BRIEFING
EU Legislation in Progress

European Parliament

Screening of foreign investments in the Union

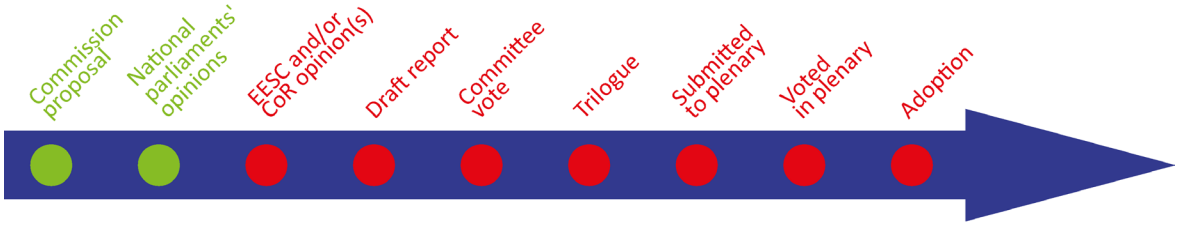
OVERVIEW

On 24 January 2024, the European Commission published a legislative proposal under the ordinary legislative procedure for a new regulation on the screening of foreign investments in the Union. It seeks to revise and repeal Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union.

Parliament's committee on international trade is expected to be in the lead to draft a report with contributing opinions from other committees; once adopted by the plenary, this will serve as Parliament's position for the trilogue negotiations with the Council based on the position of the EU Member States. Once a common position is achieved, Parliament and the Council will adopt it separately, after which the new regulation can enter into force.

Regulation (EU) 2019/452 was adopted in March 2019 and has been applied since October 2020. It has struck a delicate balance between the EU's strong belief in the benefits of open markets for its economic prosperity, and the acknowledgment of risks that may be associated with some foreign direct investment (FDI) in terms of security or public order. The Commission's evaluation of the 2019 FDI screening regulation's operation has revealed that the significant substantive and procedural discrepancies between national FDI screening mechanisms have undermined the effectiveness and efficiency of the legal instrument. It has therefore proposed a revision of the EU framework to enhance regulatory convergence.

Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council		
Committee responsible:	International trade (INTA)	COM(2024) 23 24 January 2024
Rapporteur:	To be determined	2024/0017(COD)
Shadow rapporteurs:	To be determined	
Next steps expected:	Draft report	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')



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Introduction

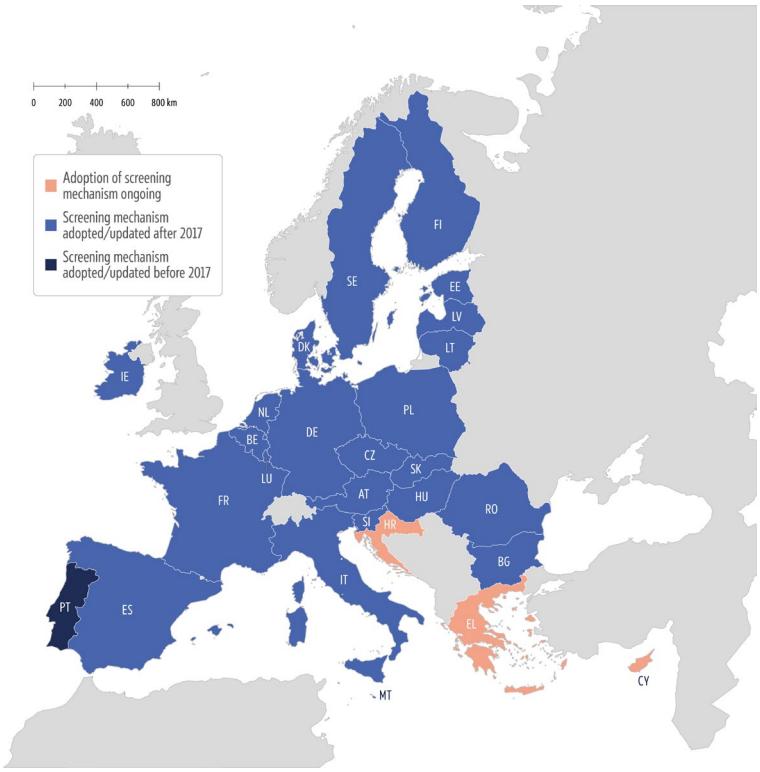
On 24 January 2024, the European Commission published a package of five initiatives to enhance the EU's economic security, in line with the EU's economic security strategy (built around the three pillars of 'promoting', 'protecting' and 'partnering') issued on 20 June 2023 amid increasing geopolitical tensions and accelerating technological shifts. One of these five initiatives, which falls under the 'protecting' pillar, is the legislative proposal for a revision of Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union ('FDI screening regulation'). The regulation entered into force in March 2019 and, after a transitional period, has been applied since October 2020.

Article 15 of the Regulation provides for a first evaluation by 12 October 2023. The Commission duly carried out an evaluation and issued a proposal for a new regulation that would repeal the existing regulation rather than merely amending the regulation in force. The Commission's evaluation has revealed that the considerable discrepancies between EU Member States' screening mechanisms in substantive, procedural and jurisdictional terms undermine the EU framework's effectiveness and efficiency and that there is a need for greater regulatory convergence.

Existing situation

The FDI screening regulation was proposed, adopted and entered into force against the backdrop of a proliferation and tightening of FDI screening regimes outside the EU. It has sought to strike a delicate balance between the growing perception that some FDI could pose risks to the EU's security or public order, and the significant concerns raised by policymakers and the business community in the EU that FDI vetting could undermine the EU's openness for FDI, which is vital for its innovation, competitiveness and economic prosperity.

Figure 1 – Member States with/without an FDI screening mechanism in place, as of August 2024



Source: Third Annual Report on the screening of FDI into the Union, European Commission, 2023, p. 9, with updates by the author.

The FDI screening regulation takes account of the distribution of competences between the EU (exclusive competence for trade and investment, except for portfolio investment, investment protection and dispute resolution pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU)) and Member States (which have sole responsibility for safeguarding their national security pursuant to Article 4(2) of the Treaty on European Union and for protecting their essential security interests under Article 346 TFEU).

The 2019 FDI screening regulation was a first step towards establishing an EU cooperation framework for FDI screening between the Commission, which hitherto had no formal role in this policy area, and Member States. When, in 2017, the Commission published its proposal for the 2019 FDI screening regulation, only 14 of the then 28 Member States had a national FDI vetting mechanism

in place, with a patchwork of divergent substantive and procedural rules that created a very fragmented regulatory landscape and an uneven playing field for investors in the EU. As of August 2024, 24 Member States had an FDI vetting regime adopted (see Figure 1).[1] The main features of the current FDI screening regulation may be summarised as follows:

- the legal basis for FDI screening is narrowly defined and focused on grounds of security or public order as opposed to a potentially broader approach based on economic grounds;
- the regulation is an enabling framework rather than a harmonising framework;
- it empowers Member States and has incentivised them to set up an FDI vetting regime; the creation of such a regime has remained voluntary, merely obliging Member States to provide details on the features of their existing or new FDI vetting mechanism;
- Member States remain free to choose the scope, coverage and procedural requirements of their FDI screening mechanisms; there is no EU FDI screening template for harmonising substantive or procedural aspects and timelines;
- the regulation sets out non-binding guidance in the form of an indicative list of factors that Member States may consider when screening investment transactions; these factors include critical infrastructure and critical technologies, the supply of critical inputs, such as energy or raw materials, access to sensitive information, the ability to control information, and the freedom and pluralism of the media;
- additional factors that may be considered are if the foreign investor is directly or indirectly controlled by the government of a third country, is involved in activities affecting security or public order, or if there is a serious risk that it will engage in illegal or criminal activities;
- the compliance of Member States' FDI screening mechanisms is limited to general principles and minimum standards, e.g. transparency, non-discrimination, judicial recourse against screening decisions, confidentiality, and measures to prevent circumvention;
- the regulation introduces a first-ever cooperation mechanism between the Commission and Member States for exchanges on FDI screening issues;
- the regulation introduces an obligation for Member States to notify all investment transactions that undergo screening through the cooperation mechanism;
- it introduces a procedure, which is subject to a timeline, for Commission opinions and Member State comments that may be sent to the Member State where the investment transaction takes place; it neither compels Member States to follow the opinion/comments in their final decision nor to provide information on the outcome or the reasons for taking a different approach, except for cases involving projects or programmes of Union interest;
- it introduces a Commission screening procedure (staged in two phases of 15 and 20 days) to assess risks to projects or programmes of Union interest, such as trans-European networks for energy, telecommunications and transport or research funded by Horizon programmes, as well as risks relating to the cross-border impact of FDI that were hitherto not taken into account by existing national FDI vetting regimes;
- the final FDI screening decisions remain with Member States irrespective of the related exchanges and information flow within the new cooperation mechanisms, i.e. neither the Commission, based on an adverse opinion, nor Member States, based on their comments on investment transactions in another Member State, can block transactions;
- the regulation creates a legal basis for international cooperation that has, for instance, been used in the EU's relations with the United States (US) in the framework of one of the 10 working groups of the EU-US Trade and Technology Council.

In essence, the FDI regulation establishes an EU framework for the continued decentralised screening of FDI into the Union by Member States on grounds of security or public order rather than creating a centralised EU-led FDI screening mechanism that operates based on a single set of rules. Therefore, the institutional set-up of this framework is very distinct from the centralised regime under the Committee on Foreign Investment in the US (CFIUS – for a detailed comparison, see the annex to the related 2023 European Court of Auditors report) that takes decisions at federal level, and which can be vetoed by the US President. The FDI regulation is thus not a European CFIUS.

In March 2020, amid the disruption of critical supply chains during the COVID-19 pandemic and heightened concerns about foreign investors using the crisis to acquire strategic assets, the Commission issued guidance to Member States encouraging them to set up FDI vetting regimes. In April 2022, after Russia launched its war of aggression against Ukraine, the Commission published further guidance regarding the increased threat to the EU from Russian and Belarusian investments.

Parliament's starting position

Parliamentary resolutions

In its June 2022 resolution on the future of EU international investment policy, Parliament urged those Member States that did not yet have one to set up a national FDI screening mechanism to ensure that EU cooperation is effective. It called on the Commission, in its review of the regulation, to assess whether other sectors can also be considered strategic, and to explore the possibility of strengthening the EU FDI screening mechanism with a view to giving it, with Member States' agreement, the power to block an investment that would create a risk to security or public order.

In its June 2023 resolution on foreign interference in all EU democratic processes, Parliament reiterated its earlier calls to bolster the EU FDI screening framework and to empower the Commission, 'subject to supervision by the Council', to block FDI, specifically FDI that 'might be detrimental or contrary to EU projects and programmes or other EU interests'.

In its January 2024 resolution on building a comprehensive European port strategy, Parliament underlined the importance of enhancing EU cooperation in screening and blocking FDI in the field of critical infrastructure. It strongly encouraged the Commission to strengthen the role of protective measures for ports through an ambitious revision of the FDI screening regulation, including making an FDI screening regime mandatory for all Member States. It called for vetting processes to be clear and objective and for the definitions, scope and procedural requirements to be consistent across Member States with a view to ensuring an EU-wide level playing field.

In its January 2024 resolution on the security and defence implications of China's influence on critical infrastructure in the EU, Parliament noted that the FDI screening mechanism provides the EU and its Member States with a better strategic overview and awareness of the trends, targets and methods deployed by foreign actors to increase their economic and political influence. Parliament called for the expansion of the current instruments addressing FDI to incorporate generalised screening procedures for all stakeholders involved in EU critical infrastructure projects, such as collaborative ventures, partnerships and technology transfers, and underlined the importance of routine evaluations of critical infrastructure projects that involve non-EU stakeholders. Parliament also called on the Commission to make its opinions on FDI screening more impactful and to increase harmonisation by, for example, ensuring full implementation of the FDI screening regulation and building appropriate expertise.

In its February 2024 resolution on the implementation of the common security and defence policy, Parliament called for a further strengthening of 'the FDI screening procedures with due-diligence standards to identify leverage by governments of states which would contravene the security and defence interests of the Union and its Member States as established in the framework of the CFSP pursuant to Title V TEU over investors in EU critical infrastructure, such as European ports and in undersea cables in the Baltic, Mediterranean, as well as in the Arctic seas'.

International trade committee meetings

In the context of Parliament's regular scrutiny of the work of the Commission, on 27 November 2023 its Committee on International Trade (INTA) held a debate (recording) with Denis Redonnet, DG Trade's Deputy Director General and Chief Trade Enforcement Officer, on the main findings of the Commission's third annual report on the screening of FDI into the Union of October 2023. On 24 January 2024, INTA organised a debate (recording) on the EU's economic security strategy, with a strong focus on the revision of the FDI screening regulation, with DG Trade's Director-General

Sabine Weyand. On 25 January 2024, INTA hosted another exchange of views (recording) with Denis Redonnet on the revision of the FDI regulation.

Parliamentary questions

Moreover, several Members of the European Parliament submitted parliamentary questions to the Commission inquiring, for instance, about which countries and sectors were involved in the cases notified and on which of them the Commission had issued an opinion (E-003376/2022, Geert Bourgeois (Belgium, ECR), 13 October 2022), and about how many foreign investments have been screened thus far, how many investments screened have been blocked and the total amount of blocked investments (E-004000/2022, Filip De Man (Belgium, ID), 7 December 2022).

Preparation of the proposal

European Commission reports on the FDI screening regulation

Pursuant to Article 5(3) of the 2019 FDI screening regulation, the Commission produced annual reports on the screening of FDI into the Union. The third such report, of November 2023, shows that in 2022 86 % of notified transactions were cleared without conditions (up from 73 % in 2021). In 9 % of cases, mitigation measures were imposed (down from 23 % in 2021), but in both years only 1 % of transactions were blocked. The Commission assessed 87 % of transactions within 15 days and therefore stressed that it had not contributed to delaying Member States' authorisations. Moreover, according to the Commission the cooperation mechanism has not undermined the EU's openness to FDI, as less than 3 % of the more than 420 cases screened by the Commission in 2022 led to an opinion. However, from 2021 to 2022 FDI inflows into the Union (-199 %) declined much more than world FDI flows (-14 %), mainly owing to large disinvestments that occurred in Luxembourg.[2]

External and European Commission evaluations

The Commission entrusted the secretariat of the Organisation for Economic Cooperation and Development (OECD) with an evaluation of the FDI screening regulation's effectiveness and efficiency, which was carried out between October 2021 and June 2022. It recognises that the FDI screening regulation has provided impetus and legitimacy to the policy area, which has resulted in a growing number of Member States having set up a new FDI screening mechanism or tightened an existing one.[3] It draws attention to the 'hitherto unusual language to indicate probability thresholds for an impact on security and public order' and to its potential implications for the scope of FDI screening in practice. It highlights the difference between the terms 'security', 'public order', 'national security' and 'essential security interests' used in the related Member States' laws and the term 'security or public order' used in the FDI screening regulation. It stresses that the latter term is widely perceived as broader and distinct from the terms 'public policy' or 'public security' in Articles 52 and 65, which may be invoked to justify derogations from the EU principles of freedom of establishment and free movement of capital, and which the Court of Justice of the European Union (CJEU) has interpreted narrowly. The study lists 12 shortcomings in the regulation's design:

- the absence of screening mechanisms in some Member States leaves gaps;
- the limited coverage of Member States' vetting mechanisms leaves gaps, such as a narrow definition of sectoral scope and extensive 'white-listing' (exempting) of investors of certain non-EU jurisdictions (e.g. the European Free Trade Association (EFTA));
- the regulation does not cover FDI by a third-country investor through an EU-established subsidiary, but in 2022 this intra-EU FDI accounted for 23 % of their investments;
- the low priority given to FDI screening in the Union has curtailed sustained reforms and thorough implementation of FDI vetting mechanisms;
- the processing of multi-jurisdiction FDI transactions is inefficient;
- timelines for screening decisions in some Member States are too short to incorporate input from the cooperation mechanism;
- limitations to the flow of transaction-specific information among Member States;

- excessive amounts of irrelevant information are fed into the cooperation mechanism, while some relevant information is not shared;
- reviewable transactions that are not notified are unlikely to be detected by Member States or the Commission;
- not all Member States have the means to gather information on unscreened transactions;
- not all Member States have the competence to act on other Member States' comments and/or the Commission's opinions;
- the low accountability of Member States with respect to their comments and/or the Commission's opinions.

Figure 2 – Number of Member State notifications (2020-2022) compared to average FDI stocks (2019-2021)

Notifications				Proportion of notifications: size of FDI	Average inward investment stock (2019-2021)		
Member State	Total	%			% of EU total		
France	193		92 %	Large share of notifications in larger MSs indicative of concentration of sensitive targets	22 %	5.8 %	
Italy	169					2.9 %	
Spain	164					5.1 %	
Austria	156					1.3 %	
Denmark	73					0.9 %	
Germany	63					6.6 %	
Lithuania	24		8 %	Small share of notifications relative to FDI, in part reflecting FDI from the Netherlands not related to sensitive targets	36 %	0.2 %	
Finland	13					0.5 %	
Malta	9					1.4 %	
Netherlands	7					28.0 %	
Czechia	6					1.2 %	
Poland	3					1.6 %	
Hungary	3					2.0 %	
Romania	2					0.7 %	
Latvia	1					0.1 %	
Luxembourg	-		0 %	No notifications relative to FDI, reflecting no screening mechanisms and FDI particularly in Luxembourg and Ireland not necessarily related to sensitive targets	42 %	21.9 %	
Ireland	-					8.2 %	
Belgium	-					3.9 %	
Cyprus	-					2.9 %	
Sweden	-					2.5 %	
Portugal	-					1.1 %	
Slovakia	-					0.3 %	
Bulgaria	-					0.4 %	
Greece	-					0.2 %	
Estonia	-					0.2 %	
Croatia	-					0.2 %	
Slovenia	-					0.1 %	
Total	886		100 %		100 %	100.0 %	

Source: Special report on screening foreign direct, ECA, 2023, p.27.

In December 2023, the European Court of Auditors (ECA) published a special report on FDI screening in the EU. The ECA report lists a large number of weaknesses in the FDI screening regulation that have arisen from the discrepancies between Member States' vetting regimes and have a significant impact on the effectiveness of the framework. As a case in point, the report provides an interesting analysis of the relationship between the number of Member States' notifications and their FDI stock. Figure 2 shows that the distribution of notifications is very uneven and there is no correlation between the size of the economies, the level of FDI and the number of notifications.

Six Member States with a vetting regime accounted for 92 % of all notifications, while a group of nine Member States with a screening mechanism submitted the remaining 8 %. The other 12 Member States had no screening mechanism in place yet or did not submit notifications of any cases, but accounted for roughly 42 % of the EU's average FDI stock. Portugal seems to be an outlier in its group; its FDI vetting regime has been in force since 2014, but no transaction has ever been blocked. This could be linked to the high equity threshold of 50 % required to trigger screening.

The report recommends that the Commission should:

- clarify the key concepts of the framework and avoid current blind spots and inefficiencies;

- assess national screening mechanisms for compliance with regulatory standards, and streamline some practices like pre-screening and aligning criteria, timeframes and processes across Member State screening mechanisms;
- improve the cooperation mechanism and the Commission's assessments for providing better justification of mitigating actions related to high-risk cases; and
- improve the reporting process.

In its replies to the ECA report, the Commission accepted most of the recommendations.

On 24 January 2024, the Commission published its evaluation of the current FDI regulation that accompanies the legislative proposal for a new regulation. The executive summary of the evaluation points to key lessons learned that are, in essence, a summary of the OECD and the ECA evaluations. Of note is that the legislative proposal is not supported by an impact assessment, since, according to the Commission, it contains limited changes to the current rules based on a thorough evaluation.

Stakeholder consultations

The Commission ran a targeted consultation on the evaluation and revision of the FDI screening regulation from 14 June to 21 July 2023. It received 47 contributions, including 18 from Member State authorities involved in EU cooperation on FDI screening, and published a summary report of the results. In parallel, the Commission scheduled a call for evidence period during which stakeholders were invited to share their experience with the current FDI screening framework. Ten stakeholders provided feedback that can be accessed through the Commission website.

The **European Sea Ports Organisation** (ESPO) argues that for EU ports, which are highly capital intensive, to retain their competitive position, it is key to safeguard the EU's open investment environment. ESPO would welcome it if all Member States had a screening mechanism to ensure a level playing field within the EU, and if definitions, scope and procedural aspects of FDI vetting were harmonised to enhance legal certainty. The Spanish renewable energy company **IBERDROLA S.A.** supports greater regulatory convergence of national FDI vetting regimes and is also supportive of strengthening the Commission's involvement in FDI screening when EU critical assets are at stake.

The **Ministry of Economy of the Slovak Republic** points to the need also to capture indirect investments by foreign investors, to define 'pre-screening' and other terms, to include research and development in the indicative list of factors on which an FDI could have an impact, to introduce exemptions from the obligation to notify transactions that are screened, and to enhance the accountability of Member States vis-à-vis other Member States and the Commission, if they raise concerns about an FDI in comments or opinions.

The industry alliance **AEGIS Europe** opposes the screening of investments from EU entities whose ultimate owners are non-EU investors, since it would add an additional administrative burden for European investors. It deems it important for the Commission to be entitled to issue opinions and assessments to Member States prior to their decisions when the FDI concerns 'critical infrastructure' and 'critical technologies' that could affect security and public order. It also posits that the scope of projects and programmes of Union interest to be screened should be expanded, for instance to important projects of common European interest (IPCEI).

The changes the proposal would bring

The proposal for a new FDI regulation represents an evolution rather than a revolution. It is based on comprehensive ECA and OECD evaluations feeding into the Commission's own evaluation and recognises that a chain is only as strong as its weakest link. The proposal aims for minimum harmonisation by adding to the legal basis of the current regulation, i.e. Article 207(2) TFEU, and Article 114 TFEU, which governs the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Member States would retain the final

decision-making power and would remain free to add jurisdiction-specific sectors to the defined scope. The regulation would *inter alia*:

- make an FDI screening mechanism mandatory for all Member States, by 15 months at the latest after the new regulation enters into force;
- determine the minimum scope for compulsory screening of transactions subject to an authorisation requirement (e.g. transactions relating to 'projects or programmes of Union interest' listed in Annex I and to sensitive economic sectors listed in Annex II, which includes the 10 technologies relevant under the economic security strategy);
- extend the material scope to indirect (intra-EU) investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country;
- encourage the screening of greenfield investments that create a lasting and direct link between a foreign investor and an EU target (although it seems unclear what criteria would qualify greenfield investments for review: e.g. turnover or asset value);
- set minimum procedural requirements, including ex-ante screening of transactions subject to authorisation, initial review and in-depth investigations, ex-post screening of transactions up to 15 months after completion, confidentiality, and judicial recourse against screening decisions; however, no alignment of important aspects of the screening procedures is envisaged, including deadlines for approval;
- increase the accountability of Member States vis-à-vis each other and the Commission by enhancing information exchanges within the cooperation mechanism (obligation for screening authorities to cooperate in cross-border investments, authorities to collect the same types of information in notifications and alignment of some of the deadlines for multi-country notifications, and annual reporting on screening activities);
- introduce an own initiative procedure for ex-post reviews to be initiated by a Member State or the Commission of investment transactions up to 15 months after their completion, if they were not notified to the cooperation mechanism and are likely to negatively affect another Member State's security or public order or the security or public order either of more than one Member State or of 'a project or a programme of Union interest'.

The most important change the proposal would bring is the shift from voluntary to mandatory national FDI vetting, forcing those Member States that have no FDI screening mechanism in place to create one. Since only very few Member States still have no vetting regime and these Member States are about to set up a national vetting mechanism, the impact of this change is likely to be insignificant in practice. The proposed extension of the material scope to indirect investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country is related to the CJEU ruling of 13 July 2023 in the case C-106/22 – Xella Magyarország.

CJEU case C-106/22 – Xella Magyarország

In 2021, the Hungarian authorities prohibited the acquisition of Janes és Társa, a Hungarian construction company, by Xella Magyarország, a Hungarian-based company controlled by a Bermuda-based company, on grounds of security or public order. The screening decision was challenged before a Hungarian court that requested a preliminary ruling from the CJEU. The latter ruled that the FDI screening regulation does not apply to intra-EU investments made by EU firms controlled by non-EU investors, except in situations involving artificial arrangements that do not reflect economic reality and that circumvent FDI screening mechanisms.

The CJEU found, moreover, that the Hungarian screening rules are incompatible with EU law, because they constitute a serious restriction to the freedom of establishment under Article 54 TFEU. The rules had allowed for the prohibition of an EU company from acquiring a stake in a 'strategic' EU company, on grounds of security or public order. The CJEU added that Hungary failed to provide sufficient justification for this restriction on the basis of overriding reasons of public interest, i.e. a 'genuine and sufficiently serious threat to a fundamental interest of society'. It concluded that such reasons must be interpreted strictly and cannot be based on purely economic grounds. The CJEU ruled that security of supply of commonly available construction materials cannot be deemed a 'fundamental interest of society' for the purposes of justifying a restriction of Article 54 TFEU.

The substantive and procedural requirements are likely to make FDI screening more compelling for Member States. It remains to be seen whether the proposed minimum harmonisation will address concerns about the fragmented regulatory framework that risks undermining the coherence of the Single Market and about an increasing administrative burden and legal uncertainty for investors.[4]

Advisory committees

On 11 July 2024, the European Economic and Social Committee (EESC) adopted an opinion on the Commission proposal (rapporteur Javier Doz Orrit, Spain, GRII). The opinion recommend greater harmonisation of national legal norms, including establishing an acquisition threshold that triggers the obligation to screen an FDI and defining common deadlines for replying to requests for information and issuing opinions within the cooperation mechanism. It also recommends: that exceptional cases should be determined in which the Commission may prohibit, mitigate or apply conditions to FDI in one or more Member States for seriously jeopardising a 'project or programme of Union interest' or public security and order in more than one Member State; that procedures should be established through which the Commission, after consultation with all Member States, could prohibit or impose mitigating measures for any of the FDI mentioned above; spelling out under what circumstances a FDI poses a risk to a 'project or programme of Union interest'; and creating mechanisms for the participation of social partners and civil society organisations in foreign investment policy and its control at EU and national levels.

The Commission for Economic Policy (ECON) of the Committee of the Regions (CoR) will adopt its opinion on 24 October 2024. The CoR plenary will adopt its opinion on 20 or 21 November 2024.

National parliaments

The proposal for a new FDI screening regulation has a dual legal basis (Article 207(2) TFEU – on common commercial policy, an area of exclusive EU competence – and Article 114 TFEU). The procedure for the subsidiarity check is applicable. The deadline for the submission of reasoned opinions on the grounds of subsidiarity through the informal political dialogue was 30 April 2024.

The **Czech Chamber of Deputies**, while welcoming the proposal's intention to standardise FDI screening mechanisms across Member States, stressed that the measures to be taken must preserve an acceptable administrative burden and must not undermine the openness of the European economy for FDI.

The **German Bundesrat** called on the German government to make sure that the future regulation sets out how Directive (EU) 2022/2555 of 14 December 2022 on measures for a high common level of cybersecurity across the Union will be taken into account during its implementation.

The **Italian Chamber of Deputies** posits that the proposal is consistent with the subsidiarity principle, but raises doubts about the need for a dual legal basis. It considers that the proposal is inconsistent with the proportionality principle, as the screening process proposed is too complex and requires complex changes to national laws (Article 4(3), for instance, is considered to be incompatible with the Italian authorisation procedure). Although it notes that Member States would retain the final say on transactions, it is concerned that the proposal could restrict their decision-making autonomy and give the Commission 'undue influence' over their exclusive prerogatives (including the scope of the Commission's power to adopt delegated acts to amend the sectors in Annex II). It takes issue with a large number of proposed provisions, including the possible ex-post screening within up to 15 months of already completed transactions not subject to an authorisation requirement or not notified to the cooperation mechanism, due to the legal uncertainty this entails. It raises the need for objective parameters that clearly distinguish 'in-depth investigations' and 'exceptional cases' subject to notification from the 'initial review' to avoid exponential growth in the number of irrelevant notifications. Finally, it recommends that the Commission evaluate whether the best way to reduce the impact of the regulation on national laws may be a targeted amendment of

the existing regulation rather than its complete repeal. Noting the absence of a Commission impact assessment (IA), it stresses that a new IA will have to be carried out.

Stakeholder views[5]

Following the publication of the proposal, from 26 January 2024 to 29 April 2024 the Commission opened a feedback period. A total of 20 stakeholders provided their feedback.

Business Europe is concerned that mandatory notifications for certain types of investment, including intra-EU investment, could increase the number of cases scrutinised, as precautionary filings are likely to increase, and contribute to delays and legal uncertainty. It welcomes the obligation for Member States to provide judicial recourse against screening decisions, since '[e]ffective avenues for redress will be important to rein in any excessive screening decisions by national authorities of intra-EU investments which are contrary to the fundamental freedoms of the Single Market'. It is concerned about the uncertainty linked to the new own initiative procedures and is curious to learn how they would work in practice and what they would entail beyond comments by other Member States and/or a Commission opinion. It suggests that an IA be conducted on intra-EU capital flows prior to adopting the new regulation and stresses that the requirement to make filings in multi-jurisdictional deals on the same day could be burdensome owing to Member States' divergent filing deadlines. Finally, it emphasises the need to clarify the definitions of 'control' and 'foreign investment'.

The **American Chamber of Commerce to the European Union** (AmChamEU) points to the risks of the proposal's broadened scope (e.g. to a list of sectors and to intra-EU transactions), combined with its broad definitions ('Union target'), leading to significantly more low-risk transactions in Member States and through the cooperation mechanism than are currently scrutinised and expanding disproportionately into transactions involving only non-EU companies with EU subsidiaries or branches. It argues that the revised scope of the cooperation mechanism puts too much of the burden on notifying parties and too little on national authorities. It claims that the proposal fails to streamline the notification and investigation of the vast majority of low-risk investments. It criticises the fact that the minimum harmonisation envisaged is based on 'vague definitions and loose procedural requirements' that leaves space for significant divergence on the scope of minimum requirements across Member States. It claims that the proposal 'lacks the specificity required to bring about legal clarity, due process and convergence between national rules' and proposes that the co-legislators agree upon more explicit language on substantive, jurisdictional and procedural features of Member States' screening mechanisms.

The US **Information Technology Industry Council** recommends that the Commission narrow the scope of the Annex II economic sectors 'to focus on high-risk transactions that raise genuine security concerns'. It criticises the fact that the 'vaguely defined list of critical technology areas does not provide Member States with a sufficiently clear and risk-based framework to develop effective investment screening rules'. It suggests that 'the Commission should also define the concept of "economically active" in Article 4(4)(b) to avoid impacting investments where the targets are merely users (rather than developers) of the listed technologies. Similarly, the term "foreign investments" should be clarified to avoid screening transactions where the investor would hold only a minority non-controlling position in the targeted company', and that, to enhance legal certainty for investors, 'Member States should also be required to introduce robust due process safeguards, including providing investors with sufficient time to share their views with screening authorities. While the provisions in Article 4(3) and 14(1) of the Commission's proposal would strengthen investors' procedural rights, they do not go far enough to encourage Member States to make meaningful improvements to their screening procedures.'

SEMI Europe, which represents EU semiconductor companies, raises concerns about incorporating greenfield investments within the scope of the regulation given the need for non-EU FDI prompted by the European Chips Act. It advocates a balanced approach to maintain the necessary levels of FDI flows into the EU that can preserve the semiconductor industry's global competitiveness. The

European Services Forum calls for reducing the notification of non-essential cases at national level, bringing down the number of unnecessary reviews by the Commission and other Member States through the cooperation mechanism, limiting as far as possible the reporting requirements for EU companies and foreign investors, protecting confidential information in the notifications, and engaging in international cooperation on FDI screening issues.

The **Austrian Federal Economic Chamber** is very critical of the extension of the legal basis to the EU internal market and the extension of FDI screening to investments by EU investors that are ultimately controlled by persons or companies from a non-EU country. It is concerned about a potential increase in the bureaucratic burden for European and Austrian companies, which will be further encouraged to move abroad, and a chilling effect on investment flows. It therefore suggests that a comprehensive study of the possible effects on European companies and their investment activities be carried out. The German business association of mechanical and plant engineering companies (**VDMA**) stresses that the EU must remain open to investments, and legal uncertainty and more bureaucracy must be avoided. Moreover, it posits that the proposal is premature and that more time is required to evaluate the effectiveness of the current legal framework.

While most stakeholders have warned against broadening the scope of screening, some stakeholders have called for additions to be made to the Annex II sectors: **WindEurope** has asked to add 'executive agreements' such as supply agreements, **UNIFE**, representing the European rail supply industry, has called for 'rail-related sector and its technologies', and **ASD**, the Aerospace, Security and Defence Industries Association of Europe, has asked for 'aerospace and defence'.

CMS, an organisation representing law firms, has pointed to the need to define under which circumstances indirect FDI falls within the scope of the regulation, for instance by providing specific voting rights thresholds. It criticises Annex II as overly generic and the definition of 'active in an area listed in Annex II' as too wide, thus capturing too many Union targets that are subject to an authorisation requirement. It suggests that a *de minimis* or materiality threshold be applied to the obligation for Member States to report FDI in 'projects or programmes of Union interest' to the cooperation mechanism. It proposes – in respect of the envisaged right to open an own initiative procedure to screen an investment transaction within 15 months after its completion – to allow foreign investors to trigger the screening process, for instance through voluntary applications to obtain legal certainty prior to the 15-month period. It also stresses that the proposal remains unclear regarding how greenfield investments are to be treated.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

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ENDNOTES

1 Belgium's FDI vetting mechanism entered into force in July 2023, Estonia's and Luxembourg's in September 2023, Sweden's in December 2023 and Ireland's related law, signed in October 2023, is expected to be applied from September 2024. Bulgaria adopted its mechanism in February 2024, while Croatia, Cyprus and Greece were still in the process of crafting a mechanism as of August 2024. See the list of notified Member State FDI screening mechanisms, last updated in February 2024.

2 The significant gap between FDI inflows into the EU and FDI inflows into the US in recent years seems to point to the EU's declining attractiveness for FDI, with inevitable consequences for the EU's global competitiveness. See: Future-proofing the EU's Investment Attractiveness: A Bold Reform Agenda for Competition Enforcement, Taxation and Digital Policy, European Centre for International Political Economy (ECIPE), July 2024.

3 A 2022 comparative study shows some convergence between national vetting mechanisms over time in terms of the growing number of sectors subject to screening and decreasing equity thresholds that trigger a review, but also continuing design divergence between sectoral and cross-sectoral review mechanisms, screening thresholds (with Portugal as an outlier that continues to screen only majority-owned transactions) and differences in language of national legislation that may broaden or narrow the screening scope. See S. Bauerle Danzman and S. Meunier, 'Naïve no more: Foreign direct investment screening in the European Union', *Global Policy Journal*, Vol. 14 (Supp. 3), p. 40.

4 For the evolution of the legislative proposal, see the EPRS Legislative Train Schedule, which is updated every month.

5 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.

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