

STATEMENT

REFERRED TO: A Draft Amendment and Supplement of the Investment Promotion Act, No. 49-354-01-68, introduced June 22, 2023.

The Center for the Study of Democracy (CSD) supports the initiative to adopt national legislation introducing a mechanism for the implementation of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening foreign direct investment in the Union. In light of the dynamic geopolitical and geo-economic environment, and the legislative actions already taken by other EU Member States, as well as the European Commission's communication on European Economic Security Strategy¹, this initiative can be defined as a necessary, albeit significantly overdue, step towards protecting Bulgaria's economic security against corrosive capital inflows.

The topic of corrosive capital inflows and their impact on the economies of Europe and Bulgaria has been explored in detail in a series of CSD reports since 2016 on countering malign foreign influence.² In late 2022, in its joint publication with the Center for International Private Enterprise in Washington, DC, "Investment Screening. An Institutional and Legal Framework"³ and "Investment Screening in Bulgaria"⁴, the Center emphasized the need for the adoption of a foreign investment screening mechanism as one of the key tools to ensure economic security for the country. In light of the Russian military aggression in Ukraine and the Kremlin's declaration of EU countries, including Bulgaria, as "unfriendly", the publications identify the serious increase in risks to Bulgaria's economic security, the lack of adequate protection mechanisms, and the real threat of Bulgaria falling into an investment and technological blackout or isolation in the EU, with all the negative consequences for economic growth and sustainable development. In this regard, the Centre recommended that the necessary legislative changes for the protection of economic security should be placed in the broadest possible context and that the mechanisms for more extensive discussion provided for in the legislative initiative procedures of the Council of Ministers should be

¹ European Union: European Commission: [Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"](#), 20 June 2023, JOIN (2017) 20 final.

² Shentov, O., Stefanov, R. and Vladimirov, M. (eds.) (2018), *The Russian Economic Grip on Central and Eastern Europe*, New York, Routledge, 25 October 2018; Georgiev, G., Petrova, V. and Tsabala, K. (2023), [Breaking the Code: Russian and Chinese Disinformation and Illicit Financial Flows in Southeast Europe](#), Sofia, Center for the Study of Democracy, 19 April 2023.

³ Boycheva, I. and Terziev, P. (2022), [Investment Screening. Institutional and Legal Framework](#), Sofia, Center for the Study of Democracy, 27 December 2022.

⁴ (2022), [Investment Screening in Bulgaria](#), Sofia, Center for the Study of Democracy, December 2022.

used and the role and views of the existing mechanisms and institutions in this area, such as the Security Council of the Council of Ministers, the State Agency for National Security, the Ministry of Finance, the Ministry of Innovation and Growth, the Ministry of Economy. In this sense, it would be desirable that the Bill proposed by the group of MPs be directed for coordination and preparation to the Council of Ministers, where it could be merged with other existing initiatives in this area at government level, as well as to provide a broader strategic initiative.

In introducing the mechanism, it is important to strike the necessary balance between encouraging foreign investment and guaranteeing economic security and sovereignty. In this regard, it is necessary, alongside the introduction of foreign investment screening, to take measures to support constructive capital - to attract high-tech investment from EU and G7 economies⁵. For greater efficiency and cohesion, it is advisable that these will be part of an overall strategy for the country's economic security, in which increasing the flow of investment into the economy should be a key element. The experience of similar European economies in this area, such as the Czech Republic, should also be studied and taken into account, as well as global best practices, such as those described by the CELIS Institute⁶.

The introduction of the mechanism requires a thorough analysis of its potential impact. The preliminary impact assessment lacks an adequate cost-benefit analysis of the Bill. However, in addition to the assessment of the impact on public finances, an assessment of the impact on private actors, especially on the creation of additional administrative burdens, should also be carried out. This will enable a comprehensive understanding of the potential implications of the mechanism for all stakeholders.

In the course of further work on the introduction of the foreign investment screening mechanism, it is advisable to hold consultations with business representatives in order to effectively present the essence of the investment screening mechanism. Engaging private sector stakeholders will gather additional ideas and recommendations, address potential concerns and contribute to a better-informed legislative process.

According to the motives, the bill has two main objectives - harmonisation of national legislation with EU law and protection of the Bulgarian economy from the inflow of corrosive capital.

- With regard to corrosive capital inflows, it should be taken into account that the investment screening mechanism alone cannot solve this problem. The mechanism is only one of the measures needed to protect Bulgaria's economy vulnerable to corrosive capital. It is advisable to consider a comprehensive package of policy and legislative measures to ensure the country's economic security.

⁵ (2021), [Promoting Constructive Capital in Bulgaria. Regional Innovation and Private Sector Development](#), Sofia, Center for the Study of Democracy, 27 September 2021.

⁶ The Center for the Study of Democracy is the national coordinator for Bulgaria for the CELIS Institute.

- Furthermore, close coordination with the European Union's efforts in this area is essential. In its Communication on a European Economic Security Strategy of 20 June 2023, the European Commission identifies the foreign investment screening mechanism as a key priority in the design of the Strategy, and plans to evaluate and revise Regulation (EU) 2019/452 by the end of 2023.
- With regard to the harmonisation of Bulgarian legislation with EU law, special attention should be paid to the specific nature of Regulation (EU) 2019/452 compared to the other regulations provided for in Article 288 of the Treaty on the Functioning of the EU. Rather than imposing binding rules or introducing a general verification mechanism, the current Regulation empowers Member States to establish mechanisms while setting common standards to which these mechanisms should adhere. It appears from the draft law that this feature has not been taken into account. The draft law relies heavily on references to the Regulation, which, however, sets standards without laying down specific legal rules for their implementation.

Regarding the systematic place of the regulation of the mechanism in the Investment Promotion Act

1. We find it inappropriate to make the investment screening part of the Investment Promotion Act, as the purpose of the mechanism does not correspond to the main objectives of the Act, as set out in Article 1(2). Instead, we recommend that a separate and independent piece of legislation should be drafted, dedicated solely to the regulation of investment screening. This approach would preserve the focus and clarity necessary for the optimal functioning of the new procedure, while allowing the legislator to devote the necessary attention to the various aspects involved. An alternative approach would be to include screening as an instrument in a more comprehensive piece of legislation to address more aspects of the country's economic security, such as the export of dual-use goods, the application of economic and financial sanctions, the protection of the financial interests of the national budget and the EU, etc.

Regarding legal definitions

2. The definition of foreign direct investment proposed in the Bill provides a broader scope than that set out in the Regulation. In this respect, account should be taken of the recent judgment of the ECJ in *Xella (C-106/22)*⁷, in which the Court clarified the scope of the Regulation by determining that part of the Hungarian foreign investment control law is incompatible with EU law, in particular with the freedom of establishment enshrined in Article 54 TFEU, precisely because of its extended scope.

It is imperative to analyse which cases fall within the scope of the extended definition and assess their potential interaction with EU law. It is advisable to analyse the risks associated with potentially leaving certain cases outside the protective umbrella of EU law. If the current definition

⁷ Court of Justice of the European Union, [Case C-106/22 Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter](#), 13 July 2023.

remains unchanged, then it is advisable to add a legal definition of the term "extension of an existing investment".

As regards the substantive procedure

3. Art. 27a, para. 1 of the Bill regulates the conditions under which foreign direct investment (FDI) is subject to verification. In the current wording of Art. 27 para. (1) p.1, however, lacks clarity in specifying the fields of activity to which the investment must be related in order to be subject to verification. In order to ensure that the mechanism is applied accurately and effectively, its scope needs to be clarified, including by explicitly listing the fields of activity currently referred to in the Regulation. The sectors listed in Article 4 of the Regulation are indicative and should be further developed in national law for greater precision. Each Member State is free to determine the high-risk sectors that correspond to its specific economic and legal needs. In order for the legislator to make use of this possibility, it is advisable to make Article 27a(1) p.1 of the Treaty applicable. 27(1)p.1 should be amended to provide for the possibility of listing in detail the areas of activity as criteria for screening FDI by means of a separate regulation. In this respect, an approach similar to that used for the regulation of critical infrastructure could be adopted, where the criteria described in the regulation serve as guiding principles.

4. Article 27a(2) of the Bill introduces the possibility for FDI that does not meet the conditions under para. (1) to also be subject to verification by way of exception. However, as drafted, the provision raises certain issues which it is advisable to address explicitly:

- When does this provision apply? It is essential to define the criteria for when an investment poses a threat to security and public order, as this is a decisive factor for the subsequent screening process.
- What are the consequences for an investor who is unaware that his investment is subject to review and especially approval under Article 27a(2)?

5. The Bill provides for the Invest Bulgaria Agency to conduct a preliminary screening to determine whether the investment is subject to substantive screening by the Interdepartmental Council for Screening foreign direct investments related to security and public order. However, there are reasonable doubts that the Agency does not have the necessary expertise and capacity in various sectors to carry out such an initial assessment. In view of this, it is advisable to review the allocation of responsibilities and ensure that the relevant bodies to which certain powers are assigned have the necessary capacity and expertise to exercise them effectively.

6. Sections 27e(2) and (3) of the Bill introduce an official screening procedure. It is unclear why, under Art. 27g para. 3, the ex officio procedure may end with the same administrative act that ends the procedure initiated on the investor's application. It is advisable to reconsider the issuance of an administrative act for "authorization to make an investment" and "rejection of an application" to make an investment, in view of the fact that no application is made in this procedure.

7. Regarding the possibility of initiating a screening procedure after notification by a state or municipal authority, the question whether the authority should notify the Interdepartmental Council for FDI Screening only for investments subject to screening under Art. 1, or also for those under para. 2. The application of the procedure also in cases under Article 27a(2) once again raises the question of the need to clarify the content of this provision.

8. The current version of the Draft Law lacks objective criteria on the basis of which the verification of each investment is carried out, which creates a risk of a subjective approach. This is also contrary to the Regulation's requirement for transparency of the procedure.

9. Article 35b of the Bill introduces the possibility of imposing so-called "behavioural and structural measures". These measures resemble compulsory administrative measures within the meaning of the Administrative Offences and Penalties Act (AOPA). However, Article 23 of the AOPA requires that 'their type, the authorities which apply them and the manner of their application, as well as the procedure for their appeal, shall be regulated by the relevant law or decree'. The current wording of the Bill does not meet these requirements.

10. It is necessary to provide rules for the determination of the administrative pecuniary sanctions regulated in the proposed Article 34a.

11. It is advisable to regulate the procedure for appeals against administrative acts under this law.

12. It is necessary to provide for measures aimed at preventing abuses of the FDI screening mechanism that may lead to violations of fundamental rights and freedoms.

13. It is advisable to provide for measures under Article 10 of the Regulation in relation to the confidentiality of information obtained for the purpose of investment screening.