

## FDI SCREENING IN THE EU: EUROPEAN COMMISSION PUBLISHES ITS FIRST ANNUAL REPORT ON THE SCREENING REGULATION

On 23 November 2021, the European Commission published its first annual report<sup>1</sup> (**the Report**) relating to the implementation of [Regulation \(EU\) 2019/452](#) (**the Regulation**).

The FDI Screening Regulation was adopted on 19 March 2019, entered into force on 10 April 2019 and was fully implemented on 11 October 2020. At the time the proposal for the Regulation was tabled, only eleven EU Member States had a national screening regime for foreign direct investment (**FDI**). Today, that number stands at 18. A further six Member States are in the process of introducing a new screening regime, and only three remain without any screening regime at all, planned or otherwise (Bulgaria, Croatia and Cyprus).

The Report is split into four chapters: FDI figures and trends, legislative developments in Member States, screening activities by Member States in 2020 and an overview of the Regulation's cooperation mechanism over a period of just under eight months from 11 October 2020 until 30 June 2021. The last two chapters illustrate FDI screening activity in 2020 and the impact of the Regulation since its full implementation.

For the purpose of the Report, FDI refers to equity transactions, reinvestment of earnings and intercompany debt transactions. There is a distinction between mergers and acquisitions (M&A) and greenfield investments, where a parent company establishes new operations in a foreign country from the ground up, rather than buying existing facilities

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<sup>1</sup> This briefing is based on both the [annual report](#) and the accompanying [Commission Staff Working Document](#) which contains a breakdown of FDI transactions and legislative developments in each Member State.

## What does the Regulation aim to do?

The FDI Screening Regulation was put in place to ensure that the EU dimension of FDI transactions would be taken into account. Under its provisions, Member States are required to notify the European Commission (**the Commission**) and the other Member States of any FDI in their territory that is undergoing screening by providing certain information relating to the transaction, including details of the foreign (meaning non-EU) investor and the target, approximate value and the date of completion or expected completion. The Regulation is clear, however, that given the nature of sensitive investments, it is in the hands of each Member State to determine its own national screening regime. The status of each of these is shown in Table 1 below.

Table 1: National FDI screening regimes of Member States

1 January 2019 to 31 July 2021				
Adopted new regime	Amended existing regime	Initiated an official process expected to lead to amendments to existing regime	Initiated an official process expected to lead to adoption of new regime	No publicly reported plans for any regime
Czechia	Austria	Netherlands	Belgium	Bulgaria
Denmark	Finland	Portugal	Estonia	Croatia
Malta	France		Greece	Cyprus
Slovakia	Germany		Ireland	
Slovenia	Hungary		Luxembourg	
	Italy		Sweden	
	Latvia			
	Lithuania			
	Poland			
	Romania			
	Spain			

In addition, an express objective of the Regulation is to protect any impact on "projects or programmes of Union interest", which are listed in the Annex to the Regulation. The Annex was updated on 3 December 2021 and its original focus on innovation funding, satellite programmes, the Trans-European Networks and defence and nuclear systems has been supplemented to include the broader EU Space Programme, the Connecting Europe fund for infrastructure investment, the Digital Europe Programme, the European Defence Fund and the EU4Health Programme. A full list of projects by sector are displayed in Table 2, with asterisks denoting the ones that have been newly added.

Table 2: Projects and programmes of Union interest

Space / satellites	Defence	Infrastructure	Nuclear	Research, innovation and technology	Health
European GNSS programmes (Galileo & EGNOS)	European Defence Industrial Development Programme	Trans-European Networks for Transport (TEN-T)	Euratom Research and Training Programme 2021-25*	Horizon 2020 including, research and development under Articles 185 & 187 TFEU	EU4Health Programme*
Copernicus	Preparatory Action on Defence Research	Trans-European Networks for Energy (TEN-E)	European Joint Undertaking for ITER	Horizon Europe*	
Preparatory Action on Preparing the new EU GOVSATCOM programme	European Defence Fund*	Trans-European Networks for Telecommunications		Digital Europe Programme*	
Space Programme*	Permanent structured cooperation (PESCO)	Connecting Europe Facility*			

## One year on, how has the Regulation fared?

### *The FDI outlook in 2020 compared with 2019*

The Report notes that 2020 saw a decrease in FDI inflows almost everywhere in the EU, with the exception of Belgium, Hungary, Luxembourg, Spain and Sweden, which saw increased flows but a decline in the number of deals. There were 33.6% fewer M&A deals in 2020 compared to 2019 and 50% fewer greenfield investments overall in Europe across the same period. The sector hardest hit by the downswing was accommodation, which suffered a decrease of 70% in the number of foreign (non-EU) investor transactions in 2020 as compared to 2019. Close behind were transport (63%) and real estate (52%). Deals involving information and communication technologies (ICT) suffered the least, with a drop of 12% in 2020 compared to 2019, and a 53% increase in Q1 2021 as compared to 2020, bringing this sector back to pre-COVID levels. The largest share of FDI in Europe came from investors from the US and Canada, followed by the UK, the EFTA countries and China.

### *National FDI screening activity*

During 2020, Member States reported screening a total of 1,793 FDI transactions. 80% of these were not formally screened due to either negligible relevance to security or public order, or because they fell outside the scope of the national screening regime. The remaining 20%, or 362 transactions, were formally screened and 91% of these were cleared, with 79% gaining

unconditional clearance and 12% being approved subject to conditions. Only 2% of the 362 were prohibited and 7% were abandoned by the parties for unknown reasons.

### **Application of the cooperation mechanism in the Regulation**

From the time the Regulation came into force on 11 October 2020 until 30 June 2021, Member States notified a total of 265 transactions under the notification provisions of the Regulation. The Commission assessed the notified transactions first under a Phase 1 review within the 15 calendar-day deadline during which 80% obtained clearance. For the small number of cases that were not cleared in Phase 1, the Commission proceeded to a Phase 2 review where it could request further information from the notifying Member State. 14% of notified transaction were cleared following a Phase 2 review and 6% of cases were ongoing as at 30 June 2021. Phase 2 reviews involved mainly the manufacturing sector (50%), the ICT sector (17%) and the financial sector (8%). The time taken by the Commission to process Phase 2 reviews has varied and often depended on the time taken to provide any additional information requested by the Commission.

### **Feedback from Member States**

Reactions from Member States have been largely positive and all have noted the value of the Regulation as a tool for increasing awareness of the implications of FDI transactions in other Member States and across the EU. Many praised the ability to ask questions and offer comments to other Member States undertaking FDI screening and felt that the Expert Group established under the Regulation also provided valuable cooperation and best practice advice.

One significant issue raised was the additional workload for Member States with resource constraints in terms of staff for FDI screening activities, particularly in light of the complex multi-jurisdictional transactions typically notified under the Regulation and the tight deadlines that it contains. Member States also commented on the fact that they considered some requests for additional information to be too burdensome.

## **Looking ahead**

### **Future developments in relation to the Regulation**

The final section of the report contains suggestions for future improvement of the Regulation and its application and glimpses of what we can expect from the Commission in this regard.

In particular, the Commission is reluctant to table any amendments to the Regulation itself prior to the evaluation date of 12 October 2023 mandated in Article 15. As a result, amendments to Regulation timeframes should not be expected before then. The Commission has also rejected the idea of introducing a system to filter FDI transactions for eligibility under the notification mechanism, noting that "what may not seem to be a sensitive transaction to one Member State could well be sensitive to another". Changes to the Regulation in this regard therefore seem unlikely.

However, the Commission is open to issuing guidelines for the benefit of national screening authorities and investors. In relation to resource constraints, it has urged Member States to allocate additional resources to FDI screening as it has done itself, implying that work in this area is only expected to increase. Further developments may be expected in relation to clarifying the

interaction between instruments (such as merger control and screening of foreign subsidiaries) and synchronicity of screening for multi-jurisdictional FDI transactions involving multiple Member States. The Commission has also entrusted a third party to prepare a comprehensive study to assess the efficiency of the cooperation mechanism under the Regulation and how best to balance the benefits of FDI against national security and public order concerns. This study is expected to be published in the summer of 2022.

It is noteworthy that the Commission has repeatedly emphasised its expectation that all 27 Member States introduce national screening mechanisms. Hence, further developments can be expected, especially in relation to the handful of Member States that have no screening mechanism and no plans as yet to introduce one.

#### **Joint EU-US stakeholder outreach on investment screening**

Further action related to FDI controls may also arise out of the ongoing dialogue between the EU-US Trade and Technology Council, which met for the first time on 29 September 2021 to discuss a number of issues, investment screening being one of them. Both sides highlighted their commitment to protecting national security (and, for the EU, public order too) through investment screening controls and set up a working group specifically to address the issue. It was noted that any regime should be guided by "the principles of non-discrimination, transparency, predictability, proportionality, and accountability". The working group held a stakeholder outreach event on 2 December 2021 for experts from industry, academia and civil society to discuss areas for cooperation between the two sides. The matter is live!

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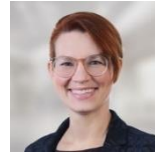
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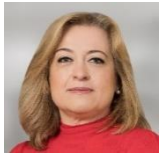
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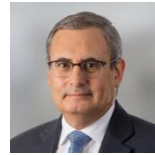
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