EU FOREIGN INVESTMENT SCREENING REGULATION TAKES EFFECT: A HIGH-LEVEL REVIEW OF REGIMES ACROSS EUROPE

Since the EU Foreign Direct Investment (FDI) Screening Regulation (Regulation 2019/452 or the “FDI Regulation”) entered into force in April 2019, there has been an increasing trend by Member States towards reforming foreign (direct) investment to shield strategic industries and businesses from opportunistic acquisitions by “foreign” investors. Whilst the Covid-19 pandemic has intensified consideration of this issue, there was a move by national governments to tighten foreign investment controls prior to the global outbreak.

Member States were required to implement the cooperation mechanism established under the FDI Regulation by 11 October 2020. The FDI Regulation does not create a new FDI regime, but seeks to regulate the screening of FDI transactions across the EU.

EU INVESTMENT SCREENING REGULATION IN FORCE: NATIONAL COMPETENCE, EUROPEAN COOPERATION

The FDI Regulation establishes a framework for the screening of FDI into the EU. It allows the European Commission to review certain investments of 'Union interest' (though the Commission has no direct power to block investments under the FDI Regulation) and to issue a non-binding opinion to the Member State in which the investment takes place.

The purpose of the FDI Regulation is to coordinate screening of FDI from third countries that could affect the security or public order of a Member State. To this end, the Member States are obliged to exchange information between themselves and with the European Commission.

The key features of the FDI Regulation are as follows:

- Allowing the European Commission to issue a non-binding opinion if (i) an investment poses a threat to the security or public order of more than one Member State, or (ii) an investment could undermine projects of interest to the whole EU, such as EU programmes for energy, transport and telecommunication networks (Galileo, Horizon 2020, Trans-European Networks and the European Defence Industrial Development Programme). The Commission will have the opportunity to 'influence' the outcome of foreign investment screening by issuing an opinion to a Member State.
- Allowing EU Member States to provide comments to the Member State reviewing an investment, when they consider that the investment will affect their security or public order. The reviewing Member State must give due consideration to such comments and opinions received. Member States may even provide comments where the Member State in which the investment takes place is not conducting a screening.
- Laying out an indicative list of factors to help Member States and the Commission determine whether an investment is likely to affect security or public order - and, thus, expanding the scope of investments to be reviewed. This list includes, *inter alia* the effects of the investment on critical technologies and dual use items (artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies); critical infrastructure (energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure); supply of critical inputs (energy, raw materials) and food security; access to sensitive information, including personal data, or the ability to control such information; and the freedom and pluralism of the media.

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EU MEMBER STATES: ACCELERATION OF IMPLEMENTATION OF NATIONAL REGIMES

As per the 11 October 2020 deadline for implementation of the FDI Regulation, 16 Member States are reported to have screening mechanisms in place, with a further seven Member States considering measures.

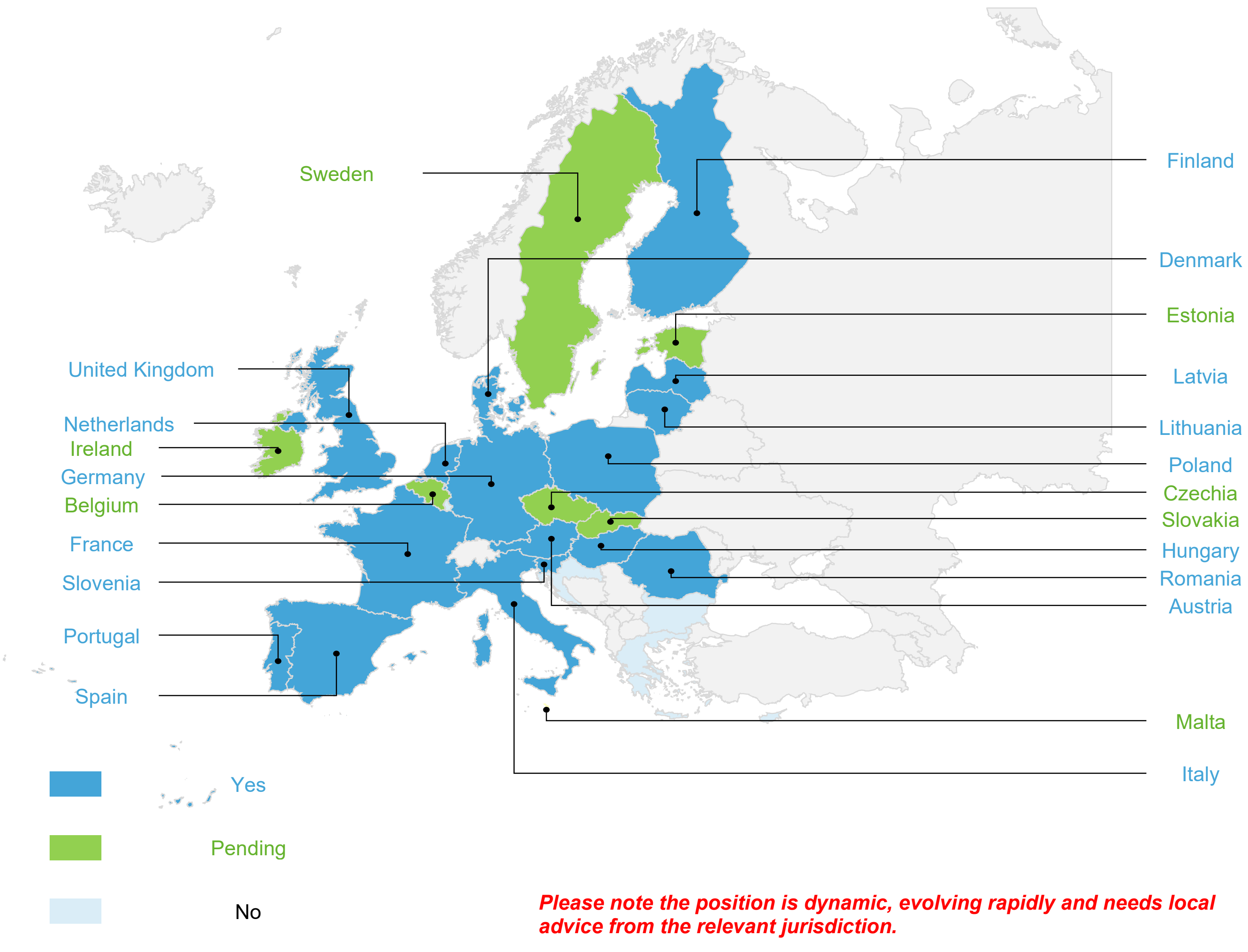
Five Member States – Bulgaria, Croatia, Cyprus, Greece and Luxembourg – do not have, nor do they have plans, to implement an FDI screening regime.

The European Commission has published [frequently asked questions] and a [Factsheet] about the FDI Regulation.

OVERVIEW OF MEMBER STATES WITH FDI REGIMES IN PLACE OR PENDING

THE INTERACTIVE MAP BELOW OFFERS A SNAPSHOT OF WHICH COUNTRIES IN EUROPE HAVE FDI SCREENING REGIMES IN PLACE.

IN THE TABLES OVERLEAF, WE PROVIDE FURTHER DETAILS, INCLUDING THE KINDS OF INVESTORS THAT MIGHT BE AFFECTED.



Please note the position is dynamic, evolving rapidly and needs local advice from the relevant jurisdiction.

COUNTRIES WITH FDI REGIMES IN PLACE

Austria

- Can apply to non-EEA/EFTA investors in certain specified sectors.
- Phase I clearance decision in 35 calendar days plus 1 month; additional 2 months for Phase II.

Denmark

- Very limited regime currently in place in the defence and offshore energy sectors.
- Proposals for FDI screening legislation are being prepared and legislation is expected to be tabled later in the current legislative session (i.e. before October 2021).

Finland

- Can apply to 'foreign' investors (being a non-EU/EFTA investor, or an entity in which such an investor has at least 10% of the votes or a corresponding influence) in certain specified sectors.
- A voluntary filing regime also operates.
- For mandatory filings, there is no time limit for the regulator to decide on clearance.

France

- Applies to direct or indirect acquisitions of (i) a 'controlling interest', (ii) in part or in full, of a business division operated by French entity (including an asset sale); or (iii) of more than 25% of votes by a non-EU/EEA investor, solely or jointly (temporarily lowered to 10% of voting rights when acquiring shares in listed companies), in a legal entity governed by French law that is active in certain specified sectors.
- Phase I clearance decision in 30 working days; phase II in 45 working days.

Germany

- Depending on the sector that the target operates in, the regime can apply to transactions involving non-German or non-EU acquirers intending to purchase German targets in certain specified sectors.
- Phase I clearance decision in 2 months; Phase II in 4 months with a possible further 4 month extension in complex cases.

Hungary

- Can apply to non-EEA/EFTA investors in Hungarian companies in certain sensitive and strategic sectors, and to acquisitions of a right (or assets that are indispensable) to operate or use infrastructure in sensitive sectors.
- Clearance decision in 60 days for sensitive sectors, with a possible 60-day extension; 45 days in strategic sectors.
- A more stringent regime is currently in place until 31 December 2020.

Italy

- Can apply to non-Italian investors in Italian targets in certain sectors, as proposed by the FDI Regulation, as well as in the financial, insurance and banking sectors.
- Clearance decision in 45 calendar days (30 calendar days for 5G communications), plus up to 30 more days if additional information requested.

Latvia

- Can apply to any investor in certain companies with 'national security significance'.
- Clearance decision in 4 months.

Lithuania

- Can apply to any Lithuanian or foreign investor in certain named Lithuanian companies or companies in specified sectors.
- Phase I clearance decision in 20 working days, subject to extension; phase II a further 14 working days.

Netherlands

- Some sector-specific measures in place, most notably in relation to restricting control of telecommunications businesses/assets by certain investors.
- A draft act is being considered which, it is envisaged, will be to review investments by foreign investors in a broader range of sectors and activities, although there is limited information on the application of this new regime.

Poland

- Applies to non-EU/EEA/OECD investors in a public company listed on the Warsaw Stock Exchange or a Polish target with activities in certain specified sectors.
- Phase I clearance decision in 30 calendar days, phase II in 120 calendar days.

Portugal

- Can apply to non-EU/EEA investors acquiring direct or indirect control over strategic infrastructures or assets in certain specified sectors.
- Voluntary filing regime.

Romania

- Can apply to any foreign or Romanian investor in certain specified sectors.
- Clearance decision typically takes up to two months, though there is no mandatory time limit.

Slovenia

- Can apply to any non-Slovenian investor in a Slovenian target active in certain specified sectors, as proposed by the FDI Regulation.
- Clearance decision in two months.

Spain

- Depending on the sector that the target operates in, the regime can apply to non-Spanish or non-EU/EFTA acquirers of Spanish targets.
- Certain acquisitions by non-EU/EFTA investors can be caught, regardless of the sector.
- Clearance decision in six months for investments worth over €5m.

United Kingdom

- Applies to investments by any foreign or UK investor that meet UK merger control thresholds (or EU thresholds, until the end of 2020) or if the target is active in certain sectors.
- Phase 1 clearance decision in 4 months; phase 2 in 24 weeks plus 30 working days (subject to extension).
- Voluntary regime.
- Legislation to introduce a much broader screening regime is expected to be introduced before the end of 2020.

COUNTRIES WITH PENDING FDI REGIMES

Belgium	Czechia	Estonia	Malta
• Very limited (ex post) regime applies only to the Flemish public sector. Draft federal law proposals are at a preliminary phase; no official draft of the legislation as yet available.	• Draft bill currently proposed would apply from 11 October 2020. Draft bill, if approved, would apply to acquisition by a non-EU investor (as defined) in certain specified sectors.	• The Estonian Government has declared that it intends to put in place an FDI screening regime and that the draft law should be ready for discussion and comments by the end of this year. At the moment no details have been disclosed.	• We understand that legislation is in the pipeline, but there is no precise target date for its introduction.

Ireland	Slovakia	Sweden
• The Irish government has announced that it will introduce legislation that will allow it to "assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside of the EU, based on a range of security and public order criteria".	• We understand that the government is drafting implementing legislation to implement Regulation (EU) 2019/452, though a draft is not currently available.	• On 4 June 2020, the Swedish Government referred a proposal to the Council on Legislation: • It is proposed that the act enter into force on 1 December 2020.

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