic writings on this topic.

Electricity and gas infrastructures considered relevant for security of supply by Member States and ownership structures of TSOs, gas storage

Few countries have listed in official legal and/or policy documents the gas and electricity infrastructures relevant for the security of supply (SOS infrastructures). Member States that have a public list or description of SOS Infrastructures in the gas and electricity sector are: Croatia, Estonia, Italy, Latvia, Lithuania, Netherlands, Slovenia and to some extent Finland and Spain. Most of these infrastructures are either 100% State owned or controlled by the State.

- *Ownership structures of gas TSOs*

In most cases the sole or major shareholder is the State, through direct or indirect control. In some countries the State is the largest shareholder with a small percentage of shares (Spain, France or Hungary). In nine cases (8 in Germany), the major shareholder is a national company; in eight cases, an EU company from another Member State; and in 6 cases, a non-EU company.

- *Ownership structures of electricity TSO*

In most of the cases the sole or major shareholder is the State, through direct or indirect control. In some cases (Spain), the State is the major shareholder with a small percentage of shares.

- *LNG terminals*

In most of the cases either directly or indirectly the State is the major shareholder. In several cases, companies that own the gas TSO own the LNG terminals. In several cases, companies that own the gas TSO own the LNG terminals. In five terminals the major shareholder is from a third country. The construction of new terminals is planned in Cyprus, Czech Republic, Estonia, Greece, Ireland, Romania, Sweden and the UK.

- *Ownership structures of gas storage*

Although, in most cases the State is the major shareholder, there is a larger variety of investors. In some cases, it is also common that the company that owns the TSO of gas, also owns the gas storage facilities.

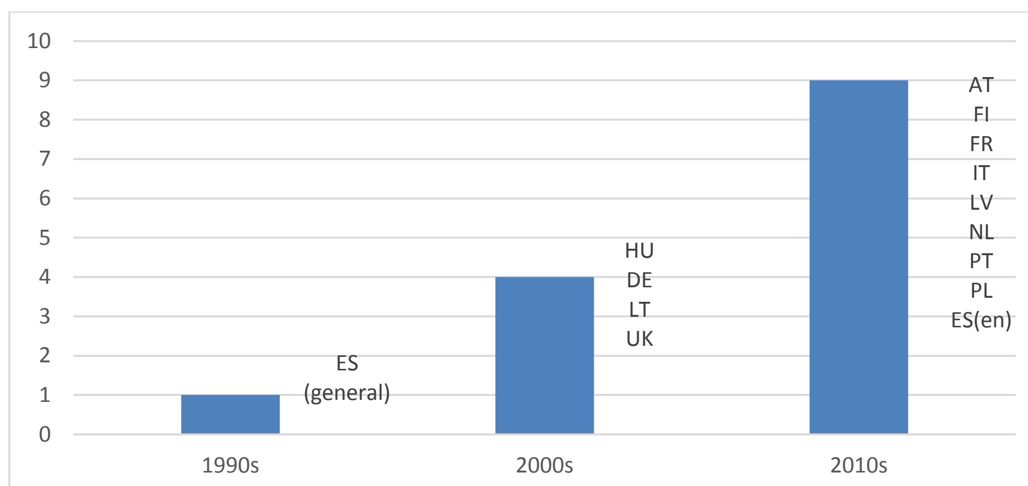
Legislation and practices to control foreign investment in Member States

Member States have developed different or a combination of approaches to control foreign investment in electricity and gas infrastructures. These approaches can be classified in three categories; investment screening laws (13 Member States); ownership restrictions (18 Member States); golden shares (three Member States). Furthermore, other practices, such as 'de facto' state ownership control of gas and electricity infrastructures were identified in several Member States which indirectly limit foreign investment in these infrastructures.

- *Investment screening laws*

14 investment screening laws procedures are in place in 13 Member States (Austria, Finland, France, Germany, Hungary, Italy, Lithuania, Latvia, the Netherlands, Poland, Portugal, Spain and the UK). Two different procedures are in place in Spain, which have been studied separately.

The following table shows the period of approval of the different investment screening laws identified in Member States:



Some of the procedures are mandatory, while others are discretionary. A procedure is mandatory when the entity needs to notify the transaction and is discretionary (ex-officio) when the authorities initiate the procedure at their own discretion. In most Member States, the review is carried out after a mandatory application/notification from investors. Four procedures are discretionary, and the competent authority can decide to start the procedure at its own initiative. In such case competent authorities must notify the investors of the initiation of the procedure.

In eight procedures the review occurs before the conclusion of the investment operation whereas in three procedures it occurs after the conclusion of the operation. In three other procedures, the procedure can start before or after the investment operation. It is possible to request a prior voluntary review in four procedures.

In most countries, the Ministry of Economy is the competent authority in charge of carrying out the screening procedure. However, in five procedures the screening decision is not issued by the authority in charge of the review but by a higher public authority (e.g. the Council of Ministers).

The nationality of the investor is a key element of the trigger of the procedure in most cases. In six of the procedures, the review can only be applied to non-EU investors. In addition, in these procedures investors from countries other than EU Member States within the EEA and EFTA are also exempted from the review. In two procedures the review can be applied to all foreign investors, including investors from other Member States. Finally, in six procedures the review is applied to all investors, including the national ones.

In some Member States, the procedure is only triggered if the investment is made in pre-defined sectors. Seven procedures are sector-specific, while five of them could potentially be triggered in all sectors. Three Member States have adopted a specific procedure applying exclusively to the energy sector. In eight Member States procedures, the law defines or includes a list of identified assets.

All procedures, but one, define the type of transactions that triggers the procedure. The main transaction will consist in the 'acquisition' of a national company. Every Member State has their own definitions of what an acquisition consists according to their national laws.

All screening procedures, apart from the general one in Spain, require for the trigger of the procedure a specific percentage of shares to be acquired in the company. In some cases, the threshold is established by the screening law while in other procedures the law cross-refers to the definition of control included in the commercial legislation.

In all Member States, the main objective of the establishment of an investment screening procedure is to assess whether foreign investments can pose a risk to some public interests set in law (i.e. public order and public security, national security/defence, national interest, security of supply, exercise of public power). In most Member States, there is no legal definition of these concepts within the framework of the screening procedures.

All Member States establish specific time frames for the investment screening reviews, but two. From the moment the investigation starts to the moment in which the competent authority issues the final decision (without counting pre-investigation phases, extensions or appeals), time-limits range from 15 days to nine months. The average time of all procedures is three months.

Member States usually include three possible outcomes of the screening procedure which are either the approval of the investment operation, approval subject to conditions, prohibition of the transaction (or annulment if already concluded).

In eight cases, the legislation on the investment screening law explicitly mention the possibility of judicial or administrative appeal against the screening decision issued by the competent authorities. Such finding does not preclude that in the other four procedure appeals are also possible according to the administrative/judicial law of the country

Only three Member States include an obligation of official publication of the screening decision.

- *Ownership restrictions*

There are three categories of ownership restrictions in Member States. Some ownership restrictions explicitly target foreign investors such as the prohibition or limits (e.g. share percentage) of foreign investment in gas and electricity infrastructures. Then there are provisions that oblige the State to entirely own or at least control (e.g. majority of shares) certain gas and electricity infrastructures. Finally, some provisions restrict the number of shares that can be owned by a private investor.

Two Member States have established a total prohibition on the ownership of some gas and electricity infrastructures by non-EU investors. Three Member States set specific share limits for private national/non-national investors. One Member States impedes to the Minister of Energy the transfer of shares unless needed. Six Member States set in law total ownership control of certain electricity and gas infrastructures by the State whereas eight Member States (in two cases the same ones) set an obligation in law for certain electricity and gas infrastructures to be controlled by the State (e.g. a majority of share must be owned by the State).

- *Golden shares*

Golden shares were identified in four Member States. It should be noted that in two Member States such as Italy or Spain golden shares were forbidden after the CJEU or the EC considered the rules on golden shares of these countries incompatible with EU law.

- *Other practices*

The main practice found is 'de facto' ownership of all or a majority of shares in companies in the gas and electricity infrastructures by the State. Private investments are not prohibited in the infrastructure or company by law, but the State can decide not to sell its shares to protect national interest. Therefore, the State actively seeks to acquire companies and assets considered of relevant public interest to guarantee security of supply. Examples of such practices were found in 15 Member States. In some cases, public bodies at the local and regional level also pursue this strategy.

Four practices were also identified such as the double counting vote for 'long-term' shareholders, the special powers of public authorities to increase public ownership in case of hostile takeover bid of a company owned (in full or in part) by the State or a public body, the prior approval need of the government for changes of control on certain infrastructures the need of consent of the Ministry of Industry for the election or dismissal of the executive director of the TSO of electricity, and the government mandatory consent for any sale of a specific asset that would impede a private company to hold the majority of voting rights.

Cases of non-EU foreign investment in the energy sector in Member States

In the period 2009-2017, a total of 48 large investment operations from non-EU companies occurred in energy infrastructures and operators in the gas and electricity sectors in the 28 Member States. the Member States where most of the investment operations from non-EU countries happened were Germany (a total of 7 operations), the Netherlands (6), Greece (5), the UK (5) and Spain (4).

Per country of origin, in most of the investment operations, companies were originally from China (in 16 of the operations), the United States (8), Canada (8), Australia (5) and Russia (4). Most of the investment operations occurred in the years 2014 (a total of 11), 2015 (9) and 2016 (12).

Selected third countries legal approaches on the control of foreign investments

When introducing changes in their legislation, some Member States partially justify their actions by the existence of similar rules in other countries. Outside the EU the control of foreign investment in energy infrastructure is quite a common and well-established practice. Globally, national security concerns in respect of foreign investment in strategic sectors have over the years gained in importance. Many countries outside the EU have recently introduced laws tightening the oversight of foreign investment in key sectors. A few countries have on the other hand eased their regime to make their economies more attractive to foreign investment. This report provides a summary of the policies and the legislative framework adopted by five countries Australia, Canada, China, United States and Russia regarding foreign investments in electricity and gas infrastructures

- *Policy context*

These five countries are open to foreign investments in the energy sector but have all set measures to control such investments. Russia and China have developed the most stringent control measures (e.g. ownership restrictions) and are the least open to foreign investment in the energy sector compared to the other three that have adopted screening laws since the seventies. These laws have been amended several times to cope with the increase of foreign investment and related risks on, inter alia, energy security.

- *Legislation and practices to control foreign investment*

All five selected third countries have adopted national measures to control foreign investment via screening procedures. Note that in these countries there are no specific procedures for foreign investments in energy infrastructures, but the procedures apply to all economic sectors or targeted sensitive economic sectors including energy. In addition, Russia and China have adopted law setting ownership restrictions which considerably limit foreign investments in certain energy sectors. Australia has set an ownership restriction clause within a 99-year lease of the transmission electricity network as further detailed in the section below. Golden shares and 'other practices' were not identified in these countries.

Country	Screening laws	Ownership restrictions in energy infrastructures		
		100% State ownership by law	100% national company ownership by law	Ownership limits by law
Australia	√			√
Canada	√			
China	√			√
Russia	√	√	√	√
United States	√			

Potential good practices in investment screening mechanisms

Based on the review of the investment screening mechanisms adopted in Member States and in five non-EU countries as well as the review of policy and academic writings on the topic, are set out below some observations on potential good practices targeting such mechanisms:

- Comprehensive screening laws should be developed instead of a blanket prohibition on private ownership of energy infrastructures impeding foreign investments in Member States
- Member States in view of potential screenings should identify assets relevant for ensuring security of supply and should provide a justification on their relevance
- Laws on screening mechanism should be based on the following guiding principles: certainty, predictability, consistency, proportionality, transparency and accountability
- Mandatory prior notification avoiding discretionary (voluntary) procedure should ensure that the State covers all transactions that could pose a risk to security of supply
- Screening laws should clearly identify and define the triggers of the investment screening mechanisms.
- For transparency and legal certainty, the screening laws should set out clearly what grounds will be used to review investments instead of referring to broad concepts such as 'national interests'.
- To ensure legal certainty and transparency of the screening mechanism the decision of the competent authority should set out the reasons to authorize/reject or authorize under certain conditions a foreign investment.
- The screening laws should clearly identify the options available to the competent authority when reviewing a transaction including whether the approval can be made conditional on certain actions being taken by foreign investors.
- To ensure legal certainty and transparency of the screening mechanism, the screening laws should contain a provision allowing the screening decisions to be subject to an administrative and/or judicial appeal.
- The screening laws should detail the communication/consultation procedures between the competent authority and the investor as well as between the competent authority and any other public authority which may be consulted by the competent authority before reaching its decision.
- Screening decisions to be made public while respecting confidentiality of sensitive information
- The screening laws should contain rules to prevent companies from circumventing the investment screening review procedure.

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1. INTRODUCTION TO THE STUDY

1.1.Context of the study

Emerging risks to energy security from non-EU investors

Security of energy supply is about ensuring the continuous and adequate supplies of energy from all sources to all users.[1] Energy security is a major concern for the EU due, inter alia, to its increasing dependency on energy imports from a limited number of non-EU suppliers. According to Eurostat more than half (54 %) of the EU-28's gross inland energy consumption in 2015 came from imported sources.[2]

In its 2014 Energy Security Strategy,[3] the Commission considered that one of the major risks to the security of energy supply is the control of strategic infrastructure by non-EU entities (e.g. by state-companies, national banks or sovereign funds) from key supplier countries, which aim to enter the EU energy market or hampering diversification rather than to develop the EU network and infrastructure.[4]

Since then there has seen been an increase of non-EU investment in key sectors, including energy, throughout the EU. For example, in the UK, China Guangdong Nuclear Power Holding invested in Hinkley Point C nuclear power plant project in 2016. The same year Beijing Enterprises acquired Energy from Waste (EEW) for EUR 1.4 billion, and represent the largest Chinese foreign investment in Germany to date[5] In France, General Electric purchased Alstom's energy generation and grid portfolio in 2015.[6]

EU initiatives

As a follow-up to the EU Strategy on Energy Security the Commission has drafted three legal initiatives on energy security related to electricity and gas. With regard to gas, it proposed a Regulation concerning measures to safeguard the security of gas supply which was adopted in October 2017[7]. Pursuant to this regulation regulatory authorities of Member States are required to make an assessment at the national and regional level of all risks affecting the security of gas supply, including risks associated with the control of infrastructure relevant for security of supply by third country entities and establish a preventive action plan containing the measures to be adopted to remove or mitigate the risks.

With regard to electricity, the Commission in 2016 proposed in Article 7(3) of the Proposal for a Regulation on risk-preparedness in the electricity sector[8] that MS be required to inform the Electricity Coordination Group and the Commission of possible risks they see in relation to the ownership of infrastructure as concern the security of supply and of any measures taken to mitigate such risks. This Proposal of Regulation is at the time of writing of this report going through the EU legislative procedure between the Council and the Parliament.

Finally, the Commission drafted a proposal for a Regulation establishing a framework for the screening by the Member States and the Commission of foreign direct investments in the Union on the grounds of security or public order in September 2017[9]. This proposal sets out the conditions which screening mechanisms in Member States must comply with including transparency, non-discrimination between third countries, protection of confidential information, and the right of an investor to seek judicial redress against screening decisions. It also seeks to impose a reporting obligation when the screening procedure of a Member State is triggered in respect of a non-EU investment in the infrastructures of such state to the extent such an investment may affect national security of another one. Finally, it also seeks to accord the European Commission for the first time the right to screen foreign direct investments in Member States

[1] COM(2014) 15 final
[2] Eurostat (2017), 'Energy production and imports'. Accessible at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports
[3] COM (2014) 330 final
[4] COM (2014) 330 final
[5] Reuters (2016), 'Beijing Enterprise buys Germany's Energy from Waste'. Accessible at: http://www.reuters.com/article/us-energyfromwaste-m-a-beijing-ent-idUSKCN0VD1NM
[6] The Guardian (2014), 'France's Alstom accepts GE bid despite government outcry'. Accessible at: https://www.theguardian.com/business/2014/apr/30/france-alstom-accepts-us-general-electric-energy-bid
[7] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_12322_2017_REV_1&from=EN
[8] COM(2016) 862 final
[9] COM(2017) 487 final

which have an effect on projects or programmes of Union interest on the grounds of security and public order, albeit neither term is defined in the proposal. This proposal is expected to be discussed in the Parliament and Council during 2018.

Member States responses to protect critical energy infrastructures from foreign investment

In the past, Member States adopted national measures to, inter alia, protect critical energy infrastructures from foreign investment by requiring that such assets be owned by the State or by limiting the percentage of shares which could be foreign owned in key companies. More recently, some Member States have also adopted investment screening laws to control investments which could entail a 'risk' to national interests including threat to security of energy supply. The introduction of these new rules is due to an increase of non-EU foreign investment (e.g. from China) in large national companies in essential sectors of the economies of Member States. Furthermore, third country with large economies such as the US, Canada, China, Australia and Russia have adopted measures to control foreign investment and this may have influenced Member States in their decision to adopt similar measures.

As a result, a number of Member States have set in place a wide range of measures to control foreign ownership of energy infrastructures such as investment screening laws, ownership restrictions and golden shares.

Note that under EU law measures adopted by Member States regarding foreign investment are considered a barrier to the free movement of capital, which is a fundamental principle of EU law unless they are justified on grounds of public policy or public security[10], as provided under Article 65(1)(b) TFEU, or by overriding requirements of general interest[11] which include the objective of safeguarding supplies of energy (i.e. petroleum and electricity).[12] The adopted measures must also be comply with the principle of proportionality as per Article 5 TEU.[13]

1.2. Project objectives

Within this context, the Commission would like to know how Member States perceive the risk associated with foreign investment in gas and electricity infrastructures and whether these risks are dealt with in national legislation and in practice.

The aim of the project is:

- To establish what gas and electricity infrastructure is considered by Member States to be relevant for security of supply; whether foreign ownership of or foreign investment in such infrastructure is considered a risk, and why.

- To collect complete and reliable information on (i) measures adopted by the Member States and five selected non-EU countries to reduce identified risks relating to security of supply concerning gas and electricity infrastructure arising from foreign ownership of such infrastructure and (ii) how such measures operate in practice.

1.3. Methodology and challenges

Based on the tender specifications for this service request, the project was completed in three main phases:

- **An inception phase** where the contractor carried out preliminary research, prepared all the relevant methodological tools (e.g. national report template) and got them approved by DG Energy.

- **A national report phase** where all national experts covering all EU MS and selected third countries (Australia, Canada, China, the United States and Russia) completed their reports through desk research and interviews with foreign investors in electricity and gas infrastructures. These reports

[10] C-54/99, Église de Scientologie
[11] C-463/00, Commission v Spain, §68 and C-174/04, Commission v Italy, §35.
[12] C-463/00, Commission v Spain, §71
[13] C-423/98, Albore, §19

were subject to quality assurance by the contractor management team. The Member States national reports were also sent for review to Member State relevant competent authorities.

- **A comparative analysis phase** where the contractor gathered and analysed information from all national reports and provided a detailed comparative analysis of the legislation and practices aiming at reducing identified risks relating to security of supply concerning gas and electricity infrastructure arising from foreign ownership of such infrastructure in Member States and selected third countries.

The contractor experienced two major challenges in the completion of this project. Several competent authorities did not provide feedback on national reports despite a one-month timeframe for review. Limited responses for interviews were received from foreign investors that are/were subject to these investment control measures in Member States or in selected third countries.

1.4. Terminology

Several terms are repeatedly used under this report and for clarification purposes we propose to define them upfront.

Foreign direct investment: Investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in another country, including investments which enable effective participation in the management or control of a company carrying out an economic activity[14].

Foreign investor: A natural person of a third country or an undertaking of a third country intending to make or having made a foreign direct investment[15].

Screening laws: A legal procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments[16].

Electricity and gas operators: Company of any legal form that owns fully or partially an electricity or gas infrastructure.

Electricity infrastructures: Power plants, transmission systems, interconnectors distribution systems.

Gas infrastructures: gas transmission and distribution systems, storage systems and LNG terminals.

Ownership restrictions: There are different type of ownership restrictions that can apply in the context of foreign investments to protect electricity and gas infrastructures:

- 100% State ownership or majority of control by the State of major electricity and gas operators set in law
- Legal prohibition for foreign investors to invest in certain electricity and gas infrastructures
- Ownership limits (e.g. percentage) in law for foreign investors in certain electricity and gas infrastructures

Golden shares: These are shares in a company which are held by the government and which enable it to exercise special rights, usually veto rights over changes in the statutes of the company and change of ownership.

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[14] Definition set under the Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union.
[15] Definition set under the Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union.
[16] Definition derived from the Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union.

2. COMPARATIVE ANALYSIS AND MAIN FINDINGS

The comparative analysis and main finding section draws on information from national reports in 28 Member States and in the five selected third countries. It also includes information obtained from interviews with foreign investors. Subsection 2.1 focuses on the Member States legal approaches to control foreign investments in electricity and gas infrastructures and includes a description of electricity and gas infrastructures that are considered relevant for security of supply and their related ownership control. Subsection 2.2 focuses on the selected five third countries and identifies differences and/or similar trends in their legal approaches to control foreign investment in electricity and gas infrastructures.

2.1. Comparative analysis and main findings in Member States

2.1.1. Typology of electricity and gas infrastructures relevant for security of supply

This section provides a description of the gas and electricity infrastructures considered relevant for security of supply by Member States based on official policy documents and laws and feedback from national authorities during the review of national reports. It then details the ownership structures of these infrastructures. As a second step, since very limited Member States have explicitly identified gas and electricity infrastructures relevant for security of supply, this section includes a mapping of the ownership control of TSOs, LNG terminals gas storage facilities and electricity TSOs in all Member States**.**

Electricity and gas infrastructures considered relevant for security of supply by Member States and related ownership structures

Few countries have listed in official legal and/or policy documents the gas and electricity infrastructures relevant for the security of supply (SOS infrastructures)[17]. Member States that have a public list or description of SOS Infrastructures in the gas and electricity sector are: Croatia, Estonia, Italy, Latvia, Lithuania, Netherlands, Slovenia and to some extent Finland and Spain.

In **Italy**, the Decree regulating the investment screening law also includes a procedure for identifying strategic assets. Following this procedure, the Council of Ministers adopted a Decree in 2014 which identifies the strategic assets for security of energy supply. In **Estonia**, the Emergency Act defines the concept of 'vital services', which is a service that has an overwhelming impact on the functioning of society and the interruption of which is an immediate threat to the life or health of people or to the operation of another vital service or service of general interest[18]. The list of providers of vital services is not publicly available. However, the Natural Gas Act and the Electricity Market Act describe which services within their sectors are considered vital. In the same vein in **the Netherlands**, the National Security Strategy includes a (constantly updated) list of eleven 'vital processes' within 'vital sectors'. Energy is one of the sectors of vital importance. Within the gas sector, production, as well as national transportation and distribution of natural gas are considered 'vital'. Within electricity, transportation and distribution are considered vital together with the storage, production and processing of nuclear energy.

The Energy Acts of **Croatia**, **Czech Republic**, **Latvia** and **Slovenia** have provided for a list of undertakings or services considered as relevant for the security of energy supply. **Lithuania** has in place a Law on Enterprises and Facilities of Strategic Importance to National Security and other Enterprises of Importance to Ensuring National Security, which includes a complete list of these companies and facilities of strategic importance. To secure power supply is among the measures considered to ensure national security.

In **Spain**, this a rather similar situation where the investment screening law of the energy sector cross-refer to the National Catalogue of Strategic Infrastructures regarding the infrastructures and operators in which investments have to be declared to the Ministry of Energy. However, the list is not publicly available. In **Finland**, the Resolution of the Goals of Security of Supply of 2013 sets out the overarching objectives concerning security of supply and defines energy transmission and distribution networks as nationally critical infrastructures and energy production as critical production. However, no list of infrastructures is

[17]Note that due to the recent adoption of the Regulation concerning measures to safeguard the security of gas supply such information will soon be available.
[18] Article 2(4) of the Emergency Act.

publicly available. In fact, the government states that the level of risk may vary in accordance with the prevailing security policy situation in Finland.

Identified list of SOS in the gas and electricity sectors and related ownership control

List of infrastructures relevant for security of supply	Ownership and control
Croatia	
Gas infrastructures	
Gas TSO	Plinacro d.o.o. (TSO), a fully State-owned company
Gas DSO	Zagreb 3.741 km gas distribution system is operated by Gradska plinara Zagreb, d.o.o., fully owned by HEP d.d., a state-owned company Osijek 2.695 gas distribution system is operated by HEP-PLIN, d.o.o., fully owned by HEP d.d., a state-owned company. Others are owned by 33 private companies.
Okoli Underground Gas Storage facility	Podzemno skladište plina d.o.o., fully owned by Plinacro d.o.o
LNG terminal (planned)	LNG Hrvatska d.o.o, owned in 50% by Plinacro d.o.o. and 50% by HEP d.d. state owned companies
Electricity infrastructures	
Electricity TSO	HOPS d.o.o., fully owned by HEP d.d. a State-owned company
Electricity DSO	HEP ODS d.o.o., fully owned by HEP d.d. a State-owned company
NPP Krško in Slovenia, 696 MW (half of capacity available to Croatia)	50% share is owned by HEP d.d. a State-owned company
26 HPPs and 3 TPPs, 3.550 MW	Owned by the company HEP Proizvodnja d.o.o., fully owned by HEP d.d. (State-owned), except the TPP Plomin owned by the company TE Plomin d.o.o., fully owned by HEP d.d.
1294 RES power plants, 640.547 Kw	Private ownership by multiple private companies
Czech Republic	
Gas infrastructures	
Gas TSO	NET4GAS, s.r.o. is wholly owned by NET4GAS Holdings, s.r.o., which is held by a consortium of Allianz Infrastructure Czech HoldCo II S.à r.l. (50%) and Borealis Novus Parent B.V. (50%).
Gas DSOs (three distribution areas)	E.ON Distribuce a.s., a joint-limited company part of group E.ON Czech Holding A.G. – distribution of gas in South Bohemian region Pražská plynárenská Distribuce a.s., a joint-stock company part of group Pražská plynárenská, a.s. – distribution of gas in Capital City of Prague GasNet s.r.o., a limited-liability company – distribution of gas in the other regions of the Czech Republic

List of infrastructures relevant for security of supply	Ownership and control
Gas Storage Facilities: • Innogy GS s.r.o. (previous RWE) • MND GS, a.s. • Moravia GS a.s.	Innogy is a limited-liability company – ownership structure mainly owned by RWE AG (German company) - 76.8% MND and Moravia are a joint-stock companies, 100% owned by KKCG SE, a Swiss Company.
Electricity infrastructures	
Electricity TSO	It is a joint-stock company 100% owned by the Ministry of Industry and Trade.
Electricity DSOs	The three main regional distribution systems operators are subsidiaries of the companies: ČEZ, E.ON and PRE. • E.ON Distribuce, a.s. is a joint-stock company managed by the German E.ON • ČEZ Distribuce, a.s.[19] is a joint-stock company, owned by ČEZ, a.s. (the state holds about 70 percent); • PREdistribuce, a.s. is a joint-stock company, owned by Pražská energetika, a.s.
Estonia	
Gas infrastructures	
Gas TSO	Owned by Elering AS. Elering AS a 100% state-owned company.
Distribution system company that has more than 10,000 consumers connected to its distribution network	In 2016, 82.4% of the gas distribution services was owned by AS Gaasivõrgud, which is owned by AS Eesti Gaas. The network is operated by its fully owned subsidiary AS Gaasivõrgud.
Electricity infrastructures	
Electricity TSO	Owned by Elering AS (*see above*)
Any distribution system company that has more than 10,000 consumers connected to its distribution network	The largest electricity distribution network is owned by Elektrilevi OÜ, a 100% owned subsidiary of Eesti Energia AS which is a 100% state-owned company. The other two larger distribution networks are owned by VKG Elektrivõrgud OÜ and Imatra Elekter AS, both privately owned.
Producers whose power station has a net capacity exceeding 200MW and any line possessor whose power line crosses the national border and has a transmission capacity exceeding 100MW.	Four power stations have a net capacity exceeding 200MW. These are the Kiisa reserve power station owned and operated by Elering AS, and the Eesti power plant, Balti power plant and Auvere power plant, which are all owned and operated by Enefit Energiatootmine AS, a fully owned subsidiary of Eesti Energia AS which is a 100% state-owned company.
Finland	
Gas infrastructures	
Gas TSO	Owned by Gasum Oy, which is 100% owned by the State.
Electricity infrastructures	

[19] CEZ distribuce, available at: http://www.cezdistribuce.cz/.

List of infrastructures relevant for security of supply	Ownership and control
Electricity TSO	Owned by Fingrid, a public limited company in which the State owns 28,24% of the shares and 37,66% of the voting rights. Other major owners include the National Emergency Supply Agency (24,90% of the shares), Aino Holding Company (26,41% of the shares) and Mutual Pension Insurance Company Ilmarinen (19,88% of the shares).
Italy	
Gas infrastructures	
The national network for the transport of natural gas and associated compressor stations and system control centres, as well as natural gas storage centres. The management activities associated with the use of said networks and infrastructure.	The national natural gas network is operated by two companies: SNAM Rete Gas S.p.A., fully owned by Snam S.p.A., a company listed on Italy's stock exchange with three main shareholders: Cassa Depositi e Prestiti (CDP) (~30.1%), Mr Romano Minozzi (~5.7%) and BlackRock (USA) (~5%). CDP is in turn controlled by the Ministry of Economy and Finance (~82.7%). Società Gasdotti Italia (S.G.I.). S.p.A is fully owned by the Macquarie Group Limited (Australia) and Swiss Life Holding AG (Switzerland)
Infrastructure for the supply of natural gas from other countries, including on-shore and off-shore LNG regasification plants. The management activities associated with the use of said networks and infrastructure.	The natural gas pipelines located in territorial seas and used to import natural gas from non-EU countries, as well as upstream natural gas pipelines, are operated by four companies: TMPC, GREENSTREAM, ENI DIV.AGIP and GALSI S.p.A. The interconnectors are operated by three companies: POSEIDON S.A., TAP AG and EAGLE LNG. The linking pipelines and LNG regasification terminals are operated by: Terminale GNL Adriatico s.r.l. and SNAM Rete Gas S.p.A.
Electricity infrastructures	
Infrastructure for the supply of electricity from other countries and the National electricity transmission network and associated control and dispatching installations. The management activities associated with the use of said networks and infrastructure.	The national electricity transmission network and the management thereof are assigned to Terna S.p.A., which is a company listed on Italy's stock exchange with two main shareholders: CDP (~29.9%) and Lazard Asset Management LLC (USA) (~5.1%). CDP has exclusive *de jure* control of Terna.
Latvia	
Gas infrastructures	
Underground Gas Storage (UGS) Inčukalns	It is owned by JSC "Conexus Baltic Grid", whose largest shareholders are Russian Gazprom (34.1%), Marguerite Fund (29.1%), German Uniper Ruhrgas International GmbH (18.3%) and Itera Latvija (16%).
Lithuania	
Gas infrastructures	
Gas TSO	'Amber Grid' (96.58% owned by the state-owned 'EPSO-G')
Gas DSO	'Energijos skirstymo operatorius' (94.98% owned by state-owned 'Lietuvos energija'), main operator of natural gas (as well electricity) distribution system

List of infrastructures relevant for security of supply	Ownership and control
Liquefied Natural Gas Terminal	Klaipėdos nafta (72.32% State owned)
Electricity infrastructures	
Electricity TSO	'LITGRID AB', owned by 'EPSO-G' (97.5% state-owned)
Electricity DSO	'Energijos skirstymo operatorius' (the 'ESO') is the main operator of electricity (as well natural gas) distribution system and it is owned by 'Lietuvos energija' (94.98% state-owned)
Electricity generation capacities (ensuring reserves of the power system, which are necessary for the state's energy security).	'Lietuvos Energijos gamyba, AB' is the main electricity producer and it is owned by UAB 'Lietuvos energija' (96.13% state-owned)
Ignalina Nuclear Power Plant	Closed in 2009.
Netherlands	
Gas infrastructures	
Production of natural gas	'Gasgebouw', owned by the Dutch companies Maatschap Groningen (extraction) and GasTerra BV (sales).
Gas TSO	Gasunie Transport Services BV (GTS) is a daughter company of Gasunie NV, of which the Dutch State is the sole shareholder. The shareholders of the seven regional gas grid operators are public authorities such as provinces and municipalities.
Gas DSO	With the gas market being liberalised, the dominant gas suppliers are RWE-Essent (DE-NL), Vattenfall-Nuon (SE-NL) and Eneco (NL).
Electricity infrastructures	
Electricity TSO	TenneT TSO BV is a daughter company of TenneT Holding BV, which is fully owned by the Dutch State. The seven regional electricity grid operators are public authorities such as provinces and municipalities.
Electricity DSO	With the electricity market being liberalised, the dominant energy companies are RWE-Essent (DE-NL), Vattenfall-Nuon (SE-NL), Eneco (NL), PZEM (NL), E.ON (DE) and Intergen (US).
The storage, production and processing of nuclear energy	The main companies active in the nuclear sector are Urenco (NL/UK/DE), EPZ (NL), NRG (US), Reactor Instituut Delft (NL), PALLAS (NL) and COVRA (NL).
Slovenia	
Gas infrastructures	
Gas TSO	Plinovodi d.o.o., owned by 21 Slovenian-based public institutions and private companies, among which the State with 41.2 % share and Petrol d.d. with 33.3 % are the most important.
Gas DSO	The distribution networks in those municipalities are operated as a municipal service of general interest by 15 undertakings. Most of those are municipal public companies operating one or two municipal

List of infrastructures relevant for security of supply	Ownership and control
	distribution networks and thus cannot be considered vital for Slovenian gas supply infrastructure.
Electricity infrastructures	
Electricity TSO	ELES d.o.o. is a public limited company in 100 % ownership of the Republic of Slovenia.
Electricity DSO	SODO d.o.o., is a public limited company in 100 % ownership of the Republic of Slovenia. SODO has a concession for public service DSO and rents the distribution network from five regional distribution companies. The five regional distribution system operators (Elektro Ljubljana d.o.o., Elektro Maribor d.o.o., Elektro Gorenjska d.o.o., Elektro Celje, Elektro Primorska) are joint stock companies. They own the distribution infrastructure they operate. Their ownership structure is the same: in all of them, the Republic of Slovenia is the major shareholder with 79.50 %, the rest are other private and public shareholders.

Ownership structure of TSOs, LNG terminals and Gas storage facilities

This section contains summarised information on the ownership structures of transmission system operators (TSOs), LNG terminals and gas storage facilities in each Member independently of whether or not these infrastructures are defined as SOS Infrastructures in Member States.

The tables outline who is the largest shareholder of the company (even if shares hold represent less than 50% of the total) differentiating whether it is the State or any public entity, a national company, an entity from another EU Member State or an entity from a third country outside the EU. These tables do not include information on the ultimate beneficial owners of these infrastructures, a much more detailed study would be required to accomplish such a task. This is due to:

- The large quantity of gas and electricity infrastructures in the EU.
- The very fragmented ownership structure of some infrastructures since in some cases companies are publically listed and, therefore, part of their shares are free float.
- The existence of complex business structures that makes difficult to track the ultimate beneficial owner.
- The lack of ultimate beneficial ownership registers in Member States.[20]

We have identified six categories of ownerships structures that apply to these infrastructures:

- The State is by law the only or major shareholder of a company operating the infrastructure (*see section on ownership restrictions*). For instance, in **Austria**, the electricity TSO is owned by Verbund AG, which must be 51% owned by the State by law. In **Denmark**, both TSOs and the gas storage facilities are owned by the state-owned Energinet.dk.
- The State has *de facto* ownership control of the company that operates these infrastructures. For examples, in **Finland**, the State recently bought to Gazprom 25% of the shares of the gas TSO,

[20]Note that there is an obligation for Member States under Article 30 of Directive 2015/849/EU on money laundering to develop a register and disclose information on ultimate beneficial ownership. However, as of December 2017 this provision has not yet been transposed and implemented in Member States.

becoming the sole owner. Regarding the electricity TSO, the State owns 28.24% and the public National Emergency Supply Agency an additional 24.9%. In **Italy**, the state-owned Cassa Depositi e Prestiti (CDP) holds 30.1% of one of the Gas TSO (SNAM Rete Gas) and 29.9% of the Electricity TSO (Terna), although according to the stakeholders' agreements, CDP has exclusive *de jure* control of SNAM and Terna. In **Croatia**, **Lithuania** or **Poland**, all infrastructures are controlled by state-owned companies

- Public bodies at the local and regional level are major shareholders. For instance, in **Austria**, the LNG terminal in Ennshafen is owned by 50.025% by Lower Austrian energy supplier, which is majority owned by the Land Lower Austria. In **Belgium**, gas infrastructures (TSO, LNG terminal and gas storage facility) are operated by Fluxys, which is owned in 77.62% by Publigas, majority owned by Belgian municipal holding companies in Flanders, Wallonia and Brussels Region. In **Luxembourg**, the Gas and Electricity TSO (Creos) is partially owned by the City of Luxembourg directly and indirectly, although it does not hold the majority of shares. In **Germany**, one Electricity TSO (Transnet BW) is owned by the state of Baden-Württemberg and Oberschwäbische Elektrizitätswerke, a consortium of municipal governments; and one gas storage facility by several municipalities.

- Some infrastructures are owned by non-EU entities. This is the case for two gas storage facilities in **Czech Republic** – MND GS and Moravia GS – owned by the Swiss KKCG SE. In **Denmark**, the LNG terminal is owned by the Norwegian Fjord Line. In **Italy**, one of the Gas TSO (SGI) is owned by the Australian Macquarie and the Swiss Life Holding AG; and one LNG is controlled by the US-based ExxonMobil. In **Latvia**, the Gas TSO and the gas storage facility are majority owned (34.1%) by the Russian Gazpom, although the Pan-European equity fund Marguerite Fund holds 29.1% and the German Uniper and the Latvian Itera Latvija holds 18% and 16% respectively. In **Malta**, the LNG terminal is owned by three investors, Chinese GEM Holdings Limited (33.34%), the German Siemens Project Ventures GmbH (33.3%) and the Swiss SOCAR Trading SA (33.3%). In **Portugal**, all infrastructures are owned by Redes Energeticas Nacionais, which is id owned by the Chinese State Grid (25%) and Oman Oil (15%) together with other shareholders companies from United States, China and Spain. In **Germany**, several joint ventures were identified. For instance, Gazprom has a joint venture (WIGA) with other two German companies to operate three Gas TSOs and another one with BP and the Danish Ørsted to operate a gas storage facility. Australian, Canadian and German companies have another joint venture (Open Grid Europe) to operate two other Gas TSOs. Two storage facilities are fully owned by Gazprom and one the Norwegian Statoil (1).

- Fragmented ownership structures. In certain companies, part of the shares is free float and, therefore, there are no stable shareholders. Sometimes, laws impose limits to the ownership of free float shares. This is the case in **Spain**, where, by law, no investor can hold more than 5% of the TSOs of gas and electricity. As a result, the largest investor in the gas TSO is the state-owned SEPI (5%), followed by Bank of America (3.61%) and the US-based BlackRock (3.38%) as of November 2017). In the **UK**, the company National Grid operating Gas and Electricity TSOs has the same fragmented structure. In **France**, the gas TSO is owned by ENGIE, where one third must be owned by the State. Currently, a 67.6% is free float. Fragmentation is also present in **Hungary**, **Luxembourg** and **Portugal**.

- Shareholders in a company hold the exact same controlling shares. This is the case of the owner of gas TSO of **Czech Republic**, NET4GAS Holdings, s.r.o, which is owned by Allianz Infrastructure Czech HoldCo II S.à r.l. (50%) – German by origin – and Borealis Novus Parent B.V. (50%), from the Netherlands. In the **Netherlands**, two gas storage facilities are 50% owned by the British-Dutch Shell and 50% owned by the US-based ExxonMobil. In **Sweden**, the gas TSO is half owned by the Spanish Enagás and half owned by the Belgian Pluxys. In the **UK**, the Dragon LNG terminal is owned by Shell and Petronas equally.

- *Gas TSOs*

According to information collected via national reports, there are 44 Gas TSOs in the 28 Member States. Germany has 16 Gas TSO whereas France, Hungary and Italy have only two. In the other Member States there is one gas TSO per country, except in Cyprus and Malta, where there are none. In most cases the sole or major shareholder is the State, through direct or indirect control. In some countries the State is the largest shareholder with a small percentage of shares (Spain, France or Hungary). In nine cases (8 in Germany), the major shareholder is a national company, in eight cases an EU company from another Member State and in 6 cases, a non-EU company.

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Public entity* (full owner)			1				1	1	1		1		1	1	1						1	1				1		
Public entity (partial owner)		1				1				1		1		1		1	1	1						1			1	
National private entity	1					8																						
Other EU MS entity					1	5						1													1			
Non-EU MS entity						2										1			1				1					1

** Public entity: State, Region, Municipality or entity controlled by them.*

- *Electricity TSOs*

There are 29 Electricity TSOs in the 28 Member States. Germany has four TSOs. In Malta, there is none. A similar conclusion must be reached regarding these TSOs. In most of the cases the sole or major shareholder is the State, through direct or indirect control. Also, in some cases (Spain), the State is the major shareholder with a small percentage of shares. In Cyprus, the TSO is legally unbundled from the Electricity Authority of Cyprus (EAC) and is thus a separate entity, but all of its employees, with the exception of the Director TSOC, come from the single vertically integrated utility, the EAC[21].

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Public entity* (full owner)			1	1	1		1	1	1				1	1	1				1		1	1			1	1	1	
Public entity (partial owner)	1					1				1	1	1				1	1	1						1				
National private entity		1				1																						
Other EU MS entity						2																						
Non-EU MS entity																							1					1

** Public entity: State, Region, Municipality or entity controlled by them.*

[21] Recently, the Council of Ministers approved the full independence of the TSOC from vertically integrated EAC, in view of the commercial operation of the revised Trading and Settlement Rules in July 2019.

- *LNG terminals*

There are 28 LNG terminals in the EU. Seven of them are in Spain, three in France, three in Italy and three in the UK. In most of the cases either directly or indirectly the State is the major shareholder. In several cases, companies that own the gas TSO own the LNG terminals. In five terminals the major shareholder is from a third country. The construction of new terminals is planned in Cyprus, Czech Republic, Estonia, Greece, Ireland, Romania, Sweden and the UK.

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Public entity* (full owner)									1		1		1									1						
Public entity (partial owner)	1	1								6		2				1	1				1							
National private entity										1						1												1
Other EU MS entity												1													1			1
Non-EU MS entity							1									1				1			1					1

** Public entity: State, Region, Municipality or entity controlled by them.*

- *Gas storage facilities*

There are 97 gas storage facilities in the EU. France, Germany and Italy have respectively 14, 13 and 12 facilities. Although, in most cases the State is the major shareholder, there is a larger variety of investors. In some cases, it is also common that the company that owns the TSO of gas, also owns the gas storage facilities.

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Public entity* (full owner)			1				2						1	5														
Public entity (partial owner)	7	1								3		12				9						7		6			2	
National private entity						7				1											5							2
Other EU MS entity					1	3						2				3								1	1			4
Non-EU MS entity	1				2	3													1		2		1					1

** Public entity: State, Region, Municipality or entity controlled by them.*

2.1.2. Legislation and practices to control foreign investment

Member States have developed different or a combination of approaches to control foreign investment in electricity and gas infrastructures. These approaches can be classified in the following three categories:

- Investment screening laws (13 Member States)
- Ownership restrictions (18 Member States)
- Golden shares (three Member States)

Furthermore, other practices, such as 'de facto' state ownership control of gas and electricity infrastructures were identified in several Member States which indirectly limit foreign investment in these infrastructures.

Country	Screening law	Ownership restrictions			Golden shares	Other practices	
		Prohibition of foreign investment	Ownership limits for private investors	State ownership control by law		State ownership control de facto	Other
Austria	√			√		√	
Belgium					√	√	
Bulgaria						√	
Croatia						√	
Cyprus		√		√			
Czech Republic				√			√
Denmark	*			√			
Estonia						√	
Finland	√			√		√	√
France	√			√	√	√	√
Germany	√					√	
Greece		√				√	
Hungary	√					√	
Ireland			√				
Italy	√		√				√
Latvia	√			√		√	
Lithuania	√			√			
Luxembourg						√	
Malta						√	
Netherlands	√			√			
Poland	√			√	√		
Portugal	√		√				
Romania						√	
Slovakia				√			
Slovenia				√	√	√	
Spain	√		√	√			√
Sweden				√		√	
UK	√						√

* *The investment screening procedure of Denmark applies only to the Defence sector*

2.1.2.1. Investment screening law

This section sets out the key findings regarding the different and common features of investment screening laws that can apply to foreign investments in gas and electricity infrastructures in Member States. Screening laws applicable only to the Defence sector (e.g. Denmark) are not covered here.

14 investment screening procedures are in place in 13 Member States (Austria, Finland, France, Germany, Hungary, Italy, Lithuania, Latvia, the Netherlands, Poland, Portugal, Spain and the UK). Two different procedures are in place in Spain, which have been studied separately.

Main common characteristics

When comparing the systems in place it can be concluded that most screening procedures contain the following steps. There is first an assessment by competent authorities (e.g. based on a notification received from investors) of whether the acquisition by a foreign investor falls within the scope of the screening procedure (e.g. certain percentage of shares or ownership of a national strategic company or infrastructure, potential risk to national interest). If the foreign investment falls within the scope of the screening procedures, the competent authority, usually the Ministry of Economy, starts an in-depth assessment of the potential risks of such investment. The procedure usually starts before the investment operation is concluded, but in some cases, it can also start after the conclusion. In the latter, some Member States set a prior voluntary review. Where the procedure officially starts the competent authorities can request relevant information to the parties involved, who have a duty to comply. In this case, confidentiality rules regarding information provided may apply. The competent authorities have on average two to three months to issue a final decision. The outcome of the decision would be the approval of the investment operation, the approval subject to some conditions, or the prohibition of the operation or its annulment if it was already concluded. The lack of response after the time-limit usually mean a tacit approval.

Specificities of procedures:

There are however some procedures in certain Member States that do not exactly follow the common characteristics mentioned above and have some specificities that are worth mentioning at the start of the analysis.

In **Germany**, until the reform in 2017, there was one single procedure in which the government could review foreign investment at its own discretion. After the reform, there is a prior notification obligation for foreign investors in certain sectors of the economy including energy. The procedure is essentially the same, apart from the notification requirement and, therefore, our study describes the procedure from the perspective of investments in electricity and gas infrastructures.

In **Hungary** and in **the Netherlands**, the investment screening procedure is included within their Acts on natural gas and electricity in the form of a prior authorisation procedure regarding specific infrastructures relevant for the security of supply.

In **Italy**, the law set two type of procedures that allows the government to control investments in the energy sector as well as in the transport and communication sectors. Our study mainly focuses on the screening procedure concerning acquisitions of companies holding strategic assets by non-EU entities. The other procedure applies to decisions, acts and transactions carried out by companies holding strategic assets which result in changes in ownership, control or availability of strategic assets or changes in the intended purpose of strategic assets. Under this procedure, the Italian company where changes occur has the duty to notify the government which can approve or block the decision.

In **Latvia** companies falling under the category of '*Commercial enterprises of national security significance*' have a duty to notify to the competent authorities of any changes in the structure of the companies, which must approve them. Such changes include the acquisition of shares by investors, who have a duty to request authorisation from the competent authority.

In **Spain**, there are two different procedures in place to control foreign investment in electricity and gas infrastructures and, therefore, both are explained separately as the 'general procedure' applying to all economic sectors and the 'specific procedure' only applying to the energy sector including electricity and gas infrastructures. However, the first procedure is exceptional and would only occur in case the government decides to suspend 'freedom of investment' in the energy sector – or sub-sector -, which has never occurred at the time of writing this report.

In the **UK**, the review procedure is carried out within the context of the review on 'competition grounds' for mergers. Under the framework of this procedure, the competent authority can decide that the merger shall also be investigated for 'public interest considerations' and not only based on competition rules. The UK government is currently assessing the needs to reform the current procedure and might implement a new separate mandatory notification regime.

Table 1: List of legislative acts containing the investment screening procedure by Member State and the year the procedure was introduced

Member State	Year	Key legislative instruments
Austria	2011	Federal Foreign Trade Act
Finland	2012	Act 172/2012 on Monitoring of Foreigners' Corporate Acquisitions
France	2012	Monetary and Financial Code
Germany	2009	Foreign Trade and Payments Act Foreign Trade and Payments Ordinance
Hungary	2007 2008	Act LXXXVI of 2007 on electricity Government Decree 273/2007 (X.19.) on the implementation of Act LXXXVI of 2007 on electricity Act XL of 2008 on natural gas supply Government Decree 19/2009 (I.30) on the implementation of Act XL of 2008 on natural gas supply
Italy	2012	Decree Law 21/2012 on Rules on special powers on corporate assets in the national defense and security sectors, as well as for activities of strategic importance in the energy, transport and communications sectors
Latvia	2017	National Security Law Regulation no. 606 on the amount of information to be submitted by the institution specified in the National Security Law, the amount of information to be submitted to the institution, the procedure for submission and evaluation of the information submitted, and the adoption and notification of the decision specified in the National Security Law
Lithuania	2002	Law on Investment of the Republic of Lithuania No VIII-1312 of 7 July 1999 Law on enterprises and facilities of strategic importance to national security and other enterprises of importance to ensuring national security 10 October 2002 No IX-1132
Netherlands	2012	Act of 12 July 2012 on the amendment of the Electricity Act 1998 and of the Gas Act 2000.
Poland	2015	The Act on control of certain investments of 24th July 2015
Portugal	2014	Decree-Law 138/2014
Spain	1999 2013	Royal Decree 664/1999 on foreign investments Law 3/2013 on the creation of the National Commission on Markets and Competition
UK	2002	Enterprise Act of 2002

The comparative analysis focuses on the main elements and steps that characterise investment screening laws in Member States:

1. Nature of the review (mandatory/discretionary)
2. Ex-ante/ex-post transaction review
3. Competent authorities
4. Elements that trigger the screening procedure
5. Screening circumvention rules
6. Risk assessment
7. Time-limit
8. Outcome of the decision and appeal
9. Confidentiality rules
10. Publicity of the decision

The procedures are described in a detailed manner under the country reports in the Annex. The table below provides an overview of the applications of these different elements and steps in Member States.

Elements of the procedure	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gn	Sp										
Nature of the review														
Mandatory	√	√		√		√	√	√	√	√	√	√		
Discretionary			√		√								√	√
Moment of the review														
Prior review	√	√	√		√	√	√		√	√	√	√		√
Post review	√			√	√			√					√	√
Prior voluntary review					√	√							√	√
Competent authority														
Ministry of Economy	√	√	√		√	√				√	√			√
Ministry of Energy				√									√	
Other authorities							√	√	√			√		√
Triggers of the procedure														
Nationality of the investor	√	√	√	√	√	√		√	√				√	
Pre-defined sectors				√		√	√	√	√	√	√	√	√	
Pre-defined assets				√	√			√	√	√	√	√	√	
Type of transaction	√	√		√	√	√	√	√	√	√	√	√	√	√
Share of votes acquired	√	√		√	√	√	√	√	√	√	√	√	√	√
Circumvention rules	√	√		√	√							√	√	
Risk assessed														
Public order/security	√	√	√			√	√	√			√	√	√	
National security/defence						√			√	√			√	√
National interest					√							√		
Security of supply				√			√	√			√		√	
Exercise of public power			√											
Time-limit	√	√	√	√	√	√		√	√	√		√	√	√

Elements of the procedure	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gn	Sp										
Tacit approval	√	√	√		√	√		√	√			√	√	
Appeal	√				√	√			√	√		√	√	√
Confidentiality rules		√		√			√	√						√
Publicity of the decision	√						√							√

2.1.2.1.1. Nature of the review

A procedure is mandatory when the entity needs to notify the transaction and is discretionary (ex-officio) when the authorities initiate the procedure at their own discretion. In most Member States, the review is carried out after a mandatory application/notification from investors. Four procedures are discretionary, and the competent authority can decide to start the procedure at its own initiative. In such case competent authorities must notify the investors of the initiation of the procedure.

Nature of the review	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
Mandatory	√	√		√		√	√	√	√	√	√	√		
Discretionary			√		√								√	√

In **Austria**, the procedure is mandatory and there is an obligation of prior notification. However, the Government can initiate an *ex officio* procedure if it considers that a company has circumvented the law in order not to be subjected to the procedure. Once the start of the investigations is notified to the company the procedure follows the same steps than when notified directly by the investor. In the same vein in **Poland**, the authorities can initiate the procedure ex officio in specific cases pre-defined by the law.

In **Germany**, before the reform, the process was discretionary in all cases. After the reform in June 2017, there is a prior notification obligation for companies included in the sectors mentioned in the law. Since the energy sector is among them, we can conclude that the notification of investment operations in this case is always compulsory. For cases not mentioned in the law, the process is still discretionary, and no notification is needed. In **Lithuania**, the investor has an obligation to notify. However, the Government – and a state or municipal authority which is involved in the management of the shares of a public limited liability company – can also initiate the procedure at its own initiative if it considers so.

Some Member States impose penalties to the investors in case they do not comply with the notification obligation. In **Poland**, the penalty includes a fine of PLN 100,000,000 (€ 23.7 million) or imprisonment from six months to five years. In **Italy** the breach of the notification obligation can lead the interested party to be held liable for a general monetary sanction equal to an amount up to twice the value of the transaction and, in any case, not less than 1 percent of the turnover realized by the companies involved in the transaction. In **Finland**, the acquirer would be fined for an offence in breach of a law concerning corporate acquisitions. In the **Netherlands**, non-notified transactions can be annulled in Court.

2.1.2.1.2. Ex-ante/ex-post transaction review

The following table identifies the Member States in which the investment screening procedure is initiated prior to the conclusion of the transaction and the Member States in which such review is undertaken after the conclusion of the transaction(ex-post). Finally, the table identifies the countries in which an investor can request a transaction review prior to its conclusion to obtain clearance.

Prior/post review	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
Prior review	√	√	√		√	√	√		√	√	√	√		√
Post review	√			√	√			√					√	√
Prior voluntary review					√	√							√	√

In eight procedures the review occurs before the conclusion of the investment operation whereas in three procedures it occurs after the conclusion of the operation. In three other procedures, the procedure can start before or after the investment operation. It is possible to request a prior voluntary review in four procedures. In **Italy**, as reflected in the table, the procedure on acquisitions of companies holding strategic assets by non-EU entities requires notification of the operation within 10 days after the transaction whereas the other procedure[22], which applies to all, national and foreign investors, there is a prior notification requirement. In **Germany** after the 2017 reform, planned foreign investments in some sectors mentioned in the law, including energy are subject to a prior notification whereas concerning the 'non-listed' sectors the government can review foreign investment at its own discretion after the conclusion of the investment. There is however a prior voluntary review in place for those cases.

2.1.2.1.3. Competent authority

This section identifies the authorities in the relevant Member States competent to carry out the investment screening review.

Competent authority	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
Ministry of Economy	√	√	√		√	√				√	√			√
Ministry of Energy				√									√	
Other							√	√	√			√		√

In most countries, the Ministry of Economy is the competent authority in charge of carrying out the screening procedure. In two countries, the Ministry of Energy is the competent authority. In **Spain** the sector-specific procedure applies only to energy infrastructures. In **Portugal**, each Ministry is competent to assess investments in strategic assets in the sector of their competence. In **Poland**, the competent authority is the one in charge of the State Treasury. Since the position of Minister of the State Treasury does no longer exists, the competent authority for Treasury matters is now the Prime Minister. In **Italy** the competent authority is the Presidency of the Council of Ministers; while in **Lithuania**, it is the so-called 'Commission for assessment of conformity of potential participants to national security interests'. This Commission is composed by the Chancellor of the Government and 13 additional representatives from ministries and other institutions. Additionally, there are 14 second-string members appointed by each institution. In **Hungary**, the competent authority is the Energy and Public Utility Regulatory Authority, an independent regulatory body.

All authorities mentioned are competent to carry out the procedure (e.g. notifications, request of information, communication with the investor, review) and to issue a screening decision. However, in **Finland, Latvia and Portugal** and in the general procedure of **Spain** the screening decision is not issued by the authority in charge of the review but by the Council of Ministers. In the **UK** the Competition and Markets Authority (CMA), is in charge of the procedure and carry out the review. However, the Secretary

[22]Procedure applicable to decisions, acts and transactions by a company holding strategic assets which result in changes in ownership, control or availability of strategic assets or changes in the intended purpose of strategic assets

of State for business is in charge of making the relevant final assessment and decisions and it is not bound by the assessment of the CMA. In all procedures, other authorities (e.g. in the areas of security and energy) can also collaborate with the competent authorities.

2.1.2.1.4. Elements that trigger the screening procedure

This section provides an overview of the elements that trigger screening procedures in Member States. The following five elements are often used in combination to trigger a screening procedure in Member States:

- Nationality of the investor
- Economic sector targeted
- Type of asset
- Type of investment operation
- Threshold of shares acquired

Elements triggering the procedure	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
Nationality of the investor	√	√	√	√	√	√		√	√				√	
Investment in pre-defined sensitive sectors				√		√	√	√	√	√	√	√	√	
Investment in pre-defined strategic assets				√	√			√	√	√	√	√	√	
Type of transaction	√	√		√	√	√	√	√	√	√	√	√	√	√
Share of votes controlled by investors	√	√		√	√	√	√	√	√	√	√	√	√	√

In the following sections, these elements are described in detail across Member States.

Nationality of the investor

The nationality of the investor is a key element of the trigger of the procedure in a majority of procedures. The table below distinguishes between procedures that apply to both national and foreign investors, to all foreign investors or to non-EU investors.

Nationality of the investor	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
National and foreign investors				√			√			√	√	√		√
All foreign investors			√			√								
Non-EU investors	√	√		√*	√			√	√				√	

**The procedure applies to more cases if the investor is from non-EU countries*

In six of the procedures, the review can only be applied to non-EU investors. In addition, in these procedures investors from countries other than EU Member States within the EEA and EFTA are also exempted from the review. **Italy, Lithuania and Portugal** expressively exclude investors from EEA countries; **Austria**, from EEA countries and Switzerland; and **Germany and Finland**, from EFTA countries. In **Italy** the screening procedure applies to non-EU entities. The other procedure[23] applies to all, national and foreign investors. In the procedure in **France** and the general one in **Spain** – the review can be applied to all foreign investors, including investors from other Member States. Finally, in **Hungary, Latvia, the Netherlands Poland, the UK** and the sector-specific procedure in **Spain** the review procedure is applied to all investors, including the national ones. Regarding the sector-specific procedure of Spain, the scope of the review is broader if the investor is from non-EU/EEA countries.

Investment in pre-defined sensitive sectors

In some Member States, the procedure is only triggered if the investment is made in pre-defined sectors. Seven procedures are sector-specific, while 5 of them could potentially be triggered in all sectors.

Hungary, the Netherlands and **Spain** are the only Member States that has adopted a specific procedure applying exclusively to the energy sector. In the cases of Hungary and the Netherlands the procedure is regulated within their Electricity and Natural Gas Acts. In **Germany**, the procedure can be applied to all sectors. However, the specific requirement of prior notification applies to specific sectors, including energy. **France, Italy, Latvia, Lithuania, Poland and Portugal** define a variety of sectors and activities, among which, electricity and gas infrastructures are included.

On the contrary five procedures are not sector specific. **Spain** allows the government to suspend the 'freedom of investment' principle in any sector and to establish a prior review procedure, which has only been used in the Defence sector at the time of writing. In the same vein in **Finland**, the law does not target any specific sector, apart from the specific procedure established for Defence. In the **UK**, the Secretary of State can intervene in cases involving public interest considerations, which includes national defence (including public security), some media considerations and the stability of the UK financial system. Since there is no definition of 'national defence' or 'public security', mergers in any king of sector could be targeted by the review. The Act also allows the Secretary of State to request the Parliament the inclusion of more considerations. Finally, **Austria and Germany** do include a list of sectors, but they are merely indicative and do not restrict the application of the procedure to other sectors.

Investment in pre-defined strategic energy infrastructures and undertakings

In eight Member States procedures, the law defines or includes a list of identified assets. In **Spain**, the specific procedure applies, among others, to the energy assets included in the National Catalogue of Critical Infrastructures, elaborated according to EU legislation. The Catalogue is however, not publicly available. In **Finland**, the assets identified are the so-called 'companies that are crucial for ensuring critical functions in the society'. There is no definition of these companies or functions. In **Italy**, the law states that the screening applies to ´strategic assets for security of supply and national security' and includes a procedure for the identification of such assets by the government. In **Lithuania**, the law provides for a list of undertakings considered of strategic importance, including companies owning the TSO and DSO and energy producers. In **Latvia**, when an undertaking falls within the category set by law of 'Commercial enterprises of national security significance´ some transactions – specified in the law – in which the company is involved must be pre-authorised. In the **Netherlands** the procedure only applies to energy producing installations with a capacity of more than 250 Megawatt (MW), or in companies managing such production installations and to LNG installations and LNG companies. The **Polish** law allows the government to issue an official list of companies whom foreign investments must be subject to the screening procedure such as in the electricity and gas infrastructures EDF Polska, ENGIE Energia Polska, PKP Energetyka and TAURON Polska Energia. Finally, in **Portugal** the procedure applies to strategic assets essential to guarantee the defence and national security and the safety of supply of the country in services which are fundamental for the national interest, in the areas of energy, transports and communications.

[23]Procedure applicable to decisions, acts and transactions by a company holding strategic assets which result in changes in ownership, control or availability of strategic assets or changes in the intended purpose of strategic assets

Type of investment operations

All procedures, but one, define the type of transactions that triggers the procedure. The main transaction will consist in the 'acquisition' of a national company. Every Member State has their own definitions of what an acquisition consists according to their national laws – as referred in the section below.

Share of votes controlled by investors

All screening procedures, apart from the general one in Spain, require for the trigger of the procedure a specific percentage of shares to be acquired in the company. In some cases, the threshold is established by the screening law while in other procedures the law cross-refers to the definition of control included in the commercial legislation.

- *Quantification of shares provided by the screening law*

In **Austria** and **Germany**, the law sets an acquisition of 25% of the shares of voting rights as a threshold that triggers the screening procedure and how to calculate this percentage of acquisition.

In **Finland**, the law defines 'corporate acquisition' as the operation where a 'foreign owner' gains at least one tenth, at least one third or at least one half of the total number of votes conferred by all shares in the company or corresponding actual influence over the monitored company. The law also includes the method of calculating the proportion of votes. The competent authorities can also impose a minor acquisition of shares to trigger the procedure.

In **France**, the legislation includes a definition of 'investment' for the purposes of the law and defines three different categories for which an investment can be screened: where a foreign investor acquires the control of a company whose head office is in France, where an investor acquires a branch of activities of a company whose head office is in France, and where a non-EU foreign investor acquires 33.33% ownership of the capital or voting rights of a company whose head office is in France.

In **Hungary**, the prior notification is needed regarding natural gas and electricity undertakings for the acquisition of voting rights or influence excessing 25%, 50% or 75% of the votes.

In **Lithuania** the procedure applies when an investor seeks to acquire the shares granting at least 1/20 or one third of votes or ownership – depending on the case – of a company of strategic importance or in a sector of strategic importance as defined by law.

In **Poland**, the procedure applies to the acquisition of stocks or shares, shareholders' rights or business, which result in obtaining a significant participation or dominance in the sectors covered by law, including energy. The law provides a well detailed definition of 'significant participation and dominance' and establishes different type of percentages of acquisition of shares as thresholds depending on the sectors.

- *Cross-reference to general legislation*

In **Latvia**, the competent authority must approve certain types of transactions for the so-called 'Commercial enterprises of national security significance', such as the acquisition of 'decisive influence', the transfer of an undertaking, or even maintaining the right to the shares when the beneficial owner changes. For the definition of these concepts, the law cross-refers to the financial and commercial legislation. In **Italy**, the **Netherlands**, **Portugal** and the specific procedure of **Spain**, the law refers to the definition of control established in the commercial legislation for defining the shares acquired needed to trigger the procedure. This is also the case in **Hungary**, where the prior authorisation is also needed in case of a 'company law event' (such as division, merger with other undertaking, termination of the activity without no legal successor, change in the capital with at least one-quarter).

In the **UK**, the procedure is already included within the general Merger regulation and, therefore, thresholds for that procedure apply. The thresholds consist in that the business being taken over has a UK turnover of more than £70 million, or the merger takes the merger parties' combined share of supply of particular goods or services in the UK to 25% or more (or increases an existing share of supply of 25% or more). Finally, in the case of the general procedure of **Spain**, no limit is imposed and, therefore, any investment can be subject to the screening procedure.

2.1.2.1.5. Screening circumvention rules

This section describes the rules introduced by Member States to prevent companies from circumventing the investment screening review procedure such as for example to avoid the use of letter box companies and other types of complex corporate structures to avoid the application of the procedure. The following table shows which Member States have in place such rules.

Circumvention rules	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
	√	√		√	√							√	√	

According to the analysis, some Member States make direct reference to the circumvention element (Austria and Germany), others refer to different forms of 'indirect acquisitions' (Poland, Portugal and Spain) and in other cases the nature of the procedure prevents circumvention conducts (Italy, Latvia and the UK).

Austria and **Germany** have specific rules that request the initiation of the procedure when there are indications that a transaction has been undertaken to circumvent the procedure. **Poland** includes a very well detailed definition of cases of indirect acquisitions and establish criteria for these cases to trigger the procedure. The **Portuguese** procedure and the specific procedure of **Spain** define the situations subject to review by referring to the 'direct or indirect' acquisition of the control of the company.

In the **UK**, the procedure is applied to 'mergers' according to the definition granted in the legislation, which covers a very detailed range of cases. Finally, as stated under the section on the nature of the procedure, some Member States (Finland, Italy and Poland) issue penalties in case of non-notification when this is mandatory, which can also have a deterrent effect for potential circumvention conducts.

2.1.2.1.6. Risk assessment

In all Member States, the main objective of the establishment of an investment screening procedure is to assess whether foreign investments can pose a risk to some public interests set in law. The table below lists the different types of risks identified in the legislation in every Member State.

Risk assessed	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
Public order and public security	√	√	√			√	√	√			√	√	√	√
National security/defence						√			√	√			√	√
National interest					√							√		
Security of supply				√			√	√			√		√	
Exercise of public power			√											

In most Member States, there is no legal definition of these concepts. However, laws in some Member States include certain criteria to assess whether there are threats to such concepts. **Austria, France, Hungary, Spain and the UK** refer to the impact on the good functioning and provision of public services; **Italy, Lithuania, Poland and Portugal** include also considerations based on the respect of democracy and fundamental rights by the investor and its possible relation with criminal or terrorist groups. In the other countries studied, there are no assessment criteria in the law.

In **Austria**, the threat to public security and order must be understood in the sense given by Article 52 and Article 65(1) of the TFEU, including the provision of public services and crisis prevention. Similarly, in the

UK, the law just states that the concept of 'National security' includes 'public security', which has the same meaning as in the European Mergers Regulation. No further definitions are provided.

The **French** legislation offers examples of when national interests are threatened, such as, when the sustainability of activities, industrial capabilities, research and development capabilities and associated know-how would not be preserved; or the integrity, security and continuity of supply or operation of a facility of vital importance or the protection of public health would not be guaranteed. France also offers in the regulatory part of the Energy Code a list of activities likely to endanger public order, public security or the interest of national defence. It includes, inter alia, foreign investments in activities relating to equipment, products or services, including those relating to the safety and proper functioning of installations and equipment which are essential for the integrity, security and continuity of supply of energy sources.

Hungary includes a list of criteria to assess the convenience of grating the authorisation: the security of supply of natural gas or electricity, public security, the pursuit of energy policy objectives, the operation of the licensed activity under the Acts or the regulation of the price of transport, storage, distribution and the quality of service, the enforcement of the principle of the least cost principle, or the breach of right of pre-emption announced by the Authority.

In **Spain**, a series of criteria must be considered to understand the concept of ´real and sufficiently serious threat to the guarantee of the supply of electricity, gas and hydrocarbons´. Criteria are related with the uninterrupted physical availability of products or services at reasonable prices for all users; sufficient investment or maintenance in infrastructures to guarantee minimum services (supervision of the level of indebtedness to guarantee the investments); and legal, technical, economic and financial capacity requirements of the acquirer or of the acquired company, in accordance with the specific laws of the sectors.

In **Italy**, competent authorities must take into account (a) reasons suggesting the relation of the acquirer with non-democratic countries that does not respect international law or have relation with criminal or terrorist organisations, (b) the appropriateness of the transaction to guarantee the security and continuity of supply and the maintenance, safety and operation of the network and installations, and the economic, financial, technical and organisational capacity of the acquirer, and (c) that the foreign investor is controlled by a third-country.

The law in **Lithuania** contains a complete series of characteristics that would render the investor inappropriate for the authorisation. Competent authorities must take into account the risk posed by the investor to the independence and sovereignty of the State and the European and trans-Atlantic integration, if the investor is a major importer of fossil energy resources (or it is related), and if the investor might be related with criminal or terrorist groups or has committed some specific crimes.

In **Poland**, the evaluation of the transaction must consider the defence of the independence and integrity of the country, the guarantee of human rights, the protection of the environment, the prevention of actions that may hinder Poland´s obligations within NATO and Polish international relations and the guarantee of public and state security and the necessities of people in regard of security of health and life. These criteria are to be applied considering Articles 52(1) and 65(1) of the TFEU and Article 4(4) of TEU.

In **Portugal**, the law includes a list of considerations to take into account to assess the real and sufficiently serious character of the threat (exhaustive list): the physical security and the integrity of the strategic assets; their permanent availability and state of operation; the continuity and regularity of services of general interest, and the preservation of the confidentiality of the data and information obtained in the exercise of the activity of the controller of the asset. In addition, in Portugal the evaluation of the transaction must take into account evidences of no respect to democracy and relations with criminal or terrorist groups by the investor (taking into account the official position of the EU in the matter); if the person has in the past created serious difficulties in the regular provision of essential public services in any country or does not guarantee the return of the assets; and if the operation pose a threat to the permanent availability and operationality of the assets.

2.1.2.1.7. Time-limit

All Member States establish specific time frames for the investment screening reviews, but two (Hungary and the Netherlands). From the moment the investigation starts to the moment in which the competent authority issues the final decision (without counting pre-investigation phases, extensions or appeals), time-

limits range from 15 days in Italy to nine months in the UK. The average time of all procedures is three months.

As stated above, certain procedures can start even after the conclusion of the investment operation[24]. In this sense, three Member States have set a time period within which the procedure can start.

- In Finland, the competent authority is entitled to start the review until up to three months after receiving information of the acquisition
- Germany has set two time-limits for the possible review; five years after the conclusion of the investment operation agreement and three months after becoming aware of the signing of the agreement. Therefore, the government will be able to review an investment operation up to five years after it was signed, but in the moment the government is aware of the conclusion of the investment, the procedure within three months after the acknowledgment of the conclusion. No other member States have such approach.
- In Portugal the procedure must take place within 30 days from the conclusion of the foreign investment or from the date the competent authorities are informed about this agreement.

There are differences in Member States concerning the initiation of the procedure:

- In eight Member States the procedure begins from the reception of application from the investor.
- In three cases the procedure starts from the moment the notification is sent to investors (Italy, the Netherlands and the UK).
- In three cases (Germany, Finland and Portugal), the procedure starts when the authority has received the relevant documents requested to the investors.

Regarding the **moment of the decision**, in Finland, although there is a time-limit for the 'investigation phase' there is no specific time-limit for the decision if referred for final decision in government plenary session. In the same vein the general procedure in Spain allows the Council of Ministers to decide on any type of time-limit if justified. The **Netherlands** and **Hungary** do not include any time-limit.

In five procedures there is a possibility of **extension** of the timeframe (ES_Gn, IT, LV and UK). In the case of Italy, there is no mention to any time-limit. Spain allows a non-determined ad hoc extension (although the standard time-limit is 3 months). In Latvia a large extension is allowed (4 months) if compared with the standard duration of the procedure (1 month).

The following table indicates the time-limits established per Member State.

MS	Duty to notify	Max. time-limit to start of procedure	Start of procedure	Approx. max. total time of procedure	Extension
AT	Before conclusion of contract	-	From reception of application	3 months[25]	-
DE	-	3 months after becoming aware of the signing of the agreement[26]	From reception of relevant documentation from investor	4 months	-

[24]Austria, Finland, Italy, Portugal, the UK, the general procedure of Spain and in the case of Germany to sectors non-indicated in the law (energy is expressively included)

[25] One month for the preliminary phase (Phase 1) and two months for in-depth verification (Phase 2).

[26] By notification or any other way. Authorities cannot start the procedure in any case 5 years after the signature of the agreement.

MS		Duty to notify	Max. time-limit to start of procedure	Start of procedure	Approx. max. total time of procedure	Extension
ES	Gn proc.	-	-	From reception of application	6 months[27]	3 months[28]
	Sp proc.	15 days after the operation	-	From reception of application	1 month	-
FI		-	3 months after receiving information of the acquisition	From reception of relevant documentation from investor	3 months[29]	-
FR		Before investment operation	-	From reception of application	2 months	-
HU		Before investment operation	-	From reception of the application	-	-
IT		10 days after the investment operation	-	From notification of application	15 days	Possible extension if needed
LT		-	-	From reception of application	1 month	-
LV		Before investment operation	-	From reception of application	1 month	4 months
NL		4 months before the investment operation	-	From notification of start of procedure	-	-
PL		Before investment operation	-	From reception of application	3 months	-
PT		-	1 month from the conclusion of the business	From reception of documents	2 months	-
UK		-	-	From notification of start of proc.	9 months[30]	2 months[31]

2.1.2.1.8. Outcome of the decision and appeal

The following section identifies the possible outcomes of the screening decisions. Member States usually include three possible outcomes:

- Approval of the investment operation
- Approval subject to conditions
- Prohibition of the transaction (or annulment if already concluded)

Member States usually do not define the types of conditions imposed on companies to obtain clearance. **France** however specifies that conditions mainly concern the integrity, the security and the continuity of the supply, among others, and provides one specific example of conditions, which is the transfer to a company, whose head office is in France and independent of the foreign investor, of the activities which ensure, inter alia, integrity, security and continuity of supply of electricity, gas, hydrocarbons or other energy sources. **Finland** or **Poland** mention the reduction in the shares to reach the permitted percentage

[27] Standard - other limits can be imposed ad hoc
[28] Standard - other limits can be imposed ad hoc
[29] To the 3 month-period it should be added indeterminate time for final decision in Government plenary session.
[30] Two months for phase 1; six months for phase 2 and one month for the final decision.
[31] Possibility of extension of Phase 2.

of voting rights. The Polish law also mentions the veto over the right to vote and other rights. The law in **Austria** and **Spain** expressively mention the imposition of conditions but do not define them.

In case the operation has already been carried out Member States legislation entitles competent authorities to invalidate the transaction when it considers that it amounts to a risk to the protected interest or in cases where the operation was concluded without the mandatory approval. In **Germany** the competent authority can appoint a trustee to bring about the unwinding of a completed acquisition.

Some Member States (**France, Italy, Spain**) also refer to the evaluation by the competent authorities of the accomplishment of the conditions imposed and the possible sanctions or annulment of the clearance decision if conditions are not respected. In Italy, certain rights (e.g. voting rights) are suspended in case of non-compliance with the conditions imposed during the period of non-compliance.

In ten out of fourteen procedures, the lack of explicit decision by the competent authorities within the time-limit supposes **tacit approval**, this is, the official recognition of approval for the transaction. In two procedures (the specific one in Spain and in the UK) there are no such provisions.

Tacit Approval	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
	√	√	√		√	√		√	√	√		√	√	

Finally, in eight cases, the legislation on the investment screening law explicitly mention the possibility of **judicial or administrative appeal** against the screening decision issued by the competent authorities. Such finding does not preclude that in the other four procedure appeals are also possible according to the administrative/judicial law of the country.

Appeal	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
	√				√	√			√	√		√	√	√

2.1.2.1.9. Confidentiality rules

The following table identifies whether the investment screening laws include provisions on the confidential treatment of the information provided by companies. The non-inclusion of these provisions does not exclude the application of the general rules on confidentiality.

Confidentiality rules	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
		√		√			√	√						√

Germany, Hungary, Italy, Spain (for the specific procedure) and the **UK** regulations contain explicit references to the confidentiality of the information. In **Hungary**, specific confidentiality rules are included only within the Gas Supply Act. **Italy** provides references to the non-public disclosure of the information provided by the companies to the Presidency of the Council of Ministers. In the specific procedure of **Spain**, companies can request the confidential treatment of any information provided. In **Latvia**, the law makes a reference on the suppression of state's secrets information on the notification of the decision to the investor, but it does not include confidentiality rules regarding companies' information.

2.1.2.1.10. Publicity of the decision

The following section identifies whether the decision is published in official publications.

Publicity of decision	AT	DE	ES		FI	FR	HU	IT	LT	LV	NL	PL	PT	UK
			Gp	Sp										
	√						√							√

Only **Austria, Hungary and the UK** include an obligation of official publication of the screening decision. In Austria, the information to be disclosed is mentioned in law: the acquiring persons or companies, the undertaking to be acquired; and the circumstance, whether (a) the transaction was considered safe, (b) conditions were imposed, (c) the operation has not been approved; (d) the application was rejected for procedural reasons. In Hungary the provision on the publicity of the decision was only included within the Gas Act. The UK publishes not only the final decision on the procedure, through the Competition and Markets Authority (CMA) website[32], but also the notice stating the initiation of the investigations. In the other Member States, there is no specific provision indicating the obligation of publication of the decision. However, this does not mean that general rules on publication of administrative decisions may apply.

2.1.2.2. Ownership restrictions

This section provides an overview of the nature and scope of restrictions imposed by Member States legislation regarding ownership of Gas and Electricity (G&E) infrastructures. There are three categories of ownership restrictions.

- Some ownership restrictions explicitly target foreign investors such as the prohibition or limits (e.g. share percentage) of foreign investment in G&E infrastructures.
- There are provisions that oblige the State to entirely own or at least control (e.g. majority of shares) certain gas and electricity infrastructures.
- Finally, some provisions restrict the number of shares that can be owned by a private investor.

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Prohibition of investment in G&E infrastructures				√					√																			
Limitation on the number of shares owned by private investors in G&E infrastructure										√						√							√					
100% State-ownership of G&E infrastructures by law				√			√										√		√		√	√					√	
State majority of shares/control by law	√									√	√	√					√		√						√	√		

[32] www.gov.uk/cma

Two Member States (Cyprus and Greece) have established a total prohibition on the ownership of some G&E infrastructures by non-EU investors. Spain, Italy, Portugal set specific share limits for private national/non-national investors. Ireland impedes to the Minister of Energy the transfer of shares unless needed. Six countries set in law total ownership control of certain electricity and gas infrastructures by the State whereas eight countries (in two cases the same ones) set an obligation in law for certain electricity and gas infrastructures to be controlled by the State (e.g. a majority of share must be owned by the State).

The following table represents the State's ownership status per type of energy infrastructure and Member State and indicates the name of the company and whether the State is the **full** owner or holds a **majority** (more than 50%) or a **minority** (less than 50%) of shares in the company.

MS	Gas TSO	Electricity TSO	Gas DSO	Electricity DSO	Energy producer	LNG terminals	Gas Storage facilities
AT				Verbund (Majority)	Verbund (Majority)		
CY			DEFA (Full)				DEFA (Full)
DK	Energinet.dk (Full)	Energinet.dk (Full)					
ES		Red Eléctrica de España (Minority)					
FI	Gasum Oy (Majority)	Fingrid Oyj (Majority)					
FR			EDF (Majority) / ENGIE (Minority)	EDF (Majority) / ENGIE (Minority)	EDF (Majority) / ENGIE (Minority)		
IE	Gas Networks Ireland (Full)	EirGrid (Full)					
LT		LITGRID (Majority)	Lietuvos energija /ESO (Majority)	Lietuvos /ESO /Facilities ≥110 kv (Majority)	Lietuvos energija (Majority)	Klaipėdos nafta (Majority)	
LV			Latvenergo (Full)	Latvenergo (Full)	Latvenergo (Full)		
NL	Regional operators (Full)	TenneT TSO BV /Regional operators (Full)					
PL	Gaz System (Full)	PSE (Full)					
SI	Plinovodi (Majority)	ELES (Majority)		SODO /Regional operators (Majority)	Gen-energija / HSE (Minority)		
SK	Eustream (Majority)	SEPS (Full)	ZSE /SSE /VSE /SPP (Majority)	ZSE /SSE /VSE (Majority)	Slovenské elektrárne, (Majority)		

The following table specifies the ownership restrictions in G&E entities or infrastructures per Member State.

Member States	Sector	Type of ownership restrictions
Austria	Electricity	According to the second Nationalization Act, Austria must hold at least 51% of the shares of Verbund AG the largest electricity provider in Austria. At the same time, the State or Verbund must hold at least 50% and 51%, depending on the case, of the companies listed in the law.
Cyprus	Electricity & Gas	Participation of foreign (non-EU) investors in the production and distribution of electricity is prohibited. Not applicable for gas. DEFA, the natural gas public company, which is state-owned, shall be the only undertaking responsible for the import, storage and supply of natural gas to the Cyprus domestic market, as well as for the establishment and management of the distribution system.
Denmark	Electricity & Gas	The electricity and gas transmission networks are owned and operated by Energinet.dk, which is an independent, but state-owned, public company. The legislation explicitly states that the ownership of the general infrastructure managed by Energinet.dk shall be kept in public ownership.
Finland	Electricity & Gas	Regarding state majority-owned companies in general, the Parliament approval is required for decisions as a result of which the State ceases to be the sole owner, gives up its majority in the entity in question, or if the State ownership of all the voting rights in the entity decreases to one third or below. It is also required if as a result of the decision the State becomes a majority owner in the entity. Since 2016, there are ownership limits in Gasum Oy (gas TSO) and in Fingrid Oyj (electricity TSO) of 50.1% of the shares in order to safeguard the State's strategic interests in the companies.
France	Electricity & Gas	EDF, who is the major producer of electricity in France and in the world, is a limited liability company, which must be owned by at least 70% by the French State. The French State currently owns 83,4% of EDF. ENGIE, is a limited liability company that must be owned at least by more than one third of the overall shares by the State. ENGIE is a global leader in the production of electricity, in all the value chain of gas from exploration to distribution, in energy services (energy efficiency, green mobility, smart grids, engineering design).
Greece	Electricity & Gas	The right to apply for an electricity production license is reserved to natural persons having the citizenship of an EU Member States or to EU-based legal persons and consortia Natural or legal persons who have been legally established and are based on an EU Member State, an EEA state, a State member to the Energy Community, or to third countries if they have a right to do so resulting from a bilateral agreement that the third country has concluded with Greece or the EU, or have established a branch in Greece can apply for a natural gas licence for the distribution and supply of natural gas.
Ireland	Electricity & Gas	The Gas TSO, Gas Networks Ireland (GNI), is a fully-owned subsidiary of Ervia, which is state owned. Any sale of part or all of these State assets may require legislation and/or Ministerial/Government Consent. The Electricity TSO is owned by EirGrid, whose shares are held by the Minister of Energy. In principle, it cannot transfer the shares unless it is necessary.
Italy	All sectors	In addition, companies directly or indirectly controlled by the State or other public bodies and that operate, among others,[33] in the energy sector to insert in their statutes a 5% maximum limit to the number of shares that may be owned (or indirectly controlled) by

[33]Other sectors to which the provision applies are defence and national security, transport, communications and other public services, banks and insurance companies.

Member States	Sector	Type of ownership restrictions
		an individual shareholder, related family and company group.[34] This provision does not distinguish between national and foreign investors. There is an additional limit to the acquisition by non-EU persons of shares in a company that holds strategic assets, which is the requirement of reciprocity, in accordance with international agreements signed by Italy or the European Union.
Latvia	Electricity	Joint Stock Company Latvenergo, the major electricity producer in Latvia, must remain by law a fully state-owned joint stock company and cannot be privatised.
Lithuania	Electricity & Gas	Facilities which form an electricity transmission network of the voltage of 110 kV and above, the oil terminal located in the territory of the Klaipėda State Seaport as well as appurtenances thereof shall be of strategic importance to national security. These facilities must be owned by the right of ownership or be used by the State, legal persons controlled (directly or indirectly) by the State or other entities conforming to national security interests. The State must, directly or through its controlled enterprises, hold over half of the voting shares of Enterprises of strategic importance to national security (i.e. LITGRID, ESO, Lietuvos energija AB, Klaipėdos nafta, including the LNG Terminal project development company and LNG Terminal operator).
Netherlands	Electricity & Gas	Direct or indirect shareholders of a regional grid operator shall only be the State or any other public authority. Since 2016, the State has to be also directly or indirectly the owner of the electricity national grid. A new proposal aims to includes a similar provision provision regarding the TSO for gas. The proposal also includes an exception to this 'privatisation ban' for both the electricity and gas TSOs. The bill stipulates that under strict conditions, a limited amount of shares in the national grid operators may be held directly or indirectly by a foreign transmission system operator (TSO) or the direct/indirect shareholder of the foreign TSO.
Poland	Electricity & Gas	The State Treasury must be the only shareholder of the TSOs for gas and electricity: Gaz - System S.A. and Polskie Sieci Energetyczne S.A., respectively.
Portugal	Electricity & Gas	There are acquisition caps in relation to the Portuguese TSOs for electricity and gas. No entity – including those operating in the electricity sector, whether in Portugal or abroad – may hold directly or indirectly, more than 25% of the share capital of the national electricity transmission network (*Rede Nacional de Transporte – RNT)* or of the companies controlling it, and of each operating company of the national LPG transmission, storage infrastructure and terminals network (*Rede Nacional de Transporte, Infraestruturas de Armazenamento e Terminais de GNL* – RNTIAT) and of the national natural gas transmission network (*Rede Nacional de Transporte de Gás Natura*l – RNTGN), respectively.
Slovakia	Electricity & Gas	A total of seven energy companies including the TSO for electricity, the three DSO, the most significant electricity producer, a gas operator and an oil pipeline company are by law state-owned monopolies. The parliament has to give permission to sell share in these companies.
Slovenia	Electricity & Gas	In Slovenia, the legislation regulates the management of State ownership rights (shares or other equity holdings) in individual companies. According to this, assets have been divided in three levels: • Strategic assets. Includes the TSOs for gas and electricity, DSOs and some electricity producers. The State will maintain or obtain at least a 50% shareholding + 1 share.

[34]Where this limit is exceeded, the exercise of voting rights and other non-pecuniary rights arising from the excess shares is suspended. See Art. 3(2) of D.L. 332/1994.

Member States	Sector	Type of ownership restrictions
		• Important assets. Includes some energy retailers. The State will retain the controlling share (25% equity stake + 1 share) in such companies • Portfolio assets. Companies of no national importance.
Spain	Electricity & Gas	There are acquisition caps in the TSOs for electricity and gas. A company cannot own more than 5% of the shares in the TSO for electricity (Red Eléctrica de España), excepting the state-owned company Sociedad Estatal de Participaciones Industriales (SEPI) which must maintain in all cases a shareholding in the parent company REE of no less than 10 per cent. Similarly, a company cannot own more than 5% of the shares in the TSO for gas (ENAGÁS) and the combined total of direct or indirect holdings owned by parties that operate within the natural gas sector may not exceed 40%.
UK	Electricity & Gas	In the UK, following the approval in September 2016 of the Hinkley Point nuclear power plant investment by French and Chinese investors, the government announced it would draw up new legislation to allow the government to decide on the ownership of key infrastructure (not only in the nuclear sector) on the grounds of national security. Reforms seem to focus on the expansion of the current merger regime powers or the creation of a new foreign investment screening process and, therefore, direct restrictions on ownership do not seem to be expected. However, at the time of writing no specific option has been yet adopted

2.1.2.3. Golden shares

Golden shares were identified in four Member States. It should be noted that in other Member States such as Italy or Spain golden shares were forbidden after the CJEU or the EC considered the rules on golden shares of these countries incompatible with EU law. In this sense, the CJEU has held that rights attached to this kind of shares related to pre-approval of share acquisitions[35], ability to veto asset disposals[36], or a requirement to approve a company's winding-up[37] breach the Treaty as they are liable to render the free movement of capital illusory. The CJEU however allowed the Belgian government to retain its golden shares in *Société Nationale de Transport par Canalisations* (SNTC) and *Distrigaz* to protect its national interest in the energy sector (possibility of disruption of gas supply).[38]

- ***Belgium***

The Belgian state maintains a golden share (*action spécifique*) in the gas transport network manager *Fluxys* (split company from *Distrigaz*) through Royal Decree of 16 June 1994. This confers the state with special rights that will remain as long as the state hold those shares. These special rights are exercised by the federal Energy Minister and suppose, among others, the right to oppose any transfer, the assignment as a guarantee, or change in what the strategic assets of Fluxys are used for if the Minister considers that this operation adversely affects national interests in the field of energy.

- ***France***

The shares of the State in ENGIE were transformed into golden shares (*actions spécifiques*) to preserve the French essential interests in the energy sector and to ensure the security of energy supply. This golden share allows the Ministry of the Economy to oppose a veto by Ministerial order to any transfer of the shares if the Ministry considers that such transfer is contrary to French essential interests in the energy sector relating to the continuity and security of energy.

- ***Poland***

The minister of energy in companies and capital group acting in sectors of electric energy, crude oil and gas with the State as a shareholder is entitled to file an objection against a company's resolution or legal

[35] C-483/99 Commission v. France [2002] ECR I-4785, C-98/01 Commission v UK [2003] ECR I-4641, C-463/00 Commission v Spain [2003] ECR I-4606, C-171/08 Commission v Portuguese Republic [2010] ECR I-6817
[36] C-483/99 Commission v. France [2002] ECR I-4785 and C-98/01 Commission v UK [2003] ECR I-4641
[37] C-212/09 Commission v. Portuguese Republic [2011] ECR I-10889
[38] C-503/99 Commission v. Belgium [2002] ECR I-4812

action concerning disposal of assets that may cause threat to the functioning, continuity of activity and integrity of a "critical infrastructure". The objection may also be filed against the following resolutions of the company if the performance of such resolution would cause the above mentioned effects: dissolution of the company, change of purpose or cease to exploit these particular assets, change of subject of company's business, sale or lease of the company's business or organised part thereof or establishing limited proprietary right over this business, acceptance of finance plan, investment plan or strategic plan, or transfer of the company outside the country.

The special rights may be executed in companies acting in the above indicated sectors, whose assets are included in the list of "critical infrastructure", which are:

- In the electricity sector - infrastructure used to generate or transmit electricity;
- In the crude oil sector - infrastructure for the extraction, refining, oil processing and storage and transmission of crude oil and petroleum products as well as port terminals for the transport of these products and crude oil;
- in the gas fuels sector - infrastructure for the production, extraction, refining, processing, storage, transmission of gaseous fuels by gas pipelines and liquefied natural gas (LNG) terminals.

- ***Slovenia***

The Budget Execution Act for years 2017 and 2018 provides that companies in energy sector in which the State directly or indirectly owns a majority of shares or voting rights, must include in their acts of association the provisions that allow acquisition of the controlling share (above 25%) only with the consent of the Government

- ***UK***

As foreign investors found the use of 'golden shares' very unattractive, the UK government surrendered golden shares held in UK companies once the privatised company were well established. The Government still holds golden shares in a small number of companies in the defence sector. Most recently, the use of a 'golden share' was considered during the acquisition of the Hinkley Point C nuclear power plant. The possibility was also discussed with the European Commission. In order to comply with EU legislation, the 'golden share' would have had to be justified on the grounds of public security or public policy or overriding requirements relating to the general interest. Ultimately, the use of a 'golden share' was not pursued for the Hinkley Point C project. Instead, an agreement was reached between EDF Energy as the majority shareholder in Hinkley Point and the UK's Secretary of State for Business, Energy and Industrial Strategy, that the UK Government's consent would be required to any sale of EDF's interest in the Hinkley Point holding company that would result in it no longer holding majority voting rights, prior to the second reactor becoming operational.

2.1.2.4. Other practices

As part of the analysis, a mapping of other type of practices aiming at limiting/containing foreign investment in the gas and electricity infrastructures was carried.

The main practice found is 'de facto' ownership of all or a majority of shares in companies in the G&E infrastructures by the State. Private investments are not prohibited in the infrastructure or company by law, but the State can decide not to sell its shares in order to protect national interest. Therefore, the State actively seeks to acquire companies and assets considered of relevant public interest to guarantee security of supply. Examples of such practices were found in Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland, France, Greece, Hungary, Latvia, Luxembourg, Malta, Romania and Sweden. In some cases, public bodies at the local and regional level also pursue this strategy, such as in Austria, Belgium or Germany.

Four specific practices were also identified such as the double counting vote for 'long-term' shareholders in **France**; the special powers of public authorities in **Italy** to increase public ownership in case of hostile takeover bid of a company owned (in full or in part) by the State or a public body; the need of consent of the Ministry of Industry for the election or dismissal of the executive director of the TSO of electricity in **Spain**, and the **UK** government mandatory consent for any sale of EDF's interest in the Hinkley Point holding company that would impede a private company to hold the majority of voting rights.

Member States	Other practices identified
Austria	Austria is a major shareholder of OMV (*Österreichische Mineralölverwaltung AG*), the largest Austrian oil and gas company, operating both upstream (exploration and production) as well as downstream (refineries and marketing). Indeed 31.50% is held by ÖBIB (*Österreichische Bundes- und Industriebeteiligungen GmbH*, Austrian State and Industrial Holding Ltd.) which is a state holding company (National Wealth Fund) which administers the investments of the Republic of Austria in partially or entirely nationalised companies and reports directly to the Finance Ministry. IPIC (Abu Dhabi) holds 24,9% of the rest and 43,6% traded on the market. In addition, the LNG terminal in Ennshafen is owned in a 50.025% by Lower Austrian energy supplier, which is majority owned by the Land Lower Austria.
Belgium	Fluxys, the Gas TSO and operator of other natural gas facilities, where the State holds a golden share, is owned in a 77.62% by Publigas, owned by Belgian municipal holding companies in Flanders (55%), Wallonia (30%) and Brussels-Capital Region (15%).
Bulgaria	In Bulgaria the Gas and Electricity TSOs, among other infrastructures, are controlled by state-owned Bulgarian Energy Holding SJSC.
Croatia	Almost all energy infrastructures are State-owned and new energy infrastructures are almost always developed by the State. This in practice creates disincentives for foreign investors. The State opened the possibility of privatisation of the Croatian Electric Power Company d.d. (HEP d.d.) through an Act in 2002, but it did not occur and the Act is not valid since 2010.
Czech Republic	The State keeps full ownership of the electricity TSO, ČEPS, and a majority of shares (69.78%) in the energy company ČEZ. In fact, to fulfil the priorities established for the *State Energy Policy,* one of the implementing instruments focuses specifically on strengthening the state's position in energy companies with significant state influence. Several actions were proposed; such as enhancing the control powers of supervisory boards (SB) or modifying the company's rules to include the need of the approval of the company strategy or important investment decisions by the SB and assurance of compliance with the State Energy Policy. The state of Czech Republic is the founder and sole shareholder of the company OTE, a.s. (Market Operator). On behalf of the state, the Ministry of Industry and Trade acts as the Company's founder and invests assets in the Company.
Denmark	Due to the acquisition plans of Dong Energy by Goldman Sachs, the government created Dansk Gas Distribution, dependent on the state-owned Energinet.dk to absorb the distribution network business of Dong Energy. The legislation explicitly states that the ownership of the general infrastructure managed by Energinet.dk shall be kept in public ownership. Additionally, one of the four regional operators of gas infrastructures (for Southern Zealand and Jutland) is Dansk Gas Distribution, which is an entity under Energinet.dk established in 2016.
Estonia	The transmission and distribution networks and key electricity production capacities are 100% state-owned companies, which is considered a way to guarantee security of Energy supply by the government.
Finland	Gasum Oy, the transmission system operator of the natural gas grid, is 100% owned by the state, ever since the 25% share owned by PJSC Gazprom was bought by the State of Finland in 2015. In addition, the project of the *Nuclear reactor Hanhikivi 1* was heavily discussed in the National Parliament in 2014 due to the influence a Russian state-owned company over the Finnish company in charge of the project (*Fennovoima*). The project received an updated Parliament-approved resolution concluding that the project is in accordance with "the overall interest of the society", a legal term, which is unclear in its application. The resolution adopted and approved in 2014 includes as a condition that prior to the granting of the construction licence Fennovoima must have updated its ownership base to a minimum 60% EU/EFTA ownership.
France	The State is a major shareholder in key energy companies in the country. It owns 28.65% of ENGIE – global leader in the production of electricity –, 83,4% of EDF – major producer of electricity in France an in the world –, 28,95% of AREVA – construction of nuclear plants. The State benefits from the double counting vote for 'long-term' shareholders that was put in place in 2014 as a result of the adoption of the law 2014-384 of 29 March 2014 for the development of a

Member States	Other practices identified
	real economy. It requires that double counting voted must be applied, unless agreed differently in the social status, for all fully paid-up shares for which a nominal registration has been valid for two years in the name of the same shareholder in companies whose shares are admitted to trading on a regulated market. The aim of this amendment was to reward long-term investments and to limit the development of short-term investors that are alleged to be harmful. However, this provision in practice allows the French State to sell shares without reducing its influence and control on the relevant companies. This is considered as a win-win situation where France can make profits by selling shares while keeping control on companies involved in sectors of major national interest.
Germany	*Transnet BW*, one of the four Electricity TSO is owned by the state of Baden-Württemberg and Oberschwäbische Elektrizitätswerke, a consortium of municipal governments. Additionally, *Trianel Gasspeicher Epe GmbH & Co.KG*, a gas storage facility, is jointly operated by 16 municipal and municipal partners.
Greece	The Greek National Natural Gas System is in hands of an essentially public company, DEPA S.A, currently in process of privatisation due to the international bailout programme that Greece has been subject to. DEPA S.A. also controls all gas supply companies. Currently (Dec 2017) a public tender is ongoing concerning the privatisation of 66% of the company's shares. Similarly, the Greek electricity market is controlled by state-owned companies. To comply with unbundling requirements, the transmission operator is independent, but is still controlled by the Greek state.
Hungary	The Electricity TSO, MAVIR, is owned by *Magyar Villamos Művek Ltd*, which is fully state owned. In addition, by the end of 2016, as a result of some acquisitions and mergers the state-owned Főgáz Limited (*Főgáz Zrt.*) became the only gas service provider. Since June 2017, Főgáz Limited is owned by the First National Public Utility Ltd (ENKSZ, "Első Nemzeti Közműszolgáltató Zrt), which is a state-owned public company. On 1 February 2017, EDF and ENKSZ have completed the transaction for the sale of the whole of EDF share in EDF DÉMÁSZ Zrt, to its Hungarian subsidiary. Power plants have been also subject to public acquisition in recent years. It is noted that the country's only nuclear power plant is a fully-owned subsidiary of the state-owned company Hungarian Electrical Works Ltd.
Italy	In case of hostile takeover bid of a company owned (in full or in part) by the State or a public body, an increase in capital stock may be used to increase public ownership and defy the takeover attempt (so-called 'poison pill'). Furthermore, *Cassa Depositi e Prestiti* (CDP), controlled by the State, is empowered to acquire shares in companies of significant national interest in terms of, inter alia, sector of activity, which includes the energy sector. Besides, a shareholders' agreement applicable to Snam and Terna gives *de jure* control over these companies to CDP.
Latvia	The Electricity TSO, *Augstsprieguma tīkls*, is fully owned by the State since 2012.
Luxembourg	The State and the City of Luxembourg have shares in relevant infrastructures of the energy sector. This is the case of Creos Luxembourg S.A., which owns the electricity and gas TSOs.
Malta	In Malta, the electricity retail market is not open to competition and Enemalta plc, a vertically integrated power utility, holds 100% share of the electricity retail market. Enemalta was recently partially privatised and now 33.3% stake is owned by Shanghai (Malta) Electric Power (SEPM), with the remaining share owned by Government.
Romania	The State is the largest shareholder in the Gas and Electricity TSOs with approximately 58% of the shares in each. The State holds also the majority of shares (70%) in Romgaz, the largest natural gas producer of the country.
Slovenia	Both the Gas and Electricity TSOs are directly or indirectly owned by the State. Plinovodi, the owner of the Gas TSO, is a limited company in the sole ownership of the company Plinhold d.o.o. Plinhold d.o.o. is owned by 21 Slovenian-based public institutions and private companies, among which the State with 41.2 % share and Petrol d.d. with 33.3 % are the most important. Petrol d.d. is a joint stock company in which the State and companies in state ownership hold 31% of stocks. The State plans to acquire the majority ownership in Plinhold. ELES d.o.o, the Electricity TSO, is a public limited company in 100 % ownership of the Republic of Slovenia.
Spain	The Ministry of Industry has to agree with the decision taken by the Board of Directors of Red Eléctrica de España, the TSO of electricity on the election or dismissal of the Executive Director.

Member States	Other practices identified
Sweden	The national grid is state owned and there is state ownership also down the chain in the regional grid, local networks and individual nuclear and hydroelectric power plants. In this sense, the state-owned, Vattenfall, owns major parts of the regional and local networks as well as hydroelectric and nuclear power plants. Sweden thus secures the access to energy infrastructures through state ownership.
UK	After deciding not to establish a golden share, it was decided that the UK Government's consent would be required to any sale of EDF's interest in the Hinkley Point holding company that would result in it no longer holding majority voting rights, prior to the second reactor becoming operational.

2.1.3. Opinion of stakeholders on Member States measures

A very limited number of stakeholders responded to the requests of the contractor team to carry out an interview on Member States measures to control foreign investments despite several reminder e-mails and contacts. Some interviews focused on the regulatory approaches in specific Member States and are therefore included in the national reports (Poland and Spain). Some interviewees provided general views on the Member States measures to control foreign investments and are therefore summarised below. It concerns a major energy company, the International Energy Agency and two major non-EU investors in electricity and gas infrastructures[39].

Opinions of representatives of the International Energy Agency

- *Investment screening laws EU Member States to fulfil certain criteria*

EU Member States will often have strategic objectives that necessitate screening investments according to national criteria. There are also criteria for networks (e.g. related to cybersecurity) or protection of intellectual property, which may necessitate strategic governance and ownership approaches to investment. It is not for the IEA to question these objectives. What is important is that these screening processes are performed in a transparent, predictable and efficient manner, and incorporate a framework that addresses the potential costs and benefits of these criteria to investment and outcomes in the energy sector.

- *Advantages of an EU screening procedure*

Timely and efficient processes for facilitating capital allocation in Europe are needed, particularly in areas where there are significant challenges to scaling up investment, such as cross-border energy network infrastructure, which are key to the energy security and decarbonisation goals of the European Union. Recognising that member states will still retain decision making authority, a European-level procedure, similar to the streamlined approach made with Projects of Common Interest, combined with frameworks to allow Member states to cooperate on investments with cross-border impacts would greatly facilitate these investment objectives.

- *Potential good practices for screening procedures*

The representatives of the IEA have outlined the following potential good practices in screening procedures:

- The risk assessment considers the impact on free movement of capitals and free trade.
- A transparent process is in place where all conditions/criteria to trigger a control of foreign investment are detailed in law
- Investors are notified with due time regarding any step/decision taken

[39] The names of the companies will not be disclosed.

- Possibility of appeal against the decision
- The procedure limits discretionary decisions on foreign investment
- Frameworks for tracking investment flows, assessing the impacts of ownership rules over time and employing cost-benefit analysis to screening criteria

- *Assessment of impacts of screening procedures on foreign investments*

It is difficult to assess the impacts of screening procedures on foreign investments given that many factors determine investments. This makes tracking the ownership and sources of finance for investments more important. The IEA is working on such tracking within its *World Energy Investment* report.

- *View on ownership restrictions*

Non-discrimination in the treatment of investors, regardless of the nationality of ownership, is a central tenet of an attractive investment climate in general, in line with the OECD's Policy Framework for Investment. Any policy that favours some firms over others can result in unnecessary costs, can undermine the competitive position of the market for investment and can reduce efficiency.

In the energy sector, the important role and mobility of international capital means that infrastructure investments often involve foreign ownership capital, project management and technical expertise. Energy markets in Europe are moving towards greater interdependence. The success of energy policy is ultimately determined by the ability to attract investment that helps to meet energy security, environmental and economic development goals. Ownership restrictions often run counter to meeting these goals.

That said, countries have in the past and will likely continue to exercise ownership restrictions that they perceive to serve national objectives. Energy security may be one of these. Moreover, some foreign actors may benefit from subsidies or other market distorting assistance that undermines competition. Any measures to address these concerns should be weighed against the costs and benefits of the restriction and its proportionality to achieving societal objectives.

- *Golden shares*

They note that government interference or measures such as 'golden shares' that undermine efficient and transparent corporate governance can hamper the commercial mission of enterprises, their ability to deliver the right infrastructure investments on time and at affordable cost and can reduce the confidence of other investors in the enterprise and the wider market.

- *Better energy policies and market design to reduce the risks associated with foreign investments*

In the energy sector, managing or reducing these risks could be advanced through better energy policies and market design, including a focus on a diversity of supply sources and project scales, improved flexibility of demand and greater integration of energy markets, both physically and financially.

- *Need for investment*

In order to meet security of supply and decarbonisation goals, Europe needs further market integration, an improved electricity market design that incorporates more granular price signals, and sustained investment in energy infrastructure, across supply, demand and networks. Through 2025, according to the 2017 IEA World Energy Outlook New Policies Scenario, renewable power investment in the EU would need to average USD 50 billion annually, similar to 2016 levels. Investment in electricity grid infrastructure should average more than USD 35 billion annually, also similar to 2016 levels. Given persistent delays in the build out of transmission infrastructure, there is a risk of insufficient investment to meet energy objectives. Some of these objectives can be achieved through spending on better technology, particularly the role of digitalization, to enhance market operations and facilitate flexible demand that can help to avoid investments. Nevertheless, a comprehensive regulatory approach to enable sustained investment in flexible resources (e.g. storage, demand response) and infrastructure is an essential precondition both for the continued growth of renewables as well as the maintenance of electricity security.

A sizeable increase in gas-fired power capacity will also be needed to provide system flexibility in view of the looming decommissioning of large amounts of baseload coal and nuclear capacity across the continent and the seasonal mismatch between winter peak demand and summer solar production. While the current capacity balance is adequate, ageing nuclear capacity and cold weather conditions can create periods of tightness such as January 2017. Even in the more climate friendly IEA scenario, the gas power capacity needed to maintain system balance in Europe increases by over 30 GW by 2030. There are very real doubts about whether this will happen, given the collapse in investor confidence and the current lack of investment in gas capacity. Every year since the financial crisis, retirements of gas plants in the European Union exceeded final investment decisions for new plants.

The security of gas supply also requires continuous investment. Given strong gas demand for heating buildings, Europe will need to develop and maintain substantial amounts of gas-storage capacity. Nevertheless, it is unclear how regulatory reforms will affect the attractiveness of investing in storage. Europe has witnessed the mothballing of storage capacity and the cancellation of several projects.

- *Origin of new investments*

This investment will come from new industry players from within the EU, foreign companies and industry incumbents. It is worth noting that some industry incumbents (e.g. utilities) are reorienting their strategies to ensure their long-term financial health. Since 2011, European utilities have written down over USD 130 billion of assets, reflecting unprofitable market conditions for thermal generation, which accounted for around half of the total losses. This financial backdrop, along with wider business model trends, has prompted the European industry to adopt new corporate strategies, including a shift towards contracted and regulated revenue sources, such as renewables and networks, implement cost-reduction programmes and restructure itself. This upheaval speaks to the need for a diversity of financing sources and industry business models, both domestic and foreign.

Opinions of a major energy company

- *Interconnectivity and unbundling to reduce the risks associated with foreign investment of electricity and gas infrastructure*

When more efforts are made to ensure open access to pipelines and unbundling the risks associated with foreign investment of electricity and gas infrastructure become less significant. The more interconnected the system the more resilient the system and the smaller the risk related to ownership of energy infrastructure as the risks related to market power are diminished. They also underline that States within the EU are again becoming the main owners of energy infrastructure particularly, in Central and Eastern Europe which significantly reduce the opportunities of investment.

- *Screening procedures not necessary*

Increasingly pipelines are regulated and therefore the risks associated with foreign ownership of energy infrastructure is significantly reduced. In other words, introduction of screening procedure is not necessary. There is a risk that an introduction of screening rules at EU level will further politicise investment in energy infrastructure. Whatever rules are introduced must be as objective and clear as possible and must be subject to effective judicial review. The introduction of sanctions regarding the ownership of energy infrastructure is having a significant impact on investment in energy infrastructure and therefore energy security. Many of the impacts are unintended and are causing significant risks.

Opinion of a large investor in energy infrastructures with a world-wide portfolio of investments

- *Negative impacts of screening procedures on foreign investment*

Screening laws negatively impact on the developments of the infrastructure pool. Many investors in the energy sector invest in the short and medium term. Existence of complex screening procedures would impede such investments. Our company has avoided investing in jurisdictions with screening laws.

- *Ownership restrictions and golden shares are not justified*

Ownership restrictions and golden shares are not justified. They may result in higher prices for consumers, inefficient energy markets and lack of interconnectivity. Existence of state incumbents in the energy sector is a key impediment to energy competitiveness of the EU.

Opinion of another large investor in energy infrastructures with a world-wide portfolio of investments.

- *Good practices in screening procedures*

As a long-term infrastructure investor without geographic or sector allocations, the company invests on a pure risk-return basis. Accordingly, the company pays close attention to the political, legal and regulatory construct in each jurisdiction. Stability and transparency is of paramount importance alongside an openness to foreign capital and the necessary protections of foreign capital such as the ability to seek redress. The company is subject to FDI screening regime mechanisms in many jurisdictions in which they operate and therefore are accustomed to factoring in these processes upfront in a transaction. The investor believes that the laws of each jurisdiction that we invest in are a matter for each individual government and we undertake investments in accordance with the local legal requirements of each investment jurisdiction. It is of paramount importance that any investment screening laws are clear in scope, transparent, applied consistently and efficiently.

- *Ownerships restrictions not always justified*

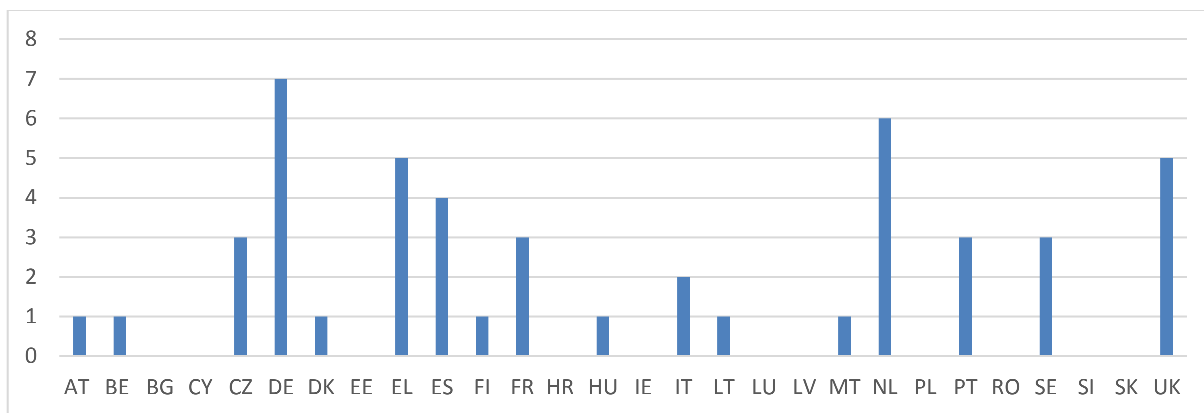
The company considers that their strong track-record as a responsible owner of critical infrastructure businesses highlights their ability to own, operate and develop complicated assets that deliver essential services. This track record of effective and responsible ownership highlights the role that private investors can play in successfully managing important infrastructure businesses globally. As such, the company believes that private capital can add real value to infrastructure assets over the long-term and therefore ownership restrictions are not always justified, however, it is also mindful of the political and sensitive nature of some assets and the need for additional government oversight (e.g. through independent regulators).

- *Golden shares not appropriate in a certain investment environment*

Based on their own experience, the company considers that with effective regulation, like-minded long-term investors and robust governance rights, infrastructure investors can be effective partners to governments in running essential infrastructure services without the need for those same governments to exercise protective rights through the use of golden shares. In general, they do not invest in businesses where governments hold special, preferential rights, and believe that the existence of golden shares can also politicise businesses which in their view is inappropriate.

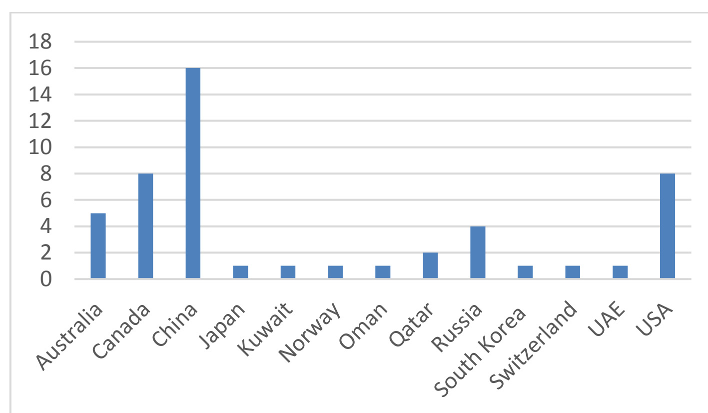
2.1.4. Cases of non-EU foreign investment in the energy sector in Member States

Since 2009, a total of 48 large investment operations from non-EU companies occurred in energy infrastructures and operators in the gas and electricity sectors in the 28 Member States. The following graph shows the number of investment operations per Member State in the referred period.

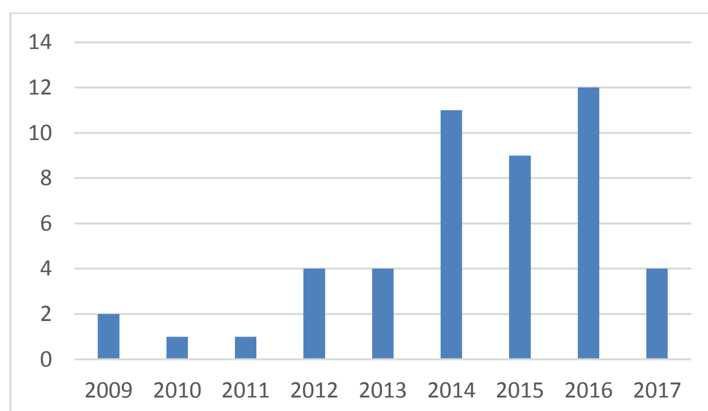


As it can be noted the Member States where most of the investment operations from non-EU countries happened were Germany (a total of 7 operations), the Netherlands (6), Greece (5), the UK (5) and Spain (4).

Per country of origin, in most of the investment operations, companies were originally from China (in 16 of the operations), the United States (8), Canada (8), Australia (5) and Russia (4), as presented in the following graph.



The following graph presents the quantity of investment operations by year. Most of the investment operations occurred in the years 2014 (a total of 11), 2015 (9) and 2016 (12).



The following table provides the overview of the major non-EU investment operations in energy assets (gas and electricity) in the past 8 years in the EU.

Country	Year	Target	Bidder	Bidder country
Austria	2016	25 per cent stake in Energie Steiermark AG	Macquarie Bank	Australia
Belgium	2015	Fluxys (19%)	Casse de dépôt et placement de Québec	Canada
Czech Rep.	2016	Energy 21	China-CEE Fund’	China
Czech Rep.	2016	EP Infrastructure	Macquarie	Australia
Czech Rep.	2009	Škoda Power	Doosan Group	South Korea
Denmark	2014	Dong Energy (18%)	Goldman Sachs	USA
Finland	2014	Nuclear reactor Hanhikivi 1	Fennovoima (34% owned by Russian state-owned Rusatom)	Finland / Russia
France	2016	Wind Farms in Bretagne (Brittany), Grand Est, Hauts de France, Auvergne-Rhône-Alpes and Occitanie	Boralex	Canada
France	2015	Alstom	General Electric	USA
France	2017	Velocita Energy Developments Ltd. (3 wind farms located in the Bourgogne-FrancheComte region of France)	Innergex Renewable Energy Inc.; Desjardins Group Pension Plan	Canada
Germany	2016	Energy from Waste (EEW)	Beijing Enterprises	China
Germany	2016	Osram	San'an Optoelectronics	China
Germany	2016	WindMW	China Three Gorges Corporation	China
Germany	2014	Avancis	China National Building Group	China
Germany	2014	SAG Solarstrom	Shunfeng Photovoltaik International	China
Germany	2014	Sunways AG	Shunfeng International Clean Energy	China
Germany	2015	Elster Group SE	Honeywell International Inc.	USA
Greece	2013	Energean Oil & Gas	Third Point Gas	USA
Greece	2014	Heron II power plant	Qatar Petroleum International (QPI) and GEK Terna	Qatar / Greece
Greece	2013	Mytilineos (5%)	Fairfax Holdings	Canada
Greece	2013	GEK Terna (10%)	York Capital Management	USA
Greece	2016	ADMIE (24%)	State Grid Europe Ltd	China

Country	Year	Target	Bidder	Bidder country
Hungary	2015	Construction of nuclear reactor Paks II (contract awarded, still under construction)	NIAEP - ASE	Russia
Italy	2014	Cassa Depositi e Prestiti S.p.a. e CDP Reti S.p.a	State Grid International Development	China
Italy	2015	ITAL GAS STORAGE S.r.l. e SANDSTONE HOLDING BV	Not specified	non-EU person (country not specified)
Latvia	2012	Offers new services	Inter RAO Latvia	Russia
Malta	2014	Enemalta (33%)	Shanghai Electric Group	China
Netherlands	2009	Darwind	XEMC	China
Netherlands	2010	Gas storage in Bergermeer.	Taqa	United Arab Emirates
Netherlands	2012	Scheuten Solar	Powerway	China
Netherlands	2013	50% share in wind parks Luchterduinen and Amalia from Eneco	Mitsubishi	Japan
Netherlands	2014	60% of offshore wind farm Gemini	Northland Power	Canada
Netherlands	2015	50% stake in Wintershall Noordzee (offshore natural gas exploitation in North Sea)	Gazprom	Russia
Portugal	2011	EDP – Energias de Portugal (21%)	China Three Gorges Corporation	China
Portugal	2012	REN – Redes Energeticas Nacionais (25%)	State Grid	China
Portugal	2012	REN – Redes Energeticas Nacionais (15%)	Oman Oil	Oman
Spain	2017	20% of gas distribution bussiness of Gas Natural Fenosa	Allianz Capital Partners / CPPIB	Germany / Canada
Spain	2016	20% of Gas Natural Fenosa	Global Infrastructure Partners (GIP)	USA
Spain	2015	Renovalia	Cerberus	USA
Spain	2014	E.ON España	Macquarie / Wren House	Australia / Kuwait
Sweden	2015	Ellevio AB (50%)	Borealis Infrastructure Management	Canada
Sweden	2016	Lundin Petroleum AB (11.93% Stake)	Statoil ASA	Norway

Country	Year	Target	Bidder	Bidder country
Sweden	2017	Varmevarden AB	J.P. Morgan Asset Management	USA
UK	2014	London Array 1 offshore wind farm (25% Stake) of DONG Energy A/S	Caisse de Depot et Placement du Quebec	Canada
UK	2015	DEA Deutsche Erdoel AG (12 North Sea gas fields)	INEOS Group AG	Switzerland
UK	2016	Tees Renewable Energy Plant	Macquarie Group Limited and PKA A/S	Australia / Denmark
UK	2016	61 per cent shareholding in the gas division of National Grid	Macquarie / CIC / Qatar Investment Authority / Allianz / Hermes	Australia / China / Qatar / Germany / UK
UK	2017	Hinkley Point C nuclear plant	EDF / CGN	France / China

2.2. Selected third countries legal approaches on the control of foreign investments

2.2.1. Introduction

When introducing changes in their legislation, some Member States partially justify their actions by the existence of similar rules in other countries. For example, in their joint statement to the Commission, the governments of France, Germany and Italy recommend the application of the principle of reciprocity governing international relations to ensure that non-EU companies are treated in the EU as EU companies in third countries. Outside the EU the control of foreign investment in energy infrastructure is quite a common and well-established practice. Globally, national security concerns in respect of foreign investment in strategic sectors have over the years gained in importance. Many countries outside the EU have recently introduced laws tightening the oversight of foreign investment in key sectors. A few countries have on the other hand eased their regime to make their economies more attractive to foreign investment.

This section provides a summary of the policies and the legislative framework adopted by five countries Australia, Canada, China, United States and Russia regarding foreign investments in electricity and gas infrastructures. These third countries were selected and approved by the European Commission during the inception phase of the project based on the following criteria:

- Investment screening laws in place
- Long traditions in controlling foreign investment in energy infrastructures
- Recent amendments to the foreign investment control measures
- Political interest for the EU
- Major investor in EU energy infrastructures
- Energy relations with the EU

2.2.2. Policy context on foreign investment restrictions in third countries

The table below shows that the five countries selected are open to foreign investments in the energy sector but have all set measures to control such investments. Russia and China have developed the most stringent control measures (e.g. ownership restrictions) and are the least open to foreign investment in the energy sector compared to the other three that have adopted screening laws since the seventies. These laws have been amended several times to cope with the increase of foreign investment and related risks on, inter alia, energy security.

Country	Policy context	Key legislative instruments
Australia	• Foreign investment currently contributes around AUD 3 trillion to Australia's economy, with the largest single investor, the United States, accounting for almost 25% of foreign investment. • Investment from East Asia has grown in recent years. Australia has been the second biggest recipient of Chinese overseas direct investment since 2007, with 38% of Chinese investment concentrated in the infrastructure (including electricity distribution infrastructure), energy (gas and electricity production) and renewable energy sectors. • Public and political concern over foreign investment appears to be particularly focused on foreign acquisitions of land and businesses in the agriculture sector. However, privatisation of assets owned by State and Territory Governments is drawing greater attention to foreign investments in critical infrastructure. • Since 1975, foreign investments have been regulated under the Foreign Acquisitions and Takeovers Act 1975 (FATA) and its regulations. The legal framework was significantly amended[40] in November 2015 to make a number of changes to Australia's foreign investment screening regime. These changes primarily focused on residential real estate transactions and investments in the agriculture sector, with some other changes to introduce fees for applications and modernise the regulatory framework. However, the 2015 changes also require automatic screening of any investments by a foreign government in Australian businesses or land.	▪ Foreign Acquisitions and Takeovers Act
Canada	• Canada is open to foreign investment but was one of the first countries that set-up an investment screening procedure to control foreign investments that can be injurious to national security • Concerns from the increasing share of foreign investment in the oil and gas industries mainly from the US led to the adoption of the Foreign Investment Review Act in 1973 together with other measures restricting investment • These measures were abandoned in 1985 with the adoption of a more liberal law, the Investment Canada Act (ICA) of 1985 which was reformed in 2009 and in 2015 • The energy industry's share of overall FDI in Canada has been steadily increasing, reaching more than 27% in 2015, up from 18% in 2006	▪ Investment Canada Act R.S.C. 1985, c. 28 (1st Supp.)
China	• Foreign investments made in China (excluding financial sectors) from 1979-2015 reached USD 1.64 trillion. In 2015 alone, foreign investment over USD 126 billion was made, creating a new record and ranking at the top in developing countries for a consecutive of 24 years. However, foreign investments in energy infrastructures, such as exploitation of oil and gas[41] or operation and construction of power plants[42], in China have decreased in the recent years and pale in amount	• Law of the People's Republic of China on Wholly Foreign-owned Enterprises ("WFOE Law") • Law of the People's Republic of China on Sino-Foreign

[40] *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*, amending the *Foreign Acquisitions and Takeovers Act 1975,* its regulations and other related legislation
[41] See https://www.chinadialogue.net/article/show/single/ch/4934-Unplugging-from-China
[42] See https://wallstreetcn.com/articles/248407

Country	Policy context	Key legislative instruments
	when compared to huge foreign investments made in other areas, • China is encouraging foreign investment under very close control, in sectors relating to security of energy supply where these investments are subject to additional requirements and procedures.	Equity Joint Ventures ("EJV Law") • Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures ("CJV Law"
Russia	• Risks (or threats) associated with foreign investments in national electricity and gas infrastructures are not explicitly mentioned under policy documents on energy security. • Foreign investments in the energy sector are encouraged primarily for technically challenging and high-risk projects (including offshore and Arctic projects) with a transfer of know-how to Russian partners. • There are however a significant number of ownership restrictions in energy infrastructures and a government screening procedure for foreign investments demonstrating that Russia is deploying a very close control on such investments.	• Federal Law #160-FZ of 09 July 1999 On Foreign Investments in the Russian Federation • Federal Law #69-FZ of 31 March 1999 on Gas Supply in the Russian Federation; • Presidential Decree #538 of 01 June 1992 On Securing Operation of the National Unified System of Gas Supply; • Presidential Decree #1333 of 05 November 1992 On Transformation of the State Gas Concern Gazprom into Russian Joint-Stock Company Gazprom; • Federal Law #35-FZ of 26 March 2003 on Electric Power Industry; • Federal Law #13-FZ of 05 February 2007 on Specifics of Control and Disposal of Shares and Properties in Entities Engaged in Utilization of Atomic Power;
United States	• The United States is the largest single recipient of foreign investment worldwide. • The recent country's natural gas boom has catalyzed domestic and foreign investment in petrochemical manufacturing as well as in the manufacturing of steel and equipment needed for gas extraction. • The United States has a screening procedure since 1973 implemented by the United States' Committee on Foreign Investment in the United States (CFIUS) • CFIUS was modified in 1988, through the 'Exon-Florio' provision, and in 1992 through the 'Byrd Amendment'. In 2007 the mandate of CFIUS was broadened through the adoption of the Foreign Investment and National Security Act of 2007 ("FINSA").	• Foreign investment and national security act of 2007 (Public law 110–49—July 26, 2007)

2.2.3. Legislation and practices to control foreign investment

All five selected third countries have adopted national measures to control foreign investment via screening procedures. Note that in these countries there are no specific procedures for foreign investments in energy infrastructures, but the procedures apply to all economic sectors or targeted sensitive economic sectors including energy. In addition, Russia and China have adopted law setting ownership restrictions which considerably limit foreign investments in certain energy sectors. Australia has set an ownership restriction clause within a 99-year lease of the transmission electricity network as further detailed in the section below. Golden shares and 'other practices' were not identified in these countries. The different types of control measures are summarised in the table below and further detailed in the following sections.

Country	Screening laws	Ownership restrictions in energy infrastructures		
		100% State ownership by law	100% national company ownership by law	Ownership limits by law
Australia	√			√
Canada	√			
China	√			√
Russia	√	√	√	√
United States	√			

2.2.3.1. Investment screening laws

The following sections detail the different elements of the investment screening laws in the selected third countries. It allows identifying differences and similarities across the different laws in place.

- ***Nationality of the investor***

In all five countries the screening laws apply to foreign investors only and not to national investors as this is the case in certain EU countries. Note that Australia and Canada set different thresholds to trigger screening procedures depending on the origin of investors. Australia sets less stringent thresholds for investments by private entities from a free-trade agreement country (Chile, China, Japan, New Zealand, South Korea, United States) in 'non-sensitive' areas. In the same vein Canada 'net and benefit' procedure sets more stringent thresholds for non-WTO investments and for State-owned investors compared to private ones. In Russia, the trigger of the screening procedure is more stringent for foreign investments from State or International Organisations and affiliated bodies.

- ***Trigger of the screening procedure***

The five selected countries have adopted different approaches to trigger a screening procedure. The table below provides an overview of the criteria considered to trigger a screening procedure in these five countries. These elements are further detailed in the text below.

Criteria to trigger a screening procedure	Australia	China	Canada	United States	Russia
Monetary value of transaction	√		√		
Origin of investment	√		√		√
Foreign investments from State or International Organisations and affiliated bodies.					√
Investment in pre-defined strategic entities or sensitive sectors	√				√

Investment in entities subject to foreign ownership restrictions		√			
Potential risks to national security			√	√	√

In **China**, the law sets a list of sectors where foreign investors are subject to ownership restrictions (e.g. joint ventures with Chinese companies, Chinese entity controlling the majority of shares). It concerns in the energy sector the following industries:

- Exploration and exploitation of oil and natural gas (including coal-bed methane, but excluding oil shale, oil sands and shale gas).
- Construction and operation of nuclear power stations.
- Construction and operation of power grids.
- Construction and operation of pipeline networks for gas, heat, water supply and sewage in cities with the population of not less than 500,000.
- Construction and operation of gas stations.

Despite being subject to ownership restrictions foreign investments in these industries are still subject to a case by case screening procedure. A contrario, for sectors where foreign investments are not subject to ownership restrictions, there is no screening procedure but only a procedural record-filing is required after the investment.

In **Canada**, there are different thresholds depending on the origin of investor, the nature of investment (direct or indirect), the amount of investments and the risk of investments. The 'net-benefit' procedure applies to:

- Private sector WTO investments. The review's threshold is $1 billion in enterprise value for investments to directly acquire control of a Canadian business by: (1) WTO investors that are not state-owned enterprises; and (2) by non-WTO investors that are not state-owned enterprises where the Canadian business that is the subject of the investment is, immediately prior to the implementation of the investment, "controlled by a WTO investor".
- Private sector trade agreement investments. The review threshold is $1.5 billion in enterprise value for investments to acquire control of a Canadian business by: (1) trade agreement investors that are not state-owned enterprises; and (2) by non-trade agreement investors that are not state-owned enterprises where the Canadian business that is the subject of the investment is, immediately prior to the implementation of the investment, "controlled by a trade agreement investor". Trade agreement investors include entities and individuals whose country of ultimate control is party to several agreements, including the Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act.
- State-owned enterprise WTO investments. The review threshold for 2017 is $379 million in asset value for investments to directly acquire control of a Canadian business by: (1) WTO investors that are state-owned enterprises; and (2) non-WTO investors that are state-owned enterprises where the Canadian business that is the subject of the investment is, immediately prior to the implementation of the investment, "controlled by a WTO investor".

Whereas the national security procedure in Canada does not have such thresholds and is triggered in case the foreign investment is considered as potentially 'injurious' to national security.

In **Russia**, a screening law procedure is triggered where a foreign investor plans to acquire control of a strategic entity, or where the take-over of a Russian company may entail risks to national defence or national security on a case by case assessment. Strategic entities in the energy sector are the ones involved in:

- Transportation of natural gas by pipeline;
- Transportation of oil and oil products by pipeline;
- Transmission of electric power (except for transmission of power through distribution networks);
- Ops and dispatching services in electric power production and supply;
- Geological survey and/or development of federal subsoil reserves;
- Construction, operation and decommissioning of nuclear facilities.

Furthermore, the screening procedure in Russia applies to foreign investments of more than 25% of total votes conferred by voting stock of any Russian company, or of a possibility to otherwise block decisions of the management bodies of such Russian company, by a foreign State; or an international organization; or an entity controlled by either of them.

In **the United States**, a screening law procedure is triggered if it is considered that a planned investment by a foreign investor can lead to national security concern that arise as a result of the transaction. There is no specific threshold.

Assessment under the review procedure

As soon as foreign investments are falling under a screening procedure, competent authorities must assess whether they should prohibit or allow, where relevant under certain conditions, foreign investments. This assessment phase differs between the five selected countries. Some have developed specific indicators/criteria in law or guidelines to carry out these assessments whereas other countries seem to apply a more discretionary approach.

	Australia	China	Canada	United States	Russia
Indicators/criteria for the assessment set in law			√	√	
Indicators/criteria for the assessment in guidelines	√		√		
Discretionary assessment	√	√	√		√

In **Australia**, the competent authorities must apply a national interest test to assess whether a foreign investment must be prohibited, allowed with or without conditions. The test is not defined in law. The competent authorities have full discretion in the matters that they may take into account. However, the Foreign Investment Policy document identifies factors that may be considered. These factors include: national security; competition; other government policy objectives; the impact on the economy and community; and the character of the investor. The Policy identifies certain investments that may be less likely to be approved, including investments in sensitive businesses and investments that would allow the investor to control the global supply of a product. In the case of investments by foreign government bodies, the Policy advises that the Government will consider whether the investor is 'pursuing broader political or strategic objectives that may be contrary to Australia's national interest' as a factor in its decision-making.

According to submissions made to a recent Senate Committee inquiry on foreign investment, review of foreign investments in critical infrastructure will usually involve a consideration of the applicant; the nature

of the investment proposal; the criticality and potential vulnerabilities of the infrastructure being acquired; and the general characteristics of the critical infrastructure sector in which the investment is to occur[43].

In **Canada,** foreign investments that do not fall under the 'national security review' procedure but still fall within the thresholds of the 'net-benefit' procedure must be subject to a 'net-benefit' test by the relevant competent authority. The net-benefit tests criteria are set in law and must be taken into account by the competent authority when issuing a decision on the fate of the foreign investment. These criteria are:

- the effect of the investment on economic activity in Canada;
- the degree of participation by Canadians in the business in question;
- the effect of the investment on productivity, efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution to Canada's ability to compete globally.

Concerning the national review procedure in Canada, there are no legal criteria to assess whether the investment is 'injurious to national security'. In December 2016, the Government approved the '*Guidelines on the National Security Review of Investments*' for investors to better understand the review[44]. These Guidelines state that the decision over the investment under the national security review involve the study of the nature of the asset or business activities and the parties, including the potential for third party influence, and include a non-exhaustive list of factors of consideration at this regard:

- The potential effects of the investment on Canada's defence capabilities and interests;
- The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
- Involvement in the research, manufacture or sale of goods/technology identified in Section 35 of the Defence Production Act;
- The potential impact of the investment on the security of Canada's critical infrastructure.
- The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- The potential of the investment to enable foreign surveillance or espionage;
- The potential of the investment to hinder current or future intelligence or law enforcement operations;
- The potential impact of the investment on Canada's international interests, including foreign relationships; and,
- The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.

In **the United States**, the CFIUS must by law assess the following specific national security risks from a foreign investment. This includes:

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[43] Australian Senate Standing Committee on Economics, Foreign Investment Review Framework, April 2016, Chapter 3, p31

[44] https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html

- homeland security, including its application to critical infrastructure such as energy assets and critical technologies;
- investments made by foreign government controlled entities from countries that are not considered US allies
- the adherence of foreign countries to non-proliferation control regimes
- the potential effects of the transaction on US international technological leadership in national security-related areas; and
- issues related to terrorism.

For each security risk the CFIUS must carry out a thorough assessment of the:

- the threat, which involves an assessment of the intent and capabilities of the acquirer,
- the vulnerability, which involves an assessment of the aspects of the U.S. business that could impact national security, and
- the potential national security consequences if the vulnerabilities were to be exploited

The United States law (Section 721) contains a non-exhaustive list of elements to be considered during the assessment which includes specific items related to energy such as:

- domestic production needed for projected national defense requirements;
- potential effects on United States critical infrastructure, including major energy assets;
- long-term projection of the United States requirements for sources of energy and other critical resources and materials;

In **China and Russia** there are no specific criteria in law and/or guidelines to assess the risk from foreign investments and the decision from competent authorities to prohibit or allow the investment is rather discretionary.

Specific timeline for the procedure and possibility of appeal

The table below provides an overview of the overall legal timeframe to complete a review procedure in the selected third countries. There are major differences between Australia, Canada and the United States. No specific timeframe was identified in China and Russia.

	Australia	China	Canada	United States	Russia
Overall timeframe of the screening procedure	40 days	-	200 days	90 days	80 days

In **Australia**, upon receiving a notification of investment falling under the mandatory screening review, competent authorities have 30 days to take a decision[45]. If the investor does not receive a decision, or an interim order, within 10 days after this time limit (i.e. 40 days after making the notification), it may carry out the investment[46]. Screening decisions cannot be appealed.

[45] Section 77, FATA
[46] Section 82, FATA

In **Canada**, the competent authorities have 45 days upon receipt of the notification of the foreign investment to notify foreign investors that no further action will be taken or that they consider that the investment could be injurious to national security. In the latter, this triggers a review procedure of up to 90 days. Including all the interim review periods and the final period in which the Governor in Council may act with respect to the investment, a full national security review may last up to 200 days.

In **the United States**, the CFIUS review procedure starts when parties to a proposed or pending transaction jointly file a voluntary notice with CFIUS Upon receiving the notice, the Staff Chairperson will promptly determine whether the notice is complete and satisfies the requirements stated in the regulations. The review procedure must be carried out within 30 days. The CFIUS will proceed to a subsequent 45-day investigation (§ 800.503 of the regulations), after the 30-day period under certain circumstances (e.g. at least one member of CFIUS determines that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated). In case the CFIUS requires the involvement of the President, the president must decide within 15 days of the CFIUS's completion of the investigation. The decision of the president is not subject to judicial review.

In **Russia,** the 'authorised body' from the Russian administration has 14 days to assess the notifications of investments from foreign investors and to identify whether the foreign investment is subject to the screening procedure. As a result of these 14 days if the 'authorised body' considers that the foreign investments fall under the screening procedure, they must carry out an investigation phase of 30 days and prepare an investigation report to be submitted where requested for consultation to other administrative bodies that must prepare some conclusions on the report within 20 days. The authorised body then must submit the entire investigation dossier to the Commission for control of foreign investment which has 30 days to adopt a decision on the fate of the foreign investment. The timeframe of the entire procedure cannot exceed three months. In exceptional case the Commission can decide to extend the overall timeframe to six months. The decision of the Commission can be subject to appeal to the High Court of the Russian Federation.

No specific timeline for the procedure was identified in China. Foreign investors subject to the screening procedure may file an administrative review or an administrative lawsuit to challenge such decisions.

Measures imposed as a result of the screening procedure

Measure imposed as a result of a screening procedure are quite similar in the selected third countries. They include the prohibition of the foreign investment, the entire approval or the approval under certain conditions which mitigate the potential risks.

In **Australia** the competent authority can prohibit a foreign investment if they consider that it is contrary to the 'national interest'. They may also attach any conditions deemed necessary to protect the national interest.

In **Canada**, under the net-benefit procedure the competent authorities allow foreign investors to submit undertakings to ensure that the investment is of net benefit to Canada. If the competent authorities are not satisfied that the investment will be of net benefit to Canada they prohibit the investment. As a result, the foreign investor shall not implement the investment to which the notice relates or, if the investment has been implemented, shall divest itself of control of the Canadian business subject of the investment. Under the procedure on investments 'injurious to national security', competent authorities can:

- prohibit the investment and require that the foreign investor does not implement the investment or divest themselves of control of the Canadian undertaking
- allow the investment under certain conditions or written undertakings from the foreign investor
- allow the investment without any mitigation measures.

In the **United States**, the CFIUS or the US president can allow either entirely or under certain mitigation measures a foreign investment or block a foreign investment. The mitigation measures objectives are to:

- Limit access to certain facilities or information to authorised US citizens
- Ensure that only US citizens handle certain critical functions

- Establish governance mechanisms to place critical decisions in the hands of US citizens and/or ensure compliance with all required actions
- Impose reporting and independent audit requirements, or require company personnel to meet with US government personnel periodically to discuss the company's products, services, and business activities, or market conditions and developments generally
- Establish guidelines and terms for handling existing or future US government contracts, customer information, and other sensitive information
- Provide the US government with the right to review certain business decisions and object if those decisions raise national security concerns
- Exclude certain sensitive assets from the transaction
- Investigations and remedial actions if anomalies or breaches are discovered or suspected

In **Russia**, the Commission for control of foreign investment can adopt a preliminary approval of the foreign investment, a refusal to grant a preliminary approval, or an approval of the foreign investment under certain conditions. A list of conditions is provided in the law such as for example the obligation to process the natural resources, produced by a business of strategic importance that exploits subsurface areas with federal status, in the Russian territory.

In **China**, the competent authorities can block or allow the foreign investment, but no specific requirements on the measures that must be applied as a result of the screening procedure were identified in the law.

2.2.3.2. Ownership restrictions

Russia, China and to some extent Australia have adopted ownership restrictions in the energy sector**.**

In **Russia**, there are several ownership restrictions on energy infrastructures. The law imposes that certain infrastructures must be owned by the federal State or by Russian undertakings only. According to the Gas Supply Law, the 'Unified System of Gas Supply' which encompasses upstream (gas production), midstream (gas transportation and storage) and downstream (gas delivery) segments can be only held by a Russian company which is Gazprom.

According to the electric Power Law, the undertaking in charge of centralized dispatching and operational control of electricity so called 'System Operator of the Unified Electricity System' must be entirely owned by the Federal State.

The unified national (all-Russian) power network (the "UNPN") is comprised of power transmission networks. At least 50% plus one share of the whole voting equity stock of the UNPN operators shall remain in federal ownership**.**

The Federal Law on Utilization of Nuclear Energy (as amended) requires that nuclear facilities (including nuclear power plants) and nuclear materials in the Russian Federation can only be owned by either the federal State or Russian companies included in the relevant lists approved by the President of the Russian Federation; besides, operation of nuclear facilities shall require a special license.

In **China** there are three levels of ownership restrictions which allow foreign investors to invest but with the participation or under the control of a Chinese undertaking:

- industries limited to equity joint venture and cooperative joint venture
- industries with the Chinese parties holding a majority of shares, and
- industries with the Chinese parties holding a relative majority of shares.

In case of 'equity joint venture and cooperative joint venture' only Chinese-foreign equity joint venture and Chinese-foreign cooperative joint venture are allowed (i.e. excluding wholly foreign-owned enterprises). In case of 'Chinese parties holding a majority of shares' the total investment proportion of the Chinese parties in a project with foreign investment shall be 51% or more; and "with the Chinese parties holding a relative majority of shares" means that the total investment proportion of the Chinese parties in a project with foreign investment shall be higher than that of any foreign party.

These three types of ownership restrictions apply to the following energy infrastructures included in the negative list adopted under the 2017 foreign investment catalogue:

- Exploration and exploitation of oil and natural gas (including coal-bed methane, but excluding oil shale, oil sands and shale gas): limited to equity/cooperative joint venture operation.
- Construction and operation of nuclear power stations: Chinese parties holding a majority of shares.
- Construction and operation of power grids: Chinese parties holding a majority of shares.
- Construction and operation of pipeline networks for gas, heat, water supply and sewage in cities with the population of not less than 500,000: Chinese parties holding a majority of shares.
- Construction and operation of gas stations: in case a foreign investor has established more than 30 chain gas stations which sell petrol products of different varieties and brands from multiple suppliers: Chinese parties shall hold the majority of shares.

In **Australia**, the Federal Government imposed conditions on the Government's 99-year lease of the major electricity transmission network in 2015. These restrictions included conditions that foreign members of the investing consortium were not allowed to acquire more than 50% of the total interest in the network; operation and control of the network is to be undertaken solely from within Australia; and all data on electricity supply and personal information is to be kept within Australia. Additional conditions on the governance arrangements for the consortium were also imposed.

2.2.4. Opinion from foreign investors in third countries

Since the policies and legislation described above intend to restrict investment, an interview phase was launched to obtain opinions from investors in the energy sector in different selected third countries. Despite a lot of efforts to reach relevant foreign investors in electricity and gas infrastructures in these third countries, the project team could only gather the view of a large energy company, which is investing in China[47]. The paragraphs below summarise the main points of the interview.

- *The company's investments in China*

The company's investments in China involve multiple sectors: nuclear energy, traditional thermal power and energy distribution.

- *Aspects of the screening procedure*

According to the company, the procedure is not difficult to understand. The process generally went well. Competent authorities provided sufficient information on all aspects of the procedure, and there was no problem of communication. In fact, they had direct contact with the Ministry of Economy as well as other competent authorities which were very efficient. The company also mentioned that most of their Chinese partners are large Chinese state-owned companies and they are usually controlling shareholders. Thus, they are inclined to facilitate the completion of the screening procedures. The procedure was fast and lasted between three to six months. They however highlighted that the timeframe is significantly much longer if it includes the time needed for seeking project approval from the National Development and Reform Commission.

- *Good practices in the screening procedure*

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[47] The name of the company will not be disclosed

During the national security review process, the possibility to do face-to-face meeting appointments with competent authorities was considered as a good practice since during these meetings they could clarify many misunderstandings in terms of whether certain projects could be deemed of national security concern or not.

- *Areas of improvements in the screening procedure*

The review process involves several implementing competent authorities. When novel issues come up, the administrative power is not clearly allocated among these authorities and they sometimes do not share a common interpretation to certain regulations. For example, the company recently had to increase capital and modify an operation mode in a project due to the uncertainty caused by a new technology. The Commission of commerce, however, considered that the company had to acquire new approval from the National Development and Reform Commission for such minor changes given the political sensitivity of this project. As a result, the company had to use shareholder loans as an alternative to meet the urgent need for capital. They are still communicating with competent authorities to solve the approval issue. The interviewee concludes that competent authorities facing novel issues tend to interpret regulations conservatively to avoid possible responsibilities.

3. POTENTIAL GOOD PRACTICES

Based on the review of the investment screening mechanisms adopted in Member States and in five non-EU countries as well as the review of policy and academic writings on the topic, we set out below some observations on potential good practices targeting such mechanisms.

As noted at the outset of the report, investment screening mechanisms analysed in this report are mechanisms which allow a State to screen investments to ensure security of supply of gas and electricity. In this regard it must be borne in mind that as EU gas and energy markets become more interconnected and given that EU provides for inter alia a regulated tariff regime and third-party access, foreign ownership of energy infrastructure should *per se* no longer be a major concern from a security of supply perspective. The better interconnected the electricity and gas markets become, the more liquid and deep the hubs are and the better and non-discriminatory the implementation of EU law by national regulators and ACER is, the greater the security of supply will be.

Any screening investment legislation should ensure that it does not hamper the achievement of EU internal market in electricity and gas by deterring the crucially needed investment in the gas and electricity sector as the EU moves to a zero-carbon economy.

More effective to have a screening law than a blanket prohibition on private ownership of energy infrastructure

This report has shown that a great majority of Member States either prescribe that the ownership of gas and/or electricity infrastructures must be 100% state-owned or under the control of the State, or de facto control gas and electricity infrastructures. In other words, in most Member States there is a blanket prohibition of private ownership of gas and electricity infrastructures. Many of the States which have a blanket prohibition are in Central and Eastern Europe where the electricity and gas markets are not well integrated.

As the IEA explains in its response to the questionnaire (*see section 2.1.3*) the transition to zero carbon economy, the need to integrate renewables into the energy system and digitilisation of the sector require huge investments in the energy sector and related infrastructures. It is unlikely that state-owned energy companies will be able to raise the investment on their own. An equity injection from the private sector is likely to be needed. For this reason, States which regard foreign ownership of energy infrastructure as a security of supply concern should, instead of keeping ownership restrictions on electricity and gas infrastructures, consider introducing only one transparent and predictable screening mechanism along the lines discussed further below. This would allow them to enable some (perhaps capped to a certain (25 or 50%) percentage of the total shareholding) private investment in the sector whilst managing the risk.

Identification of the assets relevant for ensuring security of supply and related justification

Assets may be regarded as key for ensuring security of supply in a different manner from one Member State to another due, inter alia, to the differences in energy mix, cross border interconnectivity and liquidity of the energy markets. Member States when identifying these assets should provide a justification on their relevance for ensuring security of supply.

Guiding principles in drawing up the screening mechanism

The screening mechanism should be developed based on the following guiding principles: certainty, predictability, consistency, proportionality, transparency and accountability.

Mandatory prior notification

Investors (whether domestic or foreign) would be required to notify the competent authority of its intention to carry out an investment which would fall under a screening procedure. In such case, the investor is certain that the investment will not be banned in the future. A discretionary (voluntary) procedure implies a risk that a State will not be aware of transactions that could pose a risk to security of supply

Clear timeframes

The timeframes set should not be longer than 3 months if this is not a major transaction. The grounds for extending the period of review should be clearly enumerated. The start and end of the procedure should be clearly defined in the law. Similarly, should the mechanism allow the competent authority to re-open proceedings, the grounds for doing so should be also clearly set out in the law.

Clear identification and definition of triggers

The mechanism should clearly identify and define the triggers of the investment screening mechanism. These could include for example a combination of:

- The targeted sectors
- The targeted assets (e.g. the ones relevant for securing security of supply)
- The type of targeted transactions
- The threshold size of investment

Setting out a threshold related to the size of the investment will ensure that the screening mechanism does not unnecessarily apply to unproblematic transactions. Certain EU Member State and non-EU countries adopted a trigger which is a combination of thresholds based on the size of the investment and percentage of ownership to be acquired. An approach to be considered is to set a trigger to acquire (i) 25% of the ownership in certain more critical assets for security of supply and (ii) control for other assets considered less critical. Setting the trigger for screening at 25% or higher ensures that portfolio investments by pension funds are not subject to screening mechanisms. Such investments are favored by Member States due to their relatively long-term nature.

Detailed grounds for review

For transparency and legal certainty, the screening mechanism should set out clearly what grounds will be used to review investments instead of referring to broad concepts such as 'national interests'. The key reason for ensuring that the grounds for review are defined clearly and in detail is to ensure that the right balance is struck between on the one hand the need to encourage the investments in the energy sector and on the other hand the need to ensure security of supply. The more opaque and discretionary the screening mechanism is the more it will act as a deterrent to investment. Such grounds for review could also be based on a cost benefit analysis of the potential investment

Screening decisions to provide justification

To ensure legal certainty and transparency of the screening mechanism the decision of the competent authority should set out the reasons to authorize/reject or authorize under certain conditions a foreign investment.

Competent Authorities options available in law as a follow-up to the screening review

The law setting out the screening mechanism should clearly identify the options available to the competent authority when reviewing a transaction including whether the approval can be made conditional on certain actions being taken by foreign investors.

Administrative and judicial review set in law

To ensure legal certainty and transparency of the screening mechanism, the screening law should contain a provision allowing the screening decisions to be subject to an administrative and/or judicial appeal. The time frames and grounds of appeal should also be spelt out in the law. Such review should ensure that that the investor is protected from possible arbitrary decisions of the competent authority by providing for judicial redress.

Consultation procedures set in law

The screening law should detail the communication/consultation procedures between the competent authority and the investor as well as between the competent authority and any other competent authority which may be consulted by the authority before reaching its decision. The competent authority should also provide clear guidelines for investors on how to fulfill the requirements of the screening procedure.

Screening decisions to be made public while respecting confidentiality of sensitive information

Decisions should be made public and the competent authority should prepare regular reports analyzing the implementation of the screening mechanism. These could be submitted to the national parliaments and/or the Commission for information purposes. The confidentiality of sensitive information must be ensured. The publicity of the decisions should enhance the transparency of the mechanism and ensure public and investor confidence in the process.

Rules to stop the circumvention of the mechanism

The screening laws should contain rules to prevent companies from circumventing the investment screening review procedure such as for example to avoid the use of letter box companies and other types of complex corporate structures to avoid the application of the procedure.

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