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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
INVESTMENT COMMITTEE****The Framework for the screening of foreign direct investment into the European Union****An assessment of its effectiveness and efficiency**

The present report contains an assessment of the effectiveness and efficiency of the Framework for the screening of foreign direct investment into the European Union as established by Regulation (EU) 2019/452. It was prepared by the OECD Secretariat with a financial contribution from the European Union in the context of the Committee's work on international investment and essential security interests.

The report is circulated for information. Its findings and implications beyond the European Union are planned to be discussed during the Investment Committee week in early 2023.

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# Executive summary

1. The [Regulation 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union](#) (the EU Regulation) became fully applicable on 11 October 2020. It contains legally binding rules that engage national authorities from EU Member States (Member States) and the European Commission (the EU Commission) in cooperation on screening of foreign direct investment into the Union.
2. The EU Regulation is subject to an evaluation by the EU Commission by 12 October 2023 and a report should be presented to the European Parliament and to the Council. To inform this exercise, the EU Commission has entrusted the OECD Secretariat (Investment Division of the Directorate for Financial and Enterprise Affairs) with the task to analyse the effectiveness and efficiency of the framework for investment screening as established by the EU Regulation.<sup>1</sup> The present report summarises the findings of this analytical work, which consisted of desk research and interviews with many actors involved in or concerned by investment screening, including Member States' authorities, the EU Commission, and other stakeholders. The study was carried out between October 2021 and June 2022 and reflects information as of 30 June 2022.
3. For this report, 'effectiveness' refers to situations where foreign direct investment that likely affects the security or public order of Member States or projects or programmes of Union interest is screened and managed. 'Efficiency' refers to situations where effectiveness is achieved while keeping the administrative burden for investors and other stakeholders proportionate to the policy goals and relevant security or public order concerns.

## *Stakeholders view the EU framework for investment screening favourably*

4. Most actors and stakeholders involved in investment screening and related policymaking in Member States and the EU have favourable views on the EU Regulation in general and the functioning of the cooperation mechanism in particular. This appreciation is publicly and officially stated at Member States' political level,<sup>2</sup> and widely shared within Member States' screening and related authorities as well as counsel advising international investors and target enterprises on screening procedures in the Union.
5. Government actors identify a host of different benefits, including: a broader recognition at the political level of the benefits of reviewing certain foreign direct investments for their potential implications for security and public order; a better understanding of investment trends in Europe; closer cooperation and peer learning among national authorities of Member States in an emerging field of policy; and better

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<sup>1</sup> The scope of the study is referred to in EU Commission (2021) "[First Annual Report on the screening of foreign direct investments into the Union](#)", p.19 (at footnote 27).

<sup>2</sup> Formal statements testifying of the positive overall assessments are in EU Commission (2021) "[First Annual Report on the screening of foreign direct investments into the Union](#)", p.19. Austria: Bundesministerium für Digitalisierung und Wirtschaftsstandort (2022) "[Erster Tätigkeitsbericht der Investitionskontrolle](#)", p.1.

informed screening decisions thanks to the exchange of information on specific transactions under the cooperation mechanism.

6. Counsels of foreign investors intervening in individual transactions report that the entry into effect of the EU framework has not significantly changed processes or outcomes of investment screening in Member States. They observe at most insignificantly longer processes or slight changes in implementation practice and attribute these observations only tentatively to the cooperation mechanism. They acknowledge that security implications of transactions are now more comprehensively assessed and decisions better informed, and that occasionally slightly longer processing times are likely offset by a gain in security and public order in the Union.

7. The persons interviewed in the framework of this study rank the benefits of the EU Regulation differently. Perceptions of the importance of specific benefits often reflect individual Member States' positioning vis-à-vis investment screening. Officials from countries with no or only recent screening experience tend to emphasize the political impetus and awareness that the process leading to the adoption of the EU Regulation has generated. They also frequently report that the cooperation mechanism has given them a first-ever insight into foreign direct investment into the Union beyond their borders and had made them aware of patterns of which they were previously unaware. Newcomers to investment screening also speak highly of the exchanges within the Group of Experts and in associated settings, which they describe as an incubator of a community of practice and an invaluable opportunity for exchanges of experience and good practice. Member States that have longer traditions of active investment screening as well as some newcomers tend to rank the cooperation mechanism as the greatest single benefit of the EU framework. They also note the political dynamic that the genesis and implementation of the EU Regulation has created and that has convinced more Member States of the merits of investment screening.

8. Member States participate in the cooperation mechanism to different degrees and screen very different volumes of transactions domestically. Six Member States participate very actively in the information exchange under the cooperation mechanism and screen hundreds of transactions.<sup>3</sup> Many other Member States screen few transactions or, if they do not operate a screening mechanism, none.

9. A few Member States' authorities remain sceptical about investment screening generally. They emphasise the potential downsides of screening for the attractiveness of their economies for much-desired foreign investment, especially when they compete for capital with non-screening countries.

### *Effectiveness and efficiency could be improved in several areas*

10. The EU Regulation has contributed to broader availability and application of investment screening mechanisms, has improved co-operation and co-ordination among Member States in this area, and has allowed for better informed screening decisions. Nevertheless, certain shortcomings diminish the effectiveness and efficiency of the screening of foreign direct investments into the Union.

11. Some of these shortcomings are directly observed by participants in screening processes as they result in delays, inefficient procedures, duplication of work, or tight timelines that strain resources and lead to unsatisfactory national screening decisions. Other shortcomings are not easily observed: They do not manifest through obviously ineffective or inefficient procedures or undesirable outcomes. The damage these shortcomings do to the effectiveness of investment screening results from poorly informed screening decisions or the absence of screening where it would be necessary to protect security or public order of the

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<sup>3</sup> According to the [Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union](#) (p.11), from 11 October 2020 through 30 June 2021, more than 90% of cases were notified by five Member States (Austria, France, Germany, Italy and Spain).

Union and its Member States. Only a rigorous analysis of the rules and practices – as the one performed for this report – reveal these blind spots that cannot directly be observed in the framework’s daily operation.

12. Important gaps in the effectiveness of screening in the Union stem from the absence of screening mechanisms in some Member States. These Member States have few or no effective means to manage risk related to foreign investment into the Union, do not build institutional capacity, and cannot benefit fully from exchanges with their peers in other Member States and the EU Commission. They may, however, be used as gateways into the internal market. Transactions taking place in these Member States are unlikely to be discovered and if they are, the concerned Member States may not be able to provide related information and, a fortiori, identify and address related risks to public order or security.

13. Limitations of the scope of transactions that undergo screening in Member States also dent the effectiveness of investment screening in the Union. The consequences of narrow scope-definitions, for example by industry sector or through white-listing residents or nationals of certain non-EU countries, are similar to those of the absence of screening. Gathering and sharing of information on transactions that are excluded from the scope of screening are diminished, and it is unlikely that risk associated with such transactions is fully identified and adequately mitigated.

14. Some of the aforementioned problems may result from the perceived decline of the political priority of investment screening in some Member States since the adoption of the EU Regulation. This drop slows political processes such as the adoption or reform of screening mechanisms, some of which have been under preparation for years, and may negatively affect the allocation of resources to the screening function. Some Member States have not yet adapted their screening rules to incorporate certain mandatory features of the EU Regulation.

15. Design choices made in the EU Regulation also contribute to issues that reduce the effectiveness and efficiency of the framework.

- Not all Member States have rules in place that would allow them to effectively gather and provide information on transactions that are not undergoing screening in their jurisdiction, despite this being mandatory under the EU Regulation.
- Reviewable transactions that are not notified to authorities are unlikely to be detected and screened, as institutional rules and material resources for the detection of non-notified transactions are limited in Member States and the Commission.
- Not all Member States have set rules that would allow them to incorporate input from the cooperation mechanism into their screening decisions – a condition to meaningfully “take into account” concerns that other Member States or the EU Commission share under this process. The possibility to incorporate such information is mandatory under the EU Regulation, but the Regulation frames this obligation poorly, inviting broadly different views on what is required and resulting in different practices in this regard. The cooperation mechanism lacks effectiveness and is inefficient to the extent that the EU Regulation appears to require only a procedural response to comments and opinions while tolerating substantive inaction by the addressee of such input.
- The essential absence of accountability mechanisms in the EU Regulation, specifically in the context of input from other Member States and the EU Commission, is a further reason for uncertainty of what the EU Regulation requires from Member States in this regard. It may also lead Member States to undervalue input from the cooperation mechanism in their screening decisions.
- Ambitiously set timelines for screening decisions further dent the possibility of Member States to use the input from the cooperation mechanism. In some limited cases, they may be required under their domestic laws to issue final decisions before input is due under the EU Regulation and has become available to them.

- Through its design, the EU Regulation does not organise the flow of all transaction-specific information that is available within the Union to make it available to investment screening processes.
  - The EU Regulation requires that certain transactions are notified to the cooperation mechanism. The criterion that the Regulation sets to determine which transactions need to be notified is not well chosen. As a result, potentially irrelevant information is shared while some potentially relevant information is withheld from the information exchange.
  - The information exchange mechanism of the EU Regulation is not available for a potentially significant share of investment transactions, specifically all transactions whose immediate investor is established in the EU and carries out economic activities there, regardless of the risk that the ultimate beneficial owner of that immediate investor may represent.
  - Finally, the processing of multi-jurisdiction FDI transactions, i.e. transactions that are undergoing screening in more than one Member State, is inefficient. This results from the diversity of rules in Member States, permitted under the EU Regulation, and the lack of rules in the EU Regulation to cater for the specificities of multi-jurisdiction FDI transactions.
16. The present report is organised in three main sections:
- Section 1. provides a functional description of the framework for screening of foreign investment into the Union, current practices under this framework as well as perceived benefits, strengths, and shortcomings. This section also sets out aspects that transcend the rules as currently established but that determine the effectiveness or efficiency.
  - Section 2. describes, based on the functional analysis, 12 main issues that limit the effectiveness or efficiency of the rules and practices that govern foreign direct investment into the Union as of 30 June 2022. This section sets out these individual issues, identifies the respective root cause of the shortcoming, and proposes actionable options for remedies.
  - Section 3. describes rules and practices related to investment screening in selected Member States<sup>4</sup> and especially their interaction with the cooperation mechanism, as well as the operation of the service responsible for investment screening within the EU Commission.
17. Information about the preparation of this report and a key to abbreviations and acronyms complement these sections.

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<sup>4</sup> See on the selection criteria the introduction to Section 3. , p.85.



# Abbreviations and Acronyms

Art.	Article
AWG	Foreign Trade and Payments Act (Germany)
AWV	Foreign Trade and Payments Ordinance (Germany)
BAFA	Federal office for export control (Germany, “Bundesamt für Ausfuhrkontrolle”)
BDI	Bundesverband der Deutschen Industrie (Germany)
BMDW	Federal Ministry for Digital and Economic Affairs (Austria)
BMWK	Federal Ministry for Economic Affairs and Climate Action (Germany)
BMWi	Federal Ministry for Economic Affairs and Energy (Germany); predecessor of the BMWK
BIS	Security Information Service (Czech Republic)
BRDRs	Bundesratsdrucksache (Germany, “document of the Upper House of the Federal Parliament”)
BtDRs	Bundestagsdrucksache (Germany, “document of the Lower House of the Federal Parliament”)
BTI	Bureau Toetsing Investerings (Netherlands)
CFIUS	Committee for Investment in the United States
CIIEF	Comité interministériel des investissements étrangers en France (Interministerial Committee on foreign investment in France)
CNMC	National Commission for Markets and Competition (Spain)
CZK	Czech Crowns
DKK	Danish Crown
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Association
EO	Executive Order
EU	European Union
EU Regulation	Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union
EUR	Euro
EZK	Ministry of Economic Affairs and Climate Policy (Netherlands)



FDI	Foreign Direct Investment
FTE	Full-time equivalent
ICA	Investment Control Act (Austria)
ISP	National Inspectorate of Strategic Products (Sweden)
IT	Information Technology
JINVEX	Junta de Inversiones Exteriores (Spain)
KfW	Kreditanstalt für Wiederaufbau (Germany)
NATO	North Atlantic Treaty Organization
MGRT	Ministry of Economic Development and Technology (Slovenia)
MoIT	Minister of Industry and Trade (Czech Republic)
OECD	Organisation for Economic Co-operation and Development
SISSE	Service de l'Information Stratégique et à la Sécurité Économiques (France)
TFEU	Treaty on the Functioning of the European Union
TTC	EU-U.S. Trade and Technology Council
ÚZSI	Office for Foreign Relations and Information ( <i>Úřad pro zahraniční styky a informace</i> , Czech Republic)
WOZT	Act against undesired control in the telecom sector ( <i>Wet ongewenste zeggenschap telecommunicatie</i> , Netherlands)
ZIUOOPE	Intervention Measures to Mitigate and Eliminate the Consequences of the COVID-19 Epidemic Act (Slovenia)

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19. Information for this study was collected from multiple sources: Desk research was based on information from publicly accessible government sources, in particular legislation, parliamentary documentation and public reports and other conversations with experts and practitioners during and before the duration of the research. The research team conducted 27 semi-structured interviews with 65 different interlocutors from EU Member States' governments and authorities, the European Commission as well as legal counsels involved in international transactions that were or are being screened in EU Member States. Information obtained from publicly accessible sources is cited. Information that is not referenced in this fashion was obtained in interviews or other conversations with experts and practitioners.

20. Formal interviews took place with the following constituents:

- European Commission, DG TRADE, F4.
- Austria, Federal Ministry for Digital and Economic Affairs.
- Belgium, Federal Public Service Economy.
- Bulgaria, Ministry of Innovation and Growth.
- Croatia, Ministry of Economy and Sustainable Development and Ministry of Foreign and European Affairs.
- Czech Republic, Ministry of Industry and Trade, Ministry of Finance, Ministry of Foreign Affairs.
- Denmark, Danish Business Authority.
- Finland, Ministry of Economic Affairs and Employment.
- France, Ministry of Economy and Treasury, Unit MULTICOM 4.
- Germany, Ministry of Federal Ministry for Economic Affairs and Climate Action, Unit V-B-1.
- Greece, Hellenic Ministry of Foreign Affairs, Office of the Secretary General for International Economic Affairs, B1 Directorate.
- Ireland, Department of Enterprise, Trade and Employment, Investment Screening Unit.
- Italy, Investment Control Unit, Office of the President of the Council of Ministers.
- Latvia, Ministry of Economics, Ministry of Foreign Affairs.
- Luxembourg, Ministry of Foreign and European Affairs.
- Malta, National FDI Screening Office.
- Netherlands, Ministry of Economic Affairs and Climate.
- Poland, Ministry of Economic Development and Technology, Ministry of Foreign Affairs, Ministry of Defence, Office of Competition and Consumer Protection.
- Slovak Republic, Ministry of Economy.

- Slovenia, Ministry of Economic Development and Technology, Internationalisation, Entrepreneurship and Technology Directorate.
- Spain, Ministry of Industry, Commerce and Tourism.
- Sweden, National Inspectorate of Strategic Products, Ministry of Justice.
- Representatives of the following law firms: Binder Grösswang (Vienna, Austria), Wolf Theiss (Vienna, Austria), Schoenherr (Vienna, Austria), Skadden (Paris, France), DLA Piper (Paris, France), Clifford Chance (Paris, France), Linklaters (Düsseldorf, Germany), Hengeler Müller (Berlin, Germany), Held Jaguttis (Cologne, Germany), White&Case (Düsseldorf, Germany), Noerr (Berlin, Germany).

21. The Government of Estonia has provided written input through the Ministry of Economic Affairs and Communications.

22. Member States whose rules and practices are described in Section 3. as well as the European Commission have had an opportunity to provide input on their respective draft sections before closure of the preliminary report on 30 June 2022. The European Commission has provided these Member States a further opportunity to provide written comments and suggestions for adjustments between 6 and 18 July 2022. The European Commission has likewise provided suggestions on the entirety of an earlier draft of the report. The material received under these processes has been incorporated in this revised preliminary report, which otherwise continues to reflect the situation as of 30 June 2022. The OECD Secretariat remains responsible for the entirety of the information and views expressed in this report.

23. The OECD Secretariat is grateful to all officials and practitioners it has spoken to during the preparation of this study and who have provided invaluable information, insights, and perspectives. The OECD Secretariat is likewise grateful for written input that has been provided throughout the process.

# 1. How does the framework for screening of FDI into the Union work?

24. The EU Regulation establishes legally binding rules that engage national authorities from EU Member States and the European Commission in cooperation on screening of foreign direct investment into the Union. After almost two years of full operation, its design and functioning are widely considered a success. This positive appreciation results from the recognition of a host of benefits that it brings to Member States and the Union as a whole, and to authorities of Member States involved in investment screening. Stakeholders, essentially counsels of foreign investors and European enterprises receiving investment, also view the EU Regulation favourably and have noted little if any additional delays or administrative burden for transactions they accompany.

25. Despite this positive overall appreciation, the framework for investment screening has shown some weaknesses and dysfunctions in specific areas. Some of these issues were identified early on and are already under discussion between Member States and the EU Commission. Other aspects that diminish effectiveness or efficiency have received less attention, not least because these deficits are more difficult to observe. They nevertheless weigh on the effectiveness of the framework in achieving greater collective security of the Union and its Member States in the area of foreign investment into the Union and on the goal to achieve this objective efficiently.

26. To achieve a collective understanding of these issues, the present section seeks to describe the EU framework for investment screening from a functional perspective. It sets out the components of the framework and their contribution to achieving greater collective security of the Union and its Member States in the area of foreign direct investment and describes the involved actors and processes (Section 1.1). It then discusses the material reach of the obligations under the EU Regulation, over which there is currently limited common understanding (1.2). Finally, this section discusses aspects that lie beyond the rules as currently established but that hold significant potential for greater effectiveness and efficiency of the framework (1.3).

## 1.1. More than meets the eye:

### A host of complementary elements to enhance security and public order

27. The EU Regulation was developed against the backdrop of an uneven landscape for investment screening across Member States at the time of the adoption of the EU Regulation in March 2019. At the time, less than half of the Member States had an investment screening mechanism in operation that was covering more than a single sector; reservations about the merits of investment screening were much stronger and more widespread than they are today; events that shone a sharp light on vulnerabilities associated with international economic interactions – such as the COVID-19 pandemic and Russia’s war against Ukraine – were not expected; and whether the European Commission should have any role in

investment screening, could be trusted with sensitive information on individual transactions or would deliver within acceptable delays were contested.

28. The design of the EU Regulation had to respond to the conditions prevalent at the time and needed to deliver continued benefits for any expected evolution of the abovementioned parameters. In light of these requirements, the EU Regulation contains several components that seek to: promote convergence in the area of investment screening in view of expected new screening mechanisms; encourage peer-learning and professional relationships among national investment screening authorities and the EU Commission; and create richer and more visible information about inward investment into the Union to enhance legitimacy of investment screening in Europe. The EU Regulation also establishes an operational mechanism for the exchange of information and views involving the European Commission and that engages all Member States, regardless of whether they screen investments in their territory or not. The EU Regulation also allows for international cooperation on investment screening beyond the EU.

29. To achieve its overall objective to enhance security and public order in the context of investment screening, the EU Regulation contains five complementary devices related to the screening of foreign investment into the Union:

- Rules to promote convergence of Member States' screening rules and policies (mainly regulated in Articles 3 to 5);
- Information sharing mechanisms (mainly regulated in Articles 5 and 15);
- A mechanism for peer-learning and dissemination of common practice through a group of experts (regulated in Article 12);
- An operational exchange mechanism on specific, individual transactions (regulated in Articles 6 to 9); and
- An opening to international cooperation beyond the Union (Article 13).

Rules on scope and definitions, and on transmission and confidentiality of data complement these five substantive components.

30. In addition, the EU Regulation has had effects and provided opportunities that complement these explicitly designed elements:

- An important effect of the existence of the EU Regulation is its contribution to a strong political impetus in many Member States that had hitherto perceived investment screening with reservation, if not hostility. This consequence does not result from any distinct provision in the EU Regulation but rather from the EU Regulation's sheer existence and from the political process leading up to its adoption. This dynamic of growing acceptance of the merits of investment screening continues to be fuelled by the revelation of investment trends in the European Union, geopolitical developments, and the continued exchange of information among governments about international investment and its implications – revelations and exchanges facilitated by and amplified within the network and policy community that results from the existence of the EU Regulation and its formally established processes.
- The opportunities that the EU Commission has seized and developed under the umbrella of the EU Regulation's formally established mechanisms further contribute to the functioning of the framework. These include services to identify transactions that may not have been notified or otherwise come to the knowledge of Member States' screening authorities.

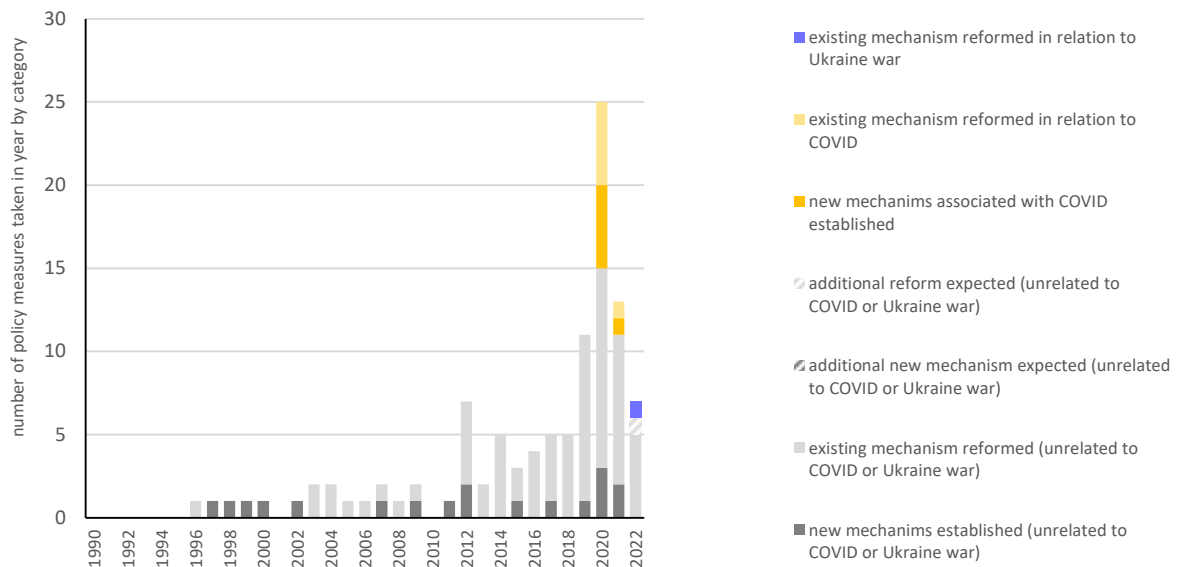
31. The following sections set out the main traits of the individual contributions that the EU Regulation makes to enhancing security and public order in the context of foreign investment into the Union, and how they are implemented in practice in Member States and by the EU Commission and which benefits, challenges and opportunities for change they represent.

**1.1.1. Driver of a political dynamic in favour of investment screening**

32. Until about 2016, investment screening enjoyed rather unfavourable press in many Member States and within European institutions. An air of “protectionism” was associated with some of the few cases that came to public attention. Investment screening was considered a barrier to international capital flows and an obstacle to economic opportunities, and the benefits or necessity of screening, as a last resort to identify and mitigate risk for security or public order were not widely recognised.

33. In the few years that have passed since then, perceptions in many Member States have changed quite dramatically, and regulatory action has accelerated markedly across Member States (Figure 1). Several factors have contributed to this change, including: growing concerns about geopolitical developments; a more assertive stance of certain economies that do not share the open economic model of the European Union and its Member States; the role of strategic acquisitions by foreign-government-guided operators; technological developments that lead to new vulnerabilities; and the exposure of hitherto unseen or ignored dependencies in supply chains in the context of the COVID-19 pandemic (see Figure 1 for policy changes that Member States’ governments explicitly associated with the particular circumstances of the pandemic).

**Figure 1. Policy making dynamics on investment screening in EU Member States 1990-2022**

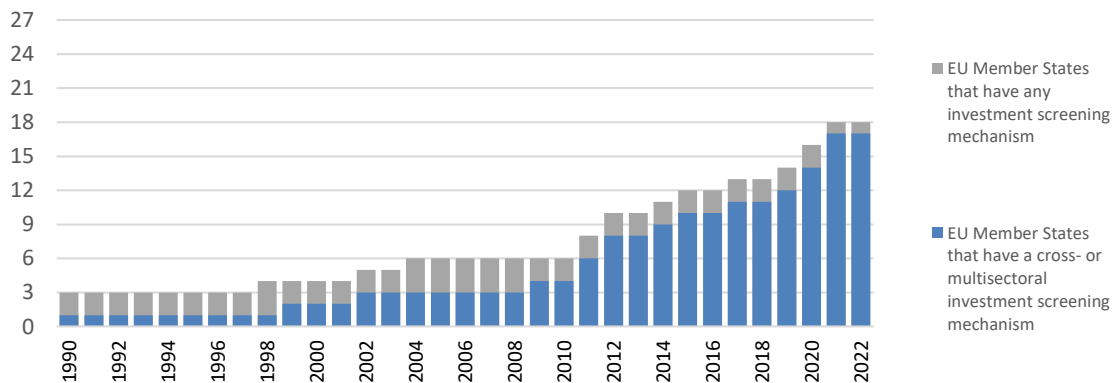


Note: Data for 2022 as of 30 June 2022, with expectations of policy changes until 31 December 2022 based on information available on 30 June 2022. Projections are based on public government statements or information obtained in conversation with Member States’ authorities. Changes that governments explicitly associated with the context of the COVID-pandemic or the war in Ukraine, even as only a contributing factor, are shown in orange and blue, respectively. Extensions of the validity of temporary measures are not counted as new measures.

Source: OECD.

34. As a result of this strong policy making activity, investment screening has become the norm rather than the exception across the EU, and this process is set to continue for the near future (Figure 2). If advanced plans for the introduction of investment screening mechanisms materialise, over 80% of Member States will have a comprehensive framework to screen inward foreign investment in the near to medium term.

**Figure 2. Presence of investment screening mechanisms in EU Member States: evolution over time (1990-2022)**



Note: Data for 2022 as of 30 June 2022. Projections based on public government statements or information obtained in interviews with Member States' authorities conducted in the context of this study. The notion of "any investment screening mechanism" includes screening or review mechanisms whose scope is limited to a single sector.

Source: OECD.

35. The process leading to the adoption of the EU Regulation and its operation since October 2020 has been a catalyst for these developments across the Union, and the actual operation of the framework set up by the EU Regulation has further boosted governments' awareness of the merits of investment screening. Authorities of many Member States that had until recently been sceptical about the benefits of investment screening have testified that the detailed information on many actual investment projects into the Union had opened their eyes to investment patterns and the implications of certain investments. Member States with longer traditions of investment screening described how the additional transparency about investment patterns had sharpened their overall awareness and understanding and that they had adjusted their approach to screening of individual transactions in response.

36. The political impetus that resulted from the negotiation and entry into force of the EU Regulation also led to the allocation of greater resources in several Member States that had already been screening investment.<sup>5</sup> Some screening authorities report however that they suffer resource shortages in staff and even material equipment and explain this situation by the low priority that their political leadership attaches to this function.

<sup>5</sup> In Austria, a special unit for investment screening has been created within the Ministry. Germany has significantly expanded the staffing dedicated to investment screening, from five agents in 2019 to fifteen agents in March 2022 ([Interview](#) by Florentine Kessler-Grobe to *Linklaters*, 7 March 2022 (2:11)). In Italy, the capacity of the Italian authorities in charge of the screening process was considerably strengthened in early 2022 with the creation of a new evaluation unit for strategic analysis regarding the exercise of special powers staffed with ten professionals. ([Decree-Law n.21 of 2022, converted with modifications into Law n.51 of 2022](#), Article 27).



37. The EU Regulation also offered the EU Commission a basis for later EU Commission communications, for instance in the context of the COVID-19 pandemic<sup>6</sup> or the Ukraine crisis<sup>7</sup> on the merits and importance of operational investment screening mechanisms. These processes are credited with further focusing political-level attention in Member States' governments and an acceleration of the policy processes leading to the introduction or strengthening of investment screening mechanisms.

38. The conviction on the benefits of investment screening is not shared equally across all Member States, according to testimony or personal views of Member States' screening authorities or contact points. Reservations about the need to screen inward investment continue to linger and were explained by the disadvantage that screening could generate in the context of efforts to attract foreign investment, especially when competing with similarly positioned countries outside the Union that do not screen inward investment. It was also noted that the decision to establish screening was driven to some extent by the desire to be seen as a responsible actor and that the establishment of a screening mechanism allowed to escape persistent political pressure from within and outside the Union to establish a screening mechanism.

39. The political impetus in the area of investment screening has diminished significantly since the adoption of the EU Regulation. It was observed that leadership levels in Member States' governments have not given strategic direction, that attention to the subject at political level had declined and as a consequence, reform efforts have slowed significantly. Authorities in several Member States indicated that the calendar for long due reforms and adjustments, including to implement the requirements of the EU Regulation in domestic law, had become uncertain and that the establishment or upgrading of screening mechanisms had slowed or stalled.

### *1.1.2. Convergence of domestic investment screening rules in EU Member States*

40. Until recently, in Europe, investment screening was a niche issue that enjoyed low policy priority and generated limited implementation practice in the few countries that were screening inward investment. In countries that had a longer history of investment screening, the mechanisms had different roots. In some, they were vestiges of gradually retreating regulatory regimes for international capital flows (e.g., France, Spain, Finland) or had developed out of the transformation of regimes of State-controlled enterprises (e.g., Italy). Elsewhere, narrow sectors especially in defence production had for decades been subject to some rudimentary regulated controls (e.g., Denmark), or new mechanisms were developed and gradually expanded where none had existed previously (e.g., Germany, Austria, Lithuania), occasionally in response to controversial transactions that exposed the absence of regulatory powers (e.g., Austria, France, Germany, Netherlands).<sup>8</sup>

41. The marginal practical role of investment screening in the EU's open economies and the absence of judicial review of individual cases had kept investment screening mechanisms outside the scope of legislative reforms for decades. Old mechanisms with small or no practical relevance remained in force unchanged and unchallenged. Combined with the idiosyncrasies of the individual mechanisms' historical developments, these factors had led to a large variety of regulatory approaches to investment screening

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<sup>6</sup> On 25 March 2020, the EU Commission published a [Communication](#) that provides guidance to Member States on how to achieve adequate protection of assets that are crucial for European security and public order in the context of economic shock posed by COVID-19.

<sup>7</sup> On 5 April 2022, the EU Commission published a [Communication](#) that provides guidance for EU Member States on assessing and preventing threats to EU security and public order associated with Russian and Belarussian investments.

<sup>8</sup> More information on these developments for individual Member States is available in Section 3. of this report and in OECD (2020), "[Acquisition- and ownership-related policies to safeguard essential security interests – Current and emerging trends, observed designs and policy practice in 62 economies](#)".

and diverse institutional cultures in Member States at the time when the EU Regulation was under preparation.<sup>9</sup>

42. Differences included vastly divergent regulatory depth; widely varying sector coverage and criteria to frame transactions as potentially problematic; and different practices on transparency.<sup>10</sup> Some investment screening mechanisms were unknown or not recognised as such as evidenced by the absence of notifications under internationally agreed reporting mechanisms.<sup>11</sup> Efforts to standardise regulatory frameworks undertaken in particular at the OECD<sup>12</sup> had inspired the design of new mechanisms but had shown little effect on decades-old rules and mechanisms.

43. The entry into force of the EU Regulation in April 2019 changed this situation: Investment screening mechanisms henceforth needed to be reported to the EU Commission and made public (Article 3(7)-(8)); they had to respect certain procedural and substantive minima set out in Article 3 (1)-(6); and Member States were encouraged to consider certain substantive factors in their assessment of individual transactions (Article 4). Member States were also required to compile certain statistics for direct use by the EU Commission and, through a publication requirement, indirect use by the general public (Article 5).

44. Legislative developments in Member States since the entry into force of the EU Regulation document that the mandatory and optional standards set out in the EU Regulation have been a rather successful driver of change. Several Member States that already had screening mechanisms in operation at the time of its entry into force made changes to adapt their domestic legislation to address the requirements or recommendations set out in the EU Regulation.<sup>13</sup> New screening mechanisms or wholesale replacements of existing mechanisms that were adopted after April 2019 largely conform to these elements.<sup>14</sup> New mechanisms or reforms that were still being planned in June 2022 also included, according to legislative documents or statements by governments, several elements evoked in the EU Regulation.<sup>15</sup>

45. Figure 3 shows how Member States progressively introduced reforms to specifically adapt to the EU Regulation between March 2019 (when the EU Regulation was adopted) and end of June 2022.

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<sup>9</sup> See for historical developments and roots as well as a snapshot of policies in most EU Member States as of May 2020 OECD (2020), "[Acquisition- and ownership-related policies to safeguard essential security interests – Current and emerging trends, observed designs, and policy practice in 62 economies](#)".

<sup>10</sup> On these aspects specifically OECD (2021), "[Transparency, Predictability and Accountability for investment screening mechanisms](#)".

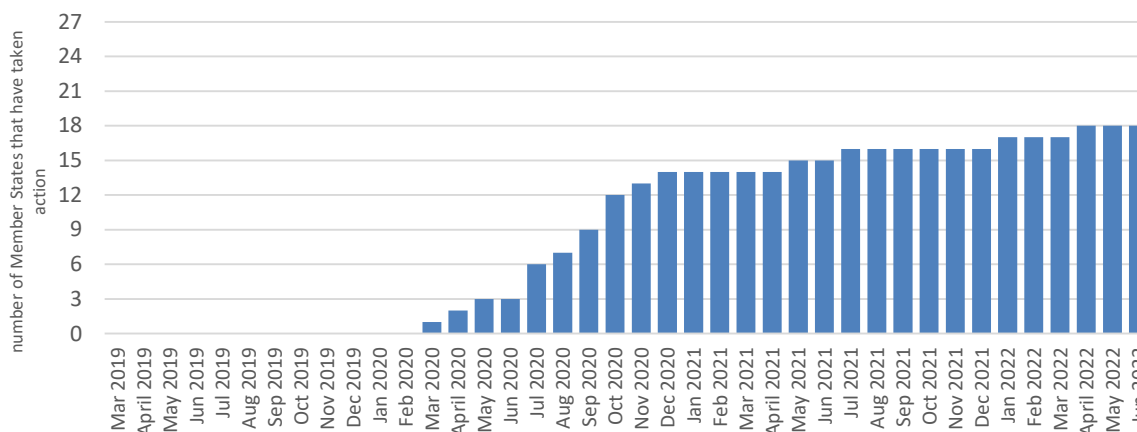
<sup>11</sup> Adherents to the [OECD Declaration on International Investment and Multinational Enterprises](#) are required to notify measures that they have in place to safeguard essential security interests to the OECD. Notified measures are included in a [list of measures reported for transparency](#) under the National Treatment instrument, which is part of the Declaration.

<sup>12</sup> [OECD Guidelines for Recipient Country Investment Policies relating to National Security](#) (2009).

<sup>13</sup> Examples include Italy, Germany, Lithuania, and Romania.

<sup>14</sup> Examples include Austria, Czech Republic, Malta, and Slovenia.

<sup>15</sup> Examples include Belgium, Greece, Estonia, and Luxembourg.

**Figure 3. Reform efforts to adjust to the EU Regulation (March 2019-June 2022)**

Note: A reform is recorded for the moment of its entry into force in monthly cohorts between March 2019 and June 2022. If a Member State made several changes, only the earliest adjustment to the EU Regulation is recorded. Data are not intended to suggest that an adjustment addresses all requirements of the EU Regulation. Changes are accounted for regardless of whether a Member State has a screening mechanism in place, but the sole assignment of a contact point for the cooperation mechanism is not considered a change for the purpose of the assessment.

Source: OECD.

46. Figure 3 also shows that the process of adjusting to requirements of the EU Regulation has slowed considerably since the EU Regulation began to apply on 11 October 2020, and that the adjustment process is not complete. Some countries have made no changes to their domestic rules at all. This relates both to procedural requirements, many of which are mandatory, and to substantive elements, where Member States have greater space for choices and where the EU Regulation contains guidance rather than obligations.<sup>16</sup>

### ***1.1.3. Greater knowledge about FDI trends, patterns, and transactions into the Union***

47. A comprehensive assessment of the implications of foreign direct investment in the Union is the basis for an appropriate assessment of risk for security and public order. Until recently, Member States' understanding of inward investment was at best confined to developments and transactions in their own jurisdictions. The mechanisms to foster exchange of information contained in the EU Regulation have changed this situation significantly, much to the appreciation of Member States' screening authorities.

48. The information exchange is based on several independent mechanisms, which include:<sup>17</sup>

- Active formal and informal exchanges among Member States' authorities, with input from the EU Commission, on individual cases under the cooperation mechanism;
- Exchanges of experiences in the group of experts;
- Annual aggregate reporting by the EU Commission as required under Article 5 of the EU Regulation;
- Reporting by Member States at national levels, which is partially instigated by the data collection requirements under the EU Regulation; and

<sup>16</sup> These issues are discussed in their respective substantive context in the following sections.

<sup>17</sup> Some of these mechanisms are discussed in greater detail in separate sections of this report.

- Horizon-scanning carried out informally by the EU Commission on foreign direct investments that could fall under the scope of screening mechanisms in one or more Member States.

49. The enhanced knowledge about foreign direct investment in the Union has had several tangible effects for investment screening: Politically, it has helped make the case for the introduction of investment screening in Member States that were still hesitant; at operational level, it has sharpened the understanding of patterns and approaches by certain investors or investors from certain countries of origin on the coordination of acquisitions, which, according to several screening authorities, has helped adjust the approaches to screening of individual transactions. The additional information has also, according to Member States' screening authorities, made it easier to explain and defend the case for a more robust stance on Europe's security and public order interests.

50. The general approach that acquisitions are decided case-by-case makes this holistic understanding of investment patterns and approaches more urgent. The strategic and coordinated acquisition of a series of assets to gain access to technology or to develop a strong position in critical inputs or technologies makes it all the more important to detect patterns early to avoid the loss of European capabilities associated with security or public order, which may not be obvious from a consideration of individual transactions in isolation.

51. Under Article 5(3) of the EU Regulation, the EU Commission shall provide an annual report on the implementation of the Regulation to the European Parliament and to the Council on a yearly basis. The EU Commission's first [Report on the Screening of Foreign Direct Investments into the Union](#) was published on 23 November 2021. The 2021 Report also includes a [Staff Working Document](#) with additional economic data on foreign investments into the Union as well as information on recent legislative developments and plans in all Member States.

#### ***1.1.4. Peer learning on policy design and implementation through a group of experts***

52. At the time of the adoption of the EU Regulation, many Member States did not have any officials with previous exposure to or experience with investment screening, and, as some Member States pointed out, nor did the EU Commission. Expertise of officials with responsibilities over international investment policymaking in Member States and at the EU Commission were mainly focused on investment promotion and attraction as well as investment protection through investment treaties. Staffing and experience with investment screening even in Member States with investment screening mechanisms in place were much lower than they are today, as case numbers and political attention to investment screening were less developed than they are now.

53. In its Article 12, the EU Regulation explicitly recognises the existing group of experts and calls for continued conversations on “the screening of foreign direct investment, to share best practices and lessons learned and exchange views on trends and issues of common concern relating to foreign direct investments”, and to provide advice “on systemic issues relating to the implementation” of the EU Regulation. The group of experts, composed of officials from Member States, was established in late 2017, before the EU Regulation had been adopted.<sup>18</sup>

54. The group of experts is composed essentially of officials of screening authorities where Member States have such authorities, and of officials acting as contact points in non-screening Member States.

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<sup>18</sup> Information on the role and composition of the group of experts on the screening of foreign direct investments into the European Union is available through the [Register of Commission Expert Groups and Other Similar Entities](#). The group of experts was initially established by [Commission Decision \(2017\) 7866 final](#) of 29 November 2017; its governing rules were amended by [Commission Decision C\(2019\) 3649 final](#) of 17 May 2019 to adjust to the requirements of the EU Regulation.

These officials attach great importance to the meetings of the group, in particular in the associated format of the “screeners’ academy”,<sup>19</sup> and emphasise various benefits, regardless of their degree of experience with investment screening. Officials from Member States with broader experience have credited the group of experts’ operation with promoting a common culture of FDI screening within the European Union and qualified the group of experts as a true Europe-wide network to share best practice in foreign investment screening. They have also emphasised the role of the group in advancing the development of investment screening at European and national levels.<sup>20</sup>

55. A very significant number of Member States’ authorities would wish that more and more frequent meetings in the format of the “screeners’ academy” take place as they support, in the view of these officials, an in-depth exchange of experience, provide a valuable learning opportunity, and serve as a catalyst for personal, trustful relationships among practitioners.

#### ***1.1.5. The information exchange mechanism on specific investment transactions***

56. The information exchange mechanism on individual transactions, laid down in Articles 6 to 9 of the EU Regulation, constitutes the greatest innovation over past practice and is globally unique in this area. It engages all Member States – those that screen transactions and those that do not yet screen transactions – regardless of whether a transaction is taking place in a given Member State.

57. The mechanism is a core contribution to the effectiveness of the system of protecting security and public order in Member States and the Union as it:

- Informs other Member States and the EU Commission about foreign direct investments that are planned, have been implemented or have been discovered, to allow the identification of security or public order implications in other Member States than the Member States’ hosting the foreign direct investment;
- Allows Member States to request information that they need for their evaluation of a given foreign direct investment from the network of peer authorities and the EU Commission and thus draw on a wider and deeper pool of information than available domestically;
- Allows screening authorities to understand investment trends, potential concentrations of acquisitions and underlying strategic intent; and
- Reaffirms the merits of the availability of a mechanism to scrutinise and potentially intervene in individual transactions.

58. The information exchange mechanism is regulated in detail in the EU Regulation, and various practices have developed in connection to its formally established components. While its contribution to the security and public order in the context of foreign investment into the Union is unanimously recognised among Member States’ authorities and the European Commission, some actors hold that its operation is not without flaws and challenges. Specific challenges arise from the sheer quantity of information that is circulated under the mechanism, the sometimes questionable relevance of individual pieces of information, the asynchronous arrival of information on transactions that concern several Member States (hereinafter referred as “multi-country transactions”).

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<sup>19</sup> Many Member States’ authorities lauded the “screeners’ academy”, an event that the EU Commission had organised in March 2022 back-to-back with a first in-person meeting of the group of experts since the beginning of restrictions under the COVID-19 pandemic.

<sup>20</sup> Some governments make similar public statements, see for example Austria: Bundesministerium für Digitalisierung und Wirtschaftsstandort (2022) “*Erster Tätigkeitsbericht der Investitionskontrolle*”, p.39 and France: Direction Générale du Trésor (2022), “*Le contrôle des investissements étrangers en France en 2021*”, p.15.

a. *A comprehensive set of formal rules, rights, and obligations*

59. The cooperation mechanism is organised around two scenarios:

- Transactions which are formally undergoing screening in the Member State where they take place. This scenario and the corresponding procedural rules are set out in Article 6 of the EU Regulation.
- Transactions which are *not* undergoing screening in the Member State where they take place. This scenario and its procedural rules are set out in Article 7 of the EU Regulation.

60. Both scenarios can lead the Commission or other Member States to issue respectively an opinion or a comment to the Member State hosting the investment if the transaction is likely to affect the public order or security of at least one Member State. If the transaction is likely to impact projects or programmes or Union interest (Article 8 of the EU Regulation) as listed in the Annex of the EU Regulation<sup>21</sup> on grounds of security or public order, the Commission may issue an opinion to the Member State hosting the investment regardless of whether it is undergoing screening.

61. The practical relevance of these two scenarios is heterogeneous. At present, a significant share of the activity under the cooperation mechanism takes place under the provisions of Article 6 (a transaction is undergoing screening in the jurisdiction where it takes place). Article 7 has a potentially large scope of application as many transactions covered by the EU Regulation are not undergoing screening in the jurisdictions where they take place but is used less frequently for several reasons: Some screening Member States' authorities noted that they do not expect that non-screening Member States can contribute useful information or do not approach them to avoid embarrassing authorities in non-screening Member States. Some Member States on the receiving end of such potential requests – especially those that do not currently have an investment screening mechanism in place – are not yet equipped to gather the information that they would need to share under the mechanisms foreseen in Article 7.

62. The EU Regulation establishes obligations, rights and opportunities for Member States' authorities or the EU Commission for the two scenarios mentioned above:

- They require that Member States systematically share certain specified factual information<sup>22</sup> on individual transactions that undergo screening (Article 6(1));

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<sup>21</sup> Pursuant to Article 8(4), the EU Commission shall adopt delegated acts to amend the list of projects and programmes of Union interest set out in the Annex of the EU Regulation. By 30 June 2022, two amendments to the list had been made in [Commission Delegated Regulation \(EU\) 2020/1298 of 13 July 2020](#) and [Commission Delegated Regulation \(EU\) 2021/2126 of 29 September 2021](#).

<sup>22</sup> The regulation uses specific terminology for different types of input as follows:

- *Information*: facts that a Member State (Article 6(2)) or the Commission (Article 6(3)) have and that they voluntarily share with the screening Member State as part of comments (Member States) or opinions (EU Commission).
- *Comments*: A Member State provides views and “information” on a voluntary basis; this is possible no matter what the circumstances.
- *Opinion*: The EU Commission provides a risk assessment or relevant “information” on a voluntary basis (an opinion *must* be issued if a third of the Member States consider their security or public order interests likely affected – Article 6(3)). The EU Commission is only allowed to issue an opinion if at least two Member States or a project or programme of Union interest are affected (Article 8). Member States that are not addressee of an opinion are only provided meta-information – on the fact that an opinion was issued – but not shown the substance of the opinion itself (Articles 6(3),7(2), unless the opinion concerns projects or programmes of Union interest (Article 8(2)b)).
- *Notification*: Mandatory information that a transaction is “undergoing a formal assessment or investigation” (Article 6(1) in conjunction with Article 2(5)).



- They offer the possibility for other Member States and the EU Commission to *provide* input – either factual information or assessments – to other Member States. In their decisions on individual transactions, the addressee must give due consideration to this input or take it into account to varying degrees (Articles 6(2), 6(3), 7(1), 7(2), 8(1)); and
- They offer the possibility to *solicit* input from other Member States and from the EU Commission related to specific cases (Articles 6(4), 7(3)). Approached Member States have to respond to such solicitations by providing certain minimum information circumscribed in Article 9 and, if the request is duly justified, additional information (Articles 6(6), 7(5)).

63. The EU Commission has structured part of these exchanges of information through agreed and standardised forms and questionnaires that are used by Member States and investors to provide information for the circulation in the system – the “Form A” and “Form B”.<sup>23</sup> The EU Commission has also established a secure system for the confidential exchange of sensitive information. National screening authorities and some EU Commission staff have access to the system.

64. For some aspects, the EU Regulation establishes the cooperation mechanism as a decentralised system of information exchange through contact points;<sup>24</sup> this system provides equal and simultaneous access to all Member States’ screening authorities and the EU Commission. Notifications of transactions, for example, are shared with all Member States and the EU Commission simultaneously.

65. In some other respects, the EU Commission has a more prominent and privileged role as recipient of certain information:

- If a Member State provides comments to another Member State, the EU Commission receives the comments simultaneously. The EU Commission provides other Member States with meta-information only, namely, that comments were provided, but not the comments themselves.<sup>25</sup>
- If the EU Commission provides an opinion to a Member State, only that particular Member State receives the actual opinion, while other Member States again only receive meta-information (except in cases where projects or programmes of Union interest are concerned, and where all Member States receive the actual opinion (Article 8(2)(b)).

66. There are further information asymmetries in the cooperation mechanism; specifically, Member States that provide comments and the Commission which provides an opinion do not systematically obtain feedback on how their comments or opinions were taken into account in the final decision on a specific transaction.

67. Several Member States’ screening authorities find these limitations on the feedback that they can obtain regrettable. They hold that knowledge of the substance of exchanges, assessments, and views on specific transactions would provide them with reassurances that their own security or public order concerns were adequately addressed. This information would also keep them aware and educate them about their peers’ practices. Further, several Member States’ authorities – regardless of whether they administer a screening mechanism or not – see this partial blackout on information as a missed opportunity for fostering

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<sup>23</sup> “Form A” is a template used for the notification by Member States to the other Member States and the EU Commission pursuant to Article 6(1) of the EU Regulation. “Form B” is filled out by investors in the context of their application for an authorisation or for notifications to individual Member States’ screening authorities. Both forms are eventually circulated in the information exchange mechanism, but potentially at different times depending on each Member States’ rules and practices. More detail on the timing of submission of the forms to the information exchange mechanism is available in section 1.1.5.h on p.37.

<sup>24</sup> Articles 6(10), 7(10) of the EU Regulation.

<sup>25</sup> Some Member States share information or comments with other Member States informally with no discernible system and potentially without an explicit legal basis in their respective domestic laws.



a common culture of investment screening across the Union. They also regret that the lack of feedback limits accountability of their peers in the context of the cooperation mechanism. Some authorities suggested that their current domestic legal frameworks may not allow them to share information on how they have addressed comments or opinions with other Member States' authorities, whether formally or informally.

*b. Informal exchanges complement formal means*

68. The cooperation mechanism, as established under the EU Regulation, is based on written exchanges through a secured and classified exchange system. These exchanges are subject to specific timelines and are systematically distributed to potentially sizable audiences – national contact points and screening authorities in the other Member States and the EU Commission. Not all actors find the information exchange under formally established procedures to always be the most effective or desirable means of exchange.

69. Member States report extensive informal exchanges about individual transactions in bilateral or plurilateral audio- and video-conversations and by e-mail. These informal exchanges coexist and complement formal exchanges established explicitly by the EU Regulation.

70. Practices around informal exchanges appear to differ among Member States. They seem to be more frequent among screening authorities of the most active Member States and exchanges involving the Commission, but no Member States' authority sees itself excluded from informal exchanges. Informal exchanges are particularly common among screening authorities that are in frequent contact and have built trustful relationships, often based on personal knowledge of their respective counterparts. The constraints of the COVID-19 pandemic that coincided with the full application of the EU Regulation have not permitted to establish such close professional contacts among all Member States' authorities, but there was generally shared optimism that this would happen eventually as restrictions subside. When informal channels are used with authorities where no such proximity exists, the EU Commission appears to play occasionally the role of an intermediary that approaches Member States' authorities.

71. Not all screening authorities see informal exchanges favourably: Some deem the means of communications such as e-mail inappropriate for certain sensitive, but unclassified, information. Informal means of exchange may also perpetuate pre-existing privileged relationships and exclude newcomers.

72. Some officials from Member States that do not yet have a screening mechanism in place pointed to traditional diplomatic networks as a co-existing channel for exchange of information on individual transactions. These channels offer established, secure means of communication and typically trustful relationships and opportunities for oral communications. Other officials mentioned ongoing exchanges among intelligence agencies of EU Member States in which confidential information about threats associated with specific actors or transactions is being exchanged. Little has been revealed about the relative importance of and interaction with informal exchanges among screening authorities and these pre-existing channels of cross-border cooperation on intelligence.

*c. Too much information – or not enough?*

73. The volume of information on transactions circulating in the information exchange mechanism is for the most part determined mechanically by the number of notifications of transactions that are notified under Article 6(1) as “undergoing screening”. In practice, the arrival of information is modulated significantly by the practice of Member States, which are based on different understandings of the EU Regulation. The pivotal question for each Member State's practice is the understanding of when a transaction “undergoes screening”, as Article 6(1) refers to this criterion as the trigger of a notification obligation.

74. The term “undergoing screening” is defined in Article 2, item 5 as “a formal assessment or investigation pursuant to a screening mechanism” – and it is the word “formal” (and potentially “investigation”) over which interpretations diverge:

- Some Member States’ authorities – Austria and Italy, for example – feed all transactions that are notified to them and that fall within the scope of their screening legislation to the information exchange mechanism without any prior assessment of whether the concrete case could potentially have security or public order implications for their own jurisdiction, for other Member States, or for projects or programmes of Union interest. This approach provides comprehensive information on investment trends and transactions to all Member States, but also leads to a large number of transactions recorded in the system; some of this information may not be particularly relevant to other Member States.
- Other Member States – France,<sup>26</sup> Germany and Malta, for example – have organised their screening procedures in two phases: During a phase 1, which in Germany can last up to two months, and lasts about a week to 10 days in France and up to five days in Malta, the screening authorities assess whether: the transaction falls under the scope of their screening mechanism; and whether it likely affects their own or other Member States’<sup>27</sup> security or public order or projects and programmes of Union interest. Only if both these conditions are met, the screening authorities begin a thorough screening in a phase 2 and notify the transaction to the exchange mechanism. They consider only such a phase-2-review as a “formal” assessment in the sense of Article 2, item 5 of the EU Regulation to which the notification obligation of Article 6(1) of the EU Regulation applies.

75. These different approaches lead to characteristic volumes of transactions that are fed into the exchange mechanism by individual Member States. While Member States tend to defend their respective approaches as the interpretation of the EU Regulation which leads to an optimal outcome, their respective counterparts in other Member States have mixed views on those choices.

76. The approach that feeds all transactions into the information exchange mechanism without a prior assessment of their potential security or public order relevance brings a relatively large number of transactions into the exchange mechanism. Views among Member States about this approach and its outcome vary:

- Some Member States’ authorities hold that the high number of notifications overburden their capacities and that the significant volume of manifestly irrelevant information distracts attention away from transactions that merit attention.<sup>28</sup> Some Member States’ authorities express concern that the amount of information in the exchange mechanism will become even less sustainable when Member States with high transaction volumes begin to operate screening mechanisms or expand the scope of existing mechanisms.

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<sup>26</sup> France had initially applied the approach mentioned as practice in Austria and Italy, notifying the European network (EU Commission and Member States) all operations involving a non-European investor, but changed its practice in light of the very high number of transactions that it contributed to the information exchange mechanism.

<sup>27</sup> See section 1.2 (paragraph 147) for more information on the scope of interests that are considered in individual Member States.

<sup>28</sup> A public statement voicing this concern, which several other Member States’ authorities also raised, at times as a priority, was made by Marie-Anne Lavergne, Head of the office in charge of the control of foreign investments in France at the French Treasury, in a [Joint public hearing SEDE/INTA in the European Parliament on “Assessing the risks and policy responses to foreign direct investment, including Chinese investments in the security and defence sectors”](#), 7 February 2022 (17:14:20). The issue is also reported, without attribution, in European Commission (2021), “[First Annual Report on the screening of foreign direct investments into the Union](#)”, p.17.

- It was also noted that investors have become overcautious and notify even transactions that are out of scope or that appear benign, and that this behaviour leads to an inflation of the number of notifications. Counsel confirmed in their testimony that this approach was adopted to avoid delays in light of what they describe as unpredictability of application of frequently changing screening rules or practices. Despite the absence of notification requirements in many instances, transactions are now notified even though their security implications appear at best remote, and they are notified to additional Member States even though the business link to these Member States may be very minor.
- Other Member States' authorities, especially those from smaller Member States and with more recent or no screening mechanisms, appreciate the comprehensive information about foreign investment into the Union and about trends and underlying strategies that this approach procures them. It was noted that information that may appear irrelevant at first may become important later and that the ample information fed into the system allowed Member States to build a rich, searchable database of transactions that may be useful background and reference material for future cases that may undergo screening in their own jurisdiction and would allow them inquire with Member States' authorities that have had previous experience with investments that feature similar criteria or involve certain investors.

77. The second approach under which only selected transactions are being notified also has supporters and critics among the Member States' contact points and screening authorities: While the number of transactions notified under this approach tends to be lower, they are considered as highly relevant. Critics hold however that the approach leads to an under-inclusive notification practice. They fear that some transactions that are not circulated in the information exchange mechanism could raise concerns in their own jurisdictions, but that the absence of a notification deprives them of an opportunity to provide comments or obtain information, or potentially take remedial action by calling in a notification in their own jurisdictions.<sup>29</sup>

78. While views among Member States' authorities as to whether the information exchange system generates too much or too little information are heterogeneous, many Member States' authorities would welcome some "selection" that would lead to less but more relevant information. Some Member States' authorities hold that this issue needs to be tackled as a priority but did not advance criteria, processes or responsibilities for such a selection.<sup>30</sup>

*d. The EU Regulation restricts the flow of transaction-specific information that is available within the Union among the Member States*

79. The EU Regulation requires or allows that certain information that is available to Member States' screening authorities and the EU Commission be shared with other Member States and the EU Commission. The subset of information that must or can be shared from among all the information that is available to Member States' authorities or the Commission is circumscribed by Articles 6(1), 6(2), 6(3), 7(1), 7(2) and 8(1) of the EU Regulation.

80. Comprehensive possibilities to share information that is available within the Union amongst all actors involved in this endeavour would contribute to the EU Regulation's purpose to enhance the collective security of Member States and the Union in the context of foreign direct investment. Today, the EU Regulation allows or requires such sharing of information only in certain scenarios, and does not

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<sup>29</sup> On a separate but related problem of the timing of the arrival of notifications under this model see section 1.1.5, in particular considerations laid out on pp.37 and following.

<sup>30</sup> Solutions of how that could be achieved are available in section 2. , Issue #10.

foresee the formal transmission of information in other scenarios where wider availability of information would allow Member States or the EU Commission to detect or assess a given transaction.

81. From the perspective of a Member State that *possesses* information that is potentially useful for other Member States, five scenarios can be distinguished that result from combinations of: in which Member State the transaction takes place in relation to the Member State that possesses the information; whether the transaction undergoes screening; and which Member State's security or public order is likely affected. A further scenario concerns the sharing of information that the EU Commission possesses. Table 1 shows these scenarios, sets out in which scenario the EU Regulation requires or allows that a Member State that has relevant information forwards this information, and identifies the purpose and benefits of information sharing in this scenario. The table documents that the EU Regulation does not allow or require information sharing among Member States in all scenarios even though information is available within the Union and its sharing could advance the collective security of Member States and the Union. Formal information flow from the Commission to Member States is possible only when a given transaction likely affects more than one Member State or projects or programmes of Union interest.

82. In the only scenario where the EU Regulation *requires* that a Member State share transaction-specific information (scenario ❶), it limits the information that must be shared, rather than requiring that all information be transmitted that could be useful for other Member States in their assessment of their own exposure.<sup>31</sup>

83. In other scenarios where potentially detailed information *is* shared (scenarios ❷ and ❸), only the Member State in which the transaction takes place receives the information, leaving other Member States where the transaction may also take place without their knowledge uninformed.

84. The Commission can share information that it possesses through opinions (Articles 6 or 7 of the EU Regulation).

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<sup>31</sup> The information that must be shared pursuant to Article 6(1) is described in Article 9(2) of the EU Regulation, plus assessments of which other Member States may be affected in their security or public order and whether the transaction likely falls in the scope of [Regulation \(EC\) No 139/2004](#), which concerns merger control.

**Table 1. Required or optional sharing of transaction-specific information that is available within the Union in different scenarios – perspective of a Member State that *possesses* such information or the EU Commission**

scenario	❶ transaction taking place in Member State that possesses the information and is undergoing screening there	❷ transaction taking place in Member State that possesses the information, but is not/longer screened there	❸ transaction taking place in other Member State, is not/longer screened there, likely affects Member State that has the information	❹ transaction taking place in other Member State, is not/longer screened there, and does not likely affect Member State that has the information	❺ transaction taking place in other Member State, screened there, likely affects Member State that has the information	EU Commission possesses information
obligation or possibility to <b>share</b> information under the Regulation (with reference)	transmission of information to other Member States and Commission is <i>required</i> as part of notification (Art.6(1))	—	transmission of information is <i>optional</i> as part of comments (Art.7(1))	transmission of information is <i>optional</i> as part of comments (Art.7(1))	<i>optional</i> information sharing as part of comments in response to the screening Member State's notification (Art 6(2))	transmission of information is <i>optional</i> as part of opinions <b>if</b> more than one Member State or projects or programmes of Union interest are likely affected (Art.6(3), 7(2), 8(1))
main purpose and benefit of information-sharing in that scenario (described from the perspective of the screening authority or contact point that possesses information)	invitation to everyone to share anything that can inform or improve our own screening decision	hint that a transaction taking place in our jurisdiction – whose security implications we are still informally assessing or will not be able to screen – may affect you. This puts you in the know so you can provide comments pursuant to Art.7(1).	request to take our interests into account, including, where possible, by opening a screening procedure, and provision of supporting information that we have	hint that, based on information that we have, a transaction that you may not be aware of may affect you (but not us)	request to take our interests into account in your ongoing screening procedure, and provision of supporting information that we have	we have information that you may not have and that may inform and improve your screening decision or allow you to identify a transaction that you may be unaware of

Note: Numbers associated with certain scenarios are used to identify these scenarios in references contained in the text.

Source: OECD.

85. The EU Regulation also limits information sharing in scenarios where a Member State or the EU Commission may *need* information that may be available in another Member State. Table 2 sets out, from the perspective of a Member State that seeks information or the EU Commission in that situation, under which circumstances its authorities can obtain information from other Member States that have or may have such information.

86. In all scenarios mentioned in Table 2, the requesting Member State or the EU Commission meet hurdles such as: the need to justify a request for information; limitations on what can be requested and which purposes may be pursued with the request; requirements that the request be proportionate and not unduly burdensome; or that more than one Member State or projects or programmes of Union interest are likely affected. These limitations are more constraining in cases where a transaction is not, not yet, or no

longer formally screened,<sup>32</sup> which may result from a choice of the Member States' legislator or the screening authorities of the Member State that holds the information.<sup>33</sup>

**Table 2. Required or optional sharing of transaction-specific information that is available within the Union in different scenarios – perspective of the Member State that seeks information or the EU Commission**

scenario	⑥ transaction taking place in Member State that possibly possesses the information and undergoing screening there, <b>uncertain</b> whether it likely affects the Member State seeking information	⑦ transaction taking place in Member State that possibly possesses the information and undergoing screening there, <b>likely</b> affecting the Member State seeking information	⑧ transaction taking place in Member State that possibly possesses the information, but is not/not yet/no longer undergoing screening there, <b>uncertain</b> whether it likely affects the Member State seeking information	⑨ transaction taking place in Member State that possibly possesses the information, but is not/not yet/no longer undergoing screening there, <b>likely</b> affecting the Member State seeking information	EU Commission seeks information
obligation or possibility to <b>request</b> information under the Regulation (with reference)	request for additional information in response to notification possible (Art.6(6))	request for additional information in response to notification possible (Art.6(6))	—	request for basic information possible (Art.7(5))	request for additional information in response to notification (Art.6(6)) or for basic information possible (Art.7(5))
main purpose and benefit of receiving the information in that scenario (described from the perspective of the screening authority or contact point that seeks information)	allowing for a better assessment of the impact of the transaction in the Member State that seeks the information, including to provide better informed comments to the screening Member State under Art.6(2), and obtaining information to decide whether a screening procedure in own jurisdiction may be possible or required	allowing for a better assessment of the impact of the transaction in the Member State that seeks the information, including to provide better informed comments to the screening Member State under Art.6(2), and obtaining information for the screening procedure in the Member State that seeks information	allowing the Member State who seeks the information to assess whether the transaction likely affects its security or public order; allowing for better informed comments to the non-screening Member State under Art.7(1)	allowing the Member State who seeks the information to make a better-informed assessment of the implications of the transaction on its own security or public order; allowing for better informed comments to the non-screening Member State under Art.7(1)	allowing the EU Commission to make a better-informed assessment of the implications of the transaction and allowing for better informed opinions under Art.6(3) or 7(2)

Note: Numbers associated with certain scenarios are used to identify these scenarios in references contained in the text.

Source: OECD.

<sup>32</sup> Under Article 7(5) of the EU Regulation (transaction not/not yet/no longer screened), only information contained in the list of Article 9(2) can be requested while the scope of information that can be requested from a screening Member State under Article 6(6) is broader provided other conditions are met. This applies even to cases where the addressees of a request may have ample information on a transaction whose screening procedure they have just closed.

<sup>33</sup> An exception is observed for cases of Article 8(1) of the Regulation (projects and programmes of Union interest): The rules here do not differentiate between scenarios where the concerned transaction is not yet/not/no longer screened.

87. The current design is particularly weak where a transaction is not yet undergoing screening in any Member State and when its impact on security or public order may still be hard to gauge. In these scenarios, information that may be available in the Union would be particularly useful to assess whether a screening procedure should be opened. The possibilities for information exchange foreseen under the EU Regulation only become stronger once a transaction is screened in at least one Member State. Ignorance about transactions has further knock-on effects, as it precludes other Member States from using procedures such as those available under Article 7(1) or 7(5).

88. This latter aspect points to the implications of the absence or narrow scoping of national screening mechanisms, which are a key driver for the number of transactions that are not screened and to the effects of a delayed notification, i.e., where a transaction is known to one or more Member States' screening authorities but is not yet undergoing "formal screening":

- The absence of the possibility to screen a transaction strongly limits options to share information that is available in the non-screening Member States and that could alert other Member States of a transaction that may be subject to screening in their jurisdiction but would require knowledge of its existence (scenario ②), with potentially positive security and public order outcomes, including for the non-screening Member State.
- A delayed opening of a "formal screening" of transactions that are already known to one or more Member States' screening authorities poses similar problems in even more scenarios (scenarios ② and ③) as under these conditions, the Regulation does neither foresee the spontaneous sharing of information nor does it provide for the possibility for Member States to seek information from their peers when they cannot reliably assess whether their security or public order may be affected (scenario ⑥).

89. The limitations of information flows also lead to a slower propagation of knowledge about transactions across Member States. This aggravates problems associated with multi-jurisdiction-transactions, that is, transactions that are subject to screening in more than one Member State; these issues are described in section 1.1.5.h below.

90. The EU Commission plays a role in some but not all scenarios: Pursuant to Articles 6(3) and 7(2) of the EU Regulation, the EU Commission may address an opinion to a Member State in which a transaction takes or has taken place to provide relevant information to that Member State in this context. It allows the Commission to share information that it has at its own disposal.

91. It could be envisaged to give the EU Commission a greater role in the coordination of information flows. As it receives the full contents of comments from other Member States (Article 6(2) and 7(1) of the EU Regulation), while other Member States except the addressee of the comments only obtain the information that comments have been provided, the EU Commission will typically have a more comprehensive understanding of the implications of a given transaction. This position could suggest that the EU Commission be given a right to invite Member States that it believes have relevant information to likewise provide comments on a given transaction and hence to mobilise information that may be available within the Union.

92. In scenarios where the EU Commission holds that a transaction not undergoing screening is affecting more than one Member State, the other Member States are currently only informed that an opinion has been issued (Article 7(2) of the EU Regulation). Even the Member State or States that in the view of the Commission may be affected by the transaction will not know which transaction is concerned, and that they are the Member States that are threatened in the eyes of the EU Commission. It could be envisaged that the EU Commission informs the Member State or States that it considers likely affected in their security or public order about this fact and that it shares the opinion or a summary thereof with those Member States – a change that may require a revision of the EU Regulation.



93. The limitations that the Regulation imposes on formal exchanges of information available within the Union as documented in Table 1 and Table 2 may explain at least in part the frequency of informal exchanges described in section 1.1.5.b above.

94. To enhance the flow of information on transactions among Member States and to increase the effectiveness of the framework for screening of foreign direct investment into the Union, and to reduce the reliance on informal exchanges that depend on trust, available resources, and goodwill, it would be beneficial to broaden the possibilities or options to share or demand information under the Regulation. Proposals how this could be achieved are presented in section 2. as Issue #9.

*e. The criterion that determines which transactions must be notified to the exchange mechanism does not result in a selection of the most pertinent transactions*

95. The information exchange mechanism contributes in several ways to the EU Regulation's overall objective to enhance security and public order of the Union in the context of foreign direct investment. It has the potential to:

- improve the information basis for screening decisions in Member States (scenarios ①, ⑤ and ⑦ in Table 1 and Table 2) or other measures where transactions are not screened (scenarios ③ and ⑨); and
- to inform other Member States and the Commission of transactions that may affect their security or public order or projects and programmes of Union interest and that they are not aware of or on which their information is incomplete (scenarios ①, ②, ③, ④, ⑤, ⑥, ⑦, ⑧, ⑨).

96. As mentioned in the preceding section, the EU Regulation does not actually provide for a formal information exchange mechanism in some of these scenarios and only exploits some of this potential.

97. Only in a single scenario (scenario ①) does the EU Regulation actually *require* that a Member State share transaction-specific information in its possession without being solicited.<sup>34</sup> Alas, for the purpose of alerting other Member States or the EU Commission about transactions that may affect their security or public order or projects and programmes of Union interest, the criterion that triggers the information-obligation is not well chosen, as it relates to factors that matter for the security and public order needs and priorities of the emitter of the information rather than those of the recipient. In many cases, information on transactions that are irrelevant for other Member States is shared, while information on transactions that would be relevant for these other Member States is not shared.

98. Specifically, Article 6(1) of the EU Regulation requires that a Member State that has information on a transaction that takes place in its territory share certain information if that transaction *undergoes screening* in this Member State. This requires that the transaction is covered by the scope of this Member States' screening mechanism, and, in practice often<sup>35</sup> implies that the Member State sees sufficient grounds related to its *own* security or public order to open a formal screening. Therefore, Member States may not notify certain transactions that are likely to matter for other Member States: For example, a landlocked Member State would not be expected to include maritime shipping under the scope of its screening mechanism. However, a transaction involving a shipping company registered in that Member State and providing services elsewhere may well affect a Member State whose security of supply substantially

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<sup>34</sup> In other scenarios, specifically in response to scenarios ⑥, ⑦ and ⑨, Member States are likewise required to provide information, but in these cases only upon explicit request.

<sup>35</sup> There are two exceptions that apply to this second of the two cumulative conditions: A few Member States do not carry out a cursory assessment of the likely security and order implications before they notify (see section 1.1.5.c for details), and a few Member States can incorporate in the cursory assessment the security and public order interests of other Member States (see section 1.2, especially paragraph 149, for details).

depends on maritime shipping. Inversely, a transaction concerning a business in the vicinity of a critical infrastructure in the middle of a Member State may seriously affect the security or public order of that Member State, hence undergo screening and be notified to all other Member States, even if it is not relevant beyond that local context and hence for any other Member State's security or public order, and where other Member States are very unlikely to be able to contribute useful information.

99. The limitation of the scope of screening mechanisms and the design and application of individual Member States' procedures determines to what extent each Member State overshares and under-shares information in relation to needs and interests of the other Member States and the Commission; but the hard link that Article 6(1) of the EU Regulation establishes between the notification obligation and the screening of a transaction in the Member State in which the transaction takes place is the root cause of the issue. A solution to this issue is proposed as Issue #10 on p.77.

*f. Comments and opinions are broadly considered useful – and some authorities would like to see more of them, too*

100. Member States' authorities have a generally positive view of the information and feedback that they receive through comments and opinions from other Member States and the EU Commission. There have been instances where such input from European peers has shed genuinely new light on the implications of a given transaction and changed the outcome of a screening decision. Also, Member States appear to take comments from other Member States and opinions of the EU Commission into account when they determine a set of mitigation measures for individual transactions that they are screening.

101. The EU Regulation does not foresee that Member States which are not addressees of the comments or opinions obtain such comments or opinions, except where projects or programmes of Union interest are concerned. In the latter case only, the EU Commission shares its opinion with all Member States (Article 8(2)b of the EU Regulation). Several Member States regret that they do not have access to the substance of such comments and opinions that others have received. In that regard, the EU Commission is in a somewhat privileged position as it receives comments submitted by other Member States in full (Articles 6(2) and 7(1) of the EU Regulation). Other Member States have also expressed dissatisfaction regarding the fact they do not obtain any feedback on how their comments have been used when they have offered such comments themselves.

102. Several Member States' authorities believe that access to comments or opinions addressed to others and feedback on the use of their own comments would enhance their understanding of how a specific case has been resolved and whether and how a risk has been mitigated. They also hold that sharing such information would allow them to calibrate their understanding on the operation of other Member States' frameworks and accelerate the establishment of a community of practice and a common culture on investment screening in Europe.<sup>36</sup> Some Member States authorities appear to share some of this information at least occasionally, informally, and potentially only with a small set of Member State authorities. Depending on the informal channel chosen, this potentially raises confidentiality issues.

103. The possibility to ask questions afforded by Articles 6(6) and 7(5) enjoys a mixed reputation among Member States' authorities. Some authorities have expressed doubts as to the relevance of some requests for information, recalling that these "shall be duly justified" and not "unduly burdensome" for the Member State where the foreign direct investment is planned or has been completed.<sup>37</sup>

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<sup>36</sup> Options to address these issues are proposed below in section 2. , Issue #7.

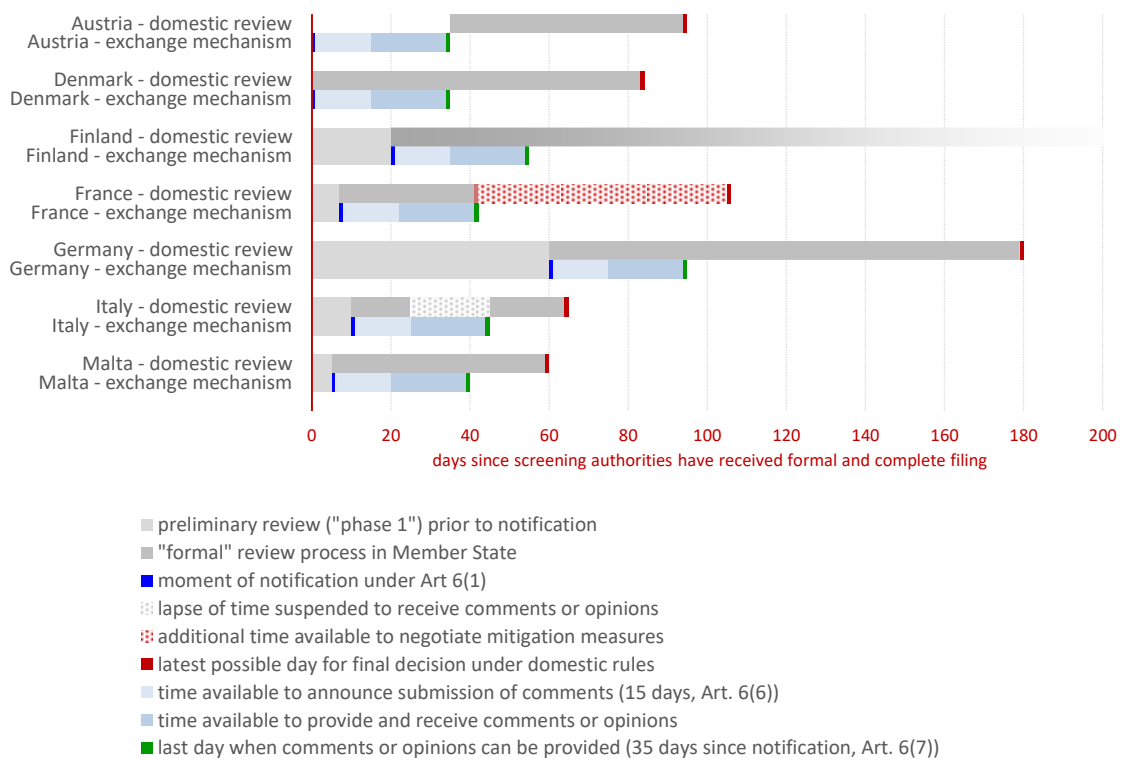
<sup>37</sup> This issue was already reported, without attribution, in European Commission (2021), "[First Annual Report on the screening of foreign direct investments into the Union](#)", pp.16-17.

g. Timelines mandatory under some Member States' domestic rules are not compatible with those under the information exchange mechanism

104. The ambition of Member States' governments to offer investors a quick and definite decision on the acceptability or potentially necessary adjustments to their investment projects has led many legislators to set generally short timelines to conduct investment screening processes.<sup>38</sup> The EU Regulation also sets very short timelines for the conduct of the proceedings in the cooperation mechanism, as set out in Articles 6 and 7 of the EU Regulation. In some Member States, the sequencing of the domestic review process and the participation in the information exchange mechanism, combined with tight timelines, may lead to problems to effectively incorporate any comments or opinions in the final decision to the applicant investor as required by Article 3(3) of the EU Regulation, especially if certain additional procedural steps available under the EU exchange mechanism take place.

105. Figure 4 illustrates how domestically set timelines for decisions of selected Member States interact with timelines set in the EU Regulation. Day "0" in the visualisation corresponds to when the screening authorities in a given Member States receive a formal and complete filing.<sup>39</sup>

**Figure 4. Timelines under the EU and domestic processes in selected Member States: schematic presentation of the base scenario**



<sup>38</sup> On the face of the law, timelines vary on a broad spectrum. These may not reflect real timelines, however. Finland for example has not set specific timelines for its authorities to screen transactions for defence and security companies under Act on the Screening of Foreign Corporate Acquisitions ([Act 172/2012](#) as amended). In Germany, up to six months are available to the authorities between knowledge of the transaction and a final decision, and time during which mitigation arrangements are negotiated is not counted, for example.

<sup>39</sup> In some Member States, informal conversations can precede a formal filing.

Note: All timelines are maxima according to the provisions of the EU Regulation but do not account for additional procedural steps (see on these Figure 5). Timelines in some countries are to some extent expandable; possible extensions are not shown unless reasons that would justify expansions are related to events associated with the EU information exchange mechanism. The scenarios shown may not occur in all or many instances in practice. The duration of “phase 1” in France and Italy is not defined in legislation; data represented here reflects typical practice. Legislation in France and Denmark express timelines in working days; for the presentation here, “working days” have been converted approximately into calendar days by applying factor  $\frac{7}{5}$ . Finland has not set a timeline for decisions under its domestic screening mechanism under the Act on the Screening of Foreign Corporate Acquisitions ([Act 172/2012](#) as amended) for companies in the defence and security sectors (shown here). Rules in France allow for additional time to determine mitigation measures.

Source: OECD.

106. Figure 4 documents that some countries such as France may need to announce their final decision before having received comments or opinions from other Member States or the EU Commission, respectively,<sup>40</sup> even in scenarios where no additional information is requested (see immediately below on these possibilities). This issue is mainly caused by short timelines for decisions under domestic rules, which were set in some Member States before the EU Regulation had been designed or come into force. Timelines available for the information exchange mechanism are already very tight and cannot realistically be shortened further.

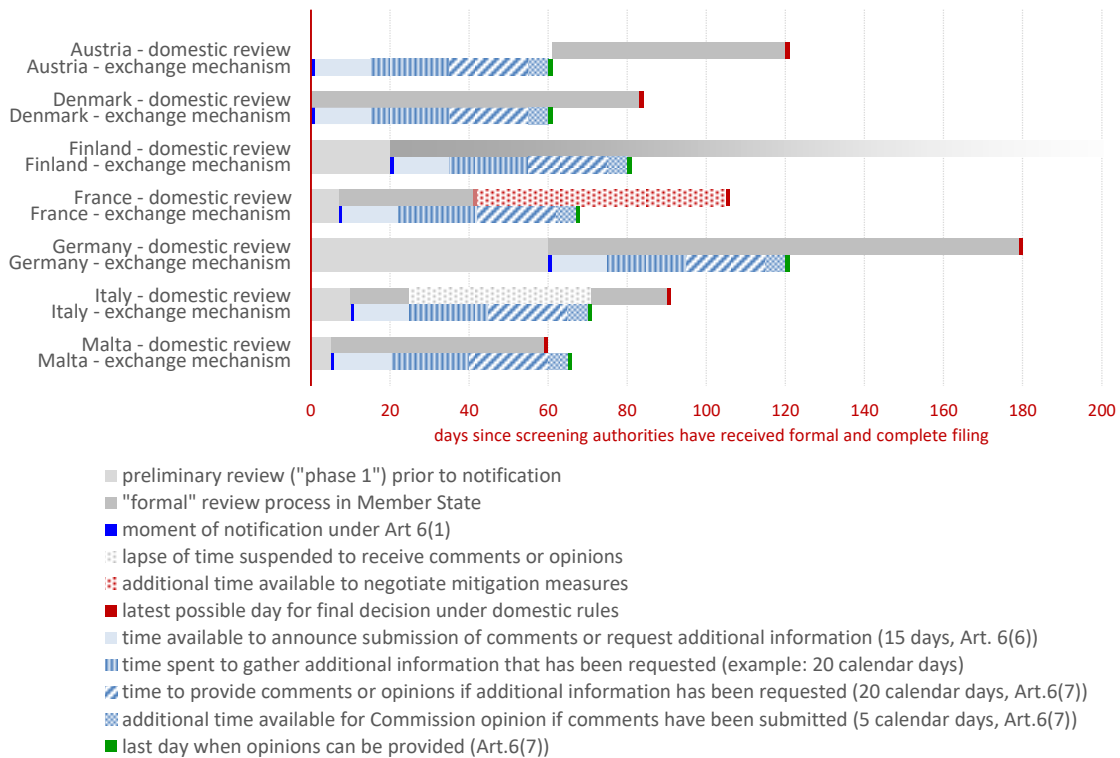
107. A further difficulty for the EU Commission arises from the fact that in the scenario described in Article 6(7), Member States and the EU Commission are given the same time – 35 days since notification – to issue comments or opinions. If Member States use the full 35 days available to them, the EU Commission has no time to include insights from these comments into its opinion, which effectively undermines the possibilities of the Commission to issue an opinion when it holds that the security or public order of more than one Member State is affected. This is different from the scenarios described in Article 7(6) (transaction not undergoing screening) in which case the EU Commission is accorded 15 calendar days to formulate its opinion counting from the day a Member State has issued a comment and in scenarios where requests for additional information have been filed under Article 6(6) of the EU Regulation.

108. Under certain circumstances, set out in articles 6(7) and 7(6) of the EU Regulation, the timelines can be extended: if additional information on a transaction undergoing screening is requested, 20 calendar days from the receipt of that information are available to provide comments or opinions. If comments were provided, five additional calendar days are available for the EU Commission to issue an opinion. In such scenarios, the domestically set timelines in some Member States may have elapsed before the process under the cooperation mechanism has concluded (Figure 5), preventing the screening Member State from having all relevant information before taking its decision.

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<sup>40</sup> Absence of an explicit approval is, under French legislation, equivalent to a refusal, which creates pressure to deliver an authorisation within the timelines of the domestic screening framework.

**Figure 5. Timelines under the EU and domestic processes in selected Member States where additional procedural steps are taken under the cooperation mechanism**



Note: Timelines typified according to rules applicable in different Member States for the scenario described in Article 6(7) of the EU Regulation. Timelines in some countries are to some extent expandable; possible extensions are not shown unless reasons that would justify expansions are related to events associated with the EU information exchange mechanism. The scenarios shown may not occur in all or many instances in practice. The duration of "phase 1" in France and Italy is not defined in legislation; data represented here reflects typical practice. Legislation in France and Denmark express timelines in working days; for the presentation here, "working days" have been converted approximately into calendar days by applying factor  $\frac{7}{5}$ . Finland has not set a timeline for decisions under its domestic screening mechanism under the Act on the Screening of Foreign Corporate Acquisitions ([Act 172/2012](#) as amended) for companies in the defence and security sectors (shown here). Rules in France allow for additional time to determine mitigation measures.

Source: OECD.

109. Member States pursue four different approaches to avoid scenarios in which they cannot take into account comments or opinions in regard to a given transaction for their final screening decision, as required by Article 3(3) of the EU Regulation:

- Some have set timelines for their domestic screening that are sufficiently generous to accommodate the timelines under the EU cooperation mechanism, even if the timelines are extended (e.g., Finland, Germany);

- Timelines can be extended for transactions that fall under the scope of the EU Regulation<sup>41</sup> or an extension of the timelines applies automatically in cases where a Member State or the EU Commission have indicated the intention to provide comments or opinions;<sup>42</sup>
- The clock running for the screening decision is stopped or suspended for as long as comments or opinions can be received;<sup>43</sup> and
- The domestic screening process and its associated timelines only start once the cooperation process has fully concluded.<sup>44</sup>

*h. Particular challenges arise when several Member States notify the same transaction*

110. As a result of the deeply integrated single market and freedoms of capital movement and establishment, many companies in the European Union have subsidiaries in more than one Member State. When their assets or operations are sensitive, several Member States in which these transactions take place will typically screen and notify foreign investment in such enterprises, a scenario referred to as “multi-jurisdiction FDI transactions”.<sup>45</sup> Empirically, these cases are frequent: Among the 265 transactions notified between 11 October 2020 and 30 June 2021, 29% were multi-jurisdiction FDI transactions.<sup>46</sup>

111. Multi-jurisdiction FDI transactions represent several challenges for the functioning of the cooperation mechanism. Most of these issues are related to the asynchronous receipt of information in the cooperation mechanism and short, inflexible timelines for decisions under some Member States’ screening frameworks. Different rules in individual Member States, some of which have not been adapted to the EU Regulation, and differences in understanding and interpretation of the EU Regulation are the main sources of these challenges.

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<sup>41</sup> The Netherlands adopted new legislation, [Wet veiligheidstoets investeringen, fusies en overnames](#) (VIFO) in June 2022 allows the screening authorities to extend the time available for their screening by up to three months (Article 12.8).

<sup>42</sup> Estonia’s bill, [Välisinvesteeringu usaldusväärse hindamise seadus](#), grants Estonia’s screening authorities the power to extend the time available for the screening process once by up to 90 calendar days (§ 9 (4)).

<sup>43</sup> This solution is implemented in the Italian “golden powers” legislation, which allows the suspension of the clock if a Member State or the EU Commission indicate their intention to issue comments or an opinion; this suspension can last until the comments or opinion is received, but no longer than provided for by the EU Regulation. The clock is also suspended if the Italian authorities request the EU Commission to issue an opinion or other Member States to make comments (Article 2ter of the [Decree-Law no.21 of 2012](#) converted, with amendments, into law by the [Law no.56 of 2012](#)). A similar solution is implemented in Lithuania under Article 12.12(2) of [Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132](#).

<sup>44</sup> This solution is implemented under the Austrian [Investment Control Act](#).

<sup>45</sup> European Commission (2021), “[First Annual Report on the screening of foreign direct investments into the Union](#)”, p.14, refers to “multi-jurisdiction FDI transactions” as “FDI transactions where the investment target is a corporate group with a presence in more than one Member States (and possibly also third countries), either by way of subsidiaries in more than one Member State, or by the target company providing goods or services in more than one Member State. Depending on the circumstances, and also the particularities of the screening mechanism of the relevant Member States such deals are notified by more than one Member State, albeit rarely in a coordinated and synchronised manner”.

<sup>46</sup> European Commission (2021), “[First Annual Report on the screening of foreign direct investments into the Union](#)”, p.18.



112. Under the EU Regulation, the clock for action under the cooperation mechanism – comments or opinions – starts with the individual notification by a given country.<sup>47</sup> Each notification runs under its own independent clock, and later notifications by other countries of the same transaction do not reset the clock of earlier notifications. As set out above,<sup>48</sup> individual Member States notify transactions to the information exchange mechanism at different moments, leading to an asynchronous arrival of notifications of the same transaction from different Member States’ authorities, even if the transaction – an ideal but not uncommon scenario according to counsel advising investors – is notified simultaneously to all concerned Member States.<sup>49</sup>

113. These differences in notification practice and overall short timelines under Member States’ rules and the EU Regulation have several consequences that undermine the proper functioning and thus effectiveness of the cooperation mechanism in cases of multi-jurisdiction FDI transactions.

114. Figure 6, identical to Figure 5, demonstrates these consequences for selected Member States for an “ideal” scenario in which the investor files the transaction (even where such a filing is not mandatory)<sup>50</sup> simultaneously (on day “0”) in all concerned Member States; and where filings in all concerned Member States are considered ‘complete’ on day “0”.<sup>51</sup>

115. Figure 6 shows in particular that:

- In some Member States such as France, domestic rules on timelines may oblige their authorities to take their final decision on a transaction before others (e.g., Austria and Germany) have even started formally screening the transaction, and possibly before some other Member States have notified the transaction to the cooperation mechanism;
- Transactions may not (yet) be undergoing “formal” screening in one Member State (e.g., Germany) while the same transaction already undergoes screening in one or more other Member States. As a consequence, comments or opinions regarding the same transaction may need to be issued to different Member States at different moments in time;
- Later comments and opinions may deviate from earlier ones on the same transaction, as new information has come in during the screening in other Member States; and
- The process under the cooperation mechanism is started at different moments in time, including, for the case of Germany, potentially after these processes have concluded for notifications made by several other Member States.

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<sup>47</sup> Under some circumstances, also laid down in Article 6(7) of the EU Regulation, the timelines can be extended if the notifying Member States provides information in response to requests for information; other Member States and the EU Commission then have at most 20 calendar days to submit comments and opinions, starting from the day the requested information is provided. An additional 5 calendar days are granted to the EU Commission to formulate an opinion should one or more Member States have provided comments.

<sup>48</sup> Section 1.1.5.c, p.25.

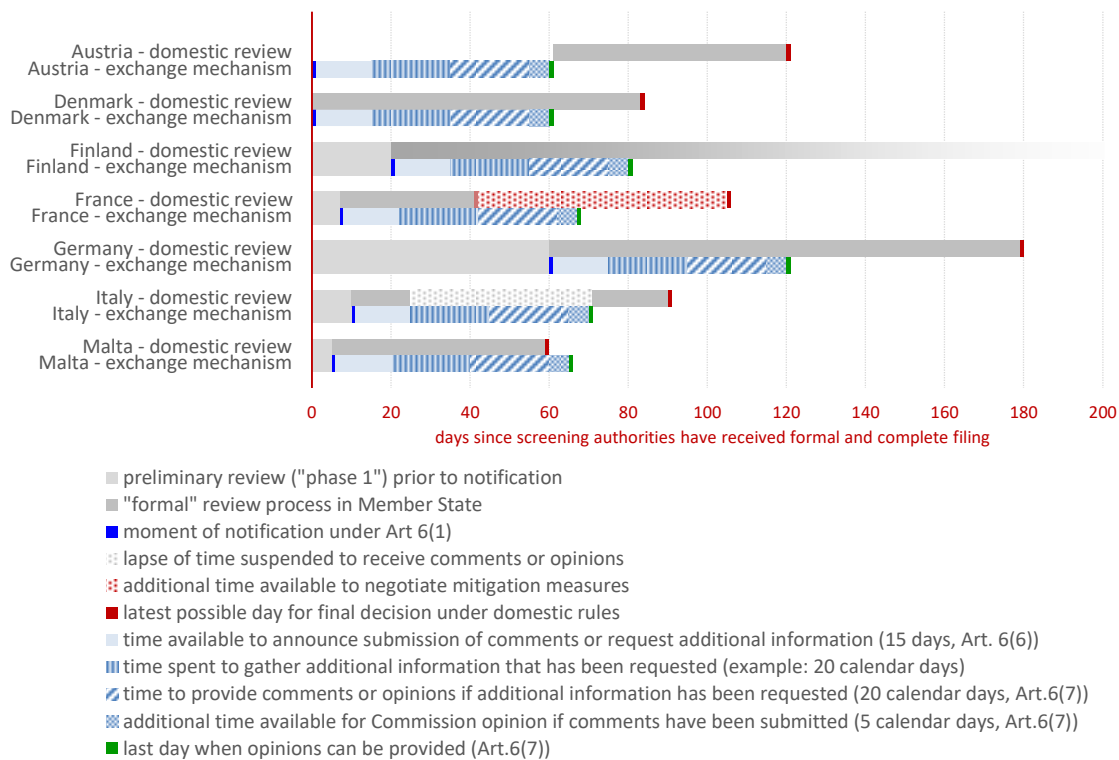
<sup>49</sup> Counsel advising clients in Austria, France and Germany suggest that notifications are submitted in different Member States simultaneously to avoid delays. They also note that notification practice is very risk-averse and notifications are filed in all Member States where the slightest possibility exists that a transaction is called in. This notification practice likely contributes to a high number of multi-jurisdiction FDI transactions and a high number of notifications overall.

<sup>50</sup> Not all Member States require that all transactions that can be screened are notified. In these cases, the notification by another Member State may start the clock for the Member State that does not require notifications, leading to the clock in the latter Member State to start later.

<sup>51</sup> In several Member States, the clock only starts to run when a file is considered “complete”.



**Figure 6. Multi-country notifications: schematic presentation of timelines in selected Member States**



Note: Timelines typified according to rules applicable in different Member States for the scenario described in Article 6(7) of the EU Regulation. Timelines in some countries are to some extent expandable; possible extensions are not shown unless reasons that would justify expansions are related to events associated with the EU information exchange mechanism. The scenarios shown may not occur in all or many instances in practice. The duration of “phase 1” in France and Italy is not defined in legislation; data represented here reflects typical practice. Legislation in France and Denmark express timelines in working days; for the presentation here, “working days” have been converted approximately into calendar days by applying factor  $\frac{7}{5}$ . Finland has not set a timeline for decisions under its domestic screening mechanism under the Act on the Screening of Foreign Corporate Acquisitions ([Act 172/2012](#) as amended) for companies in the defence and security sectors (shown here). Rules in France allow for additional time to determine mitigation measures.

Source: OECD.

116. This situation results from the absence of rules in the EU Regulation on the handling of multi-jurisdiction FDI transactions. Article 3(3) of the EU Regulation requires a result – the domestic setting of timelines that allow Member States to take into account the comments of other Member States and the opinions of the EU Commission – but does not suggest or impose a method to achieve this result. The combined choices of several Member States on how to organise the procedural steps and timelines generate the problem, and the failure to obtain the result cannot be attributed to any specific Member State.

117. The situation is not a teething problem that can be expected to disappear with growing practice and better understanding of other Member States’ policies and practices. Some Member States’ legislation imposes a specific approach and gives authorities little leeway to adjust their practice. Even where this was possible, Member States’ authorities showed little appetite to change their current practice. When prompted, several Member States’ authorities also noted that they would not consider revoking or amending an approval of a transaction in light of new information that they obtained through processes in other Member States unless the investor was clearly at fault, even if their administrative laws allowed such a course of action. Reluctance to recall and change decisions was explained by the need to nurture trust in the predictability of decisions under the relevant national screening mechanism.

118. Potential options to remedy this scenario are discussed as Issue #12 below.

*i. Many governments lack powers to effectively gather information on transactions not undergoing screening in their own country*

119. The obligation to supply information on demand of other Member States or the EU Commission is not conditional on whether a given transaction is undergoing screening in the Member State that receives a request. Information as specified in Article 9(2) of the EU Regulation must be provided upon demand in all circumstances (even for transactions not undergoing screening (Article 7(5))).

120. Several Member States have however not established rules that would allow them to effectively gather this information that they must forward to the requesting Member State or to the EU Commission. Effective means to gather information to meet the obligations under the EU Regulation requires that domestic law establish: which authorities are competent to request the information; who must provide information that is not available from public sources or within the public administration; which timelines must be met; and how the person that is required to provide information can be compelled to provide truthful information within the timeline. Many Member States, especially some of those that do not operate a screening mechanism, have not set such rules.

121. Member States that have established screening mechanisms typically impose information obligations on the investor that seeks an authorisation; the possibility to deny the requested authorisation constitutes an effective means to compel the addressee of an information request. These mechanisms are unavailable if the transaction is not, not yet or no longer undergoing screening, and they do not allow the information gathering from non-cooperative third parties.

122. Many Member States – those with and without screening mechanisms – seem to rely on Article 9(4) EU Regulation, which creates directly binding obligations for investors and target enterprises of planned or completed transactions to provide specific elements of information. This provision is too unspecific however to be operational, as it does not provide for timelines that apply to the addressee of an information request, and contain no mechanism to compel these persons to provide truthful information on time.

123. Rules that allow for the effective gathering of information outside of the context of the screening of the transaction for which the information is needed are exceedingly rare in Member States' frameworks, as shown in the breakdown of available rules by Member States in Table 3.

124. This absence typically results from the construction that build powers of screening authorities on the condition that an investment must be notified or can be screened under the respective Member States' own screening mechanisms. Where no screening takes place because a given transaction is not covered by the scope of an established screening mechanism or where no screening mechanisms exists at all, powers to effectively gather such information are typically not established.<sup>52</sup>

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<sup>52</sup> For the special case that a transaction is being reviewed, but not “formally” screened in the sense of Article 2 item (5) see below.

**Table 3. Powers to effectively gather information on transactions not undergoing screening in individual Member States**

Member State	Explicit mention of an information obligation and the scope of information for non-screened transaction	Deadlines for the provision of the information are specified	Powers to sanction non-performance or provision of false information	Reference to legislation
Austria	Yes (Section 13(1))	Yes (Section 13(1))	Yes (Section 26)	<a href="#">Investment Control Act</a>
Belgium	No	No	No	No implementing text
	Yes (Art. 31)	No	No	<i>[Projet d'accord de coopération du 1<sup>er</sup> juin 2022 visant à instaurer un mécanisme de filtrage des investissements directs étrangers]</i>
Bulgaria	No	No	No	No implementing text
Croatia	Yes (Art. 4)	Yes (Art. 4)	No	<a href="#">Regulation implementing Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March 2019 establishing a framework for screening foreign direct investment in the Union</a>
Cyprus <sup>53</sup>	No	No	No	No implementing text
Czech Republic	No	No	No	<a href="#">Act No.34/2021 Coll. on Screening of Foreign Direct Investments</a>
Denmark	No	No	No	<a href="#">Investment Screening Act</a>
Estonia	No	No	No	No implementing text
	Yes (§ 18)	Yes (§ 18)	Yes (§ 24)	<a href="#">[Välisinvesteeringu usaldusväärse hindamise seadus]</a>
Finland	No	No	No	<a href="#">Act 172/2012 as amended</a>
France	No	No	No	<i>Code Monétaire et Financier</i>
Germany	No (§14a(2) AWG)*	No (§14a(2) AWG)*	No (§14a(2) AWG)*	<a href="#">Foreign Trade and Payments Act (AWG)</a> and <a href="#">Foreign Trade and Payments Ordinance (AWV)</a>
Greece	No	No	No	No implementing text
Hungary	No	No	No	<a href="#">Government Decree 802/2021. (XII. 28)</a>
Ireland	No	No	No	No implementing text
Italy	No	No	No	Golden Powers
Latvia	Yes (Art. 14)	Yes (Art. 14)	No	<a href="#">Regulation 606</a>
Lithuania	Yes (Art. 131.1)	Yes (Art. 12)	Yes (Art.12)	<a href="#">Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132</a>
Luxembourg	No	No	No	<i>[Projet de loi portant mise en place d'un mécanisme de filtrage national des investissements directs étrangers susceptibles de</i>

<sup>53</sup> Note by the Republic of Türkiye

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Türkiye recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Türkiye shall preserve its position concerning the “Cyprus issue”.

Note by all the European Union Member States of the OECD and the European Union

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Türkiye. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

\* The powers to request information are only available in the context of an ongoing screening (preliminary assessment of formal screening) ([§14a\(2\) AWG](#)). The possibility to open a screening procedure may be precluded, for example where the authorities had knowledge of the transaction for more than two months, or if a case has already been decided or closed.

Member State	Explicit mention of an information obligation and the scope of information for non-screened transaction	Deadlines for the provision of the information are specified	Powers to sanction non-performance or provision of false information	Reference to legislation
				<a href="#">porter atteinte à la sécurité ou à l'ordre public aux fins de la mise en œuvre du règlement (UE) 2019/452</a>
Malta	No	No	No	<a href="#">NFDIS Office Act</a>
Netherlands	Yes (Art. 4)	No	Yes (Art. 6)	<a href="#">FDI Screening Regulation Implementing Act</a>
Poland	Yes (§ 3,1))	No	No	<a href="#">Regulation on the contact point for the implementation and application of the EU Regulation</a>
Portugal	No	No	No	<a href="#">Law n° 9/2014</a> and <a href="#">Decree Law n° 138/2014</a>
Romania	Yes (Art. 8)	No	No	<a href="#">Emergency Ordinance n° 46 of 14 April 2022 on implementing measures for Regulation (EU) 2019/452</a>
Slovak Republic	No	No	No	<a href="#">Act No.72/2021 Coll. amending Act No.45/2011 Coll. on Critical Infrastructure</a>
	Yes (Art.49(10))	Yes (Art.49(10))	Yes (Art.36(1))	<a href="#">[Foreign Investment Screening and Amendments to Certain Acts]</a> <sup>†</sup>
Slovenia	No	No	No	<a href="#">ZIUOOPE</a>
Spain	No	No	No	Multi-sectoral mechanism under <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>
	No	No	No	<a href="#">[Proyecto de Real Decreto sobre Inversiones Exteriores]</a>
Sweden	Yes (3 §)	No	Yes (3 §)	<a href="#">Law 2020:826 on supplementary provisions to the EU Regulation on foreign direct investment</a> and three implementing regulations

Note: Table shows screening mechanisms in force on 30 June 2022 and, to the extent that plans for arrangements are known, for the designs of future mechanisms under discussion.

Source: OECD.

125. Member States' screening authorities offer different responses when asked about their powers in cases of incoming requests for information on non-screened transactions. They state that they (must) rely on goodwill in the business community to provide the information "voluntarily"; others point to the fact that the EU Regulation is directly applicable and establishes obligations for investors to provide the information set out in Article 9(2) and no domestic rules were thus required; or that they provided (only) the information that they had from publicly available sources (hence potentially less than to the scope of Article 9(2)); or finally that such requests were very rare and the absence of special rules has thus not been a problem in practice. These responses do not appear adequate in light of a specific legal obligation established by the EU Regulation and may expose security interests of Member States or projects or programmes of Union interest.

*j. Which specific action Member States are required to take in relation to comments and opinions is uncertain and institutional arrangements in Member States are rarely explicit*

126. Pursuant to Articles 6, 7, and 8 of the EU Regulation, Member States and the EU Commission can issue comments or opinions to Member States that are screening a transaction or to Member States where a transaction is planned or completed and not undergoing screening in that Member State. Comments and opinions constitute formal outcomes of the information exchange mechanism, and potentially formal positions expressing concerns for security or public order. To give these comments and opinions effect, Article 3(3) of the EU Regulation requires that Member States have arrangements in place that allow them to take into account comments and opinions. Some Member States' national screening frameworks

explicitly recognise the inflow of information through comments or opinions and have formal arrangements in place to accommodate this formal input in their decision-making.<sup>54</sup>

127. The EU Regulation requires that Member States “give due consideration” to comments or opinions addressed to them; in cases of Article 8, the Member State(s) where the transaction takes place must “take utmost account of the EU Commission’s opinion” and “provide an explanation to the Commission if its opinion is not followed”. What substantive action – beyond giving due consideration and taking (utmost) account – the EU Regulation expects in these scenarios is uncertain. Several Member States have not regulated this issue explicitly but assert that their procedures and assessment criteria are framed to accommodate the processing of comments and opinions (see for a detailed discussion of this matter section 1.2).

#### ***1.1.6. International cooperation on investment screening beyond the Union***

128. Article 13 of the EU Regulation contains a broad but unspecific opening of the EU framework for investment screening to non-EU jurisdictions. Both the EU Commission and individual Member States are permitted or invited to cooperate in unspecified ways with “responsible authorities of third countries on issues relating to the screening of foreign direct investments on grounds of security and public order”.

129. On the face of the text, the breadth of this authorisation or mandate opens a great number of opportunities which may be pursued in bilateral or plurilateral formats, such as the G7 or the OECD. This may include sharing experiences, best practices, and information regarding investment trends.

130. Both Member States and the EU Commission make some use of the opportunities afforded by the provisions of Article 13:

- Member States are regularly involved bilaterally in conversations with like-minded countries about the merits and design options for investment screening mechanisms and experience with these designs, where EU Member States receive or provide advice.<sup>55</sup>
- The EU Commission represents the European Union and its Member States in the EU-U.S. Trade and Technology Council (TTC) as a competence arising from Article 207 TFEU, in the context of which conversations cover investment screening among other subjects. While the EU Commission has made efforts to report on these conversations, some Member States would wish to participate themselves in the conversations rather than being represented, in order to benefit fully from the opportunities that the TTC represents for transatlantic exchanges on investment screening.<sup>56</sup>
- The EU Commission has also made arrangements that allow non-Member States to participate in certain projects and programmes of Union interest while managing security implications of such participation. Specifically, the EU Commission has been concluding agreements with selected non-Member States on their participation in the Union programme *Horizon Europe*, or complementing programmes that condition such participation on the existence and operation of investment

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<sup>54</sup> Member States in which explicit arrangements are in place to cover at least some aspects include Estonia, Germany, Lithuania, Poland, Romania, Slovak Republic and Slovenia. More detail is available in section 1.2 and, for arrangements in individual Member States, in section 3. of this report.

<sup>55</sup> Beyond the better known conversations in which Member States seek and receive advice from like-minded countries with longer traditions and more ample practice, some Member States have actively provided advice to non-screening EU candidate countries to explain merits and potential designs of investment screening.

<sup>56</sup> The EU Commission has organised workshops with Member States and U.S. Government representatives on similar issues outside of the TTC to respond to interest expressed by Member States.

screening mechanisms in these partner countries and on the condition that the partner countries' governments share certain information with the EU Commission.<sup>57</sup>

131. Article 13 could also in principle open the possibility for operational collaboration on individual cases or exchange of intelligence on individual investors with third countries' authorities, but confidentiality rules and use limitations regarding the information shared within the cooperation mechanism do not currently appear to allow for such cooperation with jurisdictions outside the EU.

#### ***1.1.7. Horizon scanning for non-notified transactions***

132. A review system is only effective if the greatest possible number of reviewable and potentially problematic transactions are subjected to review. Individual Member States have designed different mechanisms to become aware of such transactions, including prior authorisation and notification requirements. However, not all reviewable transactions need to be notified in all Member States.<sup>58</sup>

133. Despite these arrangements, it is likely that not all reviewable and potentially problematic transactions come to the attention of Member States' authorities, chiefly because some investors may not comply with their obligations – intentionally or unintentionally; because not all screening authorities enjoy the resources to detect non-notified transactions; and because omissions of notifications in this area do not appear to be systematically sanctioned.<sup>59</sup>

134. Several mechanisms established by or in the context of the EU Regulation have led to a greater flow of information on reviewable and potentially problematic transactions.

135. Firstly, the information exchange mechanism established by the EU Regulation involves a dissemination of information on individual transactions beyond the Member State that has initially become aware of the transaction. Several Member States' authorities have explained that they have become aware of a sizable number of transactions taking place in their jurisdictions only via the cooperation mechanism when another Member State had notified its respective leg of the transaction to the cooperation mechanism.

136. Secondly, the EU Commission has begun to monitor and identify non-notified transactions that could fall or not under the scope of investment screening mechanisms in one or more Member States. This operation is not explicitly mentioned or mandated in the EU Regulation. Rather, it constitutes a voluntary service by the EU Commission to Member States' authorities to broaden their information on transactions that they may be interested in, especially if these transactions have not been or may not have to be notified.

137. Under this process, Member States are offered at quarterly intervals lists of transactions that EU Commission services have identified without any specific assessment or suggestion as to how the information should or could be used.

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<sup>57</sup> See for example agreements concluded with [Israel](#), [North Macedonia](#), [Türkiye](#) and [Ukraine](#) in relation to *Horizon Europe* or programmes complementing the *Horizon Europe* programme.

<sup>58</sup> Mechanisms that do not require prior authorisation or notification exist in Finland, Portugal, and Germany, for example.

<sup>59</sup> Information on resources and arrangements for discovery of non-notified transactions in EU Member States is very limited. Other countries are dedicating significant resources to this process. The United States government received substantial additional funding and staff for this function through the Foreign Investment Risk Review Modernization Act ("FIRRMA"). In 2020, 117 transactions were identified through this process, of which 17 transactions resulted in a request for filing. CFIUS uses various methods to identify non-notified/non-declared transactions, including interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications ([CFIUS Annual Report 2020](#), p.48).



138. Only very few Member States' screening authorities have provided views on the contribution that this service makes to fulfil their tasks and mandates. These views did not suggest that the EU Commission's horizon scanning effort played a sizable role for the detection of non-notified transactions or for FDI screening in their jurisdiction more broadly. This horizon scanning carries the potential to enhance the effectiveness of the framework for investment screening in the Union overall if Member States were making greater use of this input.

## 1.2. How much European security solidarity beyond the sharing of information and expertise?

139. The purpose of the EU Regulation is to enhance collective security of Member States and the Union through intra-EU cooperation in the area of investment screening. This new area of cooperation is needed to protect the collective security in a context of heightened geopolitical and geo-economic tensions, and co-operation on screening mirrors the deep integration of economies in the Union.

140. The EU Regulation appears to pursue the objective to enhance collective security primarily through an information exchange mechanism that fosters better-informed decisions in Member States where individual transactions take place and may or may not be screened. Or does it? Can a mere exchange of information be sufficient to avert threats that materialise in a different Member State than the one where the transaction formally takes place, and whose authorities could mitigate the risk associated with the transaction for another Member State? In fact, the EU Regulation could also be read as pursuing its objective to enhance collective security by creating a "common house" in which all Member States contribute to the collective security by screening or otherwise reacting to investments that enter the Union – the "common house" – through the "doors" of the individual Member States. Read in this fashion, the EU Regulation could require, at least in its spirit and purpose, more active security solidarity and assistance in such cases, and specifically that screening processes be mobilised for the security and public order benefits of *other* Member States, even if the security or public order interests of the Member States where screening takes place are not affected.

141. The EU Regulation is ambivalent on what it expects from Member States on this matter. Recital 7 ("ensure Union-wide coordination and cooperation"), Recital 13 ("impact in a Member State *or in the Union*"), Recital 16 ("mechanism to cooperate and *assist* each other")<sup>60</sup> and Recital 17 ("duty of sincere cooperation") [emphasis added] could be read as suggesting that the EU Regulation requires more substantial action for the benefit of other Member States than just information, due consideration and taking utmost account of others' views. Article 4 does not suggest that the factors that Member States' and the EU Commission may take into account in their screening are limited to the physical location of an asset or Member State where a given risk would materialise.

142. On the other hand, Article 3(3) of the EU Regulation only requires that "The screening mechanisms shall allow Member States to *take into account* the comments of other Member States referred

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<sup>60</sup> The [Proposal for a Regulation of the European Parliament and the Council establishing a framework for screening of foreign direct investments into the European Union \[SWD\(2017\) 297 final\] – Explanatory Memorandum](#) (p.13) sheds some, but not much, additional light on the meaning of assistance. It states that "The Regulation provides for a mechanism allowing Member States to cooperate *and assist each other* when foreign direct investment is likely to affect their security or public order. Potentially affected Member States should have the possibility to provide comments to the Member States in which an investment is planned or completed, regardless of whether any of the Member States concerned maintains a screening mechanism or is conducting a screening of the investment. This cooperation should allow Member States to exchange information *and coordinate, where possible, their response, as the case may be, to the foreign direct investment.*" [emphasis added].



to in Article 6 and 7 and the opinions of the Commission referred to in Articles 6, 7 and 8.”, and Articles 6(9) and 7(7) require that “the Member State undertaking the screening shall *give due consideration* to the comments of the other Member States” – yet that still falls short of requiring substantive action for the benefit of a different Member State,<sup>61</sup> even if the distinction between “due consideration” and “take into account” adds additional ambiguity.

143. The EU Regulation is slightly more explicit in regard to projects or programmes of Union interest, providing that Member States “shall *take utmost account* of the Commission’s opinion and provide an explanation to the Commission if its opinion is not followed” (Article 8(2)(c)). Recital 19 specifies that “The Member State should *take utmost account* of the opinion received from the Commission through, where appropriate, measures available under its national law, or in its broader policymaking, and provide an explanation to the Commission if it does not follow that opinion, in line with its duty of sincere cooperation under Article 4(3) TEU.” Again, this still falls short of explicitly requiring substantive action, even with respect to projects and programmes of Union interest.<sup>62</sup>

144. The genesis of the EU Regulation does not suggest any intent to require Member States to step in in the interest of their peers in the Union. At most, it was proposed that for a special constellation – where at least a third of Member States considered that a foreign investment was likely affecting their security or public order – the screening Member State where the transaction was taking place had to take “utmost account” of these Member States’ comments, still without requiring explicitly defined material action.<sup>63</sup>

145. Legislators of Member States have implemented the requirement of the EU Regulation in this regard differently. The national legislation of Member States reflects different choices or understandings

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<sup>61</sup> The framing in Article 7(7) of the EU Regulation reads: “A Member State where a foreign direct investment is planned or has been completed shall give due consideration to the comments of the other Member States and to the opinion of the Commission.”

<sup>62</sup> In its Communications on the matter, the EU Commission suggests that it may recommend “specific action to the Member State where an investment takes place in its opinions” (see for example [Annex to the Communication from the Commission – Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation \(EU\) 2019/452 \(FDI Screening Regulation\)](#), C(2020) 1981 final (25 March 2020), p.1 and [Annex to Communication from the Commission – Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions](#) (2022/C 151 I/01), (6 April 2022), item 3. In the latter document, the EU Commission also states that “FDI screening should take into account the impact on the security and public order of the Union *as a whole*.” [Emphasis added]. This suggests that the EU Commission considers that other Member States’ security interests are part of common security interests – but, in line with the letter of the Regulation, only calls for taking these interests more broadly understood “into account”, rather than requiring that these interests be substantively protected.

<sup>63</sup> A proposal for an amendment, documented in the [Report of the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union \(COM\(2017\)0487 – C8-0309/2017 – 2017/0224\(COD\)\)](#), 4 June 2018, p.34 suggested that in this scenario, accountability to the commenting Member States would be greater, but that no actual action would be required. The following text was proposed: “If at least one third of Member States consider that a foreign direct investment is likely to affect their security or public order, the Member State where the foreign direct investment is planned or has been completed shall take utmost account of their comments and the opinion of the Commission and provide a written explanation. Where those comments or opinions are not followed, the Commission shall foster dialogue between the Member States having issued comments and the Member State in which the foreign direct investment is planned or has been completed”.

– to the extent that a shared understanding of the issue even existed. Judging from preparatory material, some Member States’ legislators seem to have overlooked this issue entirely.<sup>64</sup>

146. The choices reflected in legislation do not appear to correspond to the respective government’s degree of attachment to investment screening more broadly: some of the strongest proponents of investment screening among the Member States have not incorporated any of these elements into their legislation and many screening authorities see the idea that the EU Regulation would require substantive action for the benefits of other Member States sceptically.<sup>65</sup>

147. A regulatory implementation of the possibility to act for the benefit of others in the context of investment screening requires at least that a Member State’s authorities can take specific measures with regard to a transaction that likely affects *another* Member State’s security or public order or projects or programmes of Union interest even if its own security or public order interests are not likely affected.

148. To give greater effect to this power and make it available in more constellations, legislation can additionally establish the competence of the screening authority of a Member State whose security or public order is *not* likely affected to trigger a review of a transaction that likely affects *another* Member State’s security or public order or is likely to affect projects or programmes of Union interest. This second component is not observed in all Member States that can materially intervene in transactions for the benefits of other Member States.

149. Only three Member States<sup>66</sup> (Germany, Lithuania, and Slovak Republic) currently explicitly mention in their legislation the interests of *other* Member States as factors that allow the start of screening procedures or that can influence the outcome of individual screening decisions:

- German and Lithuanian legislation allow their authorities to start screening a transaction even if their own security or public order interests are not likely affected; in addition, these Member States’ authorities can intervene in such a transaction solely based on interests of another Member State.
- In the Slovak Republic, a given transaction’s likely impact on security or public order interests of other Member States does *not* suffice to allow the authorities to open a screening procedure of that transaction. However, if a screening procedure is already ongoing, other Member States’ interests can justify a substantial intervention in a transaction.

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<sup>64</sup> Legislative material from Denmark raises the issue in very clear terms without resolving it with similar clarity: “Under the FDI Regulation, Denmark is obliged to ‘take due account’ of the comments of other Member States and of the Commission’s opinions on foreign direct investment in Denmark. In addition, Denmark is obliged to take ‘due account’ of Commission opinions on investments that could affect projects or programmes of interest to the Union. In the context of the implementation of a future general screening regime, it should therefore be considered whether the screening regime should also include a power to intervene in foreign direct investments which pose a threat to the national security and public order of another EU Member State or which could affect projects or programmes of interest to the Union on grounds of security or public order. However, it is considered sufficient that observations from other Member States and opinions from the Commission can be taken into account in assessing whether a covered acquisition, etc., constitutes a threat to national security or public policy in Denmark” [Report on an upcoming general arrangement for screening of foreign investments, Recommendations from the inter-ministerial working group regarding national security interests in certain investments](#), October 2020, p.138 [translation by the authors].

<sup>65</sup> France, for example, one of the most vocal supporters of investment screening in the Union (see [Bruno Le Maire et Franck Riester annoncent la prolongation d’un an de l’abaissement exceptionnel du seuil de contrôle des investissements étrangers en France de 25 à 10%](#), DG Trésor media release, 30 November 2021) has not included explicit language in its legislation.

<sup>66</sup> Estonia’s bill, [Välisinvesteeringu usaldusväärseuse hindamise seadus](#), currently explicitly mentions the interests of *other* Member States as factors for their planned screening mechanisms.

150. Projects and programmes of Union interests are currently explicitly mentioned in this context in six Member States: Germany, Lithuania, Poland, Romania, Slovak Republic, and Slovenia.<sup>67</sup>

- German, Lithuanian, and Slovenian legislation allow the authorities to start screening a transaction when projects and programmes of Union interest are likely affected; in addition, these Member States' authorities can intervene in transactions solely based on the Union's interests regarding those projects and programmes (even if their own interests are not likely affected).
- In Poland, Romania and Slovak Republic, a given transaction's likely impact on projects and programmes of Union interests does *not* suffice to allow the authorities to open a screening procedure of that transaction. However, if a screening procedure is already ongoing, the effect of a given transaction on projects or programmes of Union interests can justify a substantial intervention in a transaction.

151. A detailed breakdown of the rules of individual Member States is available in Table 4.

152. Even where powers to act for the benefit of other Member States have been established, these powers are currently capped by a limitative scope-definition that is tailored to the respective Member States' own security and public order interests. If the beneficiary Member State has a different exposure and corresponding greater or other security needs, for example as a result of vulnerabilities in specific sectors (e.g. maritime shipping), the Member State where the screening takes place (in the example: the holding company of the shipping company is incorporated in that jurisdiction and subject to a takeover proposal) remains – under currently observed designs – limited to the sectoral scope defined for its own jurisdiction (which in the case of a landlocked country may exclude maritime shipping from the scope of screening and would thus not suffice to help the potential beneficiary Member State in the example). Even Member States that can act in the interest of other Member States are thus currently limited in the security assistance they can provide along criteria that may not always be adequate for the Member State that would potentially benefit.<sup>68</sup>

153. Many screening authorities of Member States communicated some doubt and hesitance as to what their own legislation required and what future or current legislation should require; some other Member State authorities hold firm but opposed views. Some authorities were objecting to the idea that Member States should treat their peers' security interests on equal footing with their own interests,<sup>69</sup> while others held that this aspect was, in their view, an unambiguous requirement under the EU Regulation. Many officials especially from smaller Member States expressed the view that their European neighbours' security interests were so closely intertwined with their own security and public order interests that legislation would still be interpreted in a way that would treat their own security interests on the same footing as their neighbours', even if it omitted an explicit reference to other Member States' interests.

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<sup>67</sup> Estonia's bill, [Välisinvesteeringu usaldusväärseuse hindamise seadus](#), also mentions projects and programmes of Union interests as factors in their planned future screening mechanisms.

<sup>68</sup> This limitation is currently without consequences as all three Member States that have granted the possibility to take screening decisions for the direct benefit of other Member States operate cross-sectoral screening mechanisms. This aspect could be considered however if other Member States with sectoral scope definitions in their screening mechanisms incorporate the possibility to act for the benefit of other Member States.

<sup>69</sup> In conversations with Member States' authorities, it was mentioned that in such scenarios, the economic costs of intervening in a transaction – felt as potentially less foreign investment with implications on viability and employment of the envisaged acquisition target – would be borne by the intervening Member State, while the benefits (a threat to its security or public order) would accrue to a different Member State without any compensation mechanism available between the two Member States.

Some officials pointed out, with regret, that the stance expressed in a given country's legislation was not a reliable predictor of actual decisions and administrative practice in the respective Member States.

154. Administrative practice in this regard can to some extent be deducted from actual decisions on individual cases, especially for Member States in which a greater number of transactions have been screened. Testimony from counsel involved in such transaction suggest that mitigation measures on cases undergoing screening in one country were frequently adjusted to incorporate interests of other Member States. Specifically, counsel reported that occasionally, additional mitigation measures that had not been raised in negotiations with screening authorities had been added to the agreed set without further information or explanation of the underlying concern, rationale or origin of the additional obligation. They also noted that these additions could arrive without necessarily being linked to other agreed obligations at the last hour and likely without a re-assessment of the transaction as a whole.<sup>70</sup> This behaviour is reported with certainty only for transactions where concerns also arose for the interests of the screening Member State and where mitigated arrangements were being negotiated. Whether a screening Member State would impose obligations purely for the benefit of other Member States where it was itself not imposing obligations for its own benefit, or whether a Member State would prohibit a transaction for the benefit of other Member States, is uncertain and has not been observed or reported by counsel.

**Table 4. Explicitly legislated powers to act in the interest of other Member States or projects or programmes of Union interest**

Member State	name or reference to the screening mechanism	Explicit powers to start screening an investment that is likely to affect <b>other Member States'</b> security or public order	Explicit powers to materially intervene in investments that likely affect <b>other Member States'</b> security or public order	Explicit powers to start screening an investment that is likely to affect <b>projects and programmes</b> of Union interest	Explicit powers to materially intervene in investments that likely affect <b>projects and programmes</b> of Union interest
Austria	<a href="#">Investment Control Act</a>	No	No	No	No
Belgium	[ <i>Projet d'accord de coopération du 1<sup>er</sup> juin 2022 visant à instaurer un mécanisme de filtrage des investissements directs étrangers</i> ]	No	No	No	No
Czech Republic	<a href="#">Act No.34/2021 Coll. on Screening of Foreign Direct Investments</a>	No	No	No	No
Denmark	<a href="#">Investment Screening Act</a>	No	No	No	No
	<a href="#">Act on War Material</a>	No	No	No	No
	<a href="#">Continental shelf and pipelines installations</a>	No	No	No	No
Estonia	[ <a href="#">Välisinvesteeringu usaldusväärsete hindamise seadus</a> ]	No	Yes (§ 11)	No	Yes (§ 11. (5))
Finland	<a href="#">Act 172/2012</a>	No	No	No	No
	<a href="#">Act 470/2019</a>	No	No	No	No
France	<i>Code Monétaire et Financier</i>	No	No	No	No
Germany	<a href="#">Foreign Trade and Payments Act (AWG)</a> and <a href="#">Foreign Trade and Payments Ordinance (AWV)</a>	Yes (Section 55(1) AWV)	Yes (Section 4(1)4 AWG)	Yes (Section 55(1) AWV)	Yes (Section 4(1)4a. AWG)
Greece	-	-	-	-	-
Hungary	<a href="#">Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security</a>	No	No	No	No

<sup>70</sup> Some counsel were critical of the approach under the aspect of a fair legal hearing.

Member State	name or reference to the screening mechanism	Explicit powers to start screening an investment that is likely to affect <b>other Member States'</b> security or public order	Explicit powers to materially intervene in investments that likely affect <b>other Member States'</b> security or public order	Explicit powers to start screening an investment that is likely to affect <b>projects and programmes</b> of Union interest	Explicit powers to materially intervene in investments that likely affect <b>projects and programmes</b> of Union interest
	<a href="#">Interests</a> and <a href="#">Government Decree 802/2021. (XII. 28)</a>				
	<a href="#">Act LVIII of 2020 – Section 85 para. 276-292</a>	No	No	No	No
Italy	Golden Powers	No	No	No	No
Latvia	<a href="#">National Security Law</a>	No	No	No	No
Lithuania	<a href="#">Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132</a>	Yes (Art. 13 <sup>1</sup> .1 and Art. 13 <sup>1</sup> .2) (only upon EU COM/other MS request)	Yes (Art.11.9))	Yes (Art. 13 <sup>1</sup> .1 and Art. 13 <sup>1</sup> .2) (only upon EU COM/other MS request)	Yes (Art.11.9))
Luxembourg	<a href="#">[Projet de loi portant mise en place d'un mécanisme de filtrage national des investissements directs étrangers susceptibles de porter atteinte à la sécurité ou à l'ordre public aux fins de la mise en œuvre du règlement (UE) 2019/452]</a>	No	No	No	No
Malta	<a href="#">NFDIS Office Act</a>	No	No	No	No
Netherlands	<a href="#">Telecommunications Act (Chapter 14a)</a>	No	No	No	No
	<a href="#">Electricity Act 1988</a> and <a href="#">Gaz Act</a>	No	No	No	No
	<a href="#">Wet Veiligheidstoets Investerings, Fusies en Overnames (Vifo)</a>	No	No	No	No
Poland	Permanent review under the <a href="#">Act of 2015 on the Control of Certain Investments</a>	No	No	No	No
	Temporary review under the <a href="#">Act of 2015 on the Control of Certain Investments</a>	No	No	No	Yes (Art. 12j.1.5))
Portugal	<a href="#">Law n°9/2014</a> and <a href="#">Decree Law n°138/2014</a>	No	No	No	No
Romania	<a href="#">Competition Law</a> and <a href="#">Emergency Ordinance n° 46 of 14 April 2022 on implementing measures for Regulation (EU) 2019/452</a>	No	No	No	Yes (Art. 9(2)(c)(7) of the Emergency Ordinance)
Slovak Republic	<a href="#">Act No.72/2021 Coll. amending Act No.45/2011 Coll. on Critical Infrastructure</a>	–	Yes (§ 9b (1) and (6))	No	Yes (§ 9b (1) and (6))
	<a href="#">[Foreign Investment Screening and Amendments to Certain Acts]*</a>	No	Yes (§ 12d)	No	Yes (§ 12d)
Slovenia	<a href="#">ZIUOPE</a>	No	No	Yes (Art. 72(3))	Yes (Art. 72(3))
Spain	Multi-sectoral mechanism under <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>	No	No	No	No
	Defence review mechanism under <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>	No	No	No	No
	Defence, weapons and explosives for civilian use review mechanism under <a href="#">Royal Decree 679/2014</a> , <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>	No	No	No	No
	<a href="#">[Proyecto de Real Decreto sobre Inversiones Exteriores]</a>	No	No	No	No
Sweden	<a href="#">[Alternativt förslag till lag (2022:000) om anmälan och granskning av utländska direktinvesteringar]</a>	No	No	No	No

Note: Member States that do not have a screening mechanism in operation on 30 June 2022 are only listed if publicly available information on plans for their future arrangements are sufficiently specific in this regard. Projects for reforms are likewise reported in this manner. Planned mechanisms and reform projects are set in *italics*.

Source: OECD.

155. Even where Member States were willing to intervene for the benefit of their peers, they may not do so in practice because they remain unaware of these peers' security and order interests due to design choices of individual Member States' screening mechanisms. Many Member States' authorities will only notify transactions once they have established in a first phase that they require deeper attention according to their own national criteria; the preliminary assessment in this first phase takes place without pre-notification and without any input from other Member States. As these other Member States are not made aware of the transaction, they are typically unable to alert the authorities of the Member States where the pre-screening takes place that they have security or public order concerns that they wish to see addressed. The transaction may thus be cleared during the pre-screening phase even before any other Member State is aware of the transaction or can raise concerns that the screening Member State could take into account in the context of its own decision.<sup>71</sup>

156. A further aspect of security solidarity relates to the surveillance of mitigation measures that impose continued obligations on an investor or the target enterprise.<sup>72</sup> To be effective, compliance with mitigation measures typically requires continued or at least occasional monitoring and binds corresponding resources. If mitigation measures are imposed upon request and for the benefit of other Member States – as appears to be at least occasionally the case – the surveillance of such mitigation measures would also fall under the responsibility of the Member State in which the transaction has been screened and the measures have been imposed. This issue of which Member States oversees compliance of mitigation measures is not addressed or resolved by the Regulation.

### 1.3. Principal factors that limit the effectiveness and efficiency of the framework for screening of investment into the Union and that transcend current arrangements

157. The preceding sections describe the positive contribution that the EU Regulation currently makes to advancing security and public order interests with respect to risk associated with foreign investment into the Union, as well as some design issues in the EU Regulation or Member States' arrangements that dent the overall arrangements' effectiveness or efficiency. This analysis sticks closely to the EU Regulation as currently established — but that text is not set in stone. Would a slightly different framing or application of the EU Regulation yield significantly better results, while still respecting the principles, structure and mechanism that the European Parliament and the Council agreed upon in 2019? This section evaluates whether in relation to some aspects, choices different than those currently implemented in the EU Regulation could significantly increase effectiveness or efficiency of the overall framework.

158. Four distinct issues are considered:

- The entire absence of investment screening mechanisms in some Member States (1.3.1);

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<sup>71</sup> See on this issue section 1.1.5.c.

<sup>72</sup> On the distinction between different kinds of mitigation measures, notably those that require a modification of the initially proposed transaction but no further follow-up and obligations that require continued behaviour and, correspondingly, surveillance, see OECD (2020), "[Acquisition-and ownership-related policies to safeguard essential security interests – Current and emerging trends, observed designs, and policy practice in 62 economies](#)", section 2.2.1 (§ 239).



- The limitations of scopes of Member States' domestic screening frameworks (1.3.2);
- Areas where the EU Regulation is by its design unavailable to support and complement Member States' investment screening (1.3.3); and
- The lack of impetus and strategy on investment screening at political leadership level (1.3.4).

### *1.3.1. Absence of screening: no domestic screening framework*

159. While the number of Member States that carry out investment screening has grown over the past years (Figure 2 on p.15), not least as a result of the impetus and legitimacy that the EU Regulation has given to this policy area, one third of EU Member States still have no operational framework for investment screening at all. Member States that are important entry points for foreign capital into the Union, such as Belgium, Cyprus, Ireland, and Luxembourg belong to this group.

160. The absence of an investment screening mechanisms has several consequences:

- Member States that do not have any screening mechanism are particularly limited in their ability to identify and mitigate risk for their security or public order, for another Member States' interests, or for projects or programmes of Union interest. This may affect the interests of the Member State where the investment is located, but also of its European partners.
- No institutional infrastructure exists and very little capacity on investment screening is built in most of these Member States, widening the gap with other Member States that accumulate practical operational experience and close relationships with their colleagues in other Member States. For lack of own practical experience, authorities in these Member States may find it challenging to grasp concerns of screening authorities in other Member States and respond to their requests for information (see 1.1.5.i for details). Member States with no screening mechanism also lose out on some of the benefits of the group of experts, where on certain issues they participate *de facto* as mere observers rather than share and receive feedback on own experiences.
- Member States that do not have operational screening frameworks are also typically unable to effectively gather information on foreign direct investment planned or completed in their territory that other Member States or the EU Commission may request under Articles 7(5) and 8 of the EU Regulation (Table 4, p.47). The absence of dedicated staff and routine in dealing with information requests only aggravate an issue that is also observed in some screening Member States and limits the capacity of other Member States or the EU Commission to take fully informed decisions.

### *1.3.2. Limitations of the scope of screening mechanisms*

161. Some Member States have set the scope of their investment screening mechanisms narrowly and can thus screen only a limited set of transactions. These limitations result from choices made for several parameters, such as sectoral scope, blanket exemptions of investors that fulfil certain criteria, and exclusions of certain types of investments:

- The **sectoral scope** of Member States screening mechanisms is set very differently. Only a few Member States can screen transactions in any sector of their economy, while others operate based on lists of sectors or individualised assets. The sectoral scope in individual Member States has recently widened progressively, and several Member States currently plan significant expansions of the sectoral scope of screening in their jurisdiction.<sup>73</sup> Some of these expansions were driven by

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<sup>73</sup> With the entry into force of Denmark's [Investment Screening Act](#) on 1 July 2021, Denmark significantly broadened the sectoral scope of transactions that can be screened in its jurisdiction. Significant widening of the sectoral scope of screening are expected in the near term in the Netherlands following the adoption of new legislation



textual elements contained in Article 4 of the EU Regulation (e.g. concerns about food security and freedom and pluralism of the media), and some sectoral additions resulted from unexpected shortages of critical goods and services that Member States experienced during the early stages of the COVID-19 pandemic.<sup>74</sup>

- Many EU Member States' screening mechanisms **exempt certain acquirers** that are resident in or nationals of some countries outside the Union, such as EFTA, non-EU EEA Members, NATO, or OECD Members – 20 jurisdictions in all<sup>75</sup> – from the application of at least parts of their screening mechanisms, even though the EU Regulation requires national screening mechanisms to not discriminate between third countries (Article 3(2) of the EU Regulation). Some Member States apply the exemption to citizens, and some to residents of these countries. Table 5 shows a detailed breakdown of such whitelisting of investors associated with certain non-EU jurisdictions under screening mechanisms in operation in Member States.

**Table 5. Exemptions from the application of screening mechanism to investors with certain characteristics**

Member State	Reference to screening mechanism	Exemption for natural person based on <b>residency</b> ?	Exemption for natural person based on <b>citizenship</b> ?	Exemption for <b>legal persons</b> ?
Austria	<a href="#">Investment Control Act</a>	No	EU, EEA and Swiss citizens are exempted (Section 1 (2))	Legal entities with registered or head office in EU, EEA and Switzerland are exempted (Section 1 (2))
Belgium	[ <i>Projet d'accord de coopération du 1<sup>er</sup> juin 2022 visant à instaurer un mécanisme de filtrage des investissements directs étrangers</i> ]	<i>EU residents are exempted (Art. 2.4°)</i>	No	<i>Entities incorporated or organised under the law of an EU Member State and having their registered office or principal place of business within the EU are exempted (Art. 2.4°)</i>
Czech Republic	<a href="#">Act No.34/2021 Coll. on Screening of Foreign Direct Investments</a>	No	EU citizens are exempted (§2(1))	Entities with registered office in a EU Member State are exempted (§2(1))
Denmark	<a href="#">Investment Screening Act</a>	No	Mandatory scheme - EU and EFTA citizens are exempted for certain transactions (joint ventures and commercial contracts) (Section 2) Voluntary scheme – EU and EFTA citizens are exempted (Section 2)	Mandatory scheme – Entities domiciled in EU or EFTA countries are exempted for certain transactions (joint ventures and commercial contracts) (Section 2) Voluntary scheme – Entities domiciled in EU or EFTA countries are exempted (Section 2)
	<a href="#">Act on War Material</a>	No	Danish citizens are exempted (Section 3)	Entities domiciled in Denmark are exempted (Section 3)

([Wet veiligheidsstoets investeringen, fusies en overnames](#) – ‘Vifo’), and the Slovak Republic, where a bill is under consideration ([Foreign Investment Screening and Amendments to Certain Acts](#)).

<sup>74</sup> OECD (2020), [Inventory of investment measures taken between 16 September 2019 and 15 October 2020](#), OECD (2020), [Investment screening in times of COVID-19 and beyond](#).

<sup>75</sup> These jurisdictions include Albania, Australia, Canada, Chile, Colombia, Costa Rica, Iceland, Israel, Japan, Korea, Liechtenstein, Mexico, Montenegro, New Zealand, North Macedonia, Norway, Switzerland, Türkiye, United Kingdom, and the United States.

Member State	Reference to screening mechanism	Exemption for natural person based on <b>residency</b> ?	Exemption for natural person based on <b>citizenship</b> ?	Exemption for <b>legal persons</b> ?
	<a href="#">Continental shelf and pipelines installations</a>	No	No	No
Estonia	<a href="#">[Välisinvesteeringu usaldusväärseuse hindamise seadus]</a>	No	Estonian or EU citizens that do not simultaneously have non-EU citizenship are exempted (§ 3(1) and (2))	Entities established under the law of a EU Member State are exempted (§ 3(1) and (2))
Finland	<a href="#">Act 172/2012</a>	EU and EFTA residents are exempted (Section 2). For the defence industry sector the exemption only applies to Finnish residents (Section 2)		Entities domiciled in EU or EFTA countries are exempted (Section 2). For the defence industry sector (Section 2), an exemption only applies to entities that are domiciled in Finland
	<a href="#">Act 470/2019</a>	No	EU and EFTA citizens are exempted (Section 1.1)	Entities domiciled in EU or EFTA countries are exempted (Section 1.1)
France	<i>Code Monétaire et Financier</i>	Applies also to French nationals resident outside France ( <a href="#">Art. R 151-1.1.b) du Code monétaire et financier</a> )	EU or EEA citizens are exempted in certain cases ( <a href="#">Art. R151-2 du Code monétaire et financier</a> )	Entities governed by EU or EEA Member States law in certain cases ( <a href="#">Art. R151-2 du Code monétaire et financier</a> )
Germany	<a href="#">Foreign Trade and Payments Act</a> (AWG) and <a href="#">Foreign Trade and Payments Ordinance</a> (AWV)	Cross-sectoral mechanism - EU and EFTA residents are exempted (AWV § 55(1) and AWG §2(18)). Sector-specific mechanism – German residents are exempted (AWV § 55(1) and AWG §2(5)).	No	Cross-sectoral mechanism – Entities legally established or head-quartered in the EU and EFTA are exempted (AWV § 55(1) and AWG §2(18)). Sector-specific mechanism – Entities legally established or head-quartered in Germany are exempted (AWV § 55(1) and AWG §2(5)).
Hungary	<a href="#">Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests</a>	No	EU, EEA and Swiss citizens are exempted (Act LVII of 2018, Section 1.§1.a))	Entities registered in a EU or EEA Member State or in Switzerland are exempted (Act LVII of 2018, Section 1, § 1, a))
	<a href="#">Act LVIII of 2020 – Section 85 para. 276-292</a>	No	EU, EEA and Swiss citizens are exempted (Act LVIII of 2020 – Section 276.2.b))	Entities registered in a EU or EEA Member State or in Switzerland are exempted (Act LVIII of 2020 – Section 276.2.b))
Italy	Golden Powers	No	EU citizens are exempted for certain transactions (Art. 2 of decree-law no.21 of 2012)	Entities registered in a EU Member State are exempted for certain transactions (Art. 2 of decree-law no.21 of 2012)
Latvia	<a href="#">National Security Law</a>	No	No	No
Lithuania	<a href="#">Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132</a>	No	EU, NATO, EFTA or OECD Member citizens are exempted (Art. 2.3). But possibility to call-in transactions covered by the EU Regulation if flagged under EU mechanism (Art. 13 <sup>1</sup> )	Entities established/domiciled in EU, NATO, EFTA or OECD Member State are exempted (Art.2.3). But possibility to call-in transactions covered by the EU Regulation if flagged under EU mechanism (Art. 13 <sup>1</sup> )

Member State	Reference to screening mechanism	Exemption for natural person based on <b>residency</b> ?	Exemption for natural person based on <b>citizenship</b> ?	Exemption for <b>legal persons</b> ?
Luxembourg	<a href="#">[Projet de loi portant mise en place d'un mécanisme de filtrage national des investissements directs étrangers susceptibles de porter atteinte à la sécurité ou à l'ordre public aux fins de la mise en œuvre du règlement (UE) 2019/452]</a>	No	<i>EU and EEA nationals are exempted (Art. 3(1)).</i>	<i>Exempts entities y governed by EU and EEA law (Art. 3(1)).</i>
Malta	<a href="#">NFDIS Office Act</a>	No	EU citizens are exempted (Art.2)	Entities constituted or organized under a EU Member State law are exempted (Art.2)
Netherlands	<a href="#">Telecommunications Act (Chapter 14a)</a>	No	No	No
	<a href="#">Electricity Act 1988 and Gaz Act</a>	No	No	No
	<a href="#">Wet Veiligheidstoets Investeringsen, Fusies en Overnames (Vifo)</a>	No	No	No
Poland	Permanent review under the <a href="#">Act of 2015 on the Control of Certain Investments</a>	No	No	No
	Temporary review under the <a href="#">Act of 2015 on the Control of Certain Investments</a>	No	EU, EEA and OECD citizens are exempted (Art. 12a.1. and Art. 12c.1.5)	Entities with registered office in an EU, EEA or OECD Member State are exempted (Art. 12a.1. and Art. 12c.1.5).
Portugal	<a href="#">Law n°9/2014 and Decree Law n°138/2014</a>	EU and EEA residents are exempted (Article 2.c) of Decree Law n°138/2014)	No	Entities with statutory seat or operational headquarters in EU or EEA Member States are exempted (Art. 2.c) of Decree Law n°138/2014)
Romania	<a href="#">Competition Law and Emergency Ordinance n°46 of 14 April 2022 on implementing measures for Regulation (EU) 2019/452</a>	No	EU citizens are exempted (Art. 2.a).1. of Emergency Ordinance n°46)	Entities with registered offices in an EU Member Sate are exempted (Art. 2.a).2. of Emergency Ordinance n°46)
Slovak Republic	<a href="#">Act No.72/2021 Coll. amending Act No.45/2011 Coll. on Critical Infrastructure</a>	No	No	No
	<a href="#">[Foreign Investment Screening and Amendments to Certain Acts]</a>		<i>EU citizens are exempted (§ 4)</i>	<i>Entities with registered offices in an EU Member Sate are exempted (§ 4)</i>
Slovenia	<a href="#">ZIUOPE</a>	No	No	No
Spain	Multi-sectoral mechanism under <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>	EU and EFTA residents who habitually reside in Spain are exempted (Art. 7bis.1.a) and Art. 2.1.A).a) of Law 19/2003)	No	EU and EFTA entities with registered office in Spain and beneficially owned by EU or EFTA residents are exempted (Art. 7bis.1.b) of Law 19/2003).

Member State	Reference to screening mechanism	Exemption for natural person based on <b>residency</b> ?	Exemption for natural person based on <b>citizenship</b> ?	Exemption for <b>legal persons</b> ?
	Defence review mechanism under <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>	Spanish residents are exempted (Art. 2 of Royal Decree 664/1999); Spanish citizens are presumed to reside in Spain unless proven otherwise (Art. 2.2. of Royal Decree 664/1999)	No	Spanish entities are exempted (Art. 1 of Royal Decree 664/1999). Entities domiciled in Spain are presumed Spanish entities unless proven otherwise (Art. 2.2. of Royal Decree 664/1999)
	Defence, weapons and explosives for civilian use review mechanism under <a href="#">Royal Decree 679/2014</a> , <a href="#">Law 19/2003</a> and <a href="#">Royal Decree 664/1999</a>	Spanish residents are exempted (Art. 2 of Royal Decree 664/1999); Spanish citizens are presumed to reside in Spain unless proven otherwise (Art. 2.2. of Royal Decree 664/1999)	No	Spanish entities are exempted (Art. 1 of Royal Decree 664/1999). Entities domiciled in Spain are presumed Spanish entities unless proven otherwise (Art. 2.2. of Royal Decree 664/1999)
Sweden	<i>[<a href="#">Alternativt förslag till lag (2022:000) om anmälan och granskning av utländska direktinvesteringar</a>]</i>	No	<i>Swedish citizens are exempted (§4, 2.)</i>	<i>Legal person which are ultimately owned or controlled exclusively by Swedish citizens are exempted (§4, 2.)</i>

Note: Member States that do not have a screening mechanism in operation on 30 June 2022 are only listed if plans for their future arrangements are sufficiently specific. Concrete projects for reforms are likewise listed in this manner. Planned mechanisms and reform projects are set in *italics*.

Source: OECD.

- **Greenfield investment**, which for the purpose of this study describes investment to create a new company as opposed to the acquisition of an existing company through a merger or acquisition, is not covered by most Member States' screening mechanisms,<sup>76</sup> but is covered by the scope of the EU Regulation.<sup>77</sup> Greenfield investment may result in the exposure of security or public order in similar ways as acquisitions of existing companies and can be used for espionage or transfer or sensitive information such as client data or technological advances that the new company generates. When newly created companies are established in a market, which may require little time in fast-evolving sectors of the economy such as media or technology, they may be used to undermine security or public order in similar ways as companies that have been acquired by malign actors at the stage of maturity. Finally, greenfield investment may be used as a tool for money laundering.
- **Joint ventures** are creations of new enterprises to which existing enterprises or other investors contribute assets or capital. The creation of a Joint Venture does not typically constitute an acquisition of a stake in an existing company unless it is accompanied by a change of the shareholding in an existing business.<sup>78</sup> In many scenarios, the creation of a Joint Venture is not covered under many Member States' screening mechanisms. Exceptions exist where the creation

<sup>76</sup> As an exception to this, the Czech Republic, Denmark, Lithuania (in certain sectors), and Malta cover greenfield investment under their national screening mechanisms; Austria, France, Germany, Latvia, Portugal and the Slovak Republic are among the Member States that do not cover greenfield investment.

<sup>77</sup> See European Commission (June 2021), "[Frequently asked questions on Regulation \(EU\) 2019/452 establishing a framework for the screening of foreign direct investments into the Union](#)", 'response' to 'question' 8.

<sup>78</sup> For example, a Joint Venture may acquire a stake in an existing company if this stake is the contribution to the Joint Venture by one or the partners.

of Joint Ventures is explicitly included under the scope of screening mechanisms or where Joint Ventures can be screened as greenfield investments.

Foreigners may use the creation of Joint Ventures as an avenue to acquire access to sensitive assets or technologies or to circumvent investment screening mechanisms, potentially in collusion with the other Joint Venture partner that contributes assets or technology to the Joint Venture. The creation of Joint Ventures can thus sometimes be used as a means to orchestrate the economic outcome that would otherwise require an investment and in this role can constitute a means to circumvent investment screening mechanisms.

Given that the EU Regulation also applies to greenfield investment, it is available for any screening of the creation of Joint Ventures established within the Union;<sup>79</sup> most Member States are unlikely to notify such transactions given the essential absence of this transaction type from the scope of their national screening rules.

The practical relevance of investment screening for this transaction type may be limited overall: screening under traditional rules can at most prevent the establishment of the Joint Venture in the screening jurisdiction. Investment screening cannot prevent the establishment of the Joint Venture outside of the Union and may thus not be an effective tool to prevent or manage the transfer of technology or sensitive assets.

- The EU Regulation uses hitherto unusual language to indicate **probability thresholds** for an impact on security and public order. The wording that a transaction has to “likely affect” security or public order had not previously been used in many Member States to indicate the likelihood that an adverse effect materialise. Member States use different wording which is likely situated on a spectrum of lower or higher probability than the wording chosen in the EU Regulation, including “disrupt”,<sup>80</sup> “threaten”,<sup>81</sup> “pose a risk”<sup>82</sup> and “may affect”.<sup>83</sup> Some of these terms can be traced back to language used in screening mechanisms that predate the adoption or entry into force of the EU Regulation. While several Member States with new screening legislation have explicitly adopted this wording only Germany is known to have explicitly adapted the wording in its screening legislation to the terminology used in the EU Regulation.<sup>84</sup>

The practical relevance of these differences in the framing of the probability threshold may be limited. Few decisions taken under investment screening legislation in Member States are currently subject to litigation before their courts that would clarify how the probability of events needs to be assessed. A stricter probability threshold than “likely affect” implies however a narrowing of the

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<sup>79</sup> The establishment of Joint Ventures in a jurisdiction outside the Union falls outside its scope.

<sup>80</sup> Slovak Republic (§ 9 b of [Act No.72/2021 Coll. amending Act No.45/2011 Coll. on Critical Infrastructure](#)).

<sup>81</sup> Austria ([Investment Control Act](#), Section 7), Czech Republic ([Act No.34/2021 Coll. on Screening of Foreign Direct Investments](#), § 15), Denmark (Section 1 of the [Investment Screening Act](#)), Italy (§ 1, 2. of [Decree-Law no.21 of 2012](#) converted, with amendments, into law by the [Law no.56 of 2012](#)), Slovenia (§ 72 of [ZIUOOPE](#)).

<sup>82</sup> Lithuania (§ 11 of the [Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132](#)).

<sup>83</sup> Malta (§ 12, 4) of the [NFDIS Office Act](#)).

<sup>84</sup> The adjustment was introduced through an [amendment to the Foreign Trade and Payments Act](#) that came into effect on 17 July 2020. The adjustments of the probability threshold to align with the EU Regulation is discussed in the preparatory material (BtDrs [19/18700](#) of 21 April 2020, p.3). Previously, the competence to intervene in a transaction was only possible when the “public order or security” of Germany was “threatened”; this required a “real and sufficiently severe threat that affected elementary public interests” ([AWG as amended in 2009, § 7](#), translation by the authors).

scope of application of Member States' screening mechanisms in comparison to the potential of the EU Regulation and may lead to an under-use of the cooperation mechanism.

- Similar differences among national screening legislation in Member States and the EU Regulation are also observed with regards to **concepts of 'security', 'public order', 'national security' and 'essential security interests'**. For foreign investment into the Union, the EU Regulation references the concept of 'security or public order'. It is widely held that this concept is different from, and potentially wider, than the one referenced in Articles 52 and 65 TFEU<sup>85</sup> and which has been interpreted narrowly in consistent jurisprudence by the ECJ.

Some Member States continue to explicitly refer in their domestic screening mechanisms to Articles 52 and 65 TFEU.<sup>86</sup> Again here, the practical relevance of the different language – if it is legally different – may be limited given the current absence of litigation that would clarify the interpretation of these different concept or constrain Member States in the application of their legislation. The use of a narrower concept or one that implies higher thresholds at the level of Member States limits the scope of application of their screening mechanisms in comparison to the potential of the EU Regulation, may lead to an under-use of the cooperation mechanism and may lower their capacity to intervene in problematic transactions.

162. Limitations of the scope of investment screening in EU Member States have multiple repercussions on the effectiveness of the EU framework for investment screening:

- Any limitation on the scope of application of investment screening frameworks limit Member States' ability to effectively mitigate risks, even if they are aware of such risk or are alerted by other Member States or the EU Commission under the procedures of Article 7(7) or Article 8;
- Where transactions are not subject to screening, very little information is generally available on the transactions and the transactions-parties. Many Member States have not established powers or procedures to effectively gather information listed in Article 9(2); the scope of information that other Member States can request is narrower for transactions that are not undergoing screened than for transactions that are being screened (limitation to the scope of Article 9(2) in Article 7(5) for non-screened transactions, while any information that is useful, proportionate and not burdensome to gather can be requested under Article 6(6) on transactions undergoing screening); and Member States seem to hesitate to request information from Member States where these transactions are not undergoing screening;
- Risk associated with investment carried out through holding companies established in Member States that have significant limitations on the scope of their screening mechanism may not be effectively and efficiently mitigated. Individual Member States in which the holding company has subsidiaries need to devise mitigation measures for each concerned entity, because no mitigation at the level of the holding is possible in the absence of screening powers in the Member State of establishment of the holding company. The absence of the possibility to screen transactions in the Member State of establishment of the holding company is particularly problematic if sensitive activities are performed or decisions are taken at the level of the holding company (e.g. finance and treasury, cyber-security, IP management, etc.).

163. It would appear that screening Member States are occasionally mobilised to step in to mitigate risk in high-priority transactions when the economic centre of the transaction is located in a Member State that does not screen the transaction and thus cannot effectively address the concern. In these cases, Member

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<sup>85</sup> Articles 52 and 65 TFEU allow Member States to take measures for specific purposes, including on grounds of public policy and public security in the areas of the right to establishment and free movement of capital and payments, respectively.

<sup>86</sup> These include for example screening mechanisms in Austria, Finland, Hungary, Netherlands, and Poland.



States that operate screening mechanisms that cover the transaction and that are, however marginally, *also* concerned by the transaction step in and fill gaps in the security and public order defences left open by non-screening Member States. While this approach may occasionally yield results, it is not perceived to represent a sustainable solution to remedy the absence of screening mechanisms in some Member States, especially in those where a significant number of holding companies are domiciled.

164. At present, the EU Regulation reflects an agnostic position as to the merits of investment screening and leaves Member States with all options on whether to screen foreign investment or not, to define the scope of their screening mechanisms as they deem fit, and to decide whether or not to screen a particular foreign investment (Article 1(3) of the EU Regulation).<sup>87</sup> It may be questioned whether this agnostic position is still appropriate and whether it allows for sufficient protection of collective security and public order interests in the Union in a rapidly changing geopolitical and geo-economic environment – or whether the choice to “do nothing” as currently allowed by the EU Regulation should give way to a more suggestive or directive approach. The EU Regulation could for instance suggest or impose that certain transactions in core areas or those likely affecting projects or programmes of Union interest must be within the scope of screening mechanisms in all Member States. To describe this required or recommended scope, the Regulation could set certain asset-, acquirer-, or transaction-related parameters<sup>88</sup> such as:

- asset-related descriptions such as “assets associated with projects and programmes of Union interest”, “critical infrastructure assets”, assets that are associated with certain product categories as defined for example by [NACE codes](#); or assets associated with products or services to which export control restrictions apply;
- acquirer-related descriptions such as beneficial ownership of foreign State-owned or -directed enterprises among the acquirer; or
- transaction-related parameters such as transactions that result in a controlling stake or providing access to sensitive data or technology.

165. If establishing substantial obligations is not deemed viable, the EU Regulation could expand procedural obligations beyond those currently established (but not currently effectively implemented) in Article 7. It could for example be conceived that EU Member States notify even transactions that they do not currently screen but of which they have knowledge. This would broaden the information base on transaction into the Union and would allow other Member States where the transaction does not take place

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<sup>87</sup> The EU Commission has expressed increasingly vocal recommendations that Member States that do not yet screen inward investment introduce this possibility. On 25 March 2020, a [Communication](#) from the EU Commission provided guidance to Member States on how to achieve adequate protection of assets that are crucial for European security and public order in the context of economic shock posed by COVID-19: “The Commission also *calls upon* those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a full-fledged screening mechanism and in the meantime to consider other available options, in full compliance with Union law and international obligations, to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order, including health security, in the EU.” [emphasis added]. A later [Communication](#) of 5 April 2022 contains guidance for EU Member States on assessing and preventing threats to EU security and public order associated with Russian and Belarussian investments. It states: “For those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant FDI transactions or do not allow screening before investments are made, the *Commission calls on them urgently* to set up a comprehensive FDI screening mechanism and in the meantime to use other suitable legal instruments to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU.” [emphasis added].

<sup>88</sup> See on these concepts and choices observed in a broader sample of jurisdictions in OECD (2020), [“Acquisition- and ownership-related policies to safeguard essential security interests – Current and emerging trends, observed designs and policy practice in 62 economies”](#), Section 2.1.1.



but where it may have effects to take appropriate action. This approach would maintain the current principle that Member States are not obliged to screen certain or typified transactions but would remove the information blackout that currently results from Member States not being required to screen any transaction into the Union.<sup>89</sup>

### ***1.3.3. The EU Regulation is unavailable to support screening of some transactions in Member States***

166. Despite the broad coverage of the EU Regulation, certain transactions that are being screened in Member States are not covered by the reach of the EU Regulation. In these cases, screening in individual Member States is not supported by the cooperation mechanism, and screening decisions are taken on the basis of potentially incomplete information despite better information being available in the Union.

167. Two design aspects of the EU Regulation lead to this outcome:

- In at least some scenarios of **investment by persons resident or established in the Union**, transactions may not constitute a “foreign direct investment” for the purposes of the EU Regulation pursuant to Article 2 item (2) of the Regulation. There are currently different views under which circumstances an investment is “foreign” if the immediate investor is resident or established in the Union. Some hold that acquisitions that are ultimately beneficially owned by third country investors do not constitute “foreign” investment, unless the acquisition via an investor established in the EU amounts to an artificial arrangement which circumvents FDI screening processes.<sup>90</sup> Domestic rules and policies in many Member States take a different approach and subject investments carried out through an entity established in the Union to screening if the ultimate beneficial owner (UBO) of the investment is resident or citizen of a third country.<sup>91</sup>

The exclusion of investments by immediate investors that are resident or established in the Union – save for the exception described above – makes the cooperation mechanism unavailable for such transactions. The rules governing this mechanism depend on the presence of a “foreign direct investment” in the sense of the EU Regulation. It appears that in practice, many Member States notify transactions pursuant to Article 6(1) of the EU Regulation regardless. The decentralised organisation of the information exchange mechanism – the notification reaches all Member States and the Commission without intermediaries – helps to disseminate information among Member States.

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<sup>89</sup> Options to address these issues are proposed below in section 2. , Issue #1.

<sup>90</sup> See European Commission (June 2021), “[Frequently asked questions on Regulation \(EU\) 2019/452 establishing a framework for the screening of foreign direct investments into the Union](#)”, ‘response’ to question 12. During the preparation of the EU Regulation, the European Parliament had suggested an amendment ([Report of the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union \(COM\(2017\)0487 – C8-0309/2017 – 2017/0224\(COD\)\)](#), 4 June 2018, p.22) that sought to extend the definition of the term “foreign investors” to include nationals of third countries and consider ultimate investors, but which was not ultimately adopted.

<sup>91</sup> See detailed information of respective rules in individual Member States in Table 5. National legislation does often not explicitly state whether the immediate or ultimate beneficial owner matters for the application of potential exemptions. It is documented for or reported by authorities of several Member States that their screening authorities seek to identify the ultimate beneficial owner of a transaction for the assessment of the application of potential exemptions from the application of screening and for the risk assessment more generally (see as an example the listing of jurisdictions of the immediate and ultimate investor for Germany in [BtDrs 18/10443](#), 25 November 2016, p.5).

The exclusion of investments by entities established or resident in the Union – save for the exception related to circumvention described above – prevents the EU Commission from any formal involvement in relation to intra-EU transactions that do not carry signs of circumvention, even if the UBO is from a third country. In particular, the EU Commission is unable for such transactions to issue opinions, including in cases where projects or programmes of Union interests are likely to be affected.<sup>92</sup> This situation leaves a security gap because investments by investors which are established in the EU and carry out an economic activity there but are controlled by third country investors can pose the same security and public order risks as foreign direct investments in the meaning of the EU Regulation.

- **Asset acquisitions** describe acquisitions of all or the essential assets of an existing enterprise without the acquisition of shares in that selling entity. The acquirer obtains assets *from* an entity rather than a stake *in* that entity. If an acquirer obtains a substantial set or all of the assets of an enterprise, the asset acquisition can achieve economically similar outcomes as a takeover of the enterprise, and can substitute its acquisition. Asset acquisitions may be perfectly legitimate transactions, but they can also be employed in certain constellations to circumvent investment screening mechanisms, for example to acquire technological capabilities that would be subject to FDI screening if acquired as part of an investment in an enterprise. Under certain circumstances, asset acquisitions can affect security or public order in similar ways as an investment.

Some Member States' investment screening mechanisms include asset acquisitions under their scope to avoid that the transaction type is used to circumvent investment screening.<sup>93</sup>

If the acquired assets are not used in the context of an investment within the EU (e.g., they are exported directly), the asset acquisition may not constitute a foreign direct investment in the sense of the EU Regulation and its instruments may not be available. The definition of foreign direct investment could unequivocally clarify that such asset acquisitions are covered to close potential gaps.

#### *1.3.4. Weak political impetus*

168. The negotiation of the EU Regulation and associated processes were carried by a political impetus at the level of political leadership in the Union in certain driving Member States. Several Member States that did not have screening mechanisms and had long-standing reservations about the merits or necessity of investment screening reconsidered their position in this atmosphere, and Member States that did not have much practical experience with investment screening began reflection on an overhaul of their rules, as testified by political statements or the launch of working groups to study regulatory options. These political decisions on the principle of introducing a comprehensive framework for investment screening were predominantly taken between adoption of the Regulation in March 2019 and the start of its application in October 2020. In some Member States, the decision on principle led to the swift establishment of rules at national level (see above Figure 3, p.18).

169. The adoption and entry into force of the EU Regulation led to a marked drop in attention to this policy field at the highest levels of government. This decline in political priority is considered to have contributed to a slowdown of efforts to establish or modernise investment screening mechanisms. From

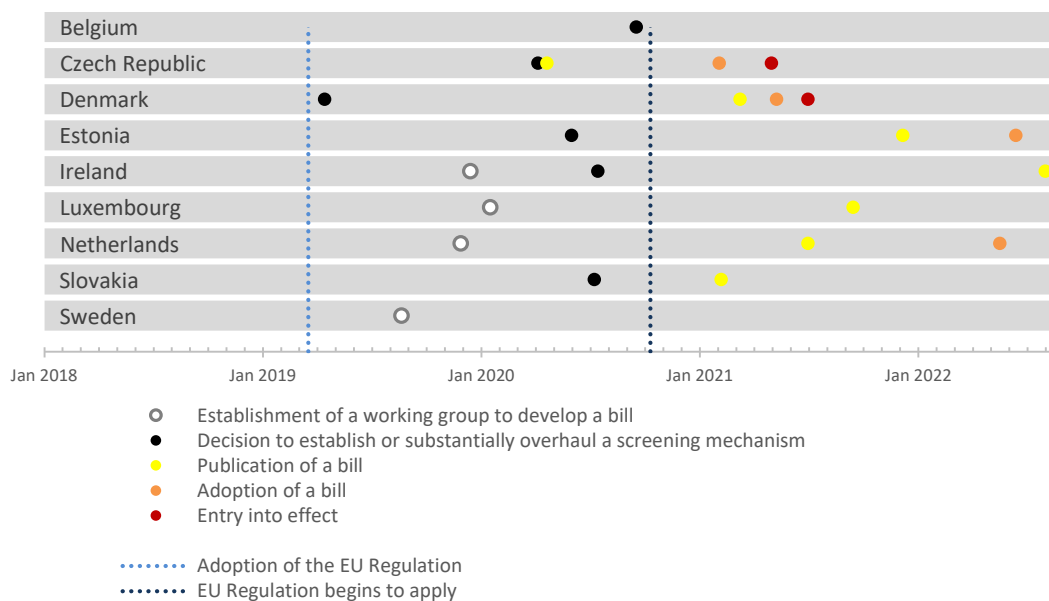
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<sup>92</sup> The European Commission in: "[Frequently asked questions on Regulation \(EU\) 2019/452 establishing a framework for the screening of foreign direct investments into the Union](#)" (June 2021), 'response' to question 12, suggests that the anti-circumvention rule in Recital 10 would bring some transactions under the scope of the Regulation despite establishment or residency of the immediate investor in the Union. Recital 10 recommends that Member States have certain arrangements in place.

<sup>93</sup> E.g. Austria ([Investment Control Act](#), Section 2) and Germany (§ 55, § 60 [AWV](#)).

among the nine Member States that had announced their intention to bring into effect or substantially overhaul their investment screening mechanisms between March 2019 and October 2020, only three had finalised the process and had brought screening mechanisms into force by 30 June 2022. In several Member States, the calendar about the adoption and entry into force of measures announced in 2019 is still uncertain, and in some Member States, no bill has been developed or published yet. Figure 7 illustrates how much time has elapsed in selected Member States between the political announcement or the launch of a working group to develop legislation and some key milestones on the way to an operational investment screening mechanism.

**Figure 7. Time lapse between preparation and announcement of the introduction of screening mechanisms and their adoption or entry into force in selected Member States**



Source: OECD.

170. While Member States' governments had to manage a series of unprecedented crises since 2019 that absorbed significant attention, these very crises also pointed repeatedly to the merits of formal instruments to intervene in investment transactions that were likely having an impact on security or public order in Member States. Both the COVID-19 pandemic and the extraordinary economic consequences that it generated and more recently the war in Ukraine reinforced the understanding of exposure. Many governments heard this message and took corresponding action in direct response, including through the introduction of temporary measures within very short timeframes (see the number of measures taken in direct and explicit response to the two crisis in Figure 1 on p.14 of this report). Some governments did not appear to significantly accelerate their action in this area.

171. The relatively low priority of investment screening at senior levels of government is felt beyond slow regulatory action. Some screening authorities suffer from inadequate resources or frequent staff movements that they attribute to the absence of priority or interest in their hierarchy or at political leadership level. These shortages of resources diminish the capacity of several Member States to meaningfully participate in and contribute to the cooperation mechanism established by the EU Regulation and lower the effectiveness of screening of foreign direct investment into the Union.

## 2. Which issues diminish the effectiveness and efficiency of the framework, and how can these be remedied?

172. The functional analysis of the framework for investment screening in the Union presented in section 1. documents circumstances as well as procedural designs of the EU Regulation and in Member States whose interaction weigh on the effectiveness and efficiency of the framework for investment screening in the Union.

173. Ineffectiveness and inefficiency can lead to the following:

- Transactions that likely affect security or public order of Member States or projects or programmes of Union interest are not being screened.
- Screening decisions are taken based on incomplete information.
- Screening procedures are costly for involved private entities, take longer than necessary, have unpredictable outcomes, and lead to constraints on benign and beneficial investment projects while not enhancing security or public order.
- Screening procedures are costly and time consuming for public administrations.

174. This section summarises the principal shortcomings that weigh on the effectiveness and efficiency of the framework for investment screening in the Union. It identifies 12 issues that any reform could address as a priority. The corresponding sections identify and describe the respective problem, identify its root cause, proposes potential remedies, and identify who would need to act.

175. These issues are the following:

Issue #1: The absence of screening in some Member States leaves gaps with substantial and procedural consequences	63
Issue #2: Limitations of the coverage of investment screening mechanisms in Member States leave gaps with procedural and substantial consequences	64
Issue #3: The priority that investment screening currently enjoys in the Union is too low to sustain reform and thorough implementation of screening mechanisms in Member States	65
Issue #4: Not all Member States possess the means to effectively gather information on transactions that are not undergoing screening	66
Issue #5: Reviewable transactions that are not notified are unlikely to be detected because the capacity of Member States and the EU Commission to discover such transactions is limited	68
Issue #6: Not all Member States have explicit competencies to effectively act on Member States' comments or the EU Commission's opinions	69
Issue #7: Accountability in the context of comments and opinions received from Member States and the EU Commission is low	73

Issue #8: Timelines for screening decisions in some Member States are too short to effectively incorporate input from the cooperation mechanism	74
Issue #9: The EU Regulation limits the flow of transaction-specific information among Member States	76
Issue #10: Information that is irrelevant for the security and public order interests of other Member States or the Union is fed into the information exchange mechanism, while some relevant information is not required to be shared	77
Issue #11: The availability of the instruments of EU Regulation is limited and uncertain when a third county investor invests via a company established in the EU	79
Issue #12: The processing of multi-jurisdiction FDI transactions is inefficient	80

## Issue #1: The absence of screening in some Member States leaves gaps with substantial and procedural consequences

**What is the issue?** The absence of screening mechanisms in some Member States diminishes the effectiveness of the EU framework for investment screening considerably: Member States that have no mechanism have few or no effective means to manage risk related to foreign investment into the Union, do not build institutional capacity, and cannot benefit fully from exchanges with their peers in other Member States and the EU Commission. The deep economic integration of the European Union may result in exposure of interests of Member States or projects or programmes of Union interest well beyond the Member State where the transaction takes place but is not screened in the absence of a screening mechanism. In exploitation of this weakness, problematic foreign investors who seek to invest in sensitive assets may choose non-screening Member States as a gateway into the internal market.

Moreover, absence of a framework for investment screening typically entails significant procedural consequences: a lack of dedicated institutional infrastructure makes it unlikely that transactions are detected and information about such transactions and on their main parameters including the transaction parties is likely to be limited. Other Member States whose security or public order may be affected are unlikely to learn about these transactions as they are not notified to the cooperation mechanism, and if they do, they are unlikely to receive meaningful information on the transaction from non-screening Member States, even though the Regulation legally requires the provision of certain information. The scope of information that other Member States can request about a transaction that is not undergoing screening is narrower than for transactions that are undergoing screening.

**Where is this issue rooted?** The EU Regulation takes an agnostic stance on Member States' choices whether to establish screening mechanisms, and the absence of any investment screening is a fully acceptable choice under the EU Regulation.

**What would be required to address this issue and who would need to act?** Member States have, at least until recently, had different views about the merits, needs and implications of investment screening in their territories. Many of these Member States have begun recently to warm to the idea to establish a screening mechanism. It appears likely that most if not all Member States will have investment screening mechanism in the medium term, given that several Member States that do not already operate such mechanisms are currently working on the design of such mechanisms.

The issues resulting from the absence of screening in Member States are thus expected to recede progressively. To accelerate processes towards the establishment of investment screening mechanisms in Member States that do not currently have any such mechanisms, a revision of the EU Regulation could *require* that all Member States have an investment screening mechanism that covers at least some core areas, for example for certain sectors or investors to capture the most concerning transactions or those where risk typically spills over or materialises beyond the national borders of a given Member State, or for projects or programmes of Union interest.

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For a more detailed analysis and description of the issue see section 1.3.1, p.50.

## Issue #2: Limitations of the coverage of investment screening mechanisms in Member States leave gaps with procedural and substantial consequences

**What is the issue?** Limitations in the coverage of investment screening mechanisms in Member States diminish the effectiveness of the EU framework for investment screening considerably: Member States that exclude important areas from the application of their screening mechanisms, including through narrow definition of their sectoral scope, extensive white-listing of certain investor classes, have limited effective means to manage risk related to foreign investment into the Union. This may have spill-over effects for security or public order interests in other Member States and for projects or programmes of Union interest.

Again here, absence of screening typically entails procedural consequences for the discovery of transactions that are not under the scope of a screening mechanism, and for basic information about such transactions.

**Where is this issue rooted?** The EU Regulation leaves broad scope for Member States to design the parameters that determine the scope of application of screening mechanisms in Member States. Member States have different views on the sectors which are more vulnerable to public order or security risk stemming from foreign direct investments and on the degree of urgency to address such risk. The absence of guidance on this matter has largely prevented convergence among Member States.

**What would be required to address this issue and who would need to act?** While some Member States have spontaneously expanded the scope of their screening mechanisms lately and lowered thresholds triggering FDI screening, further substantial and broad change in this area is unlikely in the near term. Also, limited change has been observed with respect to acquirer-related characteristics or the inclusion of asset acquisitions or greenfield investment, for example.

The processes to close gaps in the scopes of Member States' screening frameworks could be accelerated if:

- The EU Regulation would include a *requirement* that all Member States cover a core of transactions by a screening mechanism. This scope could be defined by certain asset- and acquirer-specific criteria or other transaction parameters such as trigger-conditions; or
- The EU Regulation would *recommend* in firmer terms standards in this regard beyond the suggestions currently contained in Articles 3 and 4.

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For a more detailed analysis and description of the issue see section 1.3.2, p.50.



### Issue #3: The priority that investment screening currently enjoys in the Union is too low to sustain reform and thorough implementation of screening mechanisms in Member States

**What is the issue?** Since the adoption of the EU Regulation, the number of Member States that operate national screening mechanisms has increased. However, according to individual testimonies at national level, the priority that political leadership in many Member States attaches to investment screening has declined. Lack of peer pressure among Member States' governments at political level slows progress in introducing investment screening mechanisms and upgrading existing frameworks and reduces resources available for the screening function in Member States.

**Where is this issue rooted?** The negotiation of the EU Regulation had focused attention in Member States at political level on the issue of investment screening, but its adoption has demoted the subject on the political agenda. A series of crises that documented the need of functioning investment screening mechanisms (COVID-19 and the war in Ukraine) and repeated efforts by the EU Commission to draw attention to the matter has not produced sufficient results.

While political-level conversations on investment screening are ongoing between U.S. and EU in the context of the Trade and Technology Council (TTC), there is limited strategic conversation on investment screening at political level within the EU that directly engages senior government levels of Member States.

**What would be required to address this issue and who would need to act?** It may be difficult to steer attention of political leadership to specific subjects, especially at a time where several crises absorb leaders' attention. Recent EU Council Presidencies have not included investment screening in their agendas, and the trio of presidencies that will hold the presidencies until mid-2023 has not explicitly included investment screening in their programme. The review of the EU Regulation could be a catalyst of renewed attention, especially on the slow pace of advance in several Member States. In the context of the review of the EU Regulation, it could be considered to establish a requirement for cyclical conversation on investment screening at leadership level.

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For a more detailed analysis and description of the issue see section 1.3.4, p.59.

## Issue #4: Not all Member States possess the means to effectively gather information on transactions that are not undergoing screening

**What is the issue?** The EU Regulation requires Member States to provide information on transactions set out in Article 9 to other Member States upon request, regardless of whether the transaction is or could be undergoing screening in their jurisdiction. For some elements of information, which is set out in Article 9(2), this obligation is *not* conditioned on the availability of the information from sources within the public authorities or from public sources.

Effective means to gather information to meet the obligations under the EU Regulation requires that domestic law establish: which authorities are competent to request the information; who must provide information that is not available from public sources or within the public administration; which timelines must be met; and how the person that is required to provide information can be compelled to provide truthful information within the timeline. Many Member States, especially some of those that do not operate a screening mechanism, have not set such rules. Member States that have established screening mechanisms build information obligations on the investor that seeks an authorisation, with refusal of the requested authorisation and effective means to compel the addressee of an information request; these mechanisms are unavailable if the transaction is not, not yet, or no longer undergoing screening, and they do not allow the information gathering from third parties.

Many Member States – those with and without screening mechanisms – seem to rely on Article 9(4) EU Regulation. This provision is too unspecific however to be operational, as it does not provide for timelines that apply to the addressee of an information request and contain no mechanism to compel these persons to provide truthful information on time.

As a result, many Member States are not able to produce the information upon request from other Member States or the Commission, especially in cases where a transaction is not undergoing screening in their territory.

**Where is this issue rooted?** The EU Regulation contains information obligations that apply to cases that had not existed before the EU Regulation came into force. Many Member States have not passed rules that would allow them to meet their obligations under the EU Regulation. Reliance on the direct application of Article 9(4) of the EU Regulation is unlikely to provide a sufficient remedy for an absence of specific and operational rules in domestic legislation.

**What would be required to address this issue and who would need to act?** To enable more effective information gathering on transactions that are not undergoing screening and to fulfil their obligations under Article 7 of the EU Regulation, Member States would need to establish powers domestically that would allow them to gather information independent of an ongoing screening process and to complement these powers with mechanisms to enforce the provision of timely and truthful information (examples of clauses used in selected Member States are available in paragraph 176).

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For a more detailed analysis and description of the issue see section 1.1.5.i, p.38.

176. Examples of clauses observed in Member States arrangements in the context of investment screening to provide explicit powers to effectively gather information on transactions not undergoing screening:

- **Austria: Section 13(1) Investment Control Act**

**Section 13.**

(1) If the European Commission or one or more other EU Member States submit a request for information on a direct investment not undergoing screening, the leading responsible Member of the Federal Government shall request each acquiring person and the target undertaking to provide the information in accordance with Section 12 Para 3 necessary to reply to the request. This information shall be provided within five calendar days of receipt of the request and shall be forwarded to the European Commission without delay. Section 12 Para 4 shall apply.

- **Latvia: Article 14 of Regulation 606**

**Article 14**

If a request for information is received from the European Commission or a Member State concerning a foreign direct investment which is not assessed in accordance with the provisions of Chapter VI of the National Security Law, the Ministry of Economics, if it does not have the requested information, shall immediately forward the request for information to the commercial company in which the foreign direct investment has been made and to the foreign investor concerned. The said persons shall submit the requested information to the Ministry of Economics within 10 working days of receipt of the request.

- **Sweden: § 3 of Law 2020:826 on supplementary provisions to the EU Regulation on foreign direct investment**

**§ 3**

Where necessary for the purposes of obtaining the information referred to in Article 9(2) of the EU Regulation, the contact point may order the foreign investor or the company concerned to provide information or documents. Such an order may be subject to a periodic penalty payment.

- **Estonia: § 18 of Bill *Välisinvesteeringu usaldusväärsuse hindamise seadus***

**§ 18**

Where the European Commission or another Member State of the European Union submits a request for information on a foreign investment which is not subject to the authorisation procedure provided for in this Act, the Authority shall request from the foreign investor, the target enterprise or any other party to the foreign investment the information referred to in Article 9(2) of Regulation (EU) No 2019/452 of the European Parliament and of the Council and shall forward it without delay to the European Commission and the requesting Member State of the European Union.

## Issue #5: Reviewable transactions that are not notified are unlikely to be detected because the capacity of Member States and the EU Commission to discover such transactions is limited

**What is the issue?** To detect reviewable transactions, Member States rely principally on notifications by investors or acquisition targets. The number of non-notified transactions that were brought to authorities' attention through the cooperation mechanism suggests that investors or acquisition targets do not notify all transactions that Member States believe should be screened, and it appears likely that at least some transactions are not notified to Member States. The current cooperation mechanism is unlikely to reveal all transactions that would need to be screened to ensure an effective protection of the security and public order of Member States and projects and programmes of Union interest.

Few Member States have developed capacity to detect non-notified transactions in cases where prior authorisations or ex-post notifications are required, or where transactions are reviewable, but no notification obligations exist. The Commission accesses publicly available information to identify potentially reviewable transactions, but Member States do not appear to use this offer much or follow leads resulting from this work.

**Where is this issue rooted?** The responsibility for investment screening lies with Member States, and their capacity determines the extent to which they can detect non-notified transactions. Economic, administrative, or penal sanctions are in place in many Member States to compel investors to notify transactions so that they can be subjected to screening. These sanction mechanisms are only effective to the extent that authorities have resources and means to discover breaches of notification obligations. Economic consequences such as unwinding transactions, the only means available where no notification obligation for reviewable transactions exists, may have effects too late and remain thus ineffective in cases where technology or data transfer is the main motivation for an acquisition. Many Member States' screening authorities have reported resource constraints, especially in light of the workload resulting from the EU cooperation mechanism and are unlikely to prioritise the discovery of non-notified transactions.

**What would be required to address this issue and who would need to act?** Resource constraints in Member States need to be resolved primarily by Member States. Efforts at the level of the EU Commission could support this function. At present carried out informally, efforts by the EU Commission to discover non-notified transactions of potential interest could be clarified and formalised to give this contribution greater visibility and encourage its use.

The EU Commission could obtain a role in analysing and possibly investigating identified transactions in greater depth. This would pool investigative resources and reduce the burden for Member States to carry out such research. It could be considered whether Member States should have an obligation to respond to promising leads to justify the investment of greater resources by the EU Commission.

It could also be considered to lower the bar for the EU Commission to issue an opinion to a non-screening Member State (Article 7(2) of the EU Regulation) – currently requiring that the security or public order of more than one Member State is likely affected. If the EU Commission was allowed to issue an opinion if a single Member State is likely affected, it would have more leeway to suggest action – without affecting the right of Member States to decide autonomously on the course of action that they deem appropriate.

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For a more detailed analysis and description of the issue see section 1.3.2, p.50.

## Issue #6: Not all Member States have explicit competencies to effectively act on Member States' comments or the EU Commission's opinions

**What is the issue?** The EU Regulation requires Member States to give “due consideration” to comments of other Member States and to opinions of the EU Commission; and, in cases where projects or programmes of Union interest are concerned, to “take utmost account” of the Commission’s opinion. These obligations describe behaviour, not outcomes, and what exactly is substantially required from the addressee of comments or opinions remains uncertain. At present, some Member States have established explicit powers to effectively intervene in transactions for the benefit of other Member States’ security or public order or to take measures necessary to address concerns expressed in an opinion by the EU Commission, including when these opinions concern projects or programmes of Union interest. Few screening authorities have indicated, however, that they would go to great lengths to take substantial action in the interest of other Member States, not least because they felt that the EU Regulation did not require such action.

**Where is this issue rooted?** There is currently no specific obligation that would require a Member State to assist another Member States in preventing adverse security or public order outcomes beyond the duty of sincere cooperation under Article 4(3) TEU. The EU Regulation does not contain a specific obligation for the context of investment screening and is vague on what is expected from Member States in relation to the Union’s collective security and public order interests, and how concerns expressed in comments or opinions need to be addressed. The EU Regulation frames some obligations in procedural, not substantive terms: Member States are not allowed to ignore comments or opinions, but “no action” to actually assist other Member States appears permitted.

The absence of any accountability mechanism in this regard – except in a very narrow exception, Member States do not have to inform the commenting Member State, other Member States, or the EU Commission about the outcome of their consideration of comments or opinions – likely limits peer pressure to address concerns effectively (see more specifically on the lack of accountability mechanisms Issue #7).

**What would be required to address this issue and who would need to act?** Several approaches would contribute to giving the Union’s common security interest greater prominence in the balance between Member States’ autonomy and collective security. They could be pursued individually or, for greater effect, in combination.

- Member States that have not yet done so could give greater prominence to other Member States’ security and public order interest and to interests of projects and programmes of the Union in their domestic rules governing investment screening. Specifically, they could broaden the competence to act procedurally and substantively to incorporate such interests in their individual screening decisions. This would likely give their implementing authorities greater comfort in taken decisions that serve the common security and public order interests of the Union rather than only domestic interests (examples of approaches used in selected Member States are available in paragraphs 177 to 180).
- The EU Regulation could be amended to suggest or require that Member States establish competencies to intervene in transactions that likely affect other Member States’ security or public order interests – but not necessarily their own –, or that likely affect programmes or projects of Union interest. This could lead to regulatory action as described in the preceding paragraph. The aim would be to make comments and opinions more consequential – without

interfering with the competency of Member States to take the corresponding decisions in individual cases.

- Accountability in the context of comments and opinions could be strengthened. The EU Regulation could notably require that a Member State that has received comments or opinions must provide an explanation of its course of action to those Member States that have provided comments and to the EU Commission in cases beyond Article 8(2)(c).

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For a more detailed analysis and description of the issue see section 1.2, p.43.

177. Examples of clauses observed in Member States arrangements in the context of investment screening to provide explicit powers to start screening a transaction that likely affect **other Member States'** security or public order.<sup>94</sup>

- **Germany: Section 55(1) AWV**

**Section 55(1) AWV - Scope of application of the cross-sectoral assessment**

(1) The Federal Ministry for Economic Affairs and Energy can assess whether there will be a likely effect on the public order or security [...] of another Member State of the European Union (...) if a non-EU resident directly or indirectly acquires a domestic company or directly or indirectly acquires a stake within the meaning of Section 56 in a domestic company.

- **Lithuania: Art. 13<sup>1</sup>.1, Art. 13<sup>1</sup>.2 and Art. 11.1.9 of Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132**

**Article 13<sup>1</sup> Screening of other investors under Regulation (EU) 2019/452**

1. The Commission may also carry out a screening of any investor other than those defined in Article 2(2) of this Law if, in accordance with Regulation (EU) 2019/452, a Member State of the European Union or the European Commission provides information on the impact of their planned or made foreign direct investment in Lithuania on public order or security, as they are understood under Regulation (EU) 2019/452, or on projects or programmes of interest to the European Union for reasons of security or public order.

2. In the cases referred to in paragraph 1 of this Article, the Commission shall be guided, mutatis mutandis, by the criteria laid down in Article 11 of this Law and the procedure laid down in Article 12 of this Law when carrying out the screening of the investor for compliance with the requirements for national security. [...]

**Article 11. Criteria for assessing an investor's compliance with national security interests**

1. An investor poses a risk to national security interests or does not meet national security interests if: [...]

9) if, on the basis of comments made by other Member States of the European Union or the opinion of, or information provided by, the European Commission, the Commission concludes and the Government decides that, in accordance with the provisions of Regulation (EU) 2019/452, the investor's foreign direct investment is likely to have an impact on the public order or security of another Member State of the European Union, [...]

178. Examples of clauses observed in Member States arrangements in the context of investment screening to provide explicit powers to start screening a transaction that likely affect **projects and programmes of EU interest**.

- **Germany: Section 55(1) AWV**

**Section 55(1) AWV - Scope of application of the cross-sectoral assessment**

(1) The Federal Ministry for Economic Affairs and Energy can assess whether there will be a likely effect on the public order or security [...] in relation to projects or programmes of Union interest within the meaning of Article

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<sup>94</sup> See section 1.2, specifically paragraph 147 (p.47) for more details.



8 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 I of 21 March 2019, p. 1) if a non-EU resident directly or indirectly acquires a domestic company or directly or indirectly acquires a stake within the meaning of Section 56 in a domestic company.

- **Lithuania: Art. 13<sup>1</sup>.1, Art. 13<sup>1</sup>.2 and Art. 11.1.9 of Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132**

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1. An investor poses a risk to national security interests or does not meet national security interests if: [...]

9) if, on the basis of comments made by other Member States of the European Union or the opinion of, or information provided by, the European Commission, the Commission concludes and the Government decides that, in accordance with the provisions of Regulation (EU) 2019/452, the investor's foreign direct investment is likely to have an impact [...] on projects or programmes of interest to the European Union, on grounds of security or public policy;

179. Examples of clauses observed in Member States arrangements in the context of investment screening to provide explicit powers to materially intervene in a transaction that likely affect **other Member States'** security or public order.

- **Germany: Section 4(1)4a. AWG**

**Section 4 - Restrictions and obligations to act to protect public security and external interests**

(1) In foreign trade and payments transactions, legal transactions and actions can be restricted and obligations to act can be imposed by ordinance, in order [...]

4. to guarantee the public order or security of the Federal Republic of Germany or of another Member State of the European Union, [...]

- **Lithuania: Art. 11.1.9 of Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132**

**Article 11. Criteria for assessing an investor's compliance with national security interests**

1. An investor poses a risk to national security interests or does not meet national security interests if: [...]

9) if, on the basis of comments made by other Member States of the European Union or the opinion of, or information provided by, the European Commission, the Commission concludes and the Government decides that, in accordance with the provisions of Regulation (EU) 2019/452, the investor's foreign direct investment is likely to have an impact on the public order or security of another Member State of the European Union, [...];

- **Slovak Republic: § 9b(1) and (6) of Act No.72/2021 Coll. amending Act No.45/2011 Coll. on Critical Infrastructure**

**§ 9b**

(1) The central authority may review whether the direct or indirect transfer or transition of the element to another person, [...] disrupts the public order or national security of the Slovak Republic or another Member State of the European Union or the interests of the European Union. [...]

(6) [...] If the central authority concludes that the transfer or transition of an element might disrupt the public order or national security of the Slovak Republic or another Member State of the European Union or the interests of the European Union, it shall propose to the Government to withhold its consent to the transfer or transition or grant a conditional consent. [...].

- **Estonia: § 11 of Bill [Välisinvesteeringu usaldusväärseuse hindamise seadus](#)**

**§ 11. Approval of issue of permit for foreign investment, issue of permit, issue of permit with conditional condition and refusal to issue permit**

[...]

(2) The Commission does not approve the issuance of a foreign investment permit and the Consumer Protection and Technical Surveillance Authority refuses to issue a foreign investment permit if the foreign investment may endanger the security or public order of Estonia or another Member State of the European Union.

(3) A foreign investment permit may contain an ancillary condition which obliges the foreign investor or target undertaking to take measures to prevent endangering security or public order in Estonia or another Member State of the European Union, including transferring a certain shareholding in the target undertaking or continuing valid contracts for supply of products or services.

180. Examples of clauses observed in Member States arrangements in the context of investment screening to provide explicit powers to materially intervene in a transaction that likely affect **projects and programmes of EU interest**.

- **Germany: Section 4(1)4a. AWG**

**Section 4 - Restrictions and obligations to act to protect public security and external interests**

(1) In foreign trade and payments transactions, legal transactions and actions can be restricted and obligations to act can be imposed by ordinance, in order [...]

4a. to guarantee public order or security relating to projects or programmes of Union interest within the meaning of Article 8 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 I of 21 March 2019, p. 1) or [...]

- **Lithuania: Art. 11.1.9 of Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132**

**Article 11. Criteria for assessing an investor's compliance with national security interests**

1. An investor poses a risk to national security interests or does not meet national security interests if: [...]

9) if, on the basis of comments made by other Member States of the European Union or the opinion of, or information provided by, the European Commission, the Commission concludes and the Government decides that, in accordance with the provisions of Regulation (EU) 2019/452, the investor's foreign direct investment is likely to have an impact [...] on projects or programmes of interest to the European Union, on grounds of security or public policy;

- **Slovak Republic: § 9b(1) and (6) of [Act No.72/2021 Coll. amending Act No.45/2011 Coll. on Critical Infrastructure](#)**

**§ 9b**

(1) The central authority may review whether the direct or indirect transfer or transition of the element to another person, [...] disrupts the public order or national security of the Slovak Republic or another Member State of the European Union or the interests of the European Union. [...]

(6) [...] If the central authority concludes that the transfer or transition of an element might disrupt the public order or national security of the Slovak Republic or another Member State of the European Union or the interests of the European Union, it shall propose to the Government to withhold its consent to the transfer or transition or grant a conditional consent. [...].

## Issue #7: Accountability in the context of comments and opinions received from Member States and the EU Commission is low

**What is the issue?** The EU Regulation establishes a flow of information towards the Member State in which an investment takes place to broaden the information-basis on that transaction and potential implications for security or public order. This information flow, consisting of comments and opinions, enables the recipient Member State to take a better-informed decision based on broader information, including on other Member States' and the EU Commission's security and public order concerns. The receiving Member State has the obligation to give due consideration to comments and opinions, and, in certain circumstances, to take opinions into utmost account. The receiving Member State is not required to inform the Member States that have provided comments or indeed any Member State about its course of action. The EU Commission is expected to receive feedback only in a narrow situation described in Article 8(2)(c) of the EU Regulation.

Member States and the EU Commission cannot deduct which action was taken through observation and thus rely on explicit feedback from the concerned Member State.

The absence of feedback on how screening Member States have taken into account comments and opinions diminishes the understanding of how a specific case has been resolved and whether and how a risk has been mitigated. Beyond the usefulness of feedback on a specific case, information on the use of the input may boost the readiness to provide information in future cases and foster the establishment of a community of practice and a common culture on investment screening in the Union – two important needs that are not currently served.

Some Member States share information on how comments or opinions are taken into consideration in a specific screening decision informally. This may not be a widespread or regular practice, it may not include all Member States according to the same principles, and Member States may not follow this practice if they deem that sharing this information would not be well received in other Member States, for example because they have not taken a specific action in response to a comment. The legal basis for such informal sharing of information is uncertain or even contested, which could be a contributing factor that limits the willingness of some Member States to share such information with their peers in other Member States.

**Where is this issue rooted?** The issue results from the design of the formal information flow under the EU Regulation. Informal sharing of information on how comments or opinions have been used is likely selective and uncertain and thus not a substitute for a formal accountability mechanism.

**What would be required to address this issue and who would need to act?** A change or clarification in the EU Regulation would likely be required to explicitly allow or oblige Member States that have received comments or opinions to share feedback on their use with the commenting Member State, the Commission in cases of opinions, or beyond. Such a clarification or change in rule would specify which information may or must be shared, and with whom.

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For a more detailed analysis and description of the issue see section 1.1.5.f, 31.

## Issue #8: Timelines for screening decisions in some Member States are too short to effectively incorporate input from the cooperation mechanism

**What is the issue?** Domestic investment screening frameworks in some Member States set ambitious timelines for final decisions on individual transactions. These timeframes may have elapsed before comments, opinions and other information provided by the cooperation mechanisms have arrived, especially if additional procedures in the cooperation mechanisms lead to an extension of the timelines under the cooperation mechanisms of the EU Regulation. Additional and related issues arise if a given transaction is notified by several jurisdictions at different times (see Issue #12).

**Where is this issue rooted?** Timelines for investment screening mechanisms are set autonomously by Member States, with the sole requirement that they allow Member States to take into account input received under the cooperation mechanism (Article 3(3) of the EU Regulation). The EU Regulation (Articles 6(7) and 7(6) in particular) does not set time in absolute terms; in certain scenarios, the afforded time depends on how long it takes a Member State to provide additional information (the Regulation only requires that such information needs to be provided “without undue delay”). Additional procedural steps may further extend the time that elapses before the cooperation mechanism has produced final results.

Not all Member States have set rules on timelines that are either long enough to accommodate the time needed for the process under the cooperation mechanism or that provide for extensions of domestically defined timelines if the cooperation mechanism needs more time to conclude.

**What would be required to address this issue and who would need to act?** It is the responsibility of individual Member States to set timelines applicable in their national screening frameworks so that they meet the requirements of the EU Regulation under all circumstances. This may require Member States to adjust the rules on timelines applicable to investment screening in their jurisdictions.

Member States organise their national screening frameworks in different fashions so that no uniform rule would address the issue in all Member States. Member States could set domestically applicable timelines more generously or could foresee suspensions when specified incidents occur under the information exchange mechanism (examples of approaches observed in selected Member States are available in paragraph 181).

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For a more detailed analysis and description of the issue see section 1.1.5.g, p.32.

181. Examples of clauses observed in Member States arrangements in the context of investment screening to provide specific timelines to facilitate and effective use of the information that the cooperation system generates:

- **[Italy: Article 2ter of Decree-Law no.21 of 2012 converted, with amendments, into law by the Law no.56 of 2012](#)**

### **Article 2ter**

1. Where a Member State or the Commission notifies, pursuant to Article 6(6) of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, an intention to make comments or to issue an opinion in relation to a foreign direct investment that is the subject of ongoing proceedings, the time limits for the exercise of the special powers set out in Articles 1 and 2 shall be suspended until the receipt of the Member State's comments or the European Commission's opinion. If the opinion of the European Commission is subsequent to

the observations of the Member State, the time limits for the exercise of the special powers shall run again from the date of receipt of the opinion of the Commission. The time limits for the exercise of the special powers shall also be suspended in the event that the Government, pursuant to Article 6(4) of the aforementioned Regulation (EU) 2019/452, requests the Commission to deliver an opinion or the other Member States to submit observations in relation to a proceeding under way under this Article. This is without prejudice to the possibility of exercising the special powers even before the receipt of the Commission's opinion or the Member States' comments, in cases where the protection of national security or public order requires the adoption of an immediate decision pursuant to Article 6(8) of the same Regulation (EU) 2019/452.

- **Lithuania: Article 12.12(2) of Law on Protection of Objects Important to Ensuring National Security of the Republic of Lithuania, No.IX-1132**

**Article 12.12(2)**

In accordance with Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, the European Commission or a Member State of the European Union shall notify its intention to submit comments or an opinion on the transaction undergoing screening ("the comments or opinion under Regulation (EU) 2019/452"). In such a case, the review shall be suspended pending the submission of the comments or opinion under the Regulation (EU) 2019/452 within the time limits set out in Regulation (EU) 2019/452.

- **Netherlands: Article 12 of *Wet Veiligheidstoets Investerings, Fusies en Overnames (Vifo)***

**Article 12**

[...] 8. If, following a notification, it is found that there is a foreign direct investment that falls within the scope of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ 2019 L 79), the period referred to in the third or sixth paragraph may be extended by up to three more months.

- **Estonia: §9 of Bill *Välisinvesteeringu usaldusväärssuse hindamise seadus***

**§ 9 Processing of application and terms of proceedings**

[...] (4) Where another Member State of the European Union or the European Commission has notified its intention to submit comments or an opinion on the basis of Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union (OJ L 79, 21.3.2019, p. 1-14), the Authority may extend the time limit set out in paragraph 2 of this Article once for a period of up to 90 calendar days.

## Issue #9: The EU Regulation limits the flow of transaction-specific information among Member States

**What is the issue?** The EU Regulation requires mandatory or permits optional information exchanges in a limited number of scenarios. The rules currently limit or condition the sharing or receiving of transaction-specific information that is available within the Union and would foster security or public order interests.

These constraints concern in particular information that:

- could lead to the discovery of transactions that may affect security or public order of Member States; and
- would provide more complete insights to inform an ongoing screening or other response to an identified transaction.

The fact that certain exchanges of information among authorities are not foreseen by the EU Regulation, and hurdles in existing channels of communication have given rise to informal exchanges among Member States' screening authorities and contact points. This exchange may substitute formal information exchanges and may be convenient but may exclude certain Member States' authorities and may be affected by changes of officials in Member States, or evolving preferences, sensitivities, and trust in Member States' authorities, as well as available resources and goodwill.

**Where is this issue rooted?** The design of the EU Regulation closes some formal information channels. Constraints and conditions on some exchanges of information are likewise an explicit design feature.

**What would be required to address this issue and who would need to act?** The conditioning of information flow implied in the EU Regulation could be significantly reduced through a change of the corresponding provisions of the EU Regulation. Conditions on available channels could be lifted or redefined, and new options for the voluntary sharing of information or for the request of information could be provided. The following specific approaches could be pursued:

- The Regulation could allow for the possibility to *voluntarily* notify transactions that appear of interest to other Member States where the conditions currently established for mandatory notifications are not met (see on this aspect also Issue #10);
- Member States could be allowed to ask for information on transactions that are not undergoing screening without the need that the requestor deems its security or public order likely affected; this would allow the requesting Member State to identify whether these interests are indeed likely affected; and
- The conditions under which additional information can be requested under Articles 6(6) and 7(5) could be abolished (e.g. requirement of necessity conditions of proportionality and burden, cap on the scope of information in cases of Article 7(5) to items listed in Article 9(2)); the objective to limit stress on resources in the requested Member State could be achieved by a limitation on the obligation to respond.

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For a more detailed analysis and description of the issue see section 1.1.5.d, p.25.



## Issue #10: Information that is irrelevant for the security and public order interests of other Member States or the Union is fed into the information exchange mechanism, while some relevant information is not required to be shared

**What is the issue?** The rigid and sole criterion that the EU Regulation sets for the notification of transactions to the information exchange mechanism does not guarantee that all notifications are relevant for other Member States. This criterion (“undergoing formal screening”) feeds some manifestly irrelevant information to all other Member States; its contribution to focusing attention of Member States on transactions that likely affect their security or public order is poor and unpredictable.

Where the criterion leads to a useful selection, it supports an information flow towards screening Member States where it enhances the information basis and thus quality of screening decisions.

**Where is this issue rooted?** The design of the sole information mechanism under the EU Regulation that mandates projection of information to other Member States is responsible for *oversharing* (the notification of transactions that are manifestly irrelevant for other Member States who are simultaneously unlikely to contribute useful information).

This design also contributes to *undersharing* – where a transaction does likely affect the security or public order of other Member States and is not brought to their attention – with designs and practices in Member States being another contributing factor.

Specifically,

- The choice in Article 6(1) of the EU Regulation to tie the notification obligation to the scope of domestic screening mechanisms blacks out, for all other Member States, information on transactions that may be highly relevant for other Member States in light of their particular exposure unless a transaction is – incidentally – notified by another Member State.
- The fact that all transactions undergoing screening domestically regardless of any plausible impact beyond the local context need to be mechanically notified to all other Member States and the EU Commission adds many transactions to the information exchange mechanism although it is quite possible that they may not have any impact in other Member States or on projects or programmes of Union interest.
- The ambivalent definition in Article 2 item (5) that provides that only transactions that undergo “formal” screening need to be notified allows Member States to avoid notifications of transactions that they do not deem concerning for themselves with domestically available information and despite the absence of any input from other Member States and from the Commission.
- Notifications from Member States that dispose of significant time for their preliminary consideration may reach other Member States too late to be considered by other Member States where tight timeframes apply for the national screening process.

**What would be required to address this issue and who would need to act?** The most comprehensive solution to the two aspects – oversharing and undersharing – would require a change in the text of the EU Regulation, specifically its Article 6(1).



To reduce oversharing, Member States could be given the possibility to not notify a transaction that has no implications beyond their own borders and where they cannot reasonably expect useful information from other Member States. This could be expressed through an exception to the current conditions that lead to a notification obligation.

To reduce undersharing, the EU Regulation could require that transactions which have come to the attention of a given Member State must be notified if they are, in the assessment of that Member State, likely or potentially affecting the security or public order of other Member States or projects or programmes of Union interest and independently of whether they fall under the scope of that Member State's screening mechanism.

For both scenarios, the EU Regulation could provide criteria to guide the assessment of Member States.

If this approach is not chosen, Member States could be required to notify transactions when they come to their attention, rather than when they are subject to a "formal assessment". This would require a reframing of the definition in Article 2(5) of the EU Regulation.

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For a more detailed analysis and description of the issue see section 1.1.5.e, p.30.

## Issue #11: The availability of the instruments of EU Regulation is limited and uncertain when a third country investor invests via a company established in the EU

**What is the issue?** The instruments of the EU Regulation, most notably the cooperation mechanism, apply only to transactions that fall under its definition of “foreign direct investment”. This definition excludes certain important transactions and transaction types. Some Member States’ national screening mechanisms cover a broader scope and feed transactions into the cooperation mechanism; however, the benefits of the cooperation mechanism are unavailable to some of these transactions.

The most consequential issue is the definition of “foreign investor” in the EU Regulation which limits the availability of the cooperation mechanism for investments by third country investors when they invest via an undertaking established in the EU. While interpretations of the rules differ, it is a widely held belief that the EU Regulation’s instruments are not applicable to investments made by EU-established, third-country-investor controlled entities that are economically active in the EU – even though the public order or security implications of such transactions are the same as in scenarios where the foreign investor directly invests from abroad.

The lack of clarity on the application of the EU Regulation to asset acquisitions could also make its instruments unavailable to such transactions.

**Where is this issue rooted?** The issue is squarely rooted in the choices made for the definitions and text of the EU Regulation. Many Member States approach the issues differently for the purpose of their national investment screening rules. At least the most consequential choice – the definition of foreign investor – was made deliberately as testified by amendments that had been proposed during the development of the EU Regulation and that were not taken up in the EU Regulation as adopted.

**What would be required to address this issue and who would need to act?** A textual change of the EU Regulation is required to make the EU Regulation’s instruments available to certain transactions and transaction types to which they currently do not apply.

The scope of application could be extended to cover transactions involving investors established in the EU but ultimately controlled by third country persons.

It could also be clarified that the EU Regulation cover all types of asset acquisitions by foreign investors in the EU.

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For a more detailed analysis and description of the issue see section 1.3.3, p.58.

## Issue #12: The processing of multi-jurisdiction FDI transactions is inefficient

**What is the issue?** Multi-jurisdiction FDI transactions are transactions that undergo screening in more than one Member State. Multi-jurisdiction FDI transactions constitute a sizable share of transactions undergoing screening in the EU.

Screening of multi-country FDI transactions is inefficient, time-consuming, and unpredictable for the investor, the target company, involved screening authorities and the EU Commission. Multi-jurisdiction FDI transactions currently result in repeated, asynchronous, and uncoordinated triggering of the information exchange mechanism, even if the investor submits complete information simultaneously to all concerned Member States. The progressive arrival of new information may lead to cascading additional input, while clocks that were triggered by earlier notifications continue to run against the tight timelines afforded under the EU Regulation. Information that arrives later in this process may shed new light on a given transaction and its implications but may arrive too late to be put to use in comments, opinions, or screening decisions in some Member States. The situation is exacerbated if the submission is delayed in one or more concerned Member States and these Member States' authorities trigger procedures only when prompted through the cooperation mechanism.

**Where is this issue rooted?** The inefficient treatment of multi-jurisdiction FDI transactions results ostensibly from differences in how screening procedures in individual Member States are designed and conducted, which timelines Member States apply for individual procedural steps, how these procedural steps are sequenced, and when transactions are notified to the cooperation mechanism.

This situation however ultimately results from the absence of norms and common principles for the design of screening mechanisms in Member States – a problem rooted in the EU Regulation.

**What would be required to address this issue and who would need to act?** A better coordination of the screening by Member States of multi-jurisdiction FDI transactions would require legislative change in several Member States. Common norms or principles imposed by a revised EU Regulation or recommended in guidance accompanying the EU Regulation would likely be required to drive or support these changes. The common norms and principles or guidance could apply either generally to investment screening by Member States or govern solely the screening of multi-jurisdiction FDI transactions.

Two options could lead to significant efficiency gains in the context of multi-jurisdiction FDI transactions:

- Procedural aspects of investment screening in Member States could be made more similar. Such changes would likely attenuate inefficiencies in multi-country FDI transactions as procedural steps would be better synchronised across involved Member States, provided they become aware of their involvement at around the same time. Such a general change of screening regimes across the Union does not appear realistic in the medium term and would not be necessary to remedy inefficiencies specific to multi-jurisdiction FDI transactions. Details of priority aspects for harmonisation of screening procedures are thus not discussed here in detail.
- A specific procedure applicable solely to multi-jurisdiction FDI transactions could be established. It could have the following characteristics:
  - The determination of transaction as multi-country could be based on self-declaration of the investor who is typically in a position to estimate the geographical reach and impact of the

planned transaction and has an interest in the application of a harmonised procedure. The determination could also be made based on objective criteria such as notifications of legs of the same transaction by at least two Member States; any higher minimum number of notifications, such as three instead of two, could be considered to reserve special procedural rules to situations where inefficiencies would otherwise be too significant.

- As soon as a transaction is identified as a multi-jurisdiction FDI transaction, all Member States that would be in a position to screen part of the transaction and that hold that their security or public order interests could be affected based on information contained in the trigger-notifications would need to manifest themselves within a short timeline. This might substitute their notifications and preclude later notifications of the same transaction by other Member States. It would also start “formal screening” in all concerned Member States.
- One or more plurilateral (virtual) meetings among Member States concerned and the EU Commission could be a mandatory feature to exchange about potential concerns or implications.
- Comments by Member States (including those where the transaction does not take place and who are thus not screening) and opinions by the EU Commission would, in deviation from the current rule, be shared simultaneously with all Member States involved in screening of the relevant multi-jurisdiction FDI transaction.
- Mitigation measures would be developed collectively by the concerned Member States (they may need to be validated individually at higher levels of government in some Member States). The EU Regulation could also foresee the need for a formal arrangement to coordinate the monitoring and enforcement of mitigating measures.

This approach would synchronise the processes in the cooperation mechanism and avoid cascading later entries and repeat of procedural steps (e.g., multiple opinions on the same transactions sent to individual Member States depending on the date of their notification etc.). It would shorten considerably the time until the screening has concluded in all Member States, thus resulting in greater efficiency and greater certainty of outcomes in shorter time for the transaction parties – the Member State with the longest allocation of screening time would determine the maximal overall screening by all Member States. Meanwhile, this approach would continue to respect Member States’ domestically set timelines.

Substantively, the simultaneous and coordinated development of mitigation measures would avoid over-mitigation as all Member States are aware of the degree to which individual aspects of risk are mitigated; this would ensure further benefits for the investor and Member States’ economies and lead to an overall more efficient operation of investment screening in Europe.

The approach would also lead to greater efficiency for Member States and the EU Commission as comments and opinions only need to be prepared once. The plurilateral meeting(s) would lead to an early exchange that would inform further considerations in individual screening Member States.

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For a more detailed analysis and description of the issue see section 1.1.5.h, p.35.

### 3. Rules, policies and practices in selected Member States and the EU Commission

182. This section presents the arrangements for the participation in the cooperation mechanism of 13 selected Member States as well as either an overview of the main features of these Member States' screening mechanisms or initiatives to establish a screening mechanism. The descriptions reflect the arrangements in place as of 30 June 2022 and only exceptionally foreshadow planned future arrangements. This section also contains a section on relevant arrangements at the European Commission.

183. While all Member States' arrangements were studied for the preparation of this report, the time-constraints imposed by the project allowed the OECD Secretariat to only present a subset of the EU Member States. This selection of Member States that are included in this section seeks to present: different models and approaches to investment screening; long-standing and more recent mechanisms; smaller and larger EU economies; regional representation; and representation of Member States that had, according to the First Annual Report on the screening of foreign direct investments into the Union,<sup>95</sup> submitted the highest number of cases to the cooperation mechanism. The selection also includes Member States that do not screen investments to present different ways to implement obligations established under the EU Regulation even in the absence of a screening mechanism.

184. All Member States whose arrangements are described in this section and the EU Commission have had an opportunity to propose factual corrections and suggestions on this section of the report, and most of them have seized this opportunity. The description may nonetheless not reflect the views of individual Member States or the EU Commission.

#### EU Commission

185. Before 11 October 2020, when the EU Regulation became fully applicable, the EU Commission had no role in the screening of FDI into the Union. The EU Regulation has changed this. Henceforth, the EU Commission plays a new and unique role in the implementation of the framework for the screening of FDI into the Union.

186. Member States recognise the contribution that the EU Commission makes to the various aspects of the framework. Member States' contact points and screening authorities appreciate the EU Commission's contributions to the cooperation mechanism. Among others, the EU Commission is credited

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<sup>95</sup> [“Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union”](#), {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.11.

for unique information that it offers to Member States' assessments of risk and investor-related information. Its expertise on high-tech sectors; its global network; information from EU delegations and its insights on European projects are specifically highlighted.

187. Member States authorities also acknowledge the technical expertise that the EU Commission has acquired on investment screening and that allows it to manage the cooperation process and to provide valuable risk assessments. The EU Commission is occasionally mobilised as a go-between to approach other Member States with which close personal relationships still need to be built or where the EU Commission's demarche depoliticizes a request in a bilateral relationship.

188. The appreciation also includes the quality of the contents and pertinence of opinions that the EU Commission issues.

### ***Institutional set-up of the cooperation mechanism***

189. The front office for the screening cooperation mechanism within the European Commission is established within the Directorate-General for Trade (DG Trade) (*Unit F.4 - [Technology and Security, FDI Screening \(TRADE F.4\)](#)*). As of 30 June 2022, *Unit F.4* was composed of nineteen FTE dealing with investment screening, export control, trade sanctions and other technology issues. Eight case handlers deal exclusively with investment screening, each with a portfolio of Member States for which they are primary contacts for horizontal issues. Case handlers do not specialise in any sector or country of origin and deal with their cases depending on workload considerations. A Deputy Head of Unit and a Head of Unit who also oversees other areas of the Unit also deal with investment screening issues.

190. When screening FDIs, *Unit F.4* relies on the expertise of other EU Commission DGs. Depending on the sector, technology or infrastructure associated with the transaction, DG Trade transmits the notification towards an internal network of experts within the EU Commission. Several "contact points" were established for this purpose within 15 DGs. Several DGs are systematically associated with *Unit F.4*'s handling of a case including DG FISMA, the Legal Service and the European External Action Service. According to EU officials, collaboration with the European External Action Service is notably important because it allows access to additional information on investors from certain world regions. *Unit F.4* coordinates the assessment conducted by the expert DGs and services and prepares the draft opinions on the basis of their input; opinions are formally adopted by the College of Commissioners.<sup>96</sup>

191. When a notification is received by the EU Commission, it is immediately allocated to one of the *Unit F.4* case handlers who produces a "case fiche". This document contains a factual summary of the case, a preliminary assessment of eligibility and criticality, including possible participation in EU projects or programmes, and the main issues that the EU Commission should explore. In parallel, the case handler identifies the DG and Services contact points competent in assessing that particular transaction. The case fiche and notification documents are usually shared with them within one working day from the receipt of the notification. Within 15 calendar days from the receipt of the notification, this *ad hoc* team of experts agrees to either close the case or to notify the Member State of the EU Commission's intention to issue an opinion together be, with a request for additional information. Within 20 calendar days from such notification to the Member State or from receipt of the requested additional information, the team of experts finalizes its assessment of the transaction: it decides whether the case warrants an EU Commission opinion or whether the initial concerns have been alleviated, allowing the case to be closed in phase II.

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<sup>96</sup> According to publicly available information, the EU Commission has not delegated to the Director-General of DG TRADE the power to adopt management or administrative measures (Article 14 of the [Rules of procedures of the Commission](#)).

192. Most of the resources of case handlers are dedicated to processing cases notified by Member States in which the cases are undergoing screening. There is no public information on resources dedicated to horizon-scanning and identification of non-notified transactions.<sup>97</sup>

193. According to the EU Commission, the monitoring and identification of non-notified transactions is organised based on specific information on foreign investment available to the European Union through its Joint Research Centre. *Unit F.4* forwards a subset of transactions that it considers could have implications for public order or security to FDI screening authorities of EU Member States at quarterly intervals.

### 3.1. Belgium

194. As of 30 June 2022, Belgium had not established an investment screening mechanism at federal level.

195. In January 2019, legislation (“*Bestuursdecreet*” of 7 December 2018) on the safeguarding of the strategic interests of the Flemish Community and the Flemish Region became effective. It allows the Government of Flanders to annul or declare inapplicable any legal action by a Flemish or local government body or bodies derived from these through which a foreign natural or legal person gains power of control or decision-making power in that government body, provided that the strategic interests of the Flemish Community or the Flemish Region are threatened – namely, if the continuity of vital processes is jeopardized, if certain strategic or sensitive knowledge could fall into foreign hands, or if the strategic independence of the Flemish Community or the Flemish Region would be compromised – and provided that the Government of Flanders can demonstrate that it has attempted to achieve the safeguarding of strategic interests with the consent of the government body concerned. The mechanism has not been notified to the European Commission as a screening mechanism and according to Belgian authorities it is not part of the EU cooperation mechanism.

#### 3.1.1. Arrangements for the participation in the cooperation mechanism

196. The Federal Public Service Economy has been established as the contact point as required by Article 11 of the Regulation and is actively taking part in the cooperation mechanism.

#### 3.1.2. Initiatives to establish a screening mechanism

197. Further to a broad consultation with relevant stakeholders, a draft federal law was adopted by the Belgian Council of Ministers in July 2020. Following the opinion of the Council of State issued on 28 September 2020, it was decided in 2021 to draft a so-called ‘cooperation agreement’ between all governments involved. A draft text of the cooperation agreement will be submitted to the Council of State in July 2022 and according to [official sources](#), the cooperation agreement will be debated by the various parliaments later this year, and is expected to enter into force on 1 January 2023.

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<sup>97</sup> Information on the implementation and on the institutional resources dedicated to this task in EU Member States are relatively scarce. Some advanced economies outside of the EU dedicate sizable resources to this matter. In the United States, CFIUS recently obtained additional resources for this function and has identified 117 transactions in 2020 alone that were put forward to CFIUS for consideration. From among these, 17 transactions resulted in a request for filing. CFIUS utilizes various methods to identify non-notified/non-declared transactions including interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications ([CFIUS Annual Report 2020](#), p.48).



## 3.2. Croatia

198. As of 30 June 2022, Croatian authorities had not established or notified an investment screening mechanism. Croatian authorities nominated a national contact point for the purposes of the cooperation mechanism under the Regulation.

### 3.2.1. Arrangements for the participation in the cooperation mechanism

199. Croatia's participation in the EU cooperation mechanism is governed by the [Regulation implementing Regulation \(EU\) 2019/452 of the European Parliament and the Council of 19 March 2019 establishing a framework for screening foreign direct investment in the Union](#) (Croatian Regulation),<sup>98</sup> which entered into force on 3 October 2020. Under this Regulation, a national contact point for the purpose of the EU Regulation is established within the Ministry of Economy and Sustainable Development, specifically within the Foreign Direct Investment Verification Department (*Odjel za provjeru izravnih stranih ulaganja*) under the Investment Policy Service. The Department is staffed with three agents<sup>99</sup> and fulfils outward-facing roles associated with the cooperation mechanism.<sup>100</sup>

200. An Interdepartmental Commission for the Verification of Direct Investment in the Union (Interdepartmental Commission)<sup>101</sup> complements the institutional setup. Its role is to coordinate the cooperation and efficient flow of information between government bodies involved in the implementation of both the Croatian Regulation and the EU Regulation, and the national contact point. It also provides expert assistance to the national contact point on the preparation of proposals, comments, and expert explanations (Croatian Regulation, Article 5).

201. The Interdepartmental Commission is composed of permanent representatives from other Ministries such as Foreign and European Affairs, Internal Affairs, Defence, and other public organs such as the National Security Agencies and the Central Bank. Depending on the case, the participation of other organs and institutions in its deliberations may be requested.

202. Article 4 of the Croatian Regulation defines the competencies and powers of the contact point to request information from foreign investors or Croatian enterprises in which an investment is planned or has been completed on transactions taking place in Croatia and for which Croatia has received a request

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<sup>98</sup> [Uredba o provedbi Uredbe \(EU\) 2019/452 Europskog parlamenta i Vijeća od 19. ožujka 2019. o uspostavi okvira za provjeru izravnih stranih ulaganja u Uniji](#), Official Gazette 105/2020 (25 September 2020).

<sup>99</sup> Indicative Number of Civil Servants and Employees of the Ministry of Economy and Sustainable Development according to [Decree 1816 on the internal organisation of the Ministry of Economy and Sustainable Development](#).

<sup>100</sup> According to [Decree 1816 on the internal organisation of the Ministry of Economy and Sustainable Development](#) Article 38, the Foreign Direct Investment Verification Department “coordinates and cooperates with the competent contact points in other Member States of the European Union and the European Commission for the verification of foreign direct investment in the European Union; performs administrative and technical tasks for the interdepartmental commission for verification of foreign direct investments; prepares and submits an annual report for the previous calendar year containing consolidated information on foreign direct investment carried out in the territory of the country and consolidated information on received requests from other Member States related to the verification of foreign direct investment; determines and monitors regulations and activities of the European Union and other countries in the field of foreign direct investment verification, and performs other tasks within its scope.”

<sup>101</sup> The Interdepartmental Commission is established by virtue of Article 3 of the Croatian Regulation and through the *Decision on the establishment of the Interdepartmental Commission for the Verification of Direct Investment in the Union* by the Minister of Economy and Sustainable Development, dated 2 November 2020. The Interdepartmental Commission adopted rules of procedure at its first session on 19 April 2021.

under Articles 6(6) and 7(5) of the EU Regulation. Foreign investors are required to comply with the request and must submit the requested information to the national contact point within seven days. The Croatian authorities do not appear to have any means to compel foreign investors to provide the information or to sanction non-compliance.

203. While the Croatian Regulation defines the powers of the contact point to provide comments and assess comments from other Member States or opinions from the Commission, it is uncertain under which timeframes these different actions are conducted.

### **3.2.2. Initiatives to establish a screening mechanism**

204. Croatia is currently implementing a project with the OECD that is expected to result in recommendations for the design of an investment screening mechanism for Croatia.

## **3.3. Czech Republic**

205. The Czech Republic has established an investment screening mechanism under the [Act No.34/2021 Coll. on screening of foreign direct investments](#). This mechanism is the first instrument in this area in the Czech Republic's recent history<sup>102</sup> and entered into force on 1 May 2021<sup>103</sup> following preparatory work that is documented as of September 2018.<sup>104</sup> The Act also contains provisions to implement the Czech Republic's obligations under the Regulation.

### **3.3.1. Arrangements for the participation in the cooperation mechanism**

206. The Minister of Industry and Trade (MoIT) has been designated as the Czech Republic's national contact point (Act No.34/2021, § 6(2)) and handles the cooperation process established by the EU Regulation. Other entities, such as the Czech Security Information Service, the Ministry of Defence, the Ministry of Interior, and the Ministry of Foreign Affairs may be involved in the evaluation and preparation of comments and opinions (Act No.34/2021, § 17).

207. The Czech Republic actively participates in the information exchange process under the EU Regulation. There is no publicly available information on the extent government resources – staffing or budget – are allocated to the participation in the cooperation mechanism.

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<sup>102</sup> Before the entry into force of its screening mechanism, the Czech Government had absorbed some exposure by retaining stakes or control in enterprises especially in the energy and utilities sectors, as set out in the [Security Strategy of the Czech Republic \(2015\)](#), p.20. For example, the government holds a 70% stake in the largest Czech electricity company, *CEZ* (see *CEZ Group, Shareholder structure*, 31 December 2018) and OECD (2017), "[The Size and Sectoral Distribution of State-Owned Enterprises](#)", especially its [data annex](#). The [Security Strategy of the Czech Republic \(2015\)](#) explicitly mentions State ownership as an instrument to protect essential security interests, especially with regard to critical infrastructure.

<sup>103</sup> Parts of the legislation have, according to Act No.34/2021, § 30, already come into effect on 11 October 2020.

<sup>104</sup> A [first meeting](#) of the working group for assessing the impact of a possible examination of foreign investment for reasons of state security took place on 10 September 2018.

208. The responsibilities and timelines for providing outbound comments and sharing inbound comments on behalf of the Czech Republic under the cooperation mechanism are set out in procedural rules.<sup>105</sup>

209. There are no explicit rules however that govern how information that other Member States or the European Commission may request under Articles 6(6) or 7(5) can be shared. Furthermore, it does not appear that the Czech authorities would be able to effectively gather such information from private entities in the Czech Republic for investments that are not undergoing screening in the country. The authorities' competencies and powers are built on the condition that an investment is undergoing screening (Act No.34/2021, § 9), and no stand-alone competence to effectively gather such information outside a screening process in the Czech Republic has been established. It is thus not certain how Czech authorities could gather or forward information to requesting EU Member States or the European Commission pursuant to the obligation set out in Article 9 of the Regulation.<sup>106</sup>

210. However, it could be conceived that the Czech authorities could generate their competence to gather and forward such information by triggering a screening procedure in the Czech Republic under the possibility to start procedures *ex officio* pursuant to Act No.34/2021, § 8.

### 3.3.2. *Screening under Act No.34/2021 Coll. on Screening of Foreign Direct Investments*

211. The Czech Republic's investment screening mechanism distinguishes three constellations that apply different procedural arrangements: Investments that are associated with the most sensitive areas are subject to a prior authorisation requirement. Other foreign investments in the Czech Republic do not require prior approval or notification by the investor but may be screened *ex officio* for a period of up to five years after completion, regardless of knowledge of the authorities.<sup>107</sup> Foreign investors can trigger a voluntary screening process, referred to as 'consultation', to obtain certainty about the acceptance of a given investment. A mandatory consultation procedure (but not a prior authorisation requirement) exists for certain investments in the media sector.

#### *a. Implementation practice*

212. Given the recent entry into effect of the screening mechanism, there is no official information on implementation practice. The Czech authorities had estimated during the legislative process that around 300 transactions per year could fall under the screening regime and that several dozen applications, requests for consultation and proceedings initiated *ex officio* per year were to be expected.<sup>108</sup> Around five

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<sup>105</sup> These rules are laid out in Act No.34/2021, § 17.

<sup>106</sup> As documented in the reflections during the legislative process ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, section 1.3.2) the Czech authorities had considered the specific obligations under the cooperation mechanism and noted that the obligation required to discover and forward information upon request by other Member States or the Commission and that this would lead to a regulatory burden for investors. The reflection was made in the context of the benefits of establishing a screening mechanisms within the Czech Republic itself. This reflection sits in some tension with the absence of powers to request information from foreign investors or other enterprises in the Czech Republic to gather information for the benefit of other Member States where a transaction is not undergoing screening in the Czech Republic.

<sup>107</sup> The five-year cut-off does not apply under certain conditions set out in Act No.34/2021, § 8(4) and that relate to situations in which the investor has intentionally obscured facts relevant for a decision to screen the investment.

<sup>108</sup> [Act on screening of foreign direct investments - Explanatory Memorandum](#), 6 April 2020, p.40.

to fifteen transactions per year were expected to require an examination under the second stage of the two-stage evaluation process.

*b. Institutional setup of the screening mechanism*

213. The Minister of Industry and Trade (MoIT) is comprehensively responsible for the management of investment screening in the Czech Republic. During the legislative process, it was expected that within the MOIT, a specialized team of seven agents – one manager and six analysts – would carry out the investment screening process.<sup>109</sup> The team is in charge of the analytical, coordination and control activities and carries out consultations and investment screening proceedings including the assessment of applications and requests of foreign investors and drafting of decisions. The MOIT also negotiates mitigation measures and supervises their implementation.

214. Other government departments and agencies are systematically, or, depending on the agency, occasionally, involved in the screening process (Act No.34/2021, § 11). They receive requests for authorisations and consultation requests from MoIT immediately<sup>110</sup> and are expected to provide an opinion and information on investments undergoing screening or under consultation.

215. The ministries and agencies that are systematically involved in the examination of transactions include the [Security Information Service](#) (BIS), a Czech intelligence agency; it participates in the examination of screened transactions, in the evaluation of available information, and in the identification of unreported investments that could threaten the security or public order of Czech Republic. During the legislative process, it was estimated that six BIS staff would be dedicated to these roles.<sup>111</sup> Likewise systematically involved are the [Czech Office for Foreign Relations and Information](#) (ÚZSI), a further intelligence agency,<sup>112</sup> the Ministry of Defence,<sup>113</sup> the Ministry of Interior,<sup>114</sup> the Police of the Czech Republic,<sup>115</sup> and the Ministry of Foreign Affairs. Depending on the case, the [Financial Analytical](#)

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<sup>109</sup> [Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.39. The role of the contact point under the Regulation was estimated to require less than a full-time-employment within MOIT, and that other government entities were systematically expected to provide opinions and information for the information exchange process.

<sup>110</sup> The application for a foreign investment permit or a proposal for consultation must be submitted in Czech and contain information specified by [Government Decree No.178/2021 Coll.](#) The Czech authorities also [request](#) that investors submit a filled [EU Notification Form](#).

<sup>111</sup> Estimate made during the legislative process, see [Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.44. The actual number of staff that BIS dedicates to these functions is not publicly known.

<sup>112</sup> According to ÚZSI estimations, two members of the ÚZSI would be expected to be involved in the review process as part of their roles ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.44).

<sup>113</sup> The Ministry of Defence is involved in the review process to provide information and opinions in terms of defence and state security. The Ministry estimated that two to five employees from various departments of the Ministry would be required to fulfil this role depending on the material scope of individual transactions ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.45-46).

<sup>114</sup> The Ministry of Interior is involved in the review process to provide information and opinions in terms of internal order and State security. The Ministry estimated that two officials would be required to fulfil this role ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.46).

<sup>115</sup> Act No.34/2021, § 10(2).

[Office](#), a Czech financial intelligence/anti-money laundering agency<sup>116</sup> or Ministry of Transport<sup>117</sup> may be asked for opinions or information.

216. The Czech authorities have estimated the costs of operating the mechanism to around CZK 7,648,969 per year (roughly 300kEUR) for MoIT alone.<sup>118</sup> Operating costs incurred by other departments and agencies to contribute to the investment screening process add to this amount.

*c. Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

217. There is no indication that Czech authorities are legally equipped to assess, prohibit a transaction, impose conditions, or unwind an investment if a given transaction is likely to affect the security or public order *a different* EU Member State than the Czech Republic itself or if a given investment in the Czech Republic or projects or programmes of Union interest. While § 12 (2) of the Act No.34/2021<sup>119</sup>, specifies that comments from other Member States or an opinion of the Commission may be among the motives for conducting negotiations on potential conditions, all references contained in Act No.34/2021 open the competence for government intervention in investment projects carried out in the Czech Republic exclusively in cases where the Czech Republic's own security or public order interests are concerned; the [legislative material](#) does not support a different interpretation.

218. The Czech authorities can receive and must take account of inbound information from the cooperation mechanisms to inform their decisions on transactions undergoing screening in the Czech Republic (Act No.34/2021, § 12). Comments from other Member States and opinions from the Commission may also trigger an *ex officio* screening if the Czech Republic's security of public order appears threatened, or if such information reveals an unfulfilled obligation to subject a transaction to screening in the Czech Republic.<sup>120</sup>

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<sup>116</sup> The Financial Analytical Office may intervene in the verification of financial or technical information.

<sup>117</sup> In 2020, the Ministry of Transport estimated the need to provide comments or information on approximately 30 investments per year, with an expected increase due to the expected creation of the EU Space Program Agency (EUSPA), based in Prague since 2021. The Ministry estimated that one official should participate in the review process ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, pp.46-47).

<sup>118</sup> This amount comprises CZK 6,748,969 for staff costs and CZK 900,000 for material expenses, which mainly include licenses for access to databases, additional equipment and staff training, see [Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.40.

<sup>119</sup> On this point, the legislative material specifies that: “If it emerges from the opinion or information of at least one of the cooperating state authorities or from the Ministry's own findings, including findings obtained by evaluating the comments of other EU Member States and the opinions of the European Commission, that the foreign investment may pose a threat to the security of the Czech Republic or to internal or public order, but that the risks can be adequately reduced by modifying the foreign investor's original intention, the Ministry of Industry and Trade enters into negotiations with the foreign investor on the terms of modification of the foreign investment. The agreed form of conditions is then submitted to the Government, which issues a resolution on the matter.” ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p. 64).

<sup>120</sup> The Czech authorities had noted during the legislative process that Act No.34/2021, § 8 “establishes the power of the State to examine a foreign investment *ex officio* if it is likely to endanger the security of the Czech Republic or internal or public order, *and also at the initiative of other EU Member States or the European Commission.* [Emphasis added]” ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.57).



d. *Substantial scope of the screening mechanism*

219. The investment screening mechanism applies to three scenarios, to which respective procedural rules apply:

- Acquisitions in a closed list of sensitive sectors, namely military equipment, specifically designated critical infrastructure, operators of critical information infrastructure or communications systems, cyber-security and dual-use goods, are subject to a prior authorisation requirement (Act No.34/2021, § 7);<sup>121</sup>
- Acquisitions of a nationwide radio or television broadcaster or a publisher of periodicals with an average daily print run of 100,000 copies are subject to a mandatory consultation process (Act No.34/2021, § 10(1));<sup>122</sup>
- The Czech authorities may subject any other investment that does not fall under the previously mentioned categories, is not submitted for a voluntary ‘consultation’ but that may threaten the security or public order of the Czech Republic<sup>123</sup> to a screening *ex officio* (Act No.34/2021, § 8).

220. Only investments made by foreign investors – that is, non-EU nationals<sup>124</sup> – that lead to an effective level of control over a target company are subject to screening (Act No.34/2021, § 5). An effective level of control is present if a foreign investor:

- Has at least 10% of the voting rights or exercises a corresponding influence in the entity that carries out the economic activity;
- Is itself (or a close person) represented in an organ of the entity that carries out the activity;
- Can dispose of the ownership rights of the entity; or
- Has the access to information, systems, or technologies that are important for the security or public order of the Czech Republic.<sup>125</sup>

221. From the framing of the scope, especially the broad scope of competence established by Act No.34/2021, § 8, it appears that greenfield investments in the Czech Republic may be subjected to

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<sup>121</sup> Projects or programmes of Union interest, as defined in Annex I of the EU Regulation, are not explicitly included in the closed list.

According to Act No.34/2021, § 24, the obligation established by Act No.34/2021, § 7 does not apply to cases where the foreign investment is made in the context of financial resolution or financial difficulties; in these cases, the rules of “consultation” under Act No.34/2021, § 8 apply. Which scenarios the rule addresses is somewhat uncertain, as financial institutions themselves are not included in the items to which Act No.34/2021, § 7 applies.

<sup>122</sup> This special arrangement was supposedly introduced after the results of foreign influence on the editorial line of outlets owned by a Czech media holding [was suggested](#) during the legislative process.

<sup>123</sup> The Act No.34/2021 does not provide guidance on the conditions under which this condition is met or could be met. Legislative material ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.57) and the [webpage](#) dedicated to investment screening in the Czech Republic provide some information, however.

<sup>124</sup> The definition of foreign investors in Act No.34/2021, § 2(1)(c) includes non-EU nationals, or non-EU-based legal persons and all persons controlled by such persons or entities.

<sup>125</sup> The Czech legislator was conscious of experiences in other EU Member States, in which, in its appreciation, an anti-circumvention clause had played an important role in subjecting investments to screening procedures. Czech authorities have specified that: “The experience of the Member States of the European Union which already operate screening mechanisms show that a significant proportion of the investments screened can only be detected by setting up screening mechanisms that are application of the circumvention provisions in Article 3(6) of the Regulation.” ([Act on screening of foreign direct investments – Explanatory Memorandum](#), 6 April 2020, p.54).

screening. The same would apply to the creation of joint ventures in the Czech Republic, to which a foreign and a Czech enterprise contribute capital, assets, or know-how.<sup>126</sup>

222. The screening mechanism is activated for direct and indirect acquisitions; indirect acquisitions – a change in the ownership chain that does not concern the direct owner of the assets in the Czech Republic – are treated under the same rules as direct acquisitions (Act No.34/2021, § 4).

*e. Procedural organisation of the screening process*

223. The screening process takes place either in one stage (in cases of mandatory authorisation requirements or ex officio review) or in two stages. The two-stage process begins with a ‘consultation’ (Act No.34/2021, § 10) that may take up to 45 days, of which 15 days are given to the investor to provide specified elements of information.<sup>127</sup> If the initial consideration of a transaction submitted for ‘consultation’ leads the authorities to conclude that a potential risk may be present, the transaction is verified in an in-depth assessment under the same procedural rules as a transaction for which a prior authorisation is mandatory. All relevant authorities mentioned in paragraph 215 above are already implicated during the consultation (Act No.34/2021, § 10(2)-(4)).

224. To apply for the approval of foreign investment or to propose a consultation, the applicants must use a [form](#) that contain part of the information mentioned in Art 9(2) of the EU Regulation. In addition, Czech authorities explicitly invite the applicants to submit a [specific questionnaire](#) for the execution of their commitments under the EU Regulation.

225. Information from the European Commission or other Member States does not inform the decision-making at the stage of ‘consultations’ as only transactions undergoing an in-depth assessment are notified to the European Commission and the other Member States pursuant to Article 6(1) of the Regulation (Act No.34/2021, § 17(5)). The definitive decision to allow an investment at the end of the ‘consultation’ process is thus based only on domestically available intelligence and does not draw on information available in other Member States. A decision to allow an investment cannot be reopened later, even if new information reaches the Czech authorities (Act No.34/2021, § 10(4)).

226. The in-depth assessment (Act No.34/2021, §§ 11-13) is carried out for transactions that require mandatory prior review, that are being screened in the ex officio regime, or that have been singled out in the ‘consultation’ as potentially problematic. All relevant Czech government departments are involved in the assessment and are invited to offer opinions within 60 days. Based on these opinions and potential input received through the cooperation mechanism, the MOIT may engage in negotiations of mitigation agreements.

227. Interagency consultations and the drafting of a decision may take 90 days (or 120 days in particularly complex cases); the lapse of this time is suspended during negotiations with the investor. The process ends with an unconditional approval by the Ministry unless the Ministry considers that the transaction may threaten the Czech Republic’s security or public order. In this latter case, the Ministry

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<sup>126</sup> If the Joint Venture involving a Czech enterprise is established in a different jurisdiction, no investment screening procedure could be carried out under the Czech investment screening mechanism, unless the contribution to the Joint Venture is a part of its share capital itself.

<sup>127</sup> The information requested by Czech authorities include the information mentioned in Article 9(2) of the Regulation as foreign investors must fill a [Czech application permit](#) and the [EU form](#).



forwards its draft decision for consideration to the Government; the Government is given 45 days to take a final decision.<sup>128</sup> The decision is announced by the Ministry without undue delay (Act No.34/2021, § 15).

228. Insufficient collaboration of the investor is a motive to deny the approval of the investment at both stages of the process.

*f. Powers in cases where security or public order is or may be affected*

229. While the Ministry can approve transactions, only the Government may conditionally approve, prohibit or unwind a foreign investment. An open-ended list of criteria that the Government needs to consider in this regard is set out in the legislation (Act No.34/2021, § 13(4)). A prohibition may also be ordered in case of insufficient cooperation during the negotiation of conditions (Act No.34/2021, § 12(5)) or when an investor does not provide information requested for the assessment of the investment (Act No.34/2021, § 9(5)).

230. Conditions may include the obligation to request a future ‘consultation’ if and when stakes or influence over the asset increase or if the business orientation or scope of the target changes (Act No.34/2021, § 12(4)).

231. The obligation to unwind an investment is complemented by the prohibition to exercise voting rights and sets a timeline for the divestment, which can be enforced by an auction if the investor does not meet the timeline (Act No.34/2021, § 15(4)). A divestment may also be ordered if the investor violates negotiated conditions.

### 3.4. France

232. France operates two independent mechanisms to manage risks to security and public order that may arise in the context of foreign direct investment:

- A mandatory review mechanism for certain acquisitions by foreigners in specified sectors under the *Code monétaire et financier*;<sup>129</sup> and
- A mechanism associated with merger reviews that allows ministerial intervention in public interest cases under the *Code de commerce* regardless of the nationality of the acquirer.<sup>130</sup>

233. As of 30 June 2022 the French authorities had notified only this first mechanism established under the *Code monétaire et financier* to the European Commission as an investment screening mechanism pursuant to Article 7(3) of the EU Regulation.

234. The latter mechanism, associated with merger reviews and codified in the *Code de commerce*, has not been notified under Article 7(3) of the EU Regulation. It operates under different rules, with different conditions and timelines, and is administered by a different branch of the French authorities. The French authorities acknowledge that some operations may trigger the screening mechanism and the merger review regime cumulatively; they suggest that competent authorities would cooperate to manage the interaction in such cases. According to publicly available information, the mechanism under the *Code de commerce*

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<sup>128</sup> Rules on the negotiation of conditions are available in Act No.34/2021, § 12. For the time of negotiations, the running of the time allocated for the screening process is suspended, Act No.34/2021, § 13(3).

<sup>129</sup> [Articles L.151-1 to L.151-4 of the Code monétaire et financier](#) and [Articles R.151-1 to R.151-17 of the Code monétaire et financier](#).

<sup>130</sup> [Article L.430-7-1 of the Code de commerce](#) and [Article L.430-8 of the Code de commerce](#). The law explicitly mentions “public interest”.

has not yet been used to address concerns about security and public order and is not discussed in the present section for these reasons.

### ***3.4.1. Arrangements for the participation in the cooperation mechanism***

235. The national contact point for the screening mechanism is established within the French Treasury. A deputy head of unit within *DG Trésor* serves as the contact point for the purposes of the cooperation mechanism under the EU Regulation.<sup>131</sup>

236. As of 30 June 2022, France had not codified nor was it planning to codify specific procedural rules for the participation in the cooperation mechanism, nor had it adapted its existing rules to the cooperation mechanism under the Regulation. France has however established specific procedures for these purposes internally.<sup>132</sup> According to information provided by the French authorities, incoming requests under the cooperation mechanism are collected by the national contact point and forwarded to the ministries whose sectors are covered under the French screening mechanism. Other interested departments may also receive the documents upon request. The national contact point is in charge of consolidating information after consultation with the involved ministries.

237. France notified 108 transactions to the mechanism during the EU cooperation mechanism's first year of operation from October 2020 to October 2021,<sup>133</sup> representing about a third of the cases that the French authorities handled domestically during this period.<sup>134</sup>

238. France was, during the EU cooperation mechanism's first nine months of operation, among the five Member States that submitted the highest number of cases. France also submitted a significant number of comments on transactions notified by other Member States.<sup>135</sup>

239. According to the French authorities, the EU cooperation mechanism has “helped to strengthen and expand France’s foreign investment screening system” and “promote a culture of FDI screening within the European Union”.<sup>136</sup>

240. It is not certain how French authorities would be able to effectively gather information that they are required to share pursuant to Article 7(5) of the Regulation in respect of transactions taking place in France but not undergoing screening in the country. No explicit rules appear to exist that would allow the French authorities to effectively request such information in transactions not undergoing screening from

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<sup>131</sup> It does not appear that this designation has been formalised.

<sup>132</sup> Statement by Marie-Anne Lavergne, Head of the office in charge of the control of foreign investments in France at the French Treasury, in a [Joint public hearing SEDE/INTA in the European Parliament on “Assessing the risks and policy responses to foreign direct investment, including Chinese investments in the security and defence sectors”](#), 7 February 2022 (17:09:10).

<sup>133</sup> *DG Trésor*, “[Foreign Direct Investment in France in 2021](#)”, 2022, p.15.

<sup>134</sup> Statement by Marie-Anne Lavergne, Head of the office in charge of the control of foreign investments in France at the French Treasury, in a [Joint public hearing SEDE/INTA in the European Parliament on “Assessing the risks and policy responses to foreign direct investment, including Chinese investments in the security and defence sectors”](#), 7 February 2022 (17:06:45).

<sup>135</sup> France is among the five Member States that represented more than 90% of the cases that were notified to the EU Commission from 11 October 2020 through 30 June 2021. “[Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union](#)”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.11.

<sup>136</sup> *DG Trésor*, “[Foreign Direct Investment in France in 2021](#)”, 2022, p.15.

private parties or to compel persons that would hold such information to provide timely and accurate information in this scenario.<sup>137</sup>

### 3.4.2. Screening under the Code monétaire et financier

241. The mechanism under the *Code monétaire et financier* was first codified in 1966 and has been reformed multiple times since its introduction,<sup>138</sup> occasionally in the context of takeover attempts of individual firms that were perceived as evidence of the mechanism's shortcomings.<sup>139</sup>

#### a. Implementation practice

242. France currently yields one of the highest numbers of reviewed transactions per year in the European Union, both in absolute terms and in relative terms by reference to the size of its economy. Case numbers have grown steadily and rapidly to reach 328 submitted cases in 2021<sup>140</sup>, a two-fold increase as compared to the number recorded three years earlier (137 cases in 2017).<sup>141</sup> In 2021, 124 covered transactions were authorized under the French FDI screening regime.<sup>142</sup>

243. The share of screened transactions in inward FDI transactions overall has likewise more than doubled between 2017 and 2020, from 11% in 2017 to 23% in 2020.<sup>143</sup> According to official statements,

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<sup>137</sup> *Code monétaire et financier* Article L151-5 foresees that “The investor or the company carrying out the activities mentioned in Article L. 151-3 is required to communicate to the administrative authority in charge of authorising and overseeing foreign investments, at the request of said authority, all the documents and information necessary for the performance of its assignments, and the investor or the company may not object to the provision of such items on the grounds that they constitute legally protected secrets” No equivalent rule exists for cases in which information is required under the cooperation mechanism upon request from other Member States or the Commission.

<sup>138</sup> The latest change, published on 22 September 2021 as [Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France](#) became effective on 1 January 2022 and, among others, added technologies involved in the production of renewable energy to the list of critical technologies to which the FDI review mechanism applies.

<sup>139</sup> Important reforms were carried out in 2005 ([Décret d'application de l'article L. 151-3 du code monétaire et financier, 30 décembre 2005](#), “Décret Villepin”) and in 2014 ([Décret n°2014-479 du 14 mai 2014 relatif aux investissements étrangers soumis à autorisation préalable](#), “Décret Montebourg”). Both reforms were enacted in the context of planned foreign acquisitions. A parliamentary inquiry related to the second transaction, a foreign acquisition of engineering company *Alstom*, [Rapport de la Commission d'enquête chargée d'examiner les décisions de l'État en matière de politique industrielle, au regard des fusions d'entreprises intervenues récemment, notamment dans le cas d'Alstom, d'Alcatel et de STX, ainsi que les moyens susceptibles de protéger nos fleurons industriels nationaux dans un contexte commercial mondialisé](#) – contributed to triggering a further major reform in 2018 ([Décret n°2018-1057 du 29 novembre 2018 relatif aux investissements étrangers soumis à autorisation préalable and the Loi “Pacte”, passed in May 2019](#)).

<sup>140</sup> DG Trésor (2022), [“Le contrôle des investissements étrangers en France en 2021”](#), p.3.

<sup>141</sup> Ministère de l'Économie et des Finances, [“Les chiffres clés des IEF en 2017”](#), French Treasury website, 10 September 2019.

<sup>142</sup> The figures for 2021 are the first to specify the number of transactions authorized under the French screening framework, which means that these investments targeted French business activities liable to jeopardise public order, public safety or national defence.

<sup>143</sup> Ministère de l'Économie et des Finances, [“Les chiffres clés des IEF en 2020”](#), 24 March 2021. The share in total investment projects, not communicated by the Ministry in the context of the key figures is provided in *France Stratégie (2021)*, [“Comité de suivi et d'évaluation de la loi PACTE-Deuxième Rapport”](#), p.103. It remains unclear

the increase of case numbers was in part driven by reforms introduced in 2014 and 2019 that broadened the scope of application of the mechanism.<sup>144</sup> The most recent increase in cases may be temporary and driven by the specific conditions that France experienced under the COVID pandemic in 2020<sup>145</sup> and by a temporary expansion of the screening mechanism in response to these circumstances.<sup>146</sup>

244. Only a few cases are known in which acquisitions were prohibited or met obstacles that led to proposals being abandoned. On the other hand, at least one recent proposal for a transaction met obstacles and was abandoned before being formally notified under the screening mechanism. There is no obligation – and currently no established practice – for the government to communicate outcomes or individual decisions under the screening mechanism, and the actual number of transactions subject to conditions or prohibited or unwound is unknown.

245. In 2021 France used a considerable number of mitigation measures to address security and public order concerns associated with FDI. While “several dozen” screened transactions were approved with conditions in 2019 (according to official information),<sup>147</sup> in 2021, French authorities approved 67 cases with conditions, representing 54% of the total number of authorisations granted by the authorities.<sup>148</sup>

*b. Institutional set-up of the screening mechanism*

246. France requires an explicit prior authorisation by the Minister of the Economy, Finance, and the Recovery (Minister of the Economy) for investments that fall under the scope of the investment screening

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how the total annual number of FDI transactions is assessed, that is, which criteria must be fulfilled to include a given transaction in the count of the base number of annual transactions.

<sup>144</sup> The decree which came into effect in 2014 is associated with a fivefold increase of inquiries or authorisation requests between 2013 and 2015 (French government (unidentified) [Fiche d'impact général](#), related to the *Décret relatif aux investissements étrangers soumis à autorisation préalable*, 24 October 2018, p.12); according to the same document, the reform of 2018 was expected to generate a further 250 cases per year – calculated on estimates for costs for enterprises – which would constitute an increase of 235% from the [number of cases reported for 2018](#). This expected steep increase had not materialised by end 2021.

<sup>145</sup> Ministère de l'Économie et des Finances, “[Covid-19 / Adaptation du contrôle des investissements étrangers en France \(IEF\) pendant la crise sanitaire](#)”, French Treasury website, 30 April 2020.

<sup>146</sup> The temporary regime, announced on 29 April 2020, lowers the trigger threshold for the French FDI review mechanism to a 10% foreign shareholding, down from 25%, for FDI in listed companies. It had initially come into effect on 23 July 2020 based on [Décret n°2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé](#) and the associated [Arrêté du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé](#). The measure is applicable to non-EU, non-EEA investors only. As of 30 June 2022, the measure had been extended until 31 December 2022. On 31 December 2020, France had extended the application of the temporary regime until 31 December 2021 (see “[Covid-19 – Update of the foreign direct investment screening procedure in France](#)”, French Treasury website, 30 April 2020), and the measure was further extended until end 2022 on 29 November 2021 (see [Bruno Le Maire et Franck Riester annoncent la prolongation d'un an de l'abaissement exceptionnel du seuil de contrôle des investissements étrangers en France de 25 à 10%](#), DG Trésor media release, 30 November 2021.)

There have also been permanent changes to the mechanism in the context of the COVID pandemic, such as the addition of biotechnologies to list of critical technologies ([Arrêté du 27 avril 2020 relatif aux investissements étrangers en France](#).)

<sup>147</sup> DG Trésor (2020), “[Rapport d'activité 2019](#)” p. 30.

<sup>148</sup> DG Trésor (2022), “[Le contrôle des investissements étrangers en France en 2021](#)”, p. 4.

mechanism. This scope encompasses certain investments by foreign-controlled enterprises in entities governed by French law and operating in a list of activities and sectors where public order, public safety, or national defence interests could be threatened.<sup>149</sup>

247. France has made administrative arrangements for the handling of authorisation requests, for the substantial instruction of such requests, and for the information exchange under the cooperation mechanism established by the Regulation.

248. The front office for the screening mechanism is established within the French Treasury (*Multicom 4*, established in early 2019 within the *DG Trésor*). Six agents are currently responsible for the instruction of applications for authorisation submitted by investors.<sup>150</sup> No estimate of the administrative cost of the mechanism's operation seems to be publicly available.

249. The risk assessment is the responsibility of the competent administrations. These administrations are primarily the General Delegation for Armaments (DGA)<sup>151</sup> for defence matters and, if necessary, other structures such as the Secretariat-General for National Defence and Security (SGDN)<sup>152</sup> or the *Direction Générale de la Police Nationale*.

250. The substantive assessment of authorisation requests is carried out by the *Comité interministériel des investissements étrangers en France* (CIIEF), an inter-services committee of around 30 public officials from different Ministries, departments and agencies, which is chaired by *Multicom 4*.<sup>153</sup> The CIIEF, composed of officials from Ministries whose sectors are covered under the screening mechanism, provides opinions on the sensitivity of the activities of the French acquisition target. The Minister of the Economy bases their opinion on whether to authorise the transaction, to prohibit it or impose conditions on such transaction upon the views of the CIIEF.

251. In 2019, the *Service de l'Information Stratégique et à la Sécurité Économiques* (SISSE) was mandated to contribute to the detection and identification of foreign acquisitions that fall under the scope of the investment screening mechanism either before or after their implementation.<sup>154</sup> SISSE can rely on its local presence throughout France, as it enjoys a territorial network of 21 delegates for strategic information and economic security. These delegates support the government's economic security policy at local level and, among others, coordinate the detection of potential threats. SISSE also contributes with the detection and identification of transactions before they are carried out, or when operations have been carried out without having been previously authorised by the French authorities.<sup>155</sup> SISSE has also

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<sup>149</sup> The list of activities are those defined by *Code monétaire et financier*, art. R151-3.

<sup>150</sup> See the [answer](#) by the Minister of Economy to the parliamentary written Question N°35484 – “*Resources allocated to government controls of foreign investments in France*”, published in the French Official Journal on 22 June 2021.

<sup>151</sup> The DGA is responsible for maintaining the technological and industrial capacities necessary for French defence. It is also responsible for monitoring companies working for the armament industry.

<sup>152</sup> The SGDN is a department of the Prime Minister which ensures inter-ministerial coordination in matters of national defence and security and calls on other government departments if necessary.

<sup>153</sup> See the [answer](#) by the Minister of Economy to the parliamentary written Question N°35484 – “*Resources allocated to government controls of foreign investments in France*”, published in the French Official Journal on 22 June 2021. (French government (unidentified) [Fiche d'impact général](#), related to the *Décret relatif aux investissements étrangers soumis à autorisation préalable*, 24 October 2018, p.12.

<sup>154</sup> [Décret n° 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique](#).

<sup>155</sup> France has established a country-wide network to identify potential mergers; a detailed explanation of the procedures and institutions involved in this approach is available in the minutes of a parliamentary inquiry into the decisions of the government in relation to takeovers: *Assemblée Nationale, Commission d'enquête chargée*



identified strategic companies and critical technologies to be protected as a matter of priority and which are included in a confidential list at national level.<sup>156</sup>

252. Finally, while the monitoring of commitments made by investors under the investment screening mechanism is primarily carried out by the administration designated as the "competent service" in the commitment,<sup>157</sup> when several competent departments are competent, the internal coordination of the various monitoring actions (meetings, site visits, proposals for action) may be also carried out by SISSE.<sup>158</sup>

*c. Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

253. There is no indication that the French authorities are competent to prohibit a transaction, take an interim measure, order a mitigation measure or unwind an investment in France if this transaction is likely to affect security or public policy of *a different* EU Member State, other than France, or if it is likely to affect projects or programmes of Union interest. Only threats to the security interests of France establish the competence of the French authorities to take measures with respect to such investments.

254. The extent to which French authorities use incoming information from the cooperation mechanism for their own decisions on authorisations of specific foreign investments in France remains uncertain. The rules in the *Code monétaire et financier* Article R151-17 allow the authorities to engage in international cooperation, but only to *verify* the adequacy of the information submitted by a foreign investor.<sup>159</sup> Furthermore, the list of factors that may be considered during the risk assessment does not refer to comments or opinions from other Member States or the Commission. This also applies where a direct investment is likely to affect projects or programmes of Union interest, as defined in Annex I of the EU Regulation, on grounds of security or public order, and where French authorities are called to take "utmost account of the Commission's opinion" pursuant to Article 8(2)(b) of the EU Regulation.

255. The French authorities do not appear to be in a position to reconsider an earlier decision if new information reaches the French authorities through the cooperation mechanism. Mitigation measures that

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*d'examiner les décisions de l'État en matière de politique industrielle, au regard des fusions d'entreprises intervenues récemment, notamment dans les cas d'Alstom, d'Alcatel et de STX, ainsi que les moyens susceptibles de protéger nos fleurons industriels nationaux dans un contexte commercial mondialisé, Compte rendu No 16 (25 January 2018), p.4.* The [Décret 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique](#), Article 3.II specifically mandates the SISSE to carry out this role.

<sup>156</sup> Further details are available on SISSE's [website](#).

<sup>157</sup> See the [answer](#) by the French Minister of Economy to the parliamentary written Question N°35484: "CIIEF members monitor the conditions attached to certain investment authorisations. In this context, the CIIEF's departments ensure compliance with the commitments, in particular by means of the regular information that investors are required to send to the administration in application of the commitments entered into (annual reports, interviews with designated contact points, etc.), information that can be obtained by the administration's own means, and site visits when they prove necessary. Any suspected breach of a commitment is subject to a specific characterisation procedure and may lead, if necessary, to the implementation of a sanction procedure" [translation by the authors].

<sup>158</sup> The [Décret n° 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique - Légifrance \(legifrance.gouv.fr\)](#) mandates SISSE "to coordinate the monitoring by the ministerial departments concerned or entities attached to them of the commitments made by the companies in the context of the authorisation procedure".

<sup>159</sup> The provision was introduced into the legislation in April 2019 before the adoption of the EU Regulation.



were initially attached to an authorisation can however be reconsidered if such an eventuality was foreseen in the conditions attached to the authorisation (*Code monétaire et financier* Article R151-9).

*d. Substantial scope of the screening mechanism*

256. The review mechanism applies essentially identical rules for all transactions that fall under its scope. The mechanism is based on different legal sources, in particular the *Code monétaire et financier*, Articles L.151-1 to L.151-7 and Articles R.151-1 to R.151-18 as well as a series of decrees and *arrêtés*.<sup>160</sup>

257. The scope of the mechanism and the prior request for authorisation covers three scenarios:

- Acquisition of more than 25% of voting rights in cases where the investor is a person from a country outside the EEA (a temporary 10% threshold is applicable, exclusively to listed companies, since July 2020 and until 31 December 2022);<sup>161</sup>
- Acquisition of control of a French entity, in the meaning of article L.233-3 of the *Code commercial* (which covers legal control, *de facto* control, joint control, etc.) by an investor from any foreign country;<sup>162</sup> or
- Acquisition of a part or a whole line of a French business, likewise by an investor from any foreign country.

258. Greenfield investment or asset acquisitions are not covered by the investment screening mechanism.

259. There is some uncertainty as to whether the ultimate beneficial owner or the direct owner of the would-be acquirer is the relevant “investor” under the French rules. This uncertainty stems from the fact that the rules define how the nationality of legal persons is to be assessed. According to the French authorities, the entire “chain of control”, from the legal entity directly acquiring the French entity to the ultimate controlling entity is examined. Every individual or legal entity that is part of the ownership chain qualifies as “investor” under the French mechanism.

260. The current French investment screening regime only applies to transactions that relate to a closed list of activities of targeted companies (activities listed by the *Code monétaire et financier* Article R.151-3).<sup>163</sup> Article R.151-3 list includes among others:

- Activities falling within the scope by their nature, i.e., activities in connection with defence production such as weapons and ammunitions, crypto, or activities performed by entities subject to national defence secrecy;

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<sup>160</sup> *Code commercial*, Articles L.233-3 and L.430-1, and, for penal sanctions, the *Code des douanes*, Article 459 are also part of the framework.

<sup>161</sup> This review is carried out according to an accelerated procedure: the investor crossing the 10% threshold notifies the *DG Trésor*. The *DG Trésor* must then within 10 days decide whether the transaction should be subject to further review, on the basis of a full application for authorisation, which may lead to a refusal to allow a non-European foreign investor to hold more than 10% of the voting rights of a sensitive French company. On the legal sources of this temporary regime see footnote 146.

<sup>162</sup> When assessing if a French direct investor is controlled by a foreign entity, the control is analysed in the meaning of both in the *Code de commerce* article L.233-3 (legal control, *de facto* control, joint control...) and on the meaning of article L.430-1-III of the same code (decisive influence in running a company, which is also a criterion for competition issues).

<sup>163</sup> The positive-list approach was first introduced in [2005](#). Since the adoption of this approach, the lists expanded in scope, with considerable modifications in [2014](#) and [2019](#). The most [recent modification](#) is scheduled to enter into force in January 2022 and add research and development of renewable energy generation to the list.

- Activities falling within the scope when essential to certain national interests, such as the integrity, security or continuity of water or energy supply, the functioning of transport and IT networks, public health, activities of production, the transformation and distribution of agricultural products essential to national food safety, publishing, printing and distribution of political and general information press, including online press;
- Activities that are likely to jeopardise national defence interests, public order or public security, when they are intended to be carried out in connection with one of the abovementioned activities. This item includes R&D activities relating to critical technologies (set out by article 6 of the *Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France*) and to the dual-use goods and technologies listed by the relevant Council Regulation.

261. Projects or programmes of Union interest, as defined in Annex I of the EU Regulation, are not explicitly included in the closed list of the *Code monétaire et financier*, Article R.151-3.

*e. Procedural organisation of the screening process*

262. The investment screening regime is triggered by a mandatory prior authorisation request by the foreign investor, or, if the investor fails to notify the transaction, *ex officio*. French authorities can review transactions that have not been authorised but fall under the scope of the mechanism without regard to any time limits.

263. The prior authorisation request must contain a specified set of information that includes the information mentioned in Art 9(2) of the Regulation. In early 2022,<sup>164</sup> the information which must be provided in application for authorisations was expanded to include new elements, including among others the EU notification form.<sup>165</sup>

264. The review process takes place in two phases. The authorities must carry out an initial assessment within a maximum of 30 working days from receipt of an application. The process ends after this phase if the transaction is not subject to an authorisation requirement<sup>166</sup> or if the transaction is approved without conditions. A second phase, which can take up to 45 working days, allows the authorities to carry out further examinations where conditions or a denial appears necessary. If no decision is issued within the 45 working days timeline, the authorisation is deemed to be denied. The clock only begins to run for these timelines if the French authorities consider the application complete. The timelines have not been adapted in light of the entry into force of the EU Regulation – a deliberate choice made to limit the impact on involved economic actors.<sup>167</sup>

265. According to public declarations by French officials, *Multicom 4* has notified around 1/3 of handled cases through the national procedure with the European Commission and with the other EU Member States.<sup>168</sup>

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<sup>164</sup> [Arrêté du 10 Septembre 2021](#), effective on 1 January 2022.

<sup>165</sup> A reference and a link to the form developed by the European Commission are now included in the French screening mechanism [website](#).

<sup>166</sup> The transaction is considered to be out of the scope of the screening mechanism (“*hors champ*”).

<sup>167</sup> Statement by Marie-Anne Lavergne, Head of the office in charge of the control of foreign investments in France at the French Treasury, in a [Joint public hearing SEDE/INTA in the European Parliament on “Assessing the risks and policy responses to foreign direct investment, including Chinese investments in the security and defence sectors”](#), 7 February 2022 (17:09:40).

<sup>168</sup> Statement by Marie-Anne Lavergne, Head of the office in charge of the control of foreign investments in France at the French Treasury, in a [Joint public hearing SEDE/INTA in the European Parliament on “Assessing the](#)

266. While during the first months following the full implementation of the EU Regulation, France notified the European network all transactions involving a non-European investor, the authorities decided to change their practice<sup>169</sup> and to notify the network only those transactions involving a non-European investor and deemed “eligible for control in France”. Operations “eligible for control in France” are only those declared by at least one of the CIIEF members to be “sensitive” to public safety (*sûreté publique*), public order and national defence interests.

267. The extent to which French authorities would be in a position to reopen earlier decisions based on incomplete or inaccurate information is uncertain. While penal sanctions apply in cases where an authorisation was given based on fraud (*Code monétaire et financier*, [Article L151-3-2](#)), the validity of the authorisation itself does not appear to be affected. This would appear to apply, *a fortiori*, to authorisations based on incomplete or inaccurate information in the absence of fraud.

*f. Powers in cases where security or public order is or may be affected*

268. The material assessment of whether a transaction threatens the public order, public safety (*sûreté publique*), or the interests of national defence is made by reference to a non-exhaustive list of factors, such as likelihood of criminal activity, links to foreign governments or significant funding from non-EU governments.<sup>170</sup>

269. In cases where transactions are deemed to create a risk to public order, public safety, or the interests of national defence, French authorities can authorise transactions under conditions,<sup>171</sup> authorise them in

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[risks and policy responses to foreign direct investment, including Chinese investments in the security and defence sectors](#)”, 7 February 2022 (17:06:45). It is not certain whether any transactions that may have been notified without falling under the scope of the screening mechanism (transactions “*hors champ*”) were considered for the calculation.

<sup>169</sup> According to the French authorities, this evolution was justified by the fact that the volume of cases to be notified proved to be particularly high and many of the cases notified had no impact on the security or public order of any Member State, including France.

<sup>170</sup> Among others, the Minister may deny the approval of a transaction that falls under the scope of the mechanisms if they consider that the investor is likely to commit criminal offenses. Since 2020, links to foreign governments or foreign public entities are explicitly mentioned as a consideration of refusal of the authorisation (*Code monétaire et financier*, Article R.151-10), and France has introduced an obligation on the prospective acquirer to proactively disclose significant funding links with foreign (non-EU) governments (*Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France*, Article 1, II, 7°).

<sup>171</sup> Under article [Code monétaire et financier, Article R.151-8 \(I\)](#), the Minister may, in particular, make an authorisation conditional on the transfer of part of the shares acquired in the capital of the entity that is the subject of the investment, or of all or part of a branch of activity listed in Article R.151-3 carried on by the entity that is the subject of the investment, to an entity that is separate from the investor and that is approved by the Minister.

conjunction with certain obligations,<sup>172</sup> or prohibit the transactions entirely.<sup>173</sup> Rules on these measures are spelled out in significant detail as a result of reforms in 2019. Decisions are taken by the Minister of the Economy.

270. In France, mitigation measures do not cover all the activities of the target company, but only those considered as “sensitive”. The content of these measures is the result of a collaborative process involving the investor and the target company. The conditions are placed in an annex to the authorisation issued by the Minister of the Economy. France does not currently use any external service provider for monitoring the compliance of mitigation measures.

271. The French authorities have a range of options if an investment that is subject to a prior authorisation requirement has not been subject to an authorisation.<sup>174</sup> They may order to file an application for authorisation; order the investor to modify the investment; or order the investor to re-establish the situation that existed previously at its own expense. In cases where an authorisation has not been requested, the Minister of the Economy may also take interim measures to address a threat to certain interests<sup>175</sup> and adopt financial penalties.<sup>176</sup>

### 3.5. Germany

272. Germany has screened foreign investment to safeguard its security and public order since 2004, when specific provisions were included in the [Foreign Trade and Payments Act](#) (AWG) and the related [Foreign Trade and Payments Ordinance](#) (AWV).<sup>177</sup> After having initially introduced a rather narrow review

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<sup>172</sup> The Ministry in charge of Economy also has the possibility to authorize a transaction under certain obligations (“*lettres d’engagement*”). Rules explicitly define the objectives to be achieved by these mitigation agreements (*Code monétaire et financier*, Article R.151-8), and it does not appear that French authorities are competent to order a mitigation measure if the transaction threatens the security or public order of a *different* EU Member State. Recent reforms have strengthened the authorities’ means in this policy area by making it possible to modify the agreements in the event of a risk variation, in certain cases (*Code monétaire et financier* Article R.151-9). Information received under the cooperation mechanism pointing to a risk variation from a foreign direct investment do not seem to allow a modification of an agreement by French authorities. The monitoring of the compliance of the agreements was enhanced by the recent reforms, and sanctions for any violation by investors of their obligations are also available (*Code monétaire et financier*, Article L151-3-1 and L151-3-2).

<sup>173</sup> The French investment screening design reveals the exceptional status of prohibitions. Authorisations by the Minister of the Economy are denied only in exceptional pre-identified scenarios (*Code monétaire et financier*, Article R.151-10). None of those scenarios seems to allow the French authorities to prohibit a transaction if the operation threatens the security or public order of a *different* EU Member State or if is likely to affect projects or programmes of Union interest.

<sup>174</sup> Until a reform in 2019, such transactions were void; new arrangements codified in *Code Monétaire et Financier*, article L.151-3-1, grant greater flexibility for reasons set out in [Étude d’impact – Projet de Loi relatif à la croissance et à la transformation des entreprises](#), 18 June 2018, p.471-472.

<sup>175</sup> Code Monétaire et Financier Article L. 151-3-1.

<sup>176</sup> Code Monétaire et Financier Article L. 151-3-2.

<sup>177</sup> The Foreign Trade and Payments Act had contained the possibility that restrictions be placed on investment since the [initial version of 1961](#); in 2004, a specific delimitation of this power was introduced (11<sup>th</sup> Act to amend the AWG, documented with motivations in [BtDrs 15/2537](#), 18 February 2004), but [replaced in 2013](#) by a more general authorisation to introduce controls on both inward and outward investment. The current iteration has again reframed the scope of restrictions that the Executive can regulate; the authorisation to regulate investment screening is contained in § 5(2) and § 5(3) AWG for the cross-sectoral and sector-specific screening mechanisms, respectively.

mechanism limited to war-weapons and crypto-technology in 2004 (to which companies that produce tank engines and tank gearboxes were added in 2005),<sup>178</sup> Germany broadened its screening mechanisms significantly in 2009 by adding an economy-wide screening for non-EEA acquirers.<sup>179</sup> Through a further series of reforms,<sup>180</sup> Germany gradually developed its rules into a consolidated and differentiated investment review mechanism.

273. The evolution of Germany's investment screening framework has been driven and was accompanied by a growing assertiveness in government discourse and policy about the merits of investment screening and in corresponding practices and resourcing. The initial introduction of investment screening in 2004, then for two narrow sectors related to traditional defence industries, was justified with great effort as an exception,<sup>181</sup> and the government had still estimated implausibly low expenditure for its operation for a public report in 2017.<sup>182</sup> However, still in 2017, Germany led, jointly with France and Italy, the initiative to establish investment screening in Europe which later led to the EU Regulation.<sup>183</sup>

### 3.5.1. Arrangements for the participation in the cooperation mechanism

274. Germany has designated the Federal Ministry for Economic Affairs and Climate Action (BMWK) as the national contact point for the purpose of the EU Regulation.<sup>184</sup> When being notified of a case by another EU Member State under the cooperation mechanism, the BMWK assesses the case notified and involves other German ministries and agencies concerned.

275. The powers of German authorities vis-à-vis investors or other individuals to gather information, are set out in § 14a(2) AWG. This article establishes obligations for investors to provide information<sup>185</sup> on foreign investments in Germany that are being screened by the German authorities but does not explicitly

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<sup>178</sup> This latter group of companies was added to the scope of the screening mechanism with effect from [9 September 2005](#) (introduced with the 71<sup>st</sup> Ordinance to modify the Foreign Trade and Payments Ordinance; justification and text available in [BtDrs 15/5994](#)), and no further additions to the scope were made until 2017 (see [BtDrs 18/13417](#) for the justification for the change provided by the government).

<sup>179</sup> [13th Law to amend the Foreign Trade and Payments Law and the Foreign Trade and Payments Ordinance](#), 18 April 2009. A [consolidated version of the Foreign Trade and Payments Law](#) was issued shortly after.

<sup>180</sup> The most recent major changes were made in 2020 (amendment of the AWG, [BtDrs 19/18895](#)) and 2021 (17<sup>th</sup> amendment of the AWW, [BtDrs 19/29216](#) and [BRDrs 343/21](#)) to adjust to requirements of the Regulation and make further changes. Smaller, technical adjustments were introduced in late 2021 ([BtDrs 20/76](#) and Bundesministerium für Wirtschaft und Energie, „[Runderlass Außenwirtschaft Nr. 3/2021 \(Erste Verordnung zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung](#)“, 25 August 2021).

<sup>181</sup> See [BtDrs 15/2537](#).

<sup>182</sup> Germany reported estimated costs in the justification and explanation to the reform in [Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung](#), 14 July 2017, item E.3. In that document, the German government estimated, then based on over at least 7 years of experience with the mechanisms, that administrative costs of EUR 125 were spent per case under the cross-sectoral review mechanism, EUR 195 per case for an in-depth review in the cross sectoral review; and EUR 260 for an in-depth review under the sector-specific review mechanism.

<sup>183</sup> [BtDrs 19/23834](#), p.1.

<sup>184</sup> § 13 (2) no. 2e AWG, introduced by the reform of the AWG on 17 July 2020.

<sup>185</sup> The items of information that need to be provided in the context of screening procedures in Germany are set out in a General Order ([Allgemeinverfügung](#) of the BMWi of 27 May 2021).

establish powers to gather information in cases where a transaction is not or no longer undergoing screening.<sup>186</sup>

276. § 14a(2) AWG does not mention powers where an investment is made in a Member State other than Germany and information is requested pursuant to Article 7(5) of the EU Regulation. In such cases no explicit rules appear to exist under the Regulation or under German national law that would allow the German authorities to request such information from private parties or to compel persons that would hold such information to provide timely and accurate information in this scenario.<sup>187</sup>

277. Germany has been among the five Member States that have notified the largest number of transactions under the cooperation mechanism of the Regulation.<sup>188</sup> Germany has also been actively involved in cases that were brought to its attention through the cooperation mechanism: In 2021, the most recent timeframe for which case-numbers are available, almost half of the cases handled by the German authorities had their origin in the cooperation mechanism.<sup>189</sup>

### 3.5.2. *Screening under the Foreign Trade and Payments Act*

278. The German investment screening mechanism consist of rulesets for three distinct transaction scenarios. Which of these rulesets applies to a given transaction depends on the sector in which the transaction takes place. Each of the three rulesets is associated with corresponding differentiated control intensities, procedural rules, and investor obligations.

#### *a. Implementation practice*

279. Germany has seen a very significant upward trend of case numbers since the introduction of investment screening in 2004, with a marked acceleration in recent years.<sup>190</sup> While around 40 to 50 cases

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<sup>186</sup> According to the German authorities, most information requests by other Member States are made after Germany has opened a screening procedure and has notified it via the cooperation mechanism to the EU Commission and the other Member States, making them aware of the investment in the first place. In cases where another Member State is requesting information without Germany having opened a screening procedure beforehand, the BMWK may initiate a screening of the investment to access powers under § 14a(2) AWG applies unless this is precluded by lapse of time. The German authorities also hold that pursuant to Article 288 of the TFEU, the Regulation is binding in its entirety and directly applicable in all Member States and does therefore not require, in particular for the cooperation mechanism, the passing of rules at the level of the Member States (see Bundesministerium für Wirtschaft und Energie, [Runderlass Außenwirtschaft Nr.2/2021 \(Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung\)](#), 27 April 2021, p.1).

<sup>187</sup> An obligation to provide truthful and complete information contained in [§8\(5\) AWG](#) and enforceable through administrative sanctions in [§19\(2\) AWG](#) only applies to information requests in cases undergoing screening; other than Article 9(4) of the EU Regulation no corresponding national rules exist for scenarios in which information needs to be gathered and transmitted pursuant to Articles 9, 7(5) of the Regulation for cases not undergoing screening in Germany. According to the German authorities such scenario has so far not been of practical relevance.

<sup>188</sup> [“Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union”](#), {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.11.

<sup>189</sup> The German government has reported case numbers for 2021 as follows (BMWK (March 2022), [“Investment Screening in Germany: Facts & Figures”](#)): 306 national cases screened (68 of which were also undergoing screening in other Member States and were notified to Germany), 240 cases screened that were solely notified to Germany by other Member States (i.e. no original national German screening cases).

<sup>190</sup> The German government does not systematically publish statistics on implementation of its investment screening framework. However, some authoritative data are publicly available through different sources that do not



annually were handled between 2009 and 2016, the caseload increased steadily and rapidly to 109 cases in 2019, 160 in 2020 and 306 national cases in 2021.<sup>191</sup>

280. Few cases are publicly known in which acquisitions were formally prohibited, subjected to conditions, or met obstacles that led to proposals being abandoned.<sup>192</sup> Statistical information released in 2018, suggested that no transaction was formally prohibited between 2004 and 2018, and that up to five transactions per year were associated with conditions.<sup>193</sup> Statistical information released in March 2022, the most recent information that communicates aggregated outcomes, includes information on restrictive measures adopted by the German authorities since 2017.<sup>194</sup>

281. There is however no obligation for the government to communicate aggregate outcomes or information on individual decisions, so that outcomes of the operation of the investment screening mechanism and evolutions over time cannot be described with certainty.

*b. Institutional set-up of the screening mechanism*

282. The German Federal Ministry for Economic Affairs and Climate Action (BMWK) conducts the investment screening procedure<sup>195</sup> and takes all decisions related to the investment screening mechanism, including prohibitions<sup>196</sup> or impositions of conditions. Two units within the BMWK are dedicated to investment screening. Within the BMWK, fifteen agents are currently responsible for handling the cases

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always present consistent numbers or reveal comparable data over time. Important sources of data are government responses to parliamentary requests that are made on the subject at irregular intervals (for example [BtDrs 18/10443](#) (25 November 2016), [BtDrs 19/1103](#) 7 March 2018), and [BtDrs 19/2143](#) (11 May 2018)) and communications in the context of a regulatory reform proposals (e.g. in [BtDrs 19/18700](#) of 21 April 2020). On 23 April 2020, the German Minister for Economic Affairs and Climate Action referred in a speech to parliament to “*several hundred transactions that had been proposed and reviewed [in 2019]*” ([BtDrs 19/19156](#), p.19329), which does not appear to correspond to the numbers published two days earlier in the reform proposal [BtDrs 19/18700](#). In March 2022, the German authorities released [statistical information](#) on investment screening in Germany from 2017 until the end of 2021.

<sup>191</sup> Federal Ministry for Economic Affairs and Climate Action (2022), “[Investment Screening in Germany: Facts & Figures](#)”, p.12.

<sup>192</sup> The proposal for the acquisition of *Leifeld Metal Spinning* was withdrawn in August 2018 as the government considered a prohibition. In at least two known cases (related to [50Hertz](#) in 2018 and [CureVac](#) in 2020), acquisition plans by foreign acquirers did not go forward after KfW, a German State-owned development bank, acquired the assets or made major investments in the target enterprises that were justified with national security interests (50Hertz) or concerns about acquisitions of the target by foreigners (CureVac).

<sup>193</sup> [BtDrs 19/2143](#) (11 May 2018), p.4.

<sup>194</sup> Federal Ministry for Economic Affairs and Climate Action (2022), “[Investment Screening in Germany: Facts & Figures](#)”, p. 12.

<sup>195</sup> [§ 13 \(2\) AWG](#). This competence has been explicitly established since 2004, as a then stated deviation from the competence of the Bundesbank for issues related to capital flows ([BtDrs 15/2537](#), p.9).

<sup>196</sup> Pursuant to § 13(3) AWG prohibitions require the consent of the German federal government, i.e., consent of the cabinet of Ministers.

and a further expansion is expected.<sup>197</sup> Cases are to some extent allocated to individual case handlers in relation to their specific knowledge of individual sectors or countries of origin of inward investment.<sup>198</sup>

283. The BMWK must involve other concerned ministries. The Federal Office for Economic Affairs and Export Control (BAFA) provides expert statements on individual transactions in certain cases.<sup>199</sup> Details about the internal processes, roles and responsibilities, cooperation among the ministries and the involvement of intelligence agencies<sup>200</sup> are not publicly known.

284. According to official information, Germany dedicates considerable resources to the implementation of the investment screening mechanism. Based on recent official information, Germany appears to expend almost EUR 10 million per year on the administration of the investment screening mechanism.<sup>201</sup>

*c. Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

285. In 2020 and 2021, Germany comprehensively overhauled the legal framework for investment screening with the stated aim to adapt existing rules to the EU Regulation.<sup>202</sup> The German framework distinguishes between cross-sectoral FDI screening (§§55-59a AWW) and sector-specific screening (§§60-62 AWW). The new rules on cross-sectoral screening provide explicitly that the authorities are competent to act if security interests of other EU Member States or EU projects and programmes are likely affected; Germany's own security and public order interests are hence treated on the same footing as these interests of other Member States and the relevant EU projects and programmes.

286. This appears to apply with an important caveat for transactions in sectors subject to the more stringent rules under the sector-specific review pursuant to §§ 60-62 AWW. In these sectors, even acquisitions by European investors may be subjected to a review for their impact on Germany's "essential security interests" (§ 60(1) AWW).<sup>203</sup> Approvals of acquisitions in these more sensitive sectors are however not subject to a consideration of a negative impact on security and public order interests of other Member

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<sup>197</sup> [Interview](#) by Florentine Kessler-Grobe, Head of Unit for Foreign Investment Screening of the BMWK, to Linklaters, 7 March 2022 (2:11). According to the same source, in 2019, they were five agents working on handling the cases.

<sup>198</sup> [Interview](#) by Florentine Kessler-Grobe, Head of Unit for Foreign Investment Screening of the BMWK, to Linklaters, 7 March 2022 (3:14)

<sup>199</sup> Documented in [BRDrs 343/21](#), (3 May 2021), p.18.

<sup>200</sup> The involvement of intelligence agencies in the gathering of information and the wider screening process is not explicitly mentioned in parliamentary documentation and the degree of its involvement is not publicly known.

<sup>201</sup> While official information on the total expenditure for the administration of the investment screening mechanism does not appear to be available, incremental increases have been estimated in the context of recent reforms: According to [Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes](#) (BtDrs 19/20144, bill with motivation as of 17 June 2020, item E.3, p.5), annual cost that result from the reform that entered into effect in 2020 were estimated at EUR 4.7 million. Further changes planned in the then draft 17<sup>th</sup> amendment to the related Foreign Trade and Payments Ordinance of 22 January 2021, p.21, estimate a further increase of the cost by around EUR 4.5 million ([BRDrs 343/21](#), pp.19 and 22).

<sup>202</sup> Details on intentions of the amendment of the AWG ([1st amendment of the AWG](#)), in force since 17 July 2020, in [BtDrs 19/18895](#); regarding the 16<sup>th</sup> amendment of the AWW in [BtDrs 19/23834](#), and regarding the 17<sup>th</sup> amendment of the AWW in [BtDrs 19/29216](#). A summary is available on a [dedicated website of the BMWK](#).

<sup>203</sup> According to the German authorities, this mechanism is based on Art. 346 (1) (b) TFEU, while the cross-sectoral screening mechanism is based on Art. 65 (1) (b) TFEU.

States or interests related to programmes or project of Union interest; these interests are not referenced as possibly justifying an intervention. For transactions in those particularly sensitive sectors, German authorities are thus *not* legally obliged under German national law to consider other Member States' security or public order interests or interests associated with EU projects and programmes.<sup>204</sup> German authorities will nevertheless notify the Commission and the other EU Member States under the EU cooperation mechanism pursuant to Art. 6(1) of the Regulation when they open a sector-specific screening procedure and the investor is a non-EU person or entity (as the Regulation only applies to non-EU investors).

287. No explicit rules have been laid down that would specify how information received under the cooperation mechanism would feed into the decision by the German authorities or how it is disseminated within authorities involved in the screening process to include this information into the consideration of an effect on interests of other Member States or projects or programmes of Union interest. According to information provided by the German authorities, the BMWK shares comments received from other Member States and opinions received from the Commission with other German ministries and involved authorities, and they take these comments and opinions into account when taking the final decision in a screening procedure.

*d. Substantial scope of the screening mechanism*

288. The scope of the German screening mechanism covers three scenarios, to which specific rules apply:

- A mandatory prior authorisation requirement under a sector-specific screening (§ 62 AWV); the sector-specific screening applies to direct or indirect acquisitions of at least 10% of the voting rights in enterprises involved with: items listed in the export control list; items related to defence production or IT security functions to process classified state material; or facilities that are vital for defence.<sup>205</sup> Acquisitions of parts of an enterprises or extensive asset acquisitions are likewise covered under the scope of the sector-specific screening mechanism. The sector-specific mechanism applies to all foreigners.
- A possibility to review transactions, across all sectors of the economy, exists for direct or indirect acquisitions of interests in enterprises, or of acquisitions of parts of enterprises or asset acquisitions, pursuant to § 55 AWV; by default, the review is only possible if the acquisition leads to a holding of at least 25% of the voting rights in the target enterprise or if other trigger thresholds are passed in later additional acquisitions. No notification requirement exists in this scenario, but investors can apply for a certificate of non-objection to obtain legal certainty on a given transaction.
- Within the cross-sectoral review mechanism, the possibility to review transactions is complemented by a notification requirement<sup>206</sup> for enterprises operating in 27 individually specified sectors (§ 55a AWV). For acquisitions in some of these identified sectors, a lower threshold of 20% (§ 55a(1) no.8-27 AWV) applies, and for a further subset of sectors, the threshold

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<sup>204</sup> The recently introduced provision of § 62a AWV clarifies that the procedures of §§ 55-59a AWV and §§ 60-62 AWV are distinct procedures; the administration can change between the procedures if the conditions are present, but from the wording of § 62a AWV it appears that they cannot apply cumulatively.

<sup>205</sup> The description of the scope in § 60 AWV is detailed and draws on references to other legislation; the indication here is not to be meant to reflect these details.

<sup>206</sup> Until BMWK gives clearance for a transaction that needs to be notified, the transaction is legally invalid § 15 (3) AWG. During this period, an acquirer is prohibited from exercising voting rights associated with the acquired shareholding § 15 (4) AWG and severe sanctions, including criminal sanctions are available for non-respect of these obligations (§ 18 (1b) AWG).

is set to 10% (§ 55a(1) no.1-7 AWV, amongst them critical infrastructure or media), with additional trigger thresholds for later increases of the holdings. The cross-sectoral mechanism only applies to non-EEA acquirers.

289. The screening mechanisms do not cover greenfield investment.<sup>207</sup>

*e. Procedural organisation of the screening process*

290. The screening mechanism is organised in two phases with fixed timelines and<sup>208</sup> a fiction that authorisation is granted if these timelines have passed. In the first phase, which may take up to two months beginning with the authorities acquiring knowledge of the transaction,<sup>209</sup> the authorities seek to identify whether an in-depth screening in a second phase, for which additional time is available, is warranted. The first phase can only end with an approval/certificate of non-objection – explicit or fictitious – or the decision to open an in-depth review. Figure 8 provides a visual overview of the screening procedure in the different constellations as published by the German authorities with available timelines and possible outcomes.

291. Neither AWG or AWV nor the official visualisation reproduced in Figure 8 indicate at what step in the procedure a given transaction is notified to the European Commission or the other Member States. According to information received by the German authorities, BMWK formally notifies the Commission and the Member States once it decides to open an in-depth screening (phase 2).

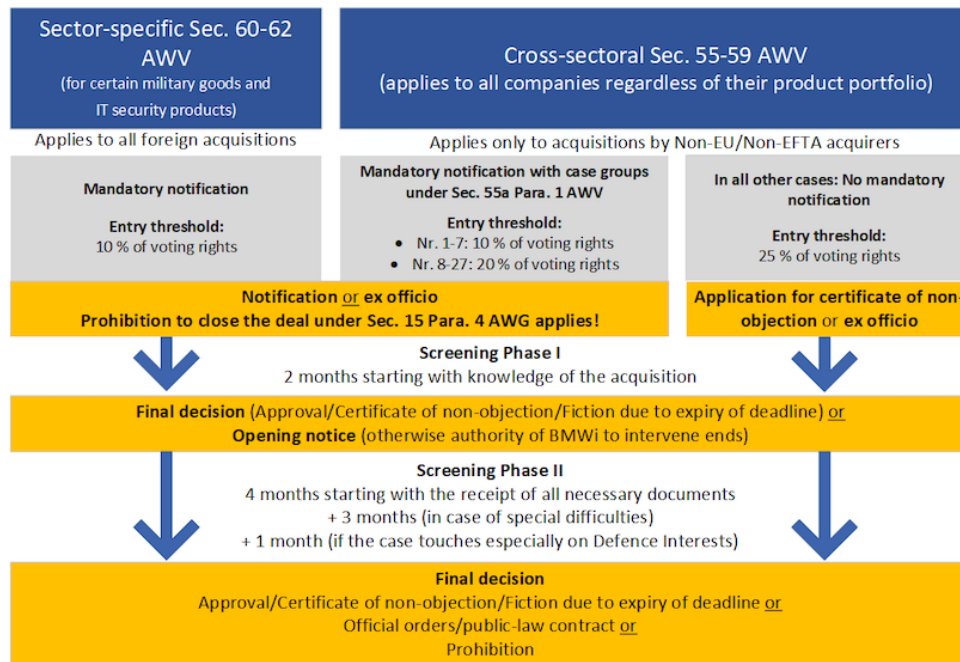
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<sup>207</sup> The possibility that the executive establishes such a mechanism may exist however, as the legislator has granted broad authority to regulate trans-border transactions in § 4(1) AWG. Specific authorisations to regulate the cross-sectoral and sector-specific screening mechanisms are legislated in § 5(2) and (3) AWG. This note does not take a position on whether the available authorisation in § 4(1) AWG is sufficiently specific to allow the executive to establish a screening mechanism for outward transactions.

<sup>208</sup> The delays can be extended by common accord of the direct would-be acquirer and the target enterprise, ([§ 14a \(5\) AWG](#)).

<sup>209</sup> According to German authorities, in 2021, 87% of the national cases were cleared in less than two months ([Interview](#) by Florentine Kessler-Grobe, Head of Unit for Foreign Investment Screening of the BMWK, to Linklaters, 7 March 2022 (5:12)).

Figure 8. Visual representation of the screening procedures in Germany



Source: [Federal Ministry for Economic Affairs and Climate Action website](#), undated.

292. A review is possible if the initial trigger thresholds are reached or if specified higher thresholds are reached in the course of later further acquisitions.<sup>210</sup> Screening is also possible if the formal holding thresholds are not reached but where the acquired share-holding entails further rights, such as additional seats in management or supervisory bodies, veto-rights or access to sensitive information (§ 56(3) AWW), and where these rights (alone or in combination with the acquired shares) give the investor a degree of influence over the company that corresponds to the rights associated with trigger thresholds set out in the rules.

293. The authorities may reopen procedures and revoke decisions that were based on incomplete or inaccurate information under rules of general administrative law within certain timelines since acquiring knowledge.<sup>211</sup> Sanctions are available to ensure the provision of complete or accurate information.<sup>212</sup>

*f. Powers in cases where security or public order is or may be affected*

294. German authorities may prohibit a transaction if it likely affects security or public order of Germany, other Member States or projects or programmes of Union interest and if mitigation measures do not suffice to address the issue. § 55a(3) AWW specifies in an open-ended list investor-specific factors that

<sup>210</sup> The thresholds that trigger a further review are set out in § 56(2) AWW and differ depending on the scenario branch of the screening mechanism.

<sup>211</sup> These rules, laid down in § 48 [Verwaltungsverfahrensgesetz](#), require the authorities to act within a year; the possibility to revoke an earlier decision is not conditioned on intent to provide inaccurate or incomplete information.

<sup>212</sup> The person “requesting an authorisation” is required to provide complete and accurate information (§ 14a(2) AWW), and the provision of incomplete or inaccurate information is subject to administrative sanctions (§ 19(2) AWW). A detailed list of information that must be provided is set out in a [General Order of 27 May 2021](#).

the authorities may consider in their decision; this list is inspired by the items listed in Article 4(2) of the Regulation.

295. Identified risk may be mitigated through obligations<sup>213</sup> which can be either imposed by an administrative act or agreed in a contract under public law. Some types of obligations that could be imposed are explicitly mentioned in the AWV, including the possibility to define lower or additional thresholds that trigger further reviews or to have a reliable and independent third person verify the respect of imposed obligations.

### 3.6. Greece

296. As of 30 June 2022, Greek authorities had not established an investment screening mechanism or notified such mechanism to the European Commission. Greece is however working towards establishing a mechanism. The Greek authorities have nominated a national contact point for the purposes of the cooperation mechanism under the EU Regulation.

#### 3.6.1. Arrangements for the participation in the cooperation mechanism

297. In late February 2021, Greece designated Section III of the [B1 Directorate of Extroversion Planning and Coordination of Extroversion Bodies](#) (B1 Διεύθυνση Σχεδιασμού Εξωστρέφειας και Συντονισμού Φορέων Εξωστρέφειας) within the Ministry of Foreign Affairs as the Greek contact point for the purposes of the EU Regulation.<sup>214</sup> The department cooperates with other competent Greek authorities on sharing notifications, gathering comments and providing information related to the EU cooperation mechanism. For this reason, a network of contact points has been established within the competent authorities to facilitate the sharing and gathering of information within the timeframes established by the EU Regulation.

298. No information is publicly available on any powers that the national contact point or other authorities have, or procedures that they apply to effectively gather information that Greek authorities are required to share pursuant to Article 7(5) of the EU Regulation upon the EU Commission or other Member States' request. No obligations to provide such information, nor timelines for the provision of such information seems to be laid down.

#### 3.6.2. Initiatives to establish a screening mechanism

299. Greek authorities announced in late 2021 that the government was planning to establish an investment screening mechanism on the grounds of security or public order and that corresponding legislation was being prepared.<sup>215</sup> Greece has prepared a draft legislation for the national FDI screening

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<sup>213</sup> The legislation does not frame these as 'conditions' but rather as 'obligations'; failure to perform does thus not automatically suspend the effect of an authorisation.

<sup>214</sup> [Law No.4781 on the "Organisation and Operation of the Ministry of Foreign Affairs"](#), Article 169. The law entered into force on 28 February 2021. According to Article 169, Section III shall be, among others, responsible for: "(a) acting as a contact point for communication and cooperation at Member State level and at Union level, in the application of the EU Regulation No 2019/452; (...) (c) cooperation with the competent Ministries and bodies for all matters relating to the envisaged the cooperation mechanism provided for in Union legislation for the control of Foreign Direct Investment, as well as and for the preparation and submission to the European Commission of an annual report, as defined by the EU Regulation No 2019/452."

<sup>215</sup> [Commission staff working document – Screening of FDI into the Union and its Member States](#), accompanying the document "Report from the Commission to the European Parliament and the Council – First



mechanism. Greek authorities are currently working on the draft legislation after its presentation and further to a consultation with Commission experts. With a view to improving the draft screening mechanism, Greek authorities are conducting meetings with other EU Member States and third countries with screening mechanisms to exchange information on best practices.

### 3.7. Ireland

300. As of 30 June 2022, Irish authorities had not established an investment screening mechanism or notified such a mechanism to the European Commission. Ireland is however working towards establishing a mechanism: Legislation has been drafted and approved by Government for publication and publication is expected over the summer 2022. The Irish authorities have nominated a national contact point for the purposes of the cooperation mechanism under the EU Regulation.

#### 3.7.1. Arrangements for the participation in the cooperation mechanism

301. The Irish authorities have established an Investment Screening Unit within the Department of Enterprise, Trade and Employment as Ireland's national contact point for the purpose of the EU Regulation.<sup>216</sup> The Unit has 2.5 FTE staff and fulfils outward-facing roles associated with the cooperation mechanism.<sup>217</sup>

302. The Investment Screening Unit in the Department of Enterprise, Trade and Employment (D/ETE) is responsible for coordinating responses to notifications received through the cooperation mechanism. According to Irish authorities, in order to support this work and in anticipation of forthcoming legislation, an informal inter-departmental group (IDG) was established. In addition to informing on the development of the screening legislation, this IDG provides a vehicle for D/ETE to seek inputs on notifications. D/ETE also leverages the knowledge of the various Enterprise Agencies in this regard (e.g., IDA Ireland, Enterprise Ireland).

303. In the absence of a legislative basis for screening, D/ETE has limited its engagement to notifications where a specific Irish-dimension is identified, or in response to direct requests from the Commission or other Member States. In some instances, D/ETE has contacted companies directly seeking information and data on notified transactions. Until such point as the forthcoming legislation is enacted, any information submitted by undertakings involved in a transaction is voluntary in nature.

304. Early insights on some of the information that the national contact point may collect from foreign investors are provided in a [Privacy Notice](#) published in November 2020.<sup>218</sup> No information is available on legal bases, timelines for the provision of the information, mechanisms to compel the investor to provide

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Annual Report on the screening of foreign direct investments into the Union”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.31.

<sup>216</sup> See the written [answer](#) by the Minister for Business, Enterprise and Innovation to the parliamentary Question N°470, 27 May 2020.

<sup>217</sup> A [Privacy Notice](#) dated 13 November 2020 alludes to plans to establish, in the future, an Interdepartmental Group on Investment Screening, as well as a dedicated Investment Screening Board; the Board is planned to consist of officials from ‘relevant’ government departments.

<sup>218</sup> The Privacy Notice only addresses the personal data being collected. The draft Bill will set out all of the various data to be submitted by parties to a transaction once the Irish mechanism is implemented and these will include all of the data points referenced in Art 9(2) of the EU Regulation.

the information or sanctions for non-compliance, although it is understood that the forthcoming legislation will include detailed and comprehensive information on all of these aspects.

305. At present, in the absence of a legislative underpinning, the Irish response to notifications is undertaken on an informal basis by the Investment Screening Unit. Where required, inputs are sought from other relevant Government departments and/or agencies. This is determined on a case-by-case basis, depending on the circumstances of individual transactions.

306. The upcoming Bill will also provide the Minister for Enterprise, Trade and Employment with powers to compel the provision of the necessary information to undertake a thorough screening process – this is important given the significant number of holding companies established in Ireland in which – from the perspective of other Member States – indirect acquisitions could take place that could trigger information requests pursuant to Article 7(5) of the Regulation.

### *3.7.2. Initiatives to establish a screening mechanism*

307. The Irish government is committed to bringing such a mechanism into force. Preparatory work began in December 2019, when Ireland established a unit within the Ministry of Business, Enterprise and Innovation dedicated to investment screening, which began examining the merits, options, and legal basis for a mechanism. On 24 April 2020, the Irish government launched a [Public Consultation on Investment Screening](#) to seek views on whether to introduce a screening mechanism. In July 2020, the Government confirmed its decision to introduce a screening mechanism and approved the preparation of corresponding legislation.

308. In late June 2022, the Irish Government approved the publication of legislation – the “Screening of Third Country Transactions Bill” – which will allow Ireland to screen investments from non-EU countries for the first time.<sup>219</sup> The Bill will be published during the summer 2022, and, thereafter, will be considered by both Houses of Parliament. When enacted, the Bill would among others:

- Ensure that Ireland can, to the extent possible, fulfil its obligations as set out in the EU Regulation in relation to reporting on FDI trends and responding to queries and opinions issued by EU Member States or the European Commission, within the timelines prescribed therein.
- Introduce a screening mechanism into Ireland for the first time, combining mandatory notification for certain sectors and activities, and a discretionary power permitting the Minister to screen other third country transactions where there are reasonable grounds for believing that risks to security or public order exist.
- Define the nature, scale and type of investments that should undergo investment screening.
- Set out the factors that will be considered when screening particular foreign investments.
- Empower the Minister to assess, investigate, authorise, condition, or prohibit foreign investments based on a range of security and public order criteria.
- Ensure that the Minister can compel the provision and collection of necessary data from potential investors/investees to facilitate the screening process. This will include all the data referenced in the EU Regulation.
- Outline the appeals’ mechanisms available to the parties to the investment, ensuring transparency, to the degree possible, whilst maintaining security and public order.

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<sup>219</sup> [“Tánaiste to publish bill to allow Ireland screen investments from non-EU countries”](#), Department of Enterprise, Trade and Employment media release, 26 June 2022.

- Set out the penalties that may apply to those investors/investees failing to fulfil all the criteria required for an investment undergoing screening, or investors that breach Ministerial orders arising as a result of the screening process, etc.

### 3.8. Italy

309. Italy established its screening mechanism in 2012, titled “golden powers” or “special powers” (“*poteri speciali*”) in reference to the “golden shares” regime that the screening mechanism replaced and that had since 1994 allowed the Italian government to manage risks stemming from international investment to its security and public order interests in specific companies.<sup>220</sup>

310. The “golden powers” mechanism covers certain transactions and certain internal corporate actions in two groups of industry sectors:<sup>221</sup>

- defence and national security related industries; and
- a broader group of industry sectors that include among others energy, transport, and communications.

311. The legal regime organising the implementation of the golden powers has evolved considerably since its creation in 2012, with the latest amendment adopted in the context of the war in Ukraine and which came partially into force on 21 May 2022.<sup>222</sup>

#### 3.8.1. Arrangements for the participation in the cooperation mechanism

312. The Department for administrative coordination ([Dipartimento per il coordinamento amministrativo, DICA](#)) within the Presidency of the Council of Ministers ([Article 2-ter, paragraph 3, of Decree-Law no.21 of 2012](#)) operates as the Italian national contact point for the purposes of the EU Regulation. Staffing and funding available for Italy’s participation in the cooperation mechanism under the EU Regulation are not publicly known.

313. According to the Italian authorities, the national contact point receives incoming requests under the cooperation mechanism and consolidates information after consultation with the involved authorities for transmission to other Member States and to the EU Commission. The contact point forwards incoming information to the Coordination Group, which is composed of ministries and agencies competent in various

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<sup>220</sup> The golden share arrangement, established by Decree-Law No 332/1994, had been declared incompatible with the European Union law in 2009 ([Judgment of 26 March 2009, Commission/Italy \(C-326/07, ECR 2009 p.I-2291\) ECLI:EU:C:2009:193](#)). Responses that the Italian government had provided in 2007 to a questionnaire by the OECD, available as [DAF/INV/RD\(2007\)27/REV2](#), contain information on the now abolished arrangements. A detailed overview of the legislative developments in this area until 2019 is available in the report by the President of the Council of Ministers to the Senate in the implementation of the mechanisms between July 2016 and December 2018, “[Relazione al Parlamento in materia di esercizio dei poteri speciali](#)”, 1 April 2019, p.4.

<sup>221</sup> The “golden powers” legislation incorporates, since 2019 and the adoption of [Decree-Law n.22 of 2019](#), the possibility for Italian authorities to assess the purchase of products and services relating to 5G technology from non-European suppliers. While it is integrated into the “golden powers” legislation, it is not an investment screening mechanism, and was consequently not notified by the Italian authorities. It is as such not covered by this report.

<sup>222</sup> Most of the [Decree-Law n.21 of 2022, converted with modifications into Law n.51 of 2022](#) entered into force in May 2022 with the exception of the rules on corporate acquisitions and asset deals by European and non-European entities (and related thresholds), which will come into force on 1 January 2023 (with the temporary regime introduced by [Decree-Law n.23 of 2020](#) remaining in force until 31 December 2022).

sectors, and which examines the information. This information may trigger internal investigations or requests to investors to provide additional information.

314. The Italian authorities are participating actively in the cooperation mechanism. According to publicly released information,<sup>223</sup> Italian authorities notified 20 cases through the national procedure with the European Commission and with the other EU Member States between October 2020 and the beginning of 2021 (13 transactions were notified in 2020, seven transactions at the beginning of 2021).<sup>224</sup> They concerned transactions of companies mainly involved in industrial products and services, defence and aerospace, services (financial, media and advertising), advanced technologies (semiconductors, telecommunications and software), and energy.<sup>225</sup> Between October 2020 and early 2021, Italy received information on 34 investment transactions from other Member States of which some had also been notified by Italy.

315. It is uncertain whether and under which legal rules Italian authorities would be able to effectively gather information that they are required to share pursuant to Article 7(5) of the EU Regulation for transactions taking place in Italy but that do not fall under the scope of the Italian screening mechanism. No explicit rules appear to exist that would allow the Italian authorities to request such information from private parties or to compel persons that would hold such information to provide timely and accurate information in this scenario.

### 3.8.2. Screening under the “golden powers” regime

316. Italy’s investment screening framework is based on [Decree-Law no.21 of 2012](#) converted, with amendments, into law by the [Law no.56 of 2012](#), and became operational on 3 October 2014. Italy’s investment screening framework is based on [Decree-Law no.21 of 2012](#) converted, with amendments, into law by the [Law no.56 of 2012](#) and became operational on 3 October 2014. Seven decrees provide for

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<sup>223</sup> Article 3bis of Decree-Law n.21 of 2012 requires the Italian Government to report by 30 June of each year to the Parliament on the use of the golden powers and to list all the decisions taken in the exercise of the golden powers. Decisions of the Council of Ministers are not publicly available but are communicated to the company concerned by the use of the golden powers. Numbers reported here are based on “[Relazione al Parlamento in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni \(Golden Power\)](#)”, covering 2020, p.40.

<sup>224</sup> In seven cases, comments or opinions were received from other Member States or the EU Commission. In six occasions, the European Commission requested additional information. For some cases, more Member States, in addition to the Commission, have expressed an interest in cooperation. Furthermore, some operations with an extra national impact have also been notified by other Member States (“[Relazione al Parlamento in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni \(Golden Power\)](#)”, covering 2020, p.40).

<sup>225</sup> The list of operations notified to the European Commission and other Member States in 2021 is available in “[Relazione al Parlamento in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni \(Golden Power\)](#)”, covering 2020, pp. 174-175.

details and rules on implementation of the golden powers.<sup>226</sup> The overall framework has been repeatedly adjusted and its scope was progressively broadened to cover additional sectors.<sup>227</sup>

*a. Implementation practice*

317. Italy has reported a steady and swift increase in the number of transactions notified to the Italian Government. While only 18 transactions were notified in 2015, the first full year of its operation, this number has increased 18-fold within five years to 342 transactions in 2020; a four-fold increase was noted between 2019 and 2020 alone. The Italian authorities explain the growth of the case-load in part with the expansion of the scope of the mechanism, notably the broadening that was introduced in response to the exceptional circumstances of the COVID-19 pandemic. In 2020, the “golden powers” were used in 24 cases: a single transaction was prohibited, and mitigation measures were applied in 23 cases. 154 transactions, accounting for almost half of the total transactions notified, were considered not falling within the scope of application of the EU Regulation (therefore, they were not formally subject to screening). This high number of transactions falling outside the scope of the Italian legislation can be due to the fact that a lot of transactions are filed for information purposes and in the interest of full transparency, in order to avoid sanctions in the case of breach of the notification obligation.

318. Moreover, Decree-Law n. 21 of 2022, converted with modifications into Law n. 51 of 2022, has provided for a pre-filing mechanism (whose procedural rules will be identified by the secondary legislation) as already in force in other EU countries, which according to Italian authorities could reduce the number of transactions subject to screening, because it aims at providing a preliminary assessment on the applicability of the EU Regulation and the need of a mandatory authorisation of the transaction to the parties.<sup>228</sup>

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<sup>226</sup> [Presidential Decree 35/2014](#) of 19 February 2014 sets out the competence and procedures for the exercise of the special powers to review and restrict foreign investment in the defence and national security sector. [Presidential Decree 86/2014](#) of 25 March 2014 sets out the procedures for the activation of the special powers in the fields of energy, transport and communications. [Ministerial Decree 108/2014](#) of 6 June 2014 identifies the activities of strategic importance for the system of national defence and security. [Ministerial Decree of 6 August 2014](#) sets out the organisational and procedural aspects of the preparatory aspects for the exercise of the special powers such as the setup of an inter-ministerial coordination committee. [Decree of the Secretary General of 18 February 2015](#) sets out the model for notifications for transactions in the strategic sectors. A [government website](#) of the President of the Council of Ministers now aggregates the rules and provides centralised access to [filing forms](#) and [information on the implementation of the policies](#). [Decreets 179/2020](#) and [180/2020](#) of the President of the Council of Ministers, which entered into force on January 14, 2021, significantly modified and clarified the scope of the ‘strategic assets and activities’ which are subject to the Italian regulation on the Foreign Direct Investment screening. The first one identifies the strategic assets and activities in the so-called “high tech sectors” (it contains a very detailed list of strategic assets and activities in all the sectors other than those identified by the [Decree 180/2020](#), such as energy, water, health, storage, process and control of personal and sensitive data, artificial intelligence, robotics, semiconductors, cyber security, nano and bio technologies etc.); the second one updates the list of strategic assets and activities in the energy, transportation and communication sectors, updating and repealing the previous implementing regulation provided by the [Presidential Decree no. 85/2014](#).

<sup>227</sup> Parts of the regulatory developments are set out in detail in “[Relazione al Parlamento in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni \(Golden Power\)](#)”, covering 2020, pp.4-27.

<sup>228</sup> “[Relazione sulla politica dell’informazione per la sicurezza 2020](#)”, p.48 and “[Relazione al Parlamento in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni \(Golden Power\)](#)”, covering 2020, p.2.



b. *Institutional set-up of the screening mechanism*

319. The Italian Department for administrative coordination ([Dipartimento per il coordinamento amministrativo, DICA](#)) within the Presidency of the Council of Ministers is responsible for the inter-ministerial organisation and the legal and administrative support of the exercise of the golden powers.<sup>229</sup> A service within this Department, the [Servizio per le attività propedeutiche all'esercizio dei poteri speciali](#), currently staffed with nine officials, is the front office for the screening mechanism. This service coordinates and manages the preparatory activities for the exercise of the golden powers and prepares and informs the considerations of the Coordination Group (*Comitato di coordinamento*).

320. In early 2022, the capacity of the Department for administrative coordination was considerably strengthened.<sup>230</sup> A new evaluation unit for strategic analysis regarding the exercise of special powers (*nucleo di valutazione e analisi strategica in materia di esercizio dei poteri speciali*) was created and is staffed with ten professionals. The change also allows the Department for administrative coordination to draw on the assistance of the Italian tax police (*Guardia di Finanza*) to investigate possible cases of failure to notify a relevant transaction.

321. When a transaction that falls within the scope of the golden powers is notified, the Prime Minister's office designates a Ministry to carry out an investigation of the transaction and to develop a proposal for the exercise of the golden powers. The choice of the Ministry depends on the sector concerned by the industry sector associated with the transaction.<sup>231</sup> In 2020, almost half of the investigations were conducted by the Ministry of Economic Development.<sup>232</sup> According to Italian authorities this percentage was significantly reduced with the entry into force of Prime Minister's [Decree No. 179/2020](#), which supplemented the Coordination Group with representatives of the relevant Ministries in relation to the specificity of the subject matter dealt with.

322. A Coordination Group in the Prime Minister's office assesses the implications of any transaction under the golden powers. This inter-ministerial organ is chaired by the Secretary General of the Presidency of the Council of Ministers and brings together representatives from the Prime Minister's office and heads

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<sup>229</sup> Setup established by the [Decree of the President of the Council of Ministers 6 August 2014 - Identification of the organisational and procedural methods for carrying out the activities preparatory to the exercise of special powers](#)", this service is part of an administrative unit ([Dipartimento per il coordinamento amministrativo, DICA](#)) of the Presidency of the Council of Ministers.

<sup>230</sup> [Decree-Law n.21 of 2022, converted with modifications into Law n.51 of 2022](#), Article 27.

<sup>231</sup> For transactions in the defence and national security sector, the Ministry of Defence or the Ministry of the Interior, according to their respective areas of competence, are competent (Article 3 of the Decree of the President no.35/2014). For transactions in identified assets of strategic importance in the fields of energy, transport, and communications and for all the strategic sectors individuated in Article 4(1) of the EU Regulation, the Ministry of Economic Development or the Ministry of Infrastructure and Transport, according to the respective areas of competence. For companies directly or indirectly owned by the Ministry of Economy and Finance (MEF), the activities related to the investigation and proposal for the exercise of special powers are entrusted to the MEF itself (Article 3, of Presidential Decree 35 and of Presidential Decree 86).

<sup>232</sup> In 2020, the Ministry of Economic Development (MISE) was responsible for launching investigations into approximately 68% of the notifications received by the Italian authorities. Other Ministries, such as the Ministry of Economy and Finance (MEF) (16%) or the Ministry of Defence (11%), also contributed significantly to the investigations launched by the Italian authorities. "[Relazione al Parlamento in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni \(Golden Power\)](#)", covering the year 2020, p.33.



of specific offices of relevant Ministries.<sup>233</sup> It acts as a body for the “confluence of the opinions” of the different administrations involved in the exercise of the golden powers.<sup>234</sup>

323. The Coordination Group can request public administrations, public or private entities, businesses and any other third party to provide information and submit any useful document for the assessment of a given transaction (Article 16, paragraph 1, letter e) of Decree-Law no.23). Several authorities are explicitly required to collaborate with the Coordination Group and to provide information for the purposes of facilitating the exercise of the golden powers (Article 2-*bis* of Decree-Law no.21). These authorities include the Bank of Italy, the National Commission for Companies and the Stock Exchange (CONSOB), the Transport Regulatory Authority (ART) and the Competition and Market Authority (AGCM),<sup>235</sup> among others.

324. The Ministry in charge of the investigation prepares a draft proposal for the exercise of the golden powers or proposes a draft resolution outlining the reasons not to exercise such powers, taking into account the findings and opinions of the Coordination Group. The Ministry transmits the draft proposal or the draft resolution with observation received from any administration participating in the Coordination Group to the Presidency of the Council of Ministers. The final decision is taken by the Council of Ministers.

325. Compliance with conditions and prescriptions that may be imposed to certain transactions are generally monitored by the Ministry in charge of the investigation.<sup>236</sup> In cases where their verification requires the participation of several administrations, the practice is to entrust the monitoring activity to specific “Monitoring Committees”. These Committees are set up by specific decrees of the President of the Council of Ministers and are usually coordinated by a representative of the Presidency of the Council of Ministers and composed of representatives of the Ministries competent for the matter, supplemented by the presence of a member of the Department of Information for Security.<sup>237</sup>

*c. Competence to consider other EU Member States’ security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

326. It is uncertain whether Italian authorities would be in a position to assess, adopt conditions or obligations, prohibit or unwind an investment or take interim measures if a transaction is likely to affect the security and public order of a different EU Member State, other than Italy, or if such a transaction is likely to affect projects or programmes of Union interest. While the Italian authorities must consider certain

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<sup>233</sup> Authorities responsible for the screening process are the Presidency of the Italian Council of Ministers in coordination with the Ministry of Defence, the Ministry of Interior, the Ministry of Finance, the Ministry of Infrastructure and Transport, and the Ministry of the Economic Development. Since the implementation of the EU Regulation, other ministries are also involved in the screening process such as Ministry for Public Health and Ministry for Agricultural Policies.

<sup>234</sup> “[Relazione concernente l’attività svolta sulla base dei poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni \(Aggiornata al 30 giugno 2016\)](#)”, report to the Parliament, 17<sup>th</sup> Parliament, Doc. CCXLIX, no.1, 22 December 2016, p.4.

<sup>235</sup> Similarly, Decree Law n.23 of 2020 envisages that agreements or memoranda of understanding with research institutes or entities may be entered into to establish forms of regular cooperation and strengthen existing intelligence tools with a view to an effective exercise of the Golden Power.

<sup>236</sup> The monitoring processes are generally regulated by Article 7 of the [Presidential Decree n.35 of 2014](#) and by Article 7 of the [Presidential Decree n.85 of 2014](#).

<sup>237</sup> In February 2022, three monitoring committees were in place (TIM Spa/Vivendi SA; Piaggio Aereo Industries Spa; and one relating to all procedures relating to the supply of 5G goods and services).

“official positions” of the EU during the risk assessment, this consideration seems to be limited to the EU position on whether there are objective grounds to believe that there are links between the purchaser and countries that feature certain characteristics.<sup>238</sup>

327. No explicit rules have been laid down that would specify the extent to which Italian authorities use incoming information from the cooperation mechanism for their own decisions on authorisations of specific foreign investments in Italy. The list of factors that may be considered during the risk assessment does not refer to comments or opinions from other Member States or the EU Commission.

328. Incoming information through the cooperation mechanism can lead to an *ex officio* investigation for transactions which have not been authorised but that do fall under the scope of the mechanism.<sup>239</sup>

*d. Substantial scope of the screening mechanism*

329. The scope of the Italian screening mechanism covers two areas, to which distinct rules apply.<sup>240</sup> The first area of application, organised under Article 1 of Decree-Law n.21 of 2012, requires a mandatory notification for certain transactions and internal corporate actions by a foreign investor – regardless of its nationality and therefore including non-Italian EU citizens – involving strategic companies operating in the Italian defence and national security sectors. Covered transactions or covered internal corporate actions include:

- Acquisition of more than 3% of share capital or voting rights for listed and not listed companies (and any subsequent acquisition exceeding, 5%, 15%, 20%, 25% and 50%); and
- Certain internal corporate actions leading, among others, to the merger/demerger of the company; transfer of the company, branches, or subsidiaries or to transfer abroad of the registered office.

330. The second area of application, organized under Article 2 of Decree-law no.21 of 2012, requires a mandatory notification for certain transactions or internal corporate actions in strategic sectors such as energy, transport, communications, and other sectors pursuant to Article 4(1) of the EU Regulation.<sup>241</sup> Depending on the nationality of the investor, different procedures apply:

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<sup>238</sup> This applies to countries which do not recognise the principles of democracy or the rule of law, which do not respect the rules of international law or which have adopted conduct deemed unsafe for the international community, as inferred from the nature of their alliances, or have relations with criminal or terrorist organisations or persons linked to them ([Article 1.3 b\) of Decree-Law n.21 of 2012](#)).

<sup>239</sup> [Article 2.bis of Decree-Law n.21 of 2012](#).

<sup>240</sup> The following description sets out the features under a temporary adjustment which was introduced by [Decree-Law n.23 of 2020](#) and is set to expire on 31 December 2022. Most of the adjustments are however expected to become permanent by virtue of [Decree-Law n.21 of 2022](#), [converted with modifications into Law n.51 of 2022](#), which is scheduled to enter into force on 1 January 2023.

<sup>241</sup> This includes in the scope of the Government’s special powers, with immediate effect, all the strategic sectors individuated in Article 4(1) of EU Regulation 2019/452 and also those listed in letters c, d, and e, for which the exercise of special powers of the Government had not yet been provided for, which are: (a) critical infrastructure, whether physical or virtual, including 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; (b) critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies; (c) supply of critical inputs, including energy or raw materials, as well as food security; (d) access to sensitive information, including personal data, or the ability to control such information; and (e) freedom and pluralism of the media.

- For non-EU investors, a mandatory notification is required for any direct or indirect acquisition of 10% of equity interests or voting rights by non-EU investors provided that the value of the investment is equal to or higher than EUR 1 million, and for any further acquisitions that lead to holdings above 15%, 20%, 25% and 50% of share capital; or
- For all investors, regardless of their nationality, a mandatory notification is required for any acquisition of control in companies operating in strategic sectors, as well as for certain internal corporate acts (resolution, decisions, acts, or operations), adopted by an undertaking that holds one or more assets identified as strategic, if the corporate act leads to change of control, ownership, or availability of such strategic assets.

331. Projects or programmes of Union interest, as defined in Annex I of the EU Regulation, are not explicitly included in the scope of any of these two schemes and may thus not be covered by the application of the golden powers.

*e. Procedural organisation of the screening process*

332. Investors must notify the Italian authorities prior to executing an acquisition, and within ten calendar days if the operation is an internal corporate action.<sup>242</sup> When an act or transaction results in the change of ownership, control or availability of assets, a notification obligation also exists for the target company.<sup>243</sup>

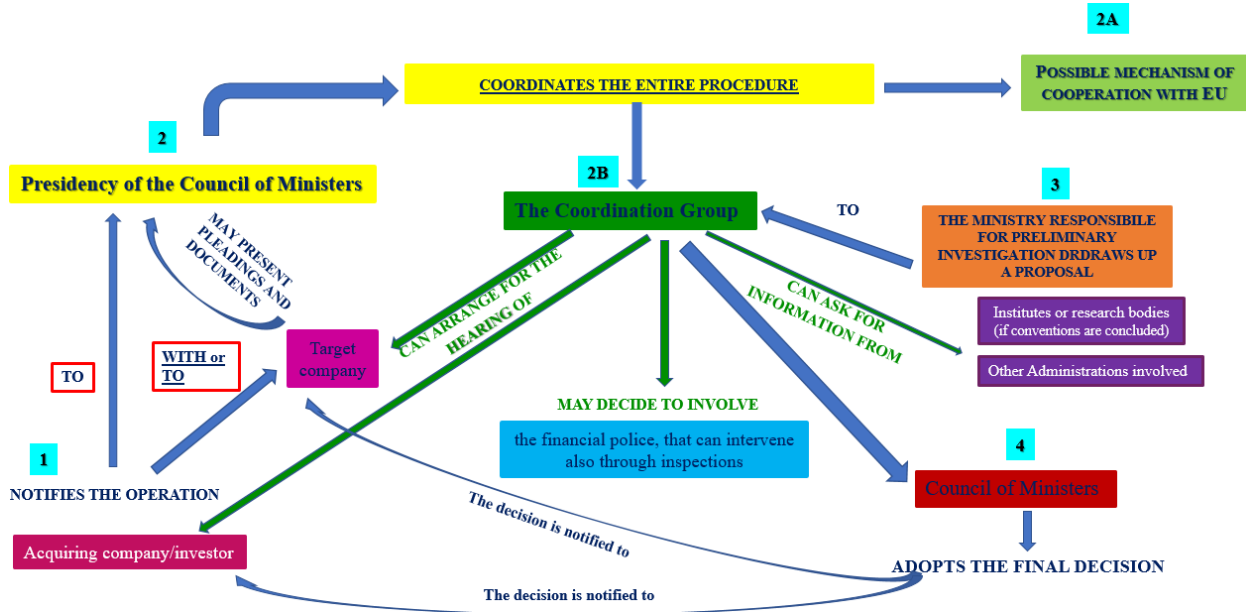
333. The Italian authorities review transactions in one phase. Counting from the date of notification of a transaction to the authorities, 45 calendar days are available to assess and decide on the course of action. The authorities may suspend this timeframe to request information from the company (for up to 10 days) or third parties (for up to 20 days). If no decision is taken within the timeframe, the transaction is considered authorised.

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<sup>242</sup> Information is collected in this context through forms, which are available from a [website](#). The applicable form depends on the sector concerned by the transaction.

<sup>243</sup> With the entry into force of [Decree-Law n.21 of 2022, converted with modifications into Law n.51 of 2022](#), the procedural organisation of the screening process is changed. A joint notification with the target company has been provided.

Figure 9. Visual representation of the screening procedure in Italy



Source: Segretariato Generale – Dipartimento per il coordinamento amministrativo, Ufficio per la concertazione amministrativa e il monitoraggio, Servizio per le attività propedeutiche all’esercizio dei poteri speciali, 19 May 2022.

334. To accommodate incoming information under the cooperation mechanism, some adjustments were made to the strict timeframe: the clock is suspended if either the Member State or the EU Commission indicate their intention to issue comments or an opinion; this suspension can last until the comments or opinion is received, but no longer than provided for by the EU Regulation. The clock is also suspended if the Italian authorities requests the EU Commission to issue an opinion or other Member States to make comments.

335. Italian authorities can review a transaction that has not been notified but falls under the scope of the mechanism *ex officio* without limits of time.<sup>244</sup> The clock for review begins from the date on which the Italian government establishes the breach of the notification obligation.

336. The Italian contact point notifies the transaction to other Member States and the EU Commission after assessing, within the Coordination Group, whether the transaction falls within the scope of the Italian regulations and the presence of non-EU entities.

*f. Powers in cases where security or public order is or may be affected*

337. Under [Decree-Law n.21 of 2012](#), assessments of whether a transaction or an internal corporate action poses a threat to essential interests of defence and national security are made against a closed list of factors. These include links between the acquirer and countries that do not recognise the principles of democracy or the rule of law; and the effects of a transaction or internal corporate action on the security

<sup>244</sup> A purchaser who has omitted to file a notification can be subject to monetary penalties of not less than 1% of the cumulative global turnover realised by the companies involved in the transaction, capped at twice the value of the transaction.

and continuity of supply for key strategic activities.<sup>245</sup> If a non-EU investor makes the transaction or the internal corporate action, additional criteria can be taken into consideration such as:

- Whether the investor is directly or indirectly controlled by the public administration, including state bodies or armed forces, of a country outside the European Union, including through ownership or substantial financing; and
- Whether the investor has already been involved in activities affecting security or public order in a Member State of the European Union.

338. The Italian Government may prohibit a transaction, attach obligations to an authorisation, or veto decisions regarding covered companies or their ownership structure. All decisions are subject to principles of proportionality and reasonableness ([Article 1.3 of Decree-Law n.21 of 2012](#)).

339. A breach of the procedure or of the imposed obligation may be sanctioned. Available sanctions include the suspension of voting rights, the invalidity of the transaction, or administrative penalties, which must be proportionate to the value of the transaction and to the turnover of the involved companies.

### 3.9. Malta

340. Malta established an investment screening mechanism under the [National Foreign Direct Investment Screening Office Act, 2020](#) (“NFDIS Office Act”). The NFDIS Office Act and mechanism established thereunder became effective on 11 October 2020, the same day that the EU Regulation began applying.<sup>246</sup>

#### 3.9.1. Arrangements for the participation in the cooperation mechanism

341. Under Article 9(1) of the NFDIS Office Act, the *National Foreign Direct Investment Screening Office* (NFDIS Office) carries out the functions of the contact point for the EU Regulation 2019/452.<sup>247</sup>

342. Between September 2020 and September 2021, Maltese authorities notified fifteen transactions undergoing screening in Malta to Member States and the EU Commission. In the same timeframe, the NFDIS Office reviewed more than 300 investment proposals occurring in other EU Member States.<sup>248</sup>

343. While Article 9(1)(l) of the NFDIS Office Act mandates the Office to “establish and implement the system by which Malta shall participate in the cooperation mechanism established in the Regulation”, no explicit rules on the specific processes and involved actors had been published by 30 June 2022.<sup>249</sup> According to the Maltese authorities, the NFDIS Office involves relevant Ministries such as Economy,

<sup>245</sup> [Article 1.3.a of the Decree-Law n.21 of 2012](#).

<sup>246</sup> [National Foreign Direct Investment Screening Office Act, 2020 – ACT LX of 2020](#), Part I 1.(2).

<sup>247</sup> The NFDIS Office Act itself contains a general rule suggesting that the Office shall “participate in the cooperation mechanism established in the Regulation as deemed necessary” and “provide to the Commission any information that may be duly justified in terms of the Act and the Regulation” (NFDIS Office Act, Article 9(1)(m) and (k)) and that if the Office subjects a transaction to screening, this decision “triggers the cooperation mechanism” (NFDIS Office Act, Article 12(4)).

<sup>248</sup> Statement by the Chief Operations Officer at the National FDI Screening Office in an interview in [The Accountant](#), Issue 1 of 2021 (April 2021), p.22.

<sup>249</sup> The Malta FDI Screening office stated its intention to define the procedures and processes for its participation in the cooperation mechanism either through public documentation or through an amendment to the NFDIS Office Act; no calendar for this step was given by 30 June 2022.

Interior, Competition, Finance etc. when it treats incoming requests under the cooperation mechanism. The procedures and Ministries and agencies involved are specific to each case and are decided ad hoc.

344. With respect to incoming requests for information from other Member States or the EU Commission, sub articles 9(1), (2) and (3) of the NFDIS Office Act mandate the Office to provide any information that may be duly justified, including to provide information that they are required to share pursuant to Article 7(5) of the EU Regulation for transactions taking place in Malta but that are not, not yet or no longer undergoing screening in Malta. Article 9(2) of the NFDIS Office Act provides powers to the Office to gather such information from persons engaged in the public sector and sets a 10-day timeline for their response.<sup>250</sup>

### 3.9.2. *Screening under the NFDIS Office Act*

#### *a. Implementation practice*

345. Given the recent entry into effect of the screening mechanism, information on the implementation is so far limited. According to Maltese officials, the NFDIS Office received over 1,000 applications for pre-evaluation in the first year of its operation until September 2021. According to the same source, fewer than ten transactions “were aborted or failed” because they did not meet the “required due diligence or fell by the wayside for other reasons”.<sup>251</sup> Several approvals were reportedly associated with conditions to monitor the investment for a specified period.<sup>252</sup>

#### *b. Institutional set-up of the screening mechanism*

346. Investment screening under the NFDIS Office Act is carried out by the NFDIS Office and its Board. The Board is composed of five to seven individuals<sup>253</sup> appointed by the Minister responsible for investment for two-year terms, renewable once for a further two-year period (NFDIS Office Act, Article 5).<sup>254</sup>

347. The entire investment screening function has been delegated to the NFDIS Office and its Board and no Ministerial or other government involvement takes place directly in the operation of the screening or final decisions, other than through the Members of the Board who are government officials.<sup>255</sup> The

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<sup>250</sup> While Article 9 NFDIS Office Act does not explicitly mention powers to compel persons or entities outside of the public sector to provide information, Article 9(3) NFDIS Office Act provides that the Office shall have the right of access to all relevant information, and may seek clarifications and explanations that it may deem necessary.

<sup>251</sup> Minister Silvio Schembri, [declaration](#) during the National Foreign Direct Investment Screening Office inauguration, 27 September 2021.

<sup>252</sup> Statement by the Chief Operations Officer at the National FDI Screening Office in an interview in [The Accountant](#), Issue 1 of 2021 (April 2021), p.22.

<sup>253</sup> The officeholders are listed on the Office’s [website](#). As of 30 June 2022, the Board included the Permanent Secretaries (Heads) of the Ministry of Finance, the Ministry of Economy and Industry, and the Registrar (CEO) of the Malta Business Registry, who are all government employees. Article 5(11) NFDIS Office Act provides that Board members receive an honorarium at the discretion of the Minister.

<sup>254</sup> It is uncertain whether and how continuity of operations of the Board and Office are ensured as the tenure of the Board members presumably end simultaneously.

<sup>255</sup> The Minister may make regulations and issue orders to give effect to the NFDIS Office Act (NFDIS Office Act, Article 20), but no such regulations or orders had been published by 30 June 2022.



Board enjoys significant latitude in making arrangements for the operation of its office and elects its own Chair.

348. To the extent that the rules for investment screening are not laid down in legislation, the Office establishes the rules for the screening mechanism as well as rules for carrying out such screening (Article 9(1) NFDIS Office Act) itself. As of 30 June 2022, none of these arrangements were publicly documented, but the NFDIS Office communicated its intention to publicly document these arrangements or include them in a future amendment of the NFDIS Office Act. The Office is also entitled to specify and levy fees for the operation of the screening mechanism but had not made use of this possibility as of 30 June 2022.<sup>256</sup>

349. The Office assesses, investigates, authorises, conditions, prohibits, or unwinds foreign direct investment on grounds of security or public order in Malta. The Board takes decisions on whether an investment in Malta is to be allowed, prohibited, conditioned, or unwound with a majority decision. According to the Maltese authorities, the Board meets regularly, at least once every six weeks, and investment proposals may be discussed on a round robin basis with the Board and a decision formalised at Board level.

350. The NFDIS Office can commence *ex officio* investigations. It was designated as the contact point for information exchange under the EU Regulation. It is also in charge of implementing final screening decisions and of imposing and monitoring any condition associated with a screening decision.

351. The NFDIS Office is entitled to request information from public administrations of Malta as well as other parties (Article 9(2) and (3) NFDIS Office Act). No information on internal arrangements and workflow of the NFDIS Office is currently available. The extent to which the NFDIS Office draws on information and expertise from Ministries, public administrations, intelligence sources or documents held by the judiciary therefore remains unknown. Maltese authorities have stated that interactions between the NFDIS Office and the government in relation to screening operations take place through Permanent Secretaries and are followed up by the Office Permanent Secretary.

*c. Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

352. It does not appear that Maltese authorities have competency to assess, condition, prohibit or unwind a transaction that threatens security or public order of *a different* EU Member State, other than Malta, or likely to affect projects or programmes of Union interest. The legislation establishes the competency of the NFDIS Office if a transaction “affects the security or public order of Malta” and does not refer to the security or public order interests of other EU Member States or interests related to EU projects or programmes. The legislation also establishes the competency of the NFDIS Office to “establish and implement the system by which Malta shall participate in the cooperation mechanism” as deemed necessary pursuant to Articles 6 and 7 of EU Regulation.

353. The extent to which incoming information or comments from Member States or opinions from the EU Commission feeds into investment screening decisions in Malta – to the extent that they need to be taken into due consideration or taken utmost account of – remains uncertain:<sup>257</sup> The list of factors that need to be considered by the Board of Malta’s NFDIS Office does not refer to comments from other Member States or comments from the EU Commission.<sup>258</sup> The mandate of the NFDIS office set out in Article 9(1)

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<sup>256</sup> NFDIS Office Act, Article 9(1)(o).

<sup>257</sup> EU Regulation Articles 6(9), 7(7), 8(2)(c).

<sup>258</sup> NFDIS Office Act, Article 12 (9) mentions that in conducting pre-screening and screening processes, the Office “may obtain further information and statements from *other public authorities*, to the extent deemed necessary”

of the NFDIS Act apply, and the NFDIS Office has expressed its intention to clarify how its approaches these issues either in public documentation or through an amendment to the NFDIS Office Act.

*d. Substantial scope of the screening mechanism*

354. Malta’s investment screening mechanism is triggered by a notification received from any person involved in a foreign direct investment in Malta (or *ex officio* in the absence of such a notification). The notification is due if a foreign investment is made by a person who is or is beneficially owned<sup>259</sup> by a person from outside the European Union in sectors mentioned in the schedule of the NFDIS Act or under factors mentioned in the schedule; when an existing foreign investment changes its business orientation so that it affects sectors or factors mentioned in the schedule; or when the ownership structure of an existing investment changes to include a cumulative foreign (non-EU) holding of at least 10% or when the controlling interest of the company that has made an investment in Malta changes and passes to a foreign investor (NFDIS Office Act, Article 11).

355. The sectors mentioned in the schedule are the same as those identified in Article 4(1) of the EU Regulation.<sup>260</sup> As the notification requirement under Article 11 of the NFDIS Office Act also arises where an investment “affects any of the factors” mentioned in the schedule, it would appear that investment screening in Malta can also cover investments in any other sector provided that factors such as foreign government control of the investor; previous involvement in activities affecting security or public order of EU Member States; or risk of engagement in criminal activity are present. The list of projects or programmes of Union interest, as defined in Annex I of the EU Regulation, are not explicitly included under the scope of Malta’s screening mechanism.

356. The definition of “foreign direct investment” under the NFDIS Act is broad, and broadly similar to the definition adopted in the EU Regulation, Article 2(1). It includes investments “of any kind by a foreign investor aiming to establish or to maintain lasting and direct links in order to carry on an economic activity in Malta, including investments which enable effective participation in the management or control

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(emphasis added); it is uncertain whether authorities of other Members States or the EU Commission are *other public authorities* in the sense of the legislation.

<sup>259</sup> The term ‘beneficial owner’ is defined in the NFDIS Office Act, Article 2(1), as “any natural person or persons who ultimately own or control the customer and, or the natural person or persons on whose behalf a transaction or activity is being conducted, and: beneficial owner shall consist of any natural person or persons who ultimately own or control that body corporate or body of persons through direct or indirect ownership of ten percent (10%) plus one (1) or more of the shares or more than ten percent (10%) of the voting rights or an ownership interest of more than ten percent (10%) in that body corporate or body of persons”.

<sup>260</sup> Critical infrastructure, whether physical or virtual, including 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 or close to such infrastructure; critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No.428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies as well as health, medical and pharmaceutical technologies; the supply of critical inputs, including energy or raw materials, food security, medical and protective equipment; access to sensitive information, including personal data, or the ability to control such information; the freedom and pluralism of the media.

of a company carrying out an economic activity and any investments made pursuant to a public procurement process” (NFDIS Office Act, Article 2).<sup>261</sup>

357. Greenfield investments in Malta appear to be covered by the screening mechanism, provided the other conditions are met. The Maltese authorities also suggest that the creation of joint ventures in Malta, to which a foreign and a Maltese enterprise contribute capital or assets are in principle covered transactions; whether the same is true when the Joint Venture is incorporated, under otherwise identical conditions outside Malta, is uncertain.

*e. Procedural organisation of the screening process*

358. The assessment of whether a transaction that is subject to a notification obligation represents an actual risk and thus an intervention is carried out in two phases. Five working days are available in the pre-evaluation phase to assess whether a notified transaction presents a “risk potential”<sup>262</sup> and should be subject to a formal screening. The second phase consists of an in-depth review, for which sixty calendar days are available. The time available for this in-depth review may be extended if necessary. The lapse of time is suspended at any stage of the review process when additional information from the parties to the transactions is required. Malta has reported, based on practical experience since the coming into effect of its mechanism, that the average length of the initial assessment lasts at most a couple of days, while the entire screening process lasts “about three weeks”.<sup>263</sup>

359. Malta introduced its own [notification form](#) for Assessment by the National Foreign Direct Investment Screening Office. This form contains a specified set of information that includes the information mentioned in Art 9(2) of the EU Regulation.

360. Only cases that are subjected to a formal screening in phase 2 are notified to the cooperation mechanisms pursuant to Article 6(1) of the EU Regulation (NFDIS Office Act, Article 12(4)). Where no formal review is opened because the initial review in phase 1 does not suggest that any “risk potential” is associated with the transaction, and thus no notification under Article 6(1) of the EU Regulation made, Maltese authorities thus potentially allow transaction to advance without having had the possibility to receive input from other Member States or the EU Commission.

*f. Powers in cases where security or public order is or may be affected*

361. Comparatively severe consequences are available to the Office in cases where investments have not been notified or information is deemed incorrect, incomplete or has not been delivered to the office within 20 days following the request. Transactions that need to be notified under the NFDIS Office Act but have not been notified can be unwound (NFDIS Office Act, Article 16). Where information is deemed inaccurate or not delivered in a timely manner, the Office may prohibit and unwind a transaction.

362. In turn, the implementation of a decision to unwind an investment can only be enforced based on a court decision (NFDIS Office Act, Article 15(2)); the Office itself does not have powers to enforce its decision or order interim measures.

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<sup>261</sup> In an interview in [The Accountant](#), Issue 1 of 2021 (April 2021) p.22, a Member of the current Board suggests that public procurement is “technically outside the remit of the Act, but the Office may intervene in cases of long standing projects that involve non-EU UBOs”.

<sup>262</sup> This term is not explicitly employed in the Act. In an interview in [The Accountant](#), Issue 1 of 2021 (April 2021), p.20, the Chief Operations Officer at the National FDI Screening Office employed this term to describe the pre-evaluation phase objective.

<sup>263</sup> [The Accountant](#), Issue 1 of 2021 (April 2021), p.22.

### 3.10. Slovak Republic

363. The Slovak Republic has made several distinct efforts to establish an investment screening mechanism. It established a national contact point for implementation of the EU Regulation in time for its entry into force, on 16 September 2020, through [Resolution 558/2020](#).

364. A screening mechanism specifically for critical infrastructure assets – which the Slovak authorities have themselves qualified as insufficient<sup>264</sup> – entered into effect on 1 March 2021 as an interim arrangement until a broader screening mechanism, which is under preparation in parallel, comes into effect.

365. Legislation seeking to establish a more broadly applicable investment screening mechanism is under preparation since late 2019. Consultations took place in 2020,<sup>265</sup> further to which the Minister of Economy tabled a [draft bill](#) on 2 June 2021, “[Foreign Investment Screening and Amendments to Certain Acts](#)” for the establishment of a investment screening mechanism to contribute to the protection of the security and public order of the Slovak Republic or in the European Union.<sup>266</sup> According to the final clauses of the bill, the entry into force of the comprehensive investment screening mechanism would abolish the screening mechanism related to critical infrastructure.<sup>267</sup> The Slovak authorities indicated that the entry into force is planned for 1 January 2023.

#### 3.10.1. Arrangements for the participation in the cooperation mechanism

366. The Slovak Republic’s Ministry of Economy is designated as the national contact point for the purposes of the Regulation by virtue of [Resolution 558/2020](#). The Ministry’s Investment Department carries out the functions of the contact point.<sup>268</sup>

367. The Investment Department is responsible for handling incoming and outgoing information under the European cooperation mechanism. It receives and assesses incoming notifications, shares them with relevant Ministries and agencies, aggregates opinions, motions, and information provided by the Ministries and agencies and consults them where necessary. The contact point also prepares comments as required.

368. [Resolution 558/2020](#) requires all members of the Government and Chairpersons of other central State administration bodies to cooperate with the Ministry of Economy. According to information received from the Slovak authorities, informal administrative arrangements were made with each Ministry and relevant agency. Ministries and agencies have nominated a contact person for the purpose of investment screening. Their role is to handle all communication with the national contact point, including receiving relevant information and requests, ensuring their processing within the ministry or agency, and returning opinions or information produced or gathered by the ministry or agency.

369. Rules on the procedures and responsibilities for the Slovak authorities’ participation in the European cooperation mechanism are not currently regulated in detail. No specific rules appear to exist about the procedures and timelines that the contact point or screening authority has to follow for incoming or outgoing information requests. It is uncertain whether and under which legal rules Slovak authorities would be able to effectively gather information that they are required to share pursuant to Article 7(5) of the EU Regulation for transactions taking place in Slovak Republic but that do not fall under the scope of

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<sup>264</sup> [Impact assessment](#) related to Bill LP/2021/302, p.2.

<sup>265</sup> Ministry of Economy of the Slovak Republic, [Annual Report 2020](#), p.53.

<sup>266</sup> Legislative process PI/2021/71, “[Preliminary information](#)”, undated.

<sup>267</sup> Bill for a “[Law on the examination of foreign investment and on the amendment of certain laws](#)”, Article V.

<sup>268</sup> Ministry of the Economy of the Slovak Republic, [Annual Report 2020](#), p.53.

the Slovak screening mechanism. No explicit rules appear to exist that would effectively allow the Slovak authorities to request such information from private parties or to compel persons that would hold such information to provide timely and accurate information in this scenario.

370. There is no publicly available information on the Slovak Republic’s actual participation in the information exchange process under the EU Regulation. The extent to which government resources – staffing or budget – are available for participation in the cooperation mechanism under the EU Regulation is also not known.

### **3.10.2. Screening under the Act No.45/2011**

371. The temporary screening mechanism notified to the EU Commission was established through [Act No.72/2021 Coll.](#) amending [Act No.45/2011 Coll. on Critical Infrastructure](#) in an expedited procedure with reference to the COVID-19 pandemic,<sup>269</sup> and notably introduced a new section in the Act No.45/2011 ([§ 9a to § 9e](#)). The driving concerns for the reform is ensuring the continuity and reliability of critical infrastructure. It thus addresses scenarios where critical infrastructure assets may fall into the ownership of an acquirer that is incompetent or unable to ensure its continued operation and proper performance, for example in cases where the assets have been pledged as collateral in bankruptcy cases, or if critical infrastructure assets are otherwise transferred to an entity that is unable to ensure and guarantee the proper performance of the critical infrastructure assets.<sup>270</sup> These scenarios may also be present if an acquirer intentionally exploits their ownership position to actively undermine security interests. In response to the concern, prior government approval is henceforth required for any change of control, transfer, or acquisition of assets, shares or entities operating critical infrastructure, including where these result from liquidation, bankruptcy proceedings or restructuring, and independent of the nationality of the acquirer.<sup>271</sup> The sectors that are identified as critical infrastructure are listed in items 3 (energy) and 5 (industry) in [Annex 3 to the Act](#).<sup>272</sup>

#### *a. Implementation practice*

372. No information is yet publicly available to shed light on the implementation of the Slovak Republic’s interim investment screening mechanism, less than a year into its operation, and in particular with respect to case numbers or any action taken by the authorities under the investment screening mechanism. According to Slovak authorities, that is considered sensitive information under § 12

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<sup>269</sup> National Council of the Slovak Republic, VIII. Legislature, [Government proposal for an abbreviated legislative procedure on the government bill amending Act no. 45/2011 Coll. on Critical Infrastructure, as amended, and amending certain laws](#), 1 February 2021.

<sup>270</sup> [Explanatory Memorandum of the Government bill amending Act no. 45/2011 Coll. on Critical Infrastructure, as amended, and amending certain laws](#), General part, 1 February 2021.

<sup>271</sup> [Commission staff working document – Screening of FDI into the Union and its Member States](#), accompanying the document “Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.42.

<sup>272</sup> The sectors include, under the category “energy” mining, electricity, gas and oil and petroleum products; and, under the category “industry” the pharmaceutical, metallurgical industry and chemical industries.

Act No. 45/2011 Coll.<sup>273</sup> The extent to which government resources – staffing or budget – are available for the implementation of the mechanism is also not known.<sup>274</sup>

*b. Institutional setup of the screening mechanism*

373. The Ministry of Economy of the Slovak Republic is comprehensively responsible for the administration of the screening mechanism. While the Ministry of Economy can itself authorise transactions (Act No.45/2011, § 9b(6)), decisions on the conditioning or prohibition of transactions are the prerogative of the Slovak Cabinet. The Cabinet bases its decision on a motivated proposal prepared by the Ministry of Economy<sup>275</sup> that contains a comprehensive assessment of factors that motivate its proposal. Before the Cabinet takes a decision on the proposal, the State Security Council, composed of nine members, provides its opinion on the draft decision (Act No.45/2011, § 9b(8)).<sup>276</sup> The Slovak authorities have stated that while the Cabinet is not formally bound by the conclusions of the Ministry or the opinion of the State Security Council, the Cabinet base their decision on this material.

374. The review process – up until the submission of a proposal to the Government as the case may be – may take up to 60 calendar days from receipt of a notification or application. The legislation does not evoke the possibility of an extension, nor does it define the consequences of this 60-calendar-day timeframe elapsing without a decision. No time limits are set for the Cabinet to reach its decision.

*c. Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

375. The Ministry of Economy determines under the investment screening legislation if a covered transaction might disrupt the public order or national security of the Slovak Republic or another Member State or the interests of the European Union (Act No.45/2011, §§ 9b(1), 9b(5) and 9b(6)), and then prepares a draft government decision to prohibit a transfer or to order mitigation measures. Nevertheless, the Slovak Government may allow a transaction to take place, potentially under conditions, even if the Ministry of Economy considers that there are implications for security of public order (Act No.45/2011, §§ 9b(11), 9b(9) and 9b(7)(c)) for the Slovak Republic, the European Union or its Member States.

376. Information provided via cooperation mechanism under the EU Regulation is taken into consideration when deciding whether to start an assessment under the Act No.45/2011 Coll., as well as during the assessment on transactions undergoing screening in the Slovak Republic (§§ 9b(1), 9b(5), 9b(6) the Act No 45/2011 Coll.).

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<sup>273</sup> A slightly different approach should be adopted in the new legislation, planned for 1 January 2023. Under the new legislation, the Ministry of Economy will be obliged to compile and publish an annual report on the implementation of the new screening legislation.

<sup>274</sup> The [impact assessment that was prepared in the context of the legislative process](#) suggests that the introduction of the mechanism has no impact on the general government budget.

<sup>275</sup> The draft decision is prepared by the “Central Authority” (Act No.45/2011, § 9b(5)-(7)). Under Act No.45/2011, the “central authority” for a subject matter is defined in [Annex No.3 to Act No.45/2011 Coll.](#) The Ministry of Economy is the “central authority” for both subject matters covered by the screening mechanism.

<sup>276</sup> More information on the Security Council is available at [The Security Council of the Slovak Republic | Government Office of the Slovak Republic.](#)



*d. Substantial scope of the screening mechanism*

377. The Slovak screening mechanism is triggered by a notification of a transaction submitted by the acquirer, the acquisition target or any person who is in a position to transfer assets. The notification obligation arises when a transaction concerns an asset associated with industries listed in items 3 (energy) or 5 (industry) in [Annex 3 to the Act](#). Where the notification has been omitted, the Ministry of Economy is allowed to start the process ex officio (§ 9b (1) Act No 45/2011 Coll.).<sup>277</sup>

378. The rules distinguish two transaction types that are associated with respective procedural obligations:

- Transactions that consist of a transfer of an enterprise, part of an enterprise or a change in persons who have an interest of at least 10% or have corresponding influence over the enterprise need to be notified (Act No.45/2011, § 9(2)b)), including if the position of the person holding the interest or influence indirectly (Act No.45/2011, § 9b(2)). A review by the Ministry of Economy is possible but not mandatory; and
- The entry into liquidation or initiation of bankruptcy, restructuring or other similar legal proceedings, the commencement of execution or other similar enforcement proceedings, as well the commencement of pledge enforcement or enforcement of any other right in relation to the operator and/or its assets, irrespective of whether such proceedings falling under the jurisdiction of the authorities of the Slovak Republic are subject to a prior authorisation requirement (Act No.45/2011, § 9(2)c) in conjunction with § 9b(3)).

379. While greenfield investments are not covered by the screening legislation, asset acquisitions are generally covered as they may fall within the scope of § 9(2)c Act No.45/2011 Coll.

*e. Procedural organisation of the screening process*

380. The investment screening regime is triggered by the notification of a transaction submitted by the acquirer, the acquisition target or any person who is in a position to transfer assets. According to the Slovak authorities, notifications that are submitted do not systematically contain all of the information mentioned in Article 9(2) of the EU Regulation. However, this information could be additionally requested – under Article 9(2) of the EU Regulation and §9b(5) of the Act No.45/2011 Coll.

381. The review process takes place in two phases. In the first phase, the Ministry of Economy carries out an initial assessment. The process ends after this first phase if no security risks are identified and if the transaction is approved without conditions. If the Ministry of Economy concludes that security risks are identified, it proposes to the Slovak Government to withhold its consent or grant a conditional consent. A second phase will then require the Slovak Government to decide as to whether to approve the transaction, to withhold its consent or to grant a conditional consent.

382. While Act No.45/2011 Coll. establishes a period of 60 calendar days for the first phase of the review process, no time limit is defined for the subsequent steps (namely, the opinion of the Security Council of the Slovak Republic and the decision of the Government).

383. Slovak legislation does not specify at what moment in the review process the authorities notify a transaction to the cooperation mechanism and which criteria determine whether a given transactions is notified.

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<sup>277</sup> An omission to notify a transaction is punishable by a fine (Act No.45/2011, § 15).

*f. Powers in cases where security or public order is or may be affected*

384. The overall decision by Slovak authorities to allow, condition or prohibit a transaction must achieve the best possible outcome for the Slovak Republic from a holistic perspective, weighing whether the covered transaction carries more benefits than risks from the viewpoint of public order or national security. This may mean that the Slovak Government could allow a transaction to take place, potentially under conditions, even if the Ministry of Economy considers that the transaction raises implications for security of public order (Act No.45/2011, §§ 9b(11), 9b(9) and 9b(7)(c)) for the Slovak Republic, the European Union or its Member States.

385. The assessment by the Slovak authorities is carried out in two phases based on different criteria. In the first phase, the Ministry of Economy determines if a covered transaction might disrupt the public order or national security of the Slovak Republic or another Member State or the interests of the European Union (Act No.45/2011, §§ 9b(1), 9b(5) and 9b(6)). No additional guidance for the interpretation of these concepts is given. In the second phase, the Slovak Government must pursue the optimal outcome for the Slovak Republic in a holistic assessment of competing interests.

386. The legislation presents conditions on a transaction as the primary means to address a threat to security or public order, and the prohibition as a measure of last resort.

387. Slovak authorities may reopen a decision and withdraw their consent without regard to time limitations if a decision is based on inaccurate or incomplete information provided by the acquirer, independent of their negligence or intention, or if the acquirer does not meet conditions attached to an authorisation (Act No.45/2011, § 9c).

388. The applicant can file for a decision of the Supreme Court if their application is rejected or consent revoked.<sup>278</sup> This action has a suspensive effect (Act No.45/2011 § 9e).

### 3.11. Slovenia

389. Slovenia operates a temporary screening mechanism to manage risks to security and public order that arise in the context of foreign direct investment. The mechanism was established in the context of the COVID-19 pandemic as part of the Intervention Measures for Mitigation and Elimination of the Consequences of the COVID-19 Epidemic Act (Official Gazette of the Republic of Slovenia, No.80/20, 152/20 - ZZUOOP, 175/20 - ZIUOPDVE, 203/20 - ZIUPOP DVE, 15/21 - ZDUOP, 112/21 - ZIU PGT and 206/21 – ZDUPŠOP; hereinafter: ZIUOOPE) under Chapter 11 of the Act (Articles 69-75).<sup>279</sup> The mechanism became effective on 31 May 2020 and is scheduled to expire on 30 June 2023. A permanent investment screening mechanism is planned to be included in Slovenia’s Investment Promotion Act (Official Gazette of the Republic of Slovenia, Nos.13/18, 204/21 and 29/22; hereinafter: ZSInv).<sup>280</sup>

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<sup>278</sup> The legislation does not mention authorisations with conditions.

<sup>279</sup> An unofficial translation of Chapter 11 of the ZIUOOPE into English is available at [https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc\\_158966.6.2020.pdf](https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc_158966.6.2020.pdf).

<sup>280</sup> [\*Commission staff working document – Screening of FDI into the Union and its Member States\*](#), accompanying the document “Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.44.

### *Arrangements for the participation in the cooperation mechanism*

390. The Ministry for Economic Development and Technology (MGRT) serves as the national contact point for the EU Regulation 2019/452. The Ministry is responsible to “ensure the exchange of information, opinions and comments” with the Commission and other Member States (Article 71(6) ZIUOOPE).

391. There is no publicly available information on the Slovenian’s participation in the information exchange process under the Regulation. There is no publicly available information on the extent of government resources – staffing or budget – that are available for the participation in the cooperation mechanism under the Regulation; Slovenian authorities hold that these resources are sufficient.

392. The current rules allow the Slovenian authorities to share information under the cooperation mechanism for transactions falling in the scope of the screening mechanism (Article 71(5) ZIUOOPE). For those transactions, in the context of the implementation of the EU Regulation, the Act explicitly authorises the national contact point to request additional information from the foreign investor. In turn, Slovenian authorities do not seem to be competent to gather information on investments that are not undergoing screening in Slovenia and are consequently limited in their ability to forward such information to requesting EU Member States required by Article 9(2) of the Regulation.

### *Screening under the ZIUOOPE*

393. Slovenia’s screening mechanism requires mandatory notifications of investments falling under its scope,<sup>281</sup> but does not require that a given transaction receives prior authorisation to its implementation. The mechanism covers, in comparison to its European peers, a large scope of situations involving foreign investments under certain conditions. These include mergers and acquisitions (Art. 71(1) ZIUOOPE), acquisitions of land and real estate (Art. 71(3) ZIUOOPE) as well as greenfield investments in Slovenia and changes in the business orientation or product range of an established, foreign owned enterprise (Article 71(2)).<sup>282</sup>

#### *Implementation practice*

394. The Slovenian authorities have not released information on the operation of the temporary investment screening mechanism;<sup>283</sup> the legislation does not contain any obligation to report to parliament or the public on the implementation of the screening mechanism. The only legislated reporting obligation concerns annual reports to the European Commission (Article 71(6)).

#### *Institutional setup of the screening mechanism*

395. The MGRT is responsible for the administration of the investment screening mechanism. Investment screening is carried out in a two-step procedure: In a first step, the standing *Notification Commission*, comprised of three members of MGRT and two members of Slovenia’s investment promotion agency (the [Public Agency for Entrepreneurship, Internationalisation, Foreign Investments and](#)

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<sup>281</sup> Art.81 of ZIUOOPE foresees sanctions in case a foreign investor fails to notify an eligible FDI.

<sup>282</sup> This scope of an investment screening mechanism is so far almost unique in acquisition- and ownership-related policies to safeguard essential security interests in advanced and transition economies. See OECD (2020, “[Acquisition- and ownership-related policies to safeguard essential security interests](#)”, OECD Secretariat research note, section 2.4. For other countries with similar practices see *ibid.*, section 2.4.2 (relating to Hungary) and paragraph 197 (relating to Australia).

<sup>283</sup> Under ZIUOOPE, such information is considered ‘internal’ and no decision has been taken to make such information publicly available.

[Technology](#), SPIRIT),<sup>284</sup> is tasked to pre-screen all incoming notifications and recommend on the need for an in-depth assessment of a given transaction to the Minister for Economic Development and Technology.<sup>285</sup> It recommends an in-depth assessment if the proposed investment likely affects Slovenia's security or public order or projects or programmes of Union interest.

396. For a potential in-depth screening of a given transaction, the Minister may appoint an *ad hoc* commission of three to ten members (Article 73(2) ZIUOOPE). This *ad hoc* commission comprises officials from ministries, agencies, chambers, universities, institutes. Neither the Ministries of Defence and of Home Affairs are automatically represented in these committees, nor are the Slovenian intelligence agencies. The *ad hoc* commission may compel authorities at central or local levels as well as private entities to provide evidence and recommends a course of action to the Minister for decision. The Ministry may, if it deems that the transaction is likely to affect Slovenia's security or public order, either approve the transaction, set out the conditions for its implementation, prohibit, or unwind the transaction. Any appeal against the decision of the Minister is decided by the Government of Slovenia.

397. No public information is available on the resources that are available to the investment screening process. The *ad hoc* nature of the commissions and an absence of rules on compensation of their members that are not government officials makes an estimate difficult.<sup>286</sup>

*Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

398. The Slovenian authorities are in a position assess, to prohibit, condition or unwind an investment or take interim measures with regard to a transaction that affect Slovenia's security or public order or that likely affect projects or programmes of Union interest (Article 72(3) ZIUOOPE). It is not certain whether they would also have this possibility if these interests are not concerned, but the transaction likely affects the security or public policy of a *different* EU Member State. The list of risk factors that also includes projects or programmes of Union interest is open-ended, so it is not inconceivable that Slovenia's security and public order could also be threatened – in analogy to the provision related to projects or programmes of interest to the European Union – if a different EU Member's interests are threatened.

399. While there are no explicit provisions or rules on the use of any information that reaches the Slovenian authorities under the cooperation mechanism, it appears that such information would inform the decision of the review authorities and the Minister under the open-ended list of factors that are to be considered (Article 72(4)).

*Substantial scope of the screening mechanism*

400. A mandatory notification is triggered when a transaction results in a foreign investor holding an ownership stake or voting rights of at least 10% in a Slovenian business that operates in a sensitive business sector listed, in an open-ended list of Article 72(3) ZIUOOPE. They include almost the same sectors that the factors identified by Article 4(1) of the EU Regulation 2019/452, with the inclusion of the list of

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<sup>284</sup> The Notification Commission is not established by ZIUOOPE itself but rather by a Ministerial decision. The membership structure of the Notification Commission was last revised by a Ministerial decision of 31 March 2022.

<sup>285</sup> Information provided in [Commission staff working document – Screening of FDI into the Union and its Member States](#), accompanying the document “Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.44.

<sup>286</sup> Article 71(5) ZIUOOPE provides that the MGRT is responsible for resourcing the contact point.

projects or programmes of Union interest as defined in Annex I of the same Regulation. The notification obligation is likewise triggered when a foreign invested enterprise is established, expanded, diversifies its business, or produces products that had not hitherto been produced, or when the production process undergoes significant changes (Article 71(1) and (2) ZIUOOPE). A notification is also required if a foreign investor acquires the real estate that is essential for the use of critical infrastructure, or land and real estate located in the vicinity of such infrastructure (Article 71(3) ZIUOOPE). Asset acquisitions are not subject to a notification requirement or review under the Slovenian investment screening mechanism more generally.

401. Increases of existing stakes in businesses trigger a new notification requirement if a foreign investor already holds a stake of or larger than 10% in a business or had acquired such a stake prior to the entry into force of the Slovenian mechanism.

402. Any person who does not hold Slovenian nationality is considered a foreign investor; investments made by EU nationals are thus subject to the notification obligation if they fall under the scope of Art.72(3) of the ZIUOOPE. With respect to legal persons, “foreign investors” are legal persons established outside Slovenia. According to the Slovenian authorities, the notification commission takes beneficial ownership into account when assessing if an entity is “foreign”. Legal persons not established in Slovenia that invest through a locally established intermediary are thus also considered “foreign”. The creation of Joint Ventures within or outside Slovenia, to which foreigners and Slovenian nationals or legal persons contribute assets or capital, but not participations of an established Slovenian company, does not fall under the scope of the review mechanism.

403. The notification obligation is imposed on the foreign investor and (if the target is an existing company) the target company, but the obligation is fulfilled if either has made the notification.<sup>287</sup> While ZIUOOPE does not contain specific rules on the possibility that the authorities start a procedure ex officio, the Slovenian authorities explain that this possibility exists under the law governing the administrative procedure.

#### *Procedural organisation of the screening process*

404. Covered transaction must be notified to the Slovenian authorities no later than fifteen days after they take place. While the notification to the Slovenian authorities must contain certain specific information that exceeds the required information as provided for in Article 9(2) of the EU Regulation (Article 71 (4) ZIUOOPE), the Slovenian authorities were not using a standardised notification form as of June 2022.

405. The assessment of a given notification is carried out in three-phases. In the first phase the *Notification Commission* is tasked to pre-screen incoming notifications, to identify potential risks and issue an opinion on the possibility of an in-depth assessment of a given transaction to the Minister for Economic Development and Technology.<sup>288</sup> If any potential risk is identified in the preliminary procedure, the Minister may, in the second phase, appoint an *ad hoc* commission consisting of different members for each review procedure. Based on the opinion of the *ad hoc* commission, the Minister should in the third and last phase decide whether the covered transaction under review is authorised, authorised with conditions, prohibited, or cancelled.

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<sup>287</sup> Art. 81 ZIUOOPE provides for sanctions in cases where a required notification has not been filed.

<sup>288</sup> Information provided in [Commission staff working document – Screening of FDI into the Union and its Member States](#), accompanying the document “Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.44.

406. While the Act establishes an overall period of two months for the review of a covered transaction, it does not specify the time-limits for each of the three phases of the procedure, nor does it include any provision on the way the Slovenian rules on timelines organise the cooperation under the EU Regulation. According to the Slovenian authorities, the Notification Commission must issue an opinion within 30 working days.<sup>289</sup> The *ad hoc* commission's specific deadlines are determined by each Minister's decision establishing an *ad hoc* screening commission. According to the responses of the Slovenian authorities to the Commission's questionnaire, the deadlines triggered by the investor's notification cannot be extended, nor suspended, under any circumstances. The regulatory deadline for processing an application for authorisation, whether or not it is notified to the European network, is always a maximum of two months.

407. The Slovenian authorities have so far not notified any cases to other Member States and the EU Commission. According to the Slovenian authorities, they will notify a transaction when "in the Notification Commission's opinion on the introduction of the review procedure goes through all internal procedures and is deemed as appropriate for dispatch to the foreign investor/its representatives".

408. In addition to the process initiated through the notification obligation, individual transactions could be subject to the *ex officio* screening up to five years after the completion of the investment. In this scenario, there is also a time frame of two months from the initiation of *ex officio* proceedings by the authorities.

*Powers in cases where security or public order is or may be affected*

409. Criteria under which the *Notification Commission* pre-screens incoming notifications to identify potential risks and recommend on the opportunity of an in-depth assessment of a given transaction to the Minister for Economic Development and Technology are listed in Article 72 of the ZIUOOPE.

410. According to the Slovenian authorities, if the activities of the target company/undertaking fall under the scope of Article 72(3) ZIUOOPE, it means that the case is "eligible". This means that the Notification Commission will officially consider a case to determine whether there is a need for a review procedure. If a case is not eligible, the Notification Commission will not continue with the pre-screening procedure and will determine that such a case did not require a notification requirement. For eligible cases, the Notification Commission will continue and assess if the foreign investor falls under the scope of the criteria of Article 72(4), using the Dun & Bradstreet Ownership and Compliance report services as part of due diligence. These criteria of Article 72(4) ultimately inform the Notification Commission's decision on introducing the screening procedure.

411. The assessment of whether a framed transaction represents an actual risk is then carried out in two additional phases, most likely, based on the same criteria: whether the foreign direct investment "poses a threat to security or public order of the Republic of Slovenia". While both assessments, that of the *ad hoc* commission and that of the Ministry of Economic Development and Technology, are based on the same criteria, the Act provides only additional guidance for the interpretation of these concepts by the Ministry during the second phase. According to the Act, the Ministry should interpret these rather broad concepts by taking into account, in particular, the risk factors referred to in Article 72(3) of the ZIUOOPE, which appear to be the same as those that define the sectors of business under the scope of the instrument. In addition, the Ministry should also consider three specific acquirer-characteristics identified in Article 72(4) of the ZIUOOPE.<sup>290</sup> These last criteria exactly correspond to those identified by Article 4(2) of the EU Regulation.

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<sup>289</sup> This deadline is not included in the ZIUOOPE, and was, according to the Slovenian authorities, determined by an internal document (the Rules of the *Notification Commission*).

<sup>290</sup> Whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; whether the foreign



412. Planned or impending transactions that have been identified as representing a risk can meet four different government responses: the Ministry may, if it deems that the transaction is likely to affect Slovenia's security or public order, either approve the transaction, set out the conditions for its implementation, prohibit, or unwind the transaction (Article 74(1) of the ZIUOOPE).

### 3.12. Spain

413. As of 30 June 2022, Spanish authorities notified four<sup>291</sup> distinct legal frameworks to the EU Commission as “investment screening mechanisms” according to Article 3(7) of the EU Regulation. These are:

- An investment screening mechanism organised under [Law 19/2003, on the legal system on transfers of capitals and foreign economic transactions](#) (Law 19/2003) and [Royal Decree 664/1999 – On foreign investment](#) (RD 664/1999). These rules also contain the general legal framework for foreign investment in Spain.<sup>292</sup> The main features of this framework were defined in 1999, but several reforms of Law 19/2003, prompted by the COVID-19 crisis and the adoption of the EU Regulation, have significantly reshaped this regime.<sup>293</sup> The screening mechanism under Law 19/2003 and RD 664/1999 requires a prior authorisation for certain transactions in the defence sector (Law 19/2003, Article 7) and [Royal Decree 679/2014](#) (RD 679/2014) requires a prior authorisation for certain transactions in the defence sector, and the weapons and explosives for civilian use sector (Law 19/2003, Article 7 and [Royal Decree 137/1993](#)) and for transactions (Law 19/2003, Article 7bis introduced by RDL 8/2020) raising concerns regarding Spanish public security, public health or public order related to specified sectors (such as critical infrastructure, critical technologies, sectors with access to sensitive information, or means of communication alien to audiovisual) or to specific features of the non-EU/EFTA investor (such as being under control of a third country Government or the existence of a high risk of illegal activities);
- A second mechanism is established under licensing requirements for providers of audio-visual broadcasting services (radio or television) and associated restrictions in which investors from third countries outside the European Economic Area may hold participations in the share capital of a national license holder. The mechanism is established in Article 25 of [Law 7/2010 of 31 March](#)

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investor has already been involved in activities affecting the security or public order of a Member State; whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

<sup>291</sup> In addition to the notified frameworks, Spain maintains a mechanism to manage risk related to the acquisition of real estate rights and assets in sensitive locations. This regime was established in 1975 under [Law 8/1975 on areas and installations of interest to the National Defence](#) and the related [Royal Decree 698/1978](#). It has not been notified to the EU Commission pursuant to Article 3(7) of the EU Regulation, as it does not fulfil the criteria of an “investment screening mechanism” pursuant to Article 2(4) of the EU Regulation. According to Spanish authorities, these transactions, mainly carried out by natural persons, are, by and large, aimed at residential purposes, not at creating lasting and direct links between the foreign investor and an entrepreneur or undertaking (Article 2(4) of the EU Regulation). Loading these transactions onto the Article 6 exchange mechanism system would be cumbersome and useless, according to the Spanish authorities.

<sup>292</sup> [Order of 28 May 2001 establishing the procedures applicable to foreign investment declarations and their settlement, as well as the procedures for the submission of annual reports and authorisation requests](#), completes this legal framework by clarifying some of the procedures and the documents required from foreign investors in order to obtain authorisation.

<sup>293</sup> The introduction of Article 7bis of Law 19/2013, in March 2020 [Real Decreto-Ley 8/2020, Disposición Final Cuarta](#) [Real Decreto-Ley 11/2020, Disposición Transitoria Segunda y Disposición Final Tercera](#).

[2010 – General Law on Audiovisual Communication](#), and explicitly refers to the obligations with which the investor must comply: the principle of reciprocity and individual participation not directly or indirectly exceeding 25% of the share capital. In addition, the total shares in the same legal person of a number of natural or legal persons of nationals of third countries other than members of the European Economic Area shall be less than 50% of the share capital;

- Under [Law 3/2013 of 5 June 2013](#), Spanish authorities may review certain transactions involving companies carrying out activities in the Spanish energy sector, based on considerations of security of supply; and
- Spain has also notified [Law 9/2014 on Telecommunications](#) pursuant to Article 3(7) of the EU Regulation. It is not obvious which provisions of this law fulfil the criteria of an “investment screening mechanism” set out in Article 2(4) of the EU Regulation.

414. While Law 19/2003 has undergone considerable changes over time, the regulatory part of the framework as established by RD 664/1999 and has remained unchanged since 1999. As recent reform proposals issued in 2019 and November 2021<sup>294</sup> contain proposals for changes that would modify how Spain participates in the European cooperation mechanism, some of these changes are explained in this section.<sup>295</sup>

415. The relationship between these legal frameworks is organised by Article 1.2 of RD 664/1999. According to this rule, the screening mechanisms subject to RD 664/1999 are implemented without prejudice to the previous application of sectoral legislation.<sup>296</sup> They do not explicitly preclude the application of the general mechanism. However, according to the Spanish authorities, the general review mechanism is never applied cumulatively to deal with the same risks, once the procedures under a sectoral instrument have concluded. According to the Spanish authorities, the horizontal screening mechanism is implemented as a last resort mechanism, so that, in sectors subject to specific regulation, the role of sectoral regulators or independent agencies is never undermined. Their decisions are not reviewed under the horizontal screening mechanism. This approach should be made explicit to prevent that the organisation or the application of norms entail any such uncertainties.<sup>297</sup>

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<sup>294</sup> A reform of RD 664/1999 had been under consideration since at least 2019; a first [draft Royal Decree on Foreign Investment](#) was published by the Spanish authorities in early 2019 but was not adopted (herein after “draft Royal Decree proposal 2019”). The Spanish Government announced a reform in its normative annual plans in [2020](#), [2021](#) and [2022](#), and new [draft Royal Decree on Foreign Investment](#) was [published](#) for public comments in late 2021 (herein after “draft Royal Decree proposal 2021”).

<sup>295</sup> The 2020 Normative Annual Plan explicitly identified the necessity to “Update RD 664/1999 on Foreign Investments, to EU Regulation 2019/452 (...) both in terms of the operation of the cooperation mechanism between the Member States and the updating of the register of investments, which has not been done since 1999” ([Normative Annual Plan 2020](#), p.30). The description of the framework here refers to some of these proposals.

<sup>296</sup> RD 664/1999, Article 1.2 provides that: “The provisions contained in this Royal Decree shall be understood without prejudice to the special regimes affecting foreign investments in Spain established in specific sectoral legislation, and, in particular, in the areas of air transport, radio, minerals and mineral raw materials of strategic interest and mining rights, television, gambling, telecommunications, private security, manufacture, trade or distribution of arms and explosives for civilian use and activities related to National Defence. In the aforementioned cases, the investments will be adjusted to the requirements of the competent administrative bodies established in said regulations. Once the requirements set forth in the aforementioned sectoral legislation have been met, the provisions of this Royal Decree must be complied with.” [Translation by the authors].

<sup>297</sup> By way of example, no double test through sectoral legislation and horizontal screening is carried out in the fields of banking and insurance, according to the Spanish authorities. If financial authorities have settled a specific risk, no horizontal screening is carried out on that same risk. Consultations regarding the filing of direct foreign investment transactions in the financial sector usually end up with the conclusion that the transaction is not subject

416. According to the Spanish authorities, out of the four distinct legal frameworks notified to the EU Commission as “investment screening mechanisms” according to Article 3(7) of the EU Regulation, only one, organised mainly under [Law 19/2013](#) and [RD 664/1999](#), is effectively used in the context of the cooperation mechanism under the EU Regulation. Arrangements under [Law 3/2013 of 5 June 2013](#); [Law 9/2014 on Telecommunications](#) and [Law 7/2010 of 31 March 2010 – General Law on Audiovisual Communication](#) are not used in the context of the EU cooperation mechanism and for this reason, these frameworks are be discussed in the following sections.

### ***3.12.1. Arrangements for the participation in the cooperation mechanism***

417. Spain’s contact point for exchanges under the EU cooperation mechanism is established within the Ministry of Industry, Tourism and Trade Spanish authorities have identified before the EU Commission the contact point as required by Article 11 of the EU Regulation. If and when the current version of the [draft Royal Decree proposal 2021](#) becomes effective this provision will be made public. In this draft, the Directorate General for International Trade and Investment publicly designated as the contact point for the implementation of the EU Regulation (Article 22.2 of the draft Royal Decree on Foreign Investment).

418. Under Article 9.c) of the RD 664/1999, the Foreign Investment Board (*Junta de Inversiones Exteriores* (JINVEX)), is entrusted for most of the tasks related the cooperation process established by the EU Regulation.<sup>298</sup> The secretariat and presidency of JINVEX submit to this board all files related to investment screening. A report is prepared which – only if it is validated by the JINVEX – allows the resolution body to decide (Government or Directorate General). Incoming comments from other Member States and opinions from the EU Commission are incorporated into the reports that JINVEX must evaluate. The Spanish authorities specify that cases cannot be resolved without having previously substantiated the procedures of the EU exchange mechanism.

419. According to Spanish authorities, incoming requests of information under Article 9(2) of the EU Regulation are assigned to case handlers from the Ministry of Industry, Tourism and Trade and the Ministry for Defence for their evaluation. Case handlers are in charge of collecting timely information from the investors and the ministerial departments concerned.

420. Spain ranks among the five most active participants in the cooperation mechanism under the EU Regulation in the first year of its operation, as measured by the number of cases it submitted to Member States and the EU Commission under the EU Regulation.<sup>299</sup>

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to authorisation on the grounds of Article 7bis. In the planned reform, Articles 11.1 and 18.1 of the [draft Royal Decree proposal 2019](#) foresee that investments are screened only if the transaction entails a risk for public security, public order or public health. Consequently, if a previous sectoral test deals with such risks, concluding that they do not exist or by mitigating them, there is no way to carry out the horizontal screening for such risks. Nevertheless, such understanding could benefit from being made more explicit.

<sup>298</sup> Most of the administrative practices described in this section should be consolidated in the new [draft Royal Decree proposal 2021](#). For the current administrative practices [Law 39/2015 of 1 October, on the Common Administrative Procedure of Public Administrations](#) applies by default, and the Agreements of the Council of Ministers are subject to the control of the Commission of Secretaries and Undersecretaries (CGSEYS).

<sup>299</sup> Spain is among the five Member States which together represented more than 90% of the cases notified to the EU Commission in the period of 11 October 2020 to 30 June 2021. “[Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investments into the Union](#)”, {COM(2021) 714 final}, SWD(2021)334 final, 23 November 2021, p.11.

### 3.12.2. Screening under Law 19/2003 and under RD 664/1999

421. In 1999, the mechanism in RD 664/1999 replaced [Royal Decree 671/1992, of 2 July 1992, on foreign investments in Spain](#), expressly to comply with the requirements of EU law, in particular those set up by the Maastricht Treaty. While RD 664/1999 establishes the freedom of inward and outward capital movements as a rule, it allows the authorities to suspend the liberalisation regime where foreign investments may affect the exercise of public authority, public order, public safety, or public health. [Law 19/2003](#) takes the same approach in that regard.

422. Several amendments to Law 19/2003 led to substantial changes in the context of the COVID-19 crisis between 2020 and 2021.<sup>300</sup> Henceforth, four distinct schemes based on Law 19/2003 in combination with RD 664/1999 allow the Spanish authorities to review and potentially prohibit certain acquisitions if they threaten the country's security, public order, or public health:

- The Council of Ministers may suspend the liberalisation regime for certain transactions that may affect activities related to the exercise of official authority, national defence, or activities which affect or may affect public order, security, and public health under Article 7 of Law 19/2003. In that scenario, a transaction may only be completed if the Council of Ministers has given prior authorisation.
- Article 7bis of Law 19/2003 includes a list of sectors and conditions in application of Article 7 of Law 19/2003 – concerning the suspension of the liberalisation regime. Certain investments in listed areas and investments made by investors with some characteristics hence require prior authorisation by the Council of Ministers.<sup>301</sup> Certain acquisitions under the scope of Article 7bis of Law 19/2003<sup>302</sup> can be approved under a transitional simplified procedure; they only require prior authorisation by the Director General for International Trade and Investment (this process is organised under the second transitory provision of [Royal Decree-Law 11/2020](#) (RDL 11/2020) and under [Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations](#).
- Certain acquisitions in activities directly related to national defence – production or marketing of arms, munitions, explosives etc. (Law 19/2003, RD 679/2014 and RD 664/99) – require prior authorisation by the Council of Ministers.
- Certain acquisitions in activities directly related to weapons and explosives for civilian use (Ley Orgánica 4/2015, RD 679/2014, RD 664/1999 and [RD 137/1993](#)) require prior authorisation by the Council of Ministers.

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<sup>300</sup> Five Royal Decree Laws were adopted since March 2020: [Royal Decree-Law 8/2020, Fourth Final Provision](#); [Royal Decree-Law 11/2020, Second Transitory Provision and Third Final Provision](#); [Royal Decree-Law 34/2020, Single Transitory Provision and Fourth Final Provision](#); [Royal Decree-Law 12/2021, Second Final Provision](#) and [Royal Decree-Law 27/2021, Article Four](#).

<sup>301</sup> Under a temporary regime adopted in 2020 in light of the COVID-19 crisis, certain investments made by EU/EFTA residents or residents in Spain who are ultimately beneficially owned by residents of EU/EFTA States are subject to authorisation if: the target is a company listed in Spain, or, for unlisted companies, if the invested amount exceeds EUR 500 million and if the investment takes place in a defined list of areas (critical infrastructures, critical technologies and dual-use products, sectors with access to sensitive information, essential inputs, or means of communication), and the investment affects public security, public order, or public health. However, in this case, the investor's characteristics are not examined.

<sup>302</sup> Those whose amount is equal to or greater than EUR 1 million and less than EUR 5 million or those that were not yet closed but on which the price had been fixed, specified or subject to specification before the entry into the force of article 7bis in March 2020.

*a. Implementation practice*

423. Spanish authorities have only recently begun to release some aggregated information on the implementation of country’s screening mechanism.<sup>303</sup> This information covers reviews conducted since March 2020, when Law 19/2003 was amended and Article 7bis was introduced, and the number of transactions that required a review grew significantly.<sup>304</sup>

424. Between 17 March 2020 and 31 December 2020, Spanish authorities received 334 inquiries – about eight per week – on whether a given transaction needed prior authorisation under Article 7bis. A request for authorisation was filed for 29 operations.<sup>305</sup> In the following twelve-month throughout 2021, the frequency of inquiries roughly halved (a total of 231 inquiries were made in 2021), but the number of filings for approval almost doubled to 55 transactions.<sup>306</sup>

425. According to Spanish authorities, no acquisitions were prohibited in 2020 and 2021, and mitigation measures were used infrequently – once in 2020 and in six cases in 2021. The depth of information is limited, as decisions under the simplified procedure (authorisation by the Director General for International Trade and Investment) are not systematically published.<sup>307</sup> Only the fact that the Council of Ministers has taken a decision on individual transactions is made public, but not the content of the decision itself.<sup>308</sup>

*b. Institutional set-up of the screening mechanism*

426. Under Law 19/2003, the responsibility for managing a review falls either to the Ministry of Defence or the Ministry of Industry, Tourism and Trade. Which Ministry is in charge for a specific transaction depends on whether the investment touches upon an enterprise in the defence sector (Article 7 of Law 19/2003), or a sector mentioned in Article 7bis of Law 19/2003. The Ministry of Industry, Tourism and Trade is also responsible for all authorisations under the simplified procedure as provided for under the second transitory provision of RDL 11/2020.

427. Both Ministries have established their own front office to manage authorisation requests: in the Ministry of Defence, the Deputy General Directorate of International Relations in the General Directorate of Armament and Material,<sup>309</sup> and in the Ministry of Industry, Tourism and Trade, the General Directorate

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<sup>303</sup> While the government is not currently under any obligation to report to Parliament or the public on the implementation of the screening mechanism, the [draft Royal Decree proposal 2021](#) (Article 20) would require the Ministry of Industry, Tourism and Trade to publish aggregated information in annual reports.

<sup>304</sup> “[Regulatory impact analysis of the draft Royal Decree on Foreign Investment](#)”, 2021, p.28.

<sup>305</sup> Ministerio de Industria, Comercio y Turismo (2022), “[Control de Inversiones Exteriores 2020 en cifras](#)”, p.1.

<sup>306</sup> Ministerio de Industria, Comercio y Turismo (2022), “[Control de Inversiones Exteriores 2021 en cifras](#)”, p.1.

<sup>307</sup> Article 96 of the [Law 39/2015 of 1 October, on the Common Administrative Procedure of Public Administrations](#) does not require the publication of administrative decisions. The [Law 19/2013 of 9 December 2013, on transparency, access to public information and good governance](#) may offer access to decisions obtained under the simplified procedure.

<sup>308</sup> Decisions are published on the [website of the Council of Ministers](#) and in the Boletín Oficial del Estado (BOE).

<sup>309</sup> Article 5(g) of the [Royal Decree 372/2020, of February 18, developing the basic organic structure of the Ministry of Defence](#).



for International Trade and Investments under the State Secretariat of Commerce.<sup>310</sup> Specific information on available resources – staffing or budget – in these units is not publicly available.

428. The JINVEX, an inter-ministerial committee attached to the General Directorate for International Trade and Investments, composed of representatives of each of the Ministerial Departments and chaired by the Director General of Trade Policy and Foreign Investment, passes an internal report on each transaction regardless of sector that is concerned by the transaction.<sup>311</sup> According to Spanish authorities, all the ministerial departments that are members of the Board give their opinion on all formal requests and on all consultations that have any difficulty. The reports presented to the JINVEX and the draft decisions for the Council of Ministers on individual transactions are prepared by the Ministry of Industry, Trade, and Tourism in cases related to article 7 and 7bis, by the Ministry of Defence alone for investments in the defence area, and by the Ministry of Industry, Trade, and Tourism and the Ministry of Interior in case of civil weapons. If some investments need approval as they fall in different schemes, more than one ministry can be involved in preparing the draft decision. The Director General for International Trade and Investment takes decisions under the simplified procedure.

429. Which information resources the Spanish authorities can draw on for their decision on individual transactions is not explicitly regulated.<sup>312</sup> According to Spanish authorities, they may generally rely on information from the notification form that explicitly ask questions on a given transaction. They can also rely on information provided by ministerial departments and intelligence units and on information from open sources such as U.S. Stock Exchange Commission Enforcement Actions, etc.

430. Spanish authorities rely on authorisation requests as a trigger for reviews but also regularly invite investors to fulfil their obligations regarding foreign direct investment screening as the authorities monitor foreign investments *ex officio*. According to Spanish authorities, no sanctioning procedures have yet been launched.

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<sup>310</sup> Article 3(1)(i) of the [Royal Decree 998/2018, of August 3, developing the basic organic structure of the Ministry of Industry, Trade and Tourism](#).

<sup>311</sup> The Board is currently regulated in rather general terms under Article 9 of the RD 664/1999. Article 19 of the [draft Royal Decree proposal 2021](#) would bring more detailed rules: the Ministry of Industry, Commerce and Tourism would “issue the necessary rules to detail the operation of the Foreign Investment Board, both in its plenary configuration, which will be the one to report on the authorisation proposals, as well as in working groups constituted by some of its members. In any case, mechanisms should be foreseen for holding the meetings of the Board in the meetings of the Board, as well as mechanisms for issuing a favourable report by means of a written procedure”. The same Article 19 of the [draft Royal Decree on Foreign Investment](#) would also require that a representative of the National Intelligence Centre (*Centro Nacional de Inteligencia*) join the Foreign Investment Board.

<sup>312</sup> This situation may change, as Article 18.3 of the [draft Royal Decree proposal 2021](#) defines a list of information resources that the Spanish authorities can rely on to form their own opinion on the merits. According to article 18.3, the assessment of authorisation requests “shall, in addition to the information provided by the investor in its notification or in response to subsequent request by the Directorate General instructing the case, take into consideration: a) Information provided by the EU Commission or other Member States in the framework of the information exchange mechanism provided for in Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 for the control of foreign direct investments in the Union. b) The information provided by the General State Administration, by other Administrations, economic agents, civil society organisations or social partners, in relation to a foreign direct investment that may affect public security, health or public order, national defence or foreign action that, where appropriate, has been deemed appropriate to collect. c) The conformity of the actions of the State in which the ultimate investor resides with the international commitments signed by Spain in matters affecting national security, public health, or public order”.



*c. Competence to consider other EU Member States' security or public order interests or projects or programmes of European interest and provisions for participation in the cooperation mechanism*

431. There is no indication that Spanish authorities are competent to assess, prohibit a transaction, order a mitigation measure or unwind an investment if a given transaction is likely to affect security or public order of a *different* EU Member State, other than Spain, or likely to affect projects or programmes of Union interest. Only threats to the national security, public health or public order of Spain establish the competence of the Spanish authorities to take measures with respect to such investments.<sup>313</sup>

*d. Substantial scope of the screening mechanism*

432. The current investment screening mechanism applies only to “foreign persons”. This notion is defined as non-residents of EU or EFTA States or legal persons whose ultimate parent company resides outside the EU and the EFTA and that are owned or controlled directly or indirectly more than 25% of the capital or voting rights in the target company or exercised direct or indirect control of the target company through other means. It also only applies to transactions in a closed list of sectors and having a negative impact on Spanish security, public order, or public health<sup>314</sup> or in any sector when conducted by foreign investor with certain characteristics are subject to the prior authorisation regime.<sup>315</sup> The remainder of the trigger criteria depend on the specific regime under which a given transaction can be reviewed:

- The investment screening processes under Law 19/2003 is triggered when a transaction results in a holding by a foreigner of 10% or more of the shares of a Spanish company or if a foreign investor effective participates in the management or control of a Spanish company;
- Under Article 11 of RD 664/1999, a lower threshold of 5% applies for transactions in Spanish listed companies whose activities are related to defence (i.e., the production and commerce of weapons and war materials): transactions that result in a share of 5% or that enable an investor to participate directly or indirectly in managing bodies of such companies require prior authorisation.

433. Transactions under the scope of Article 7bis of Law 19/2003 whose amount is equal to or greater than EUR 1 million and less than EUR 5 million or those that were not yet closed but on which the price had been fixed, specified, or subject to specification before the entry into the force of Article 7bis in March 2020, are processed under the transitional simplified procedure.

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<sup>313</sup> While Article 12.2(d) of the [draft Royal Decree proposal 2021](#) explicitly mentions technologies benefiting from financing under the instruments listed in the List of projects or programmes of Union interest as technologies developed under programmes and projects of particular interest to Spain and therefore falling in the scope of the proposed regime, the current version of the [draft Royal Decree proposal 2021](#) does not foresee any additional change in this area.

<sup>314</sup> Those in a defined list of areas (critical infrastructures, critical technologies, and dual-use products, sectors with access to sensitive information, essential inputs, or the means of communication) and the investment negatively affects Spanish security, public order, or public health. Projects or programmes of Union interest, as defined in Annex I of the EU Regulation, are not explicitly included in the list.

<sup>315</sup> This is the case for foreign investors directly or indirectly controlled by the government (including sovereign funds, state bodies or the armed forces) of a third country; foreign investors that have already invested or been involved in activities in the security, public health or public policy sectors in another Member State, and in particular those sectors listed above; and foreign investors subject to administrative or judicial proceedings in another Member State, in their home state or any other third country for engaging in criminal or illegal activities. According to the Spanish authorities, these criteria are largely inspired by Article 4 of the EU FDI screening regulation.

*e. Procedural organisation of the screening process*

434. The investment screening regime is triggered by a mandatory prior authorisation request by a foreign investor, or, if an investor fails to notify the transaction, *ex officio*. Spanish authorities can review transactions that fall under the scope of the mechanism but have not been authorised.

435. The Spanish authorities have implemented an informal consultation system that will become formal if and when the Draft Royal Decree is passed.<sup>316</sup>

436. As for the authorisation request, it must contain a specified set of information that encompasses all elements mentioned in Art 9(2) of the Regulation.<sup>317</sup> The [application form](#) also requires investors to provide information related to the last owner, about the acquisition target, about the operation and the investor's business plan.

437. The review process takes place in one phase which may take up to six months. The lapse of time can be suspended if the authorities request additional information from either party – until this information is provided – or, when technical/internal reports from other public bodies are needed, until these reports are issued. According to the Spanish authorities, silence does not imply that the transaction is rejected; rather, it simply indicates that it has not yet been approved. Nevertheless, the resolution body must still issue an explicit decision that can be either positive or negative. When the resolution deadline is not complied with, the investor can bring an appeal before the courts on the basis of a lack of explicit resolution to their request.

438. The timeframe for the simplified procedure is shorter: authorisations by the Director General for International Trade and Investment must be issued within 30 days. The same rules on silence and resolution apply in this case.

439. The Spanish authorities notify a transaction that falls under Law 19/2003 to the cooperation mechanism shortly after an investor has officially filed a request for authorisation (informal consultations as mentioned in paragraph 435 do not constitute on official filing). Spanish authorities may reopen a decision if incorrect or incomplete information has been provided during the screening process.

*f. Powers in cases where security or public order is or may be affected*

440. The assessment of whether a framed transaction represents an actual risk is carried out in two phases based on the same criterion, namely, whether the transaction generates “potential risks to security, public order or public health”. The preamble to Law 19/2003, specifies that assessments should be carried out “in accordance with the principles of legality, typicality and proportionality and with due regard for procedural guarantees”<sup>318</sup>. While not yet approved, the [draft Royal Decree proposal 2021](#), operates,

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<sup>316</sup> Data published by the Spanish authorities for [2020](#) and [2021](#) show that this consultation procedure leads to a significantly lower number of transactions subject to the authorisation procedure as compared to the number of transactions in relation to which consultations are held.

<sup>317</sup> The authorisation [form](#) used by the Spanish authorities is similar in structure and content to the model developed by the EU Commission.

<sup>318</sup> While the authorisation reports prepared by the Foreign Investments Board are not publicly accessible (position confirmed by the [General Directorate of International Trade and Investment - Resolution of request for information No. 48962](#), December 2020, p.5), decisions made by the Council of Ministers are public but not the content of these decisions.

according to the Spanish authorities, as an “implementation guidelines” which provides the understanding of Law 19/2003 by the administration.<sup>319</sup>

441. For the powers of Article 7 of Law 19/2003 to apply, the liberalisation regime needs to be suspended first for a certain scope of transactions. A suspension is possible when “investments, by their nature, form or conditions of implementation, affect or are likely to affect activities connected, even occasionally, with the exercise of official authority, or activities which affect or are likely to affect public policy, public security or public health”.<sup>320</sup> The Council of Ministers upon proposal of the Ministry of Industry, Trade and Tourism and, of the Ministry which is appropriate according to the sector,<sup>321</sup> and following a report from the Foreign Investment Board is competent for decisions on the suspension of the liberalisation. It appears that the Spanish authorities may only suspend the liberalisation regime for future transactions; the suspension does not apply retroactively for transactions that have already been closed. Once the liberalisation regime has been suspended, an investor must apply for prior administrative authorisation under the same process as that described above.

442. If a transaction affects national security, public health, or public order it can be authorised in conjunction with certain obligations<sup>322</sup> or prohibited. Final decisions are taken by the Council of Ministers (or by the Directorate General for International Trade and Investment for the simplified procedure).

443. The Spanish authorities have several options at their disposal when they discover non-authorised transactions that fall under the scope of the authorisation requirement. Article 7bis 5) of Law 19/2003 declares a covered transaction that is implemented without the prior authorisation void until and unless the authorisation has been granted. Financial and administrative sanctions are also available to sanction failure to request prior authorisation, or the provision of false information in during the authorisation process. Available sanctions were recently reinforced (Articles 8-12 of Law 19/2003).

### 3.13. Sweden

444. As of 30 June 2022, Swedish authorities had not established an investment screening mechanism or notified such a mechanism to the European Commission. Sweden is however working towards

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<sup>319</sup> Additional guidance is expected to be provided by the [draft Royal Decree proposal 2021](#). The current version of the explanatory memorandum of the draft Royal Decree proposal mentions “that the purpose of the authorisation is to determine whether the investment affects safety, health, or public order, and to adopt, if necessary, corrective measures. The examination and, where measures, if any, must be necessary and proportionate to preserve public safety, health, and order public safety, should be made in accordance with Article 65 TFEU. Thus, investment transactions that have no or little impact on the legal assets protected by Art.7bis and Art.65 of the Treaty on the Functioning of the European Union will not be subject to authorisation.”

<sup>320</sup> While some additional information on this process is available in article 10 of the [Order of 28 May 2001](#), one of the clear objectives of the [draft Royal Decree proposal 2021](#) is to provide further clarifications regarding this regime ([Regulatory impact analysis of the draft Royal Decree on Foreign Investment](#), 2021, p.12).

<sup>321</sup> See paragraph 428 for the responsibilities for certain sectors.

<sup>322</sup> While both Law 19/2003 and RD 664/1999 remain silent on the possibility of using mitigation measures, according to Spanish authorities, the mechanism provides “implicit possibility” for mitigating measures. According to the same authorities, these measures can only be taken by the Council of Ministers leaving some doubt as to whether the Directorate General for International Trade and Investment can adopt this type of measure under the simplified procedure.

establishing a screening mechanism.<sup>323</sup> The Swedish authorities have nominated a national contact point for the purposes of the cooperation mechanism under the Regulation.

### ***3.13.1. Arrangements for the participation in the cooperation mechanism***

445. Sweden has established rules that govern its participation in the EU cooperation mechanism under [Law 2020:826 on supplementary provisions to the EU Regulation on foreign direct investment](#) and three implementing regulations.<sup>324</sup> Under these rules, the Swedish Government [decided](#) on 4 June 2020 to designate the Inspectorate of Strategic Products (ISP) as Sweden’s national contact point under the [Regulation](#).<sup>325</sup> A specific [rule](#) by the ISP specifying the information that could be collected from the investors following the EU Regulation obligations entered into force on 1 November 2020.

446. Within the Inspectorate of Strategic Products, a specific unit was created to address issues relating to security or public order associated with foreign direct investment in Sweden.<sup>326</sup>

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<sup>323</sup> Since 2018, Sweden has had in place a mechanism that requires operators of security-sensitive activities to carry out self-assessments of certain security-sensitive operations under the [Protective Security Act \(2018\)](#) and its implementing [regulations](#). This mechanism does not however have the features of an investment screening mechanism in the sense of the Regulation, as it is based self-assessments of risk by private actors in consultation with the Armed Forces or the Swedish Security Service. More information on the mechanism is available in Sweden’s notification to the OECD ([DAF/INV/RD\(2020\)13](#)) and legislative material, notably a [committee report](#) on the [website of the Swedish Parliament related to the legislation](#). The introduction of the mechanism followed an earlier inquiry into the merits of such an instrument, released as Swedish Government (2018), “[Supplements to the new Security Protection Act](#)”, Report on the Inquiry on certain security protection issues.

Until December 1992, Sweden had rules in place that regulated foreign acquisition, ownership or management of property near strategic sites under the [Lag \(1982:618\) om utländska förvärv av fast egendom m.m.](#) (Act on Foreign Ownership of Property), in particular its chapter 1, section 8, which empowered the Swedish authorities to prohibit acquisitions when these were contrary to the country’s defence or security interests. Likewise, until the end of 1992, acquisitions of companies operating in the defence industry were subject to restrictions. These rules were replaced by the provisions of the [Lagen om krigsmateriel \(1992:1300\) \(Military Equipment Act\)](#), in force since the beginning of 1993, which operate through licences in the sector; the licenses may be accompanied by conditions relating to foreign ownership, nationality of management and domicile.

<sup>324</sup> Ordinance [2020:827 on supplementary provisions to the EU Foreign Direct Investment Regulation](#); Ordinance [2020:828 amending the ordinance \(2010:1101\) with instructions for the Inspectorate of Strategic Products](#); Ordinance [2020:829 amending the Public Access to Information and Secrecy Ordinance \(2009:641\)](#).

<sup>325</sup> The ISP was chosen for its extensive experience in making decisions that involve weighing in differently forms of security policy assessments and to be able to analyse a company’s business from a technical perspective and its ability to collaborate with other security agencies and its habit of international cooperation (see [Interim report](#) p.137). Before its designation, the ISP was already the managing authority for matters and supervision in accordance with the Military Equipment [Act \(1992:1300\)](#) and the Dual-Use Items and Technical Assistance Control [Act \(2000:1064\)](#). The ISP is therefore the licensing and the regulatory authority in the field of munitions and dual-use products. The ISP is also the national liaison point for the exchange of information under the UN Arms Trade Treaty. The inspectorate is generally responsible for having an information and exchange of experience with similar bodies in other countries and participating in European cooperation, including by monitoring other countries’ refusals of permit applications, inform the European the Commission, the Council of the European Union and the other Member States in European Union and relevant international bodies refusing Swedish applications for permits.

<sup>326</sup> ISP [website](#). The ISP as a whole had approximately 50 employees in 2021; in 2018, approximately 40 employees were working at ISP ([Interim report](#) p.137).

447. Law 2020:826 contains provisions on the powers of the contact point. Some of these provisions are based on the recommendations of the Inquiry which aimed to “fulfil the obligations set out in the Regulation in an effective way”.<sup>327</sup>

448. The national contact point, in addition to finding information in open sources such as public registers, can obtain information from other authorities within the framework of the authorities’ obligation to cooperate.<sup>328</sup> The obligation to cooperate means, among other things, that an authority on request by another authority shall provide information at its disposal, if the information is not classified. The information obtained during the information gathering is protected by the [Public Access to Information and Secrecy Act \(2009:400\)](#). Since secrecy also applies between authorities, information which is classified can only be exchanged if there are provisions for exemption from secrecy.<sup>329</sup> Concerning the disclosure of information to the contact point, there is an applicable exemption stating that classified information may be provided given that there is an obvious interest of providing the information that takes precedence over the interest which the confidentiality is supposed to protect.

### 3.13.2. *Initiatives to establish a screening mechanism*

449. Sweden has not established or notified an investment screening mechanism to the EU. This situation is bound to change, however, given the intention of the Swedish government to establish a screening mechanism. In August 2019, the Swedish Government initiated a government inquiry, the Swedish Committee on FDI, to propose a framework for screening of foreign direct investments in Sweden. In November 2021, the Swedish Committee on FDI presented its [final report](#) to propose how a Swedish mechanism for screening FDI in protected areas could be designed.<sup>330</sup>

450. In May 2022, the Swedish Minister of Justice and Home Affairs [declared](#) that the Swedish Government was currently preparing a government bill on the matter for introduction in to the Swedish Parliament.

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<sup>327</sup> Among others, the Inquiry identified that the contact point should be able to adopt an injunction to the foreign investor or undertaking concerned to provide the information requested by the Regulation, injunction that may be combined with a fine ([Interim report](#) p.14). This possibility is foreseen by Law 2020:826, section 3 – Order to provide information or documents.

<sup>328</sup> This obligation is expressed in, among other things, the [Public Administration Act \(2017:900\)](#) and the [Government Ordinance \(2007:515\)](#).

<sup>329</sup> The provision of interest to the contact point can be found in the [Public Access to Information and Secrecy Act \(2009:400\)](#) chapter 10, paragraph 27.

<sup>330</sup> The report had been mandated on 22 August 2019 “[Ett system för granskning av utländska direktinvesteringar inom skyddsvärda områden](#)”. An [interim report](#) was published in March 2020. It had proposed adaptations and supplementary provisions necessary for the implementation of the EU Regulation in Sweden.