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## EU Commission Proposal for a new European Economic Security Framework

Jay Modrall (Norton Rose Fulbright, Belgium) · Tuesday, March 12th, 2024

What a difference five years make. In 2019, the European Union (EU) created a modest common framework for foreign direct investment (FDI) screening, [Regulation 2019/452](#) (the FDI Regulation), stressing that decisions on proposed investments, and even the decision whether to engage in FDI screening at all, remained with EU Member States. A pandemic and two wars later, the EU seems poised to take a major step towards a more centralized approach to economic security policy.

In January 2024, the Commission adopted a [communication](#) on advancing European economic security, outlining five initiatives to create a framework for continuous strategic coordination between the Commission and EU Member States on the risks that Europe faces and actions required to tackle them. The package includes a [proposal](#) for a new FDI screening regulation (the Proposed FDI Regulation) to strengthen and further harmonize FDI screening in the EU. The other initiatives are set out in white papers on export controls of dual-use technologies, potential risks stemming from outbound investments and options for enhancing support for research and development (R&D) involving technologies with dual-use potential, as well as a proposal for a Council recommendation on strengthening research security.

### Proposed FDI Screening Regulation

#### *Background*

When the Commission first proposed the FDI Regulation, in [September 2017](#), 12 Member States had FDI screening mechanism in place. The Commission stressed that the “new EU-level investment screening framework will [...] not affect EU countries’ ability to adopt any new review mechanisms or to remain without such national mechanisms. [...] Member States keep the last word in any investment screening.” Similarly, when the FDI Regulation was adopted in March 2019, Commission President Juncker [hailed](#) the creation of an EU cooperation mechanism, but reiterated that “Member States also keep the last word whether a specific investment operation should be allowed or not in their territory.”

By March 2020, the EU, like the rest of the world, was struggling to respond to the Covid-19 pandemic. Although the FDI Regulation had not even been fully implemented, the Commission

urged Member States in a March 13, 2020 [communication](#), “to be vigilant and use all tools available at Union and national level to avoid that the current crisis leads to a loss of critical assets and technology” and promised to “guide Member States ahead of the application” of the FDI Regulation. The Commission soon issued [another](#) communication urging Member States to apply FDI screening to “critical health infrastructures, supply of critical inputs, and other critical sectors.” In response to another global shock, Russia’s full-scale invasion of Ukraine, the Commission issued [guidance](#) to the Member States concerning foreign direct investment from Russia and Belarus. By 2023, the Commission had reviewed over 1,200 transactions under the FDI Regulation.

The Proposed FDI Regulation reflects the experience the Commission has accumulated since 2019 and addresses shortcomings identified in a 2022 OECD [assessment](#) of the FDI Regulation’s effectiveness and efficiency. Notably, unlike the FDI Regulation, which left the decision to implement FDI screening to the Member States, the Proposed FDI Regulation requires all Member States to adopt FDI screening mechanisms that comply with the new regulation.

### *Minimum requirements*

The Proposed FDI Regulation would impose stricter harmonized standards for Member State screening mechanisms. Under the FDI Regulation, national mechanisms are already required to be transparent and not discriminate against third countries. Member States must set out the circumstances triggering screening, the grounds for screening and detailed procedural rules. Confidential information must be protected, and foreign investors and other parties concerned must have the possibility to seek judicial redress against screening decisions.

The Proposed FDI Regulation tightens and further harmonizes these minimum requirements. Under the Proposed FDI Regulation, Member State screening mechanisms must include (a) procedures for assessing jurisdiction over a proposed investment, an initial review, and, where necessary, an in-depth investigation; (b) a monitoring system to identify and prevent circumvention; (c) powers to conduct own-initiative investigations for at least 15 months after a transaction’s completion; (d) protection of confidential information; (e) publication of an annual report; (f) mandatory notification and screening of certain foreign investments before the foreign investment is completed; (g) powers to impose mitigating measures, prohibit, or unwind foreign investments; (h) procedures for participation in the EU’s cooperation mechanism; and (i) due process rights for foreign investors, including a right to be heard before a decision is taken to authorise a foreign investment subject to mitigating measures or to prohibit a foreign investment, as well as a right to seek judicial recourse.

### *Scope*

The FDI Regulation listed factors for FDI screening, but as noted does not require Member States to screen FDI in particular sectors, or at all. Factors listed in the FDI Regulation include potential effects on critical infrastructure (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, as well as sensitive facilities and investments in related real estate); critical technologies and dual use items (including artificial intelligence, robotics, semiconductors, cybersecurity, quantum,

aerospace, defense, energy storage, and nuclear technologies, nanotechnologies and biotechnologies); supply of critical inputs (including energy, raw materials, and food security); access to or the ability to control sensitive information (including personal data); and freedom and pluralism of the media.

Under the Proposed FDI Regulation, screening would be mandatory for FDI in certain sectors (although, as discussed below, not all investments screened by national authorities would be subject to coordination with other Member States and the Commission). Screening would be mandatory not only for proposed investments by a non-EU entity, but also investments where an EU-based direct investor is ultimately owned by individuals or entities from a non-EU country. However, screening would not be mandatory for greenfield investments.

Mandatory screening would cover investments involving a project or program of EU interest (as listed in Annex I) or involving critical infrastructure areas listed in Annex II. Annex II includes products covered by EU rules on exports of dual-use items or military technology and equipment; critical technologies (advanced semiconductors; artificial intelligence; quantum; biotechnologies; advanced connectivity, navigation and digital; advanced sensing; space & propulsion; energy; robotics and autonomous systems; and advanced materials, manufacturing and recycling); critical medicines; and critical entities and activities in the EU financial system. Unsurprisingly, this list largely overlaps with the factors mentioned in the FDI Regulation, but there are some curious omissions, such as transport, water, health (except for critical medicines), communications, media and food security.

#### *Cooperation procedure*

The FDI Regulation created an elaborate cooperation mechanism. Member States must notify the Commission and other Member States of any FDI that is undergoing screening. Where a Member State considers that an FDI planned or completed in another Member State is likely to affect its security or public order, or otherwise has relevant information, it may provide comments to the host Member State, with a copy to the Commission. The Commission must then notify the other Member States and may issue an opinion itself. A Member State may request the Commission to issue an opinion or other Member States to provide comments, and the Commission must deliver such an opinion if requested by at least one-third of Member States. Although it must give “due consideration” to comments and opinions from other Member States and the Commission and take “utmost account” of Commission opinions in cases of “Union interest,” host Member States have the ultimate say.

The Proposed FDI Regulation would make the cooperation between the Member States and the Commission more effective and efficient. Member States will be required to notify the Commission and other Member States of proposed investments if the investment involves any of the mandatory screening sectors and the foreign investor is controlled by a non-EU government, including through ownership structure, significant funding, special rights or state-appointed directors or managers; the proposed investor is subject to EU sanctions; or the foreign investor was involved in a previously screened investment that was prohibited or authorised with conditions. Member States must also notify the Commission and the other Member States of any foreign investment where they initiate an in-depth investigation or intend to impose a mitigating measure or to prohibit a transaction without an in-depth investigation. Member States may also notify

proposed investments that are not required to be notified if they consider that a foreign investment could be of interest from a security or public order perspective.

The Proposed FDI Regulation creates special requirements for so-called “multi-country transactions,” where a proposed investment triggers notification requirements in more than one Member State. Applicants requesting authorisations in multi-country transactions must file all notifications on the same day to ensure that timelines run in parallel. Each request for authorisation must refer to the other requests. The relevant Member State authorities and, upon request, the Commission, must coordinate with one another.

Member States may issue comments to the notifying Member State if it considers that a foreign investment is likely to negatively affect its security or public order; or has information relevant for the screening of that foreign investment. A Member State issuing comments must simultaneously send its comments to the Commission and inform other Member States that comments have been provided. The Commission may issue an opinion if it considers that such a foreign investment is likely to negatively affect the security or public order of more than one Member State; is likely to negatively affect projects or programmes of EU interest on grounds of security or public order; or it has relevant information related to that foreign investment or considers that several foreign investments or other similar investments, taken together, could affect EU security or public order.

Where a notifying Member State receives a comment from another Member State or an opinion from the Commission, it must give those comments or opinion “utmost consideration.” The host Member State must set up a meeting to discuss how to best address the risks identified. If the host Member State disagrees with the risks identified or, if applicable, the measure proposed with the comment, the Member States shall aim to identify alternative solutions. In multi-country transactions, all relevant Member States must also be invited to discuss whether the intended outcomes are compatible with one another and, where applicable, the intended conditions are able to address identified cross-border risks adequately.

The host Member State retains the ultimate decision-making authority but must notify its decision to the relevant Member States and the Commission, provide a written explanation on the extent to which it gave the Member States’ comments or the Commission opinion utmost consideration or the reason for its disagreement with the Member States’ comments or the Commission opinion. If another Member State or the Commission believes that the decision failed to give utmost consideration to their comments or opinion, the host Member State must organise a meeting to explain the obstacles encountered or the reasons for disagreement and shall endeavour to identify solutions should a similar situation arise in the future. This cooperation mechanism is subject to strict timelines set out in the Proposed FDI Regulation. Notifying Member States may take their screening decisions only after the consultation deadlines have expired.

Member States, and the Commission itself, will have the power to open own-initiative investigations where a foreign investment that has not been notified under the cooperation mechanism is likely to negatively affect security or public order in that Member State or the EU. Member States and the Commission will have at least 15 months after a foreign investment has been completed to open an own-initiative procedure. In the context of an own-initiative investigation, requests for information may be issued to the host member State that are proportionate to the purpose of the request and not unduly burdensome for the host Member State.

To ensure the effective operation of the cooperation system, Member States will be required to

provide the necessary resources, legal and administrative means; designate a contact point; ensure that their deadlines and procedures allow them to provide complete answers to requests for additional information by the Commission or other Member States; and ensure that their screening mechanisms give sufficient time and means to assess and give utmost consideration to other Member States' comments and Commission opinions before a screening decision is taken. Where a foreign investment is notified to the Commission and other Member States, screening mechanisms shall not allow Member States to take their screening decision until the deadlines for comments by the Member States and Commission opinions expire. Member States shall ensure that their national laws allow compliance with these obligations. Where mitigating measures in a screening decision require compliance by undertakings established in other Member States, the Member States that adopted a screening decision shall cooperate with the other Member State or Member States concerned on the monitoring and enforcement of screening decision. Member States must ensure that they have all necessary legal means and powers to address non-compliance with any mitigating measures.

### *FDI negatively affecting security or public order*

The Proposed FDI Regulation includes new requirements regarding how Member States and the Commission should assess notified investments and the consequences of a determination that an investment is likely to have a negative effect on security or public order. Among other things, the new provisions ensure that a Member State can block (or impose conditions on) a proposed investment in its territory based on security or public order concerns arising in a different Member State. (Otherwise, an authority might be unable, under local law, to prohibit or impose conditions on a proposed investment based on concerns raised by the Commission or another Member State.)

When determining whether an investment is likely to negatively affect security or public order, the Member States or the Commission must consider whether the investment concerned is likely to negatively affect: (a) the security, integrity and functioning of critical infrastructure, whether physical or virtual; (b) the availability of critical technologies; (c) the continuity of supply of critical inputs; (d) the protection of sensitive information, including personal data, in particular with regard to the ability of the foreign investor to access, control, and otherwise process such personal data, or (e) the freedom and pluralism of the media, including online platforms that can be used for large scale disinformation or criminal activities.

The Member States or the Commission must also consider (a) whether the foreign investor was previously involved in a foreign investment previously screened by a Member State but not authorised or authorised with conditions; (b) where applicable, the reasons for subjecting the foreign investor to EU sanctions; (c) whether the foreign investor has already been involved in activities negatively affecting the security or public order in a Member State; (d) whether the foreign investor has engaged in illegal or criminal activities; and (e) whether the foreign investor is likely to pursue a third country's policy objectives, or facilitate the development of a third country's military capabilities.

Where the host Member State concludes that the foreign investment is likely to negatively affect security or public order in one or more Member States, it must issue a screening decision to: (a) authorise the FDI subject to mitigating measures, or (b) prohibit the FDI. Where the Member State considers that other measures are available and appropriate under EU or national law to address the

foreign investment's effect on security and public order, however, the foreign investment shall be authorised without conditions.

### *FDI screening infrastructure*

To support the heightened level of cooperation required by the Proposed FDI Regulation, the proposal requires creation of new infrastructure. Information on notified transactions will be exchanged among the Member States' and the Commission's contact points through a secure and encrypted system to be provided by the Commission.

The Commission will also set up a secure database available to all Member States with information on foreign investments assessed by the cooperation mechanism and the outcome of the assessments under the national screening mechanisms, including information about the relevant screening decisions. The database will also include information on screening since the FDI Regulation entered into force.

### **Other Economic Security Initiatives**

Although the Proposed FDI Regulation is the most substantive element in the EU's economic security package, the package includes four other significant initiatives. These relate to monitoring and assessment of outbound investment risks; control of dual-use goods exports; support for research and development in technologies with dual-use potential; and enhancement of research security.

Perhaps the most noteworthy of these initiatives is the study of concerns regarding outbound investments in advanced technologies, which are not currently monitored or controlled at EU or Member State level. The Commission's White Paper on Outbound Investments proposes a step-by-step analysis of outbound investments to understand potential risks, including a stakeholder consultation and a 12-month monitoring and assessment of outbound investments at national level. This exercise will contribute to a joint risk assessment report, which may include recommendations for EU-level legislation.

### **Conclusions**

With European elections looming, work on the Commission's economic security proposals will continue in the next Commission mandate. In particular, the European Council and Parliament will likely begin in-depth work on the Proposed FDI Regulation only in 2025. Given the numerous economic and security challenges facing Europe, however, the momentum for a more coordinated, proactive EU role will likely continue.

The Proposed FDI Regulation would replace, not amend, the FDI Regulation, but it builds on the now-familiar framework. Member States will be required to adopt FDI screening mechanisms, but virtually all would likely have done so in any case by the time the Proposed FDI Regulation is fully implemented. Even if more transactions require notification based on the long list of mandatory

screening areas, the cooperation procedure will be triggered only where the Proposed FDI Regulation criteria indicate a higher degree of risk, so the cooperation mechanism may ultimately be triggered by fewer transactions.

The most significant changes in the Proposed FDI Regulation relate to the cooperation procedure. Member States will continue to have the final say over proposed investments in their territory, but they will have heightened obligations to take account of the views of other Member States and the Commission. These obligations will be reinforced by the requirements to meet with other Member States and the Commission where a Member State proposes to take (or has taken) screening decisions they disagree with. The new screening infrastructure will also likely promote a more joined up approach.

Though building on the framework established in 2019, the Commission's proposals appear to reflect greater confidence on the part of the Commission, as well as a heightened sense of risks facing the EU in a dangerous world.

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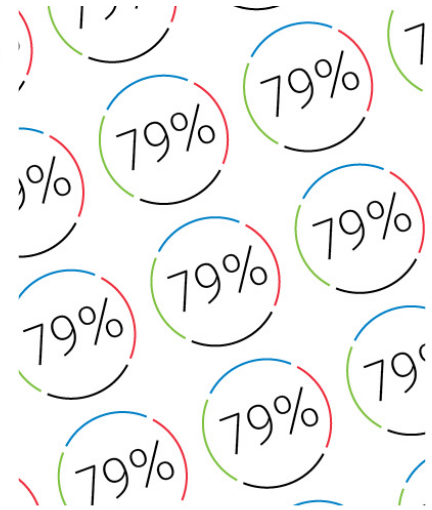
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