



MEMO - Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union

Disclaimer: This MEMO provides information on the FDI Screening regulation, from the perspective of the Commission services. Only the Court of Justice of the EU can give an authoritative interpretation of Union legislation.

I. Objective of the regulation

1. Why is it necessary to have an EU framework on FDI screening?

In the past years there have been growing **concerns regarding certain foreign investors** seeking to acquire control of or influence in European firms whose activities have repercussions on critical technologies, infrastructure, inputs or sensitive information, putting security or public order at risk. This is especially the case when foreign investors are state owned or controlled, including through financing or other means of direction. The framework for FDI screening ensures that while remaining open to investment, the EU is equipped to protect its essential interests.

2. What is the objective of the Regulation?

Today, more than ever, the EU's openness to foreign direct investment (FDI) needs to be balanced by appropriate screening tools to **safeguard our security and public order**.

Without questioning Europe's openness to FDI, the Regulation plays an important role in **exceptional cases** where foreign investors seek to acquire **assets critical for our essential interests**. **The Regulation has equipped the EU to** identify risks related to acquisition or control of strategic assets that threaten security or public order.

Given the high degree of integration between EU Member States' markets, interconnected supply chains and common infrastructures between Member States, **a foreign investment could pose a security risk beyond the Member State where the investment is made**. An input, a service or a technology provided by a company established in one Member State may be critical to the security of another Member State or to a project of Union interest.

Without the EU framework these "beyond the border impacts" would remain blind spots as the screening of an investment by a Member State takes into account only risks to the national security of the Member State where the investment is planned or completed. Thanks to the Regulation, Member States and the Commission **will have a much better overview of foreign investments in the EU**.

3. What are risks that the EU is trying to identify with the new framework?

In the internal market, a critical technology or infrastructure in one country may also be **critical for its neighbours** and sometimes for the whole Union. Acquisitions in strategic sectors may also have impacts on **EU-funded projects**, like the navigation system Galileo, Trans-European Networks in the areas of energy and transportation or the EU's research and innovation programme Horizon 2020.

The Regulation includes **an indicative list of factors** that Member States and the Commission may take into account when assessing whether a foreign direct investment is likely to affect security or public order. These factors include effects on critical infrastructure, technologies and inputs, which are essential for security or public order. Effects of FDI relating to access to sensitive information, including personal data, or the ability to control such information, or the freedom and pluralism of the media may also be taken into account when making such an assessment.

Member States and the Commission may also take into account **the context and circumstances** of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly (for example through significant funding, including subsidies), by the government of a third country or is pursuing state-led outward projects or programmes.

The assessment shall be conducted on a **case-by-case** basis.

4. Does the regulation target any specific country?

No. Concerns relating to security and public order can potentially arise from anywhere. **Non-discrimination** among foreign (non-EU) investors is a key principle of the Regulation and the sole grounds for screening a foreign investment are risks to security and public order, regardless of the foreign investor's origin.

5. Will the EU be less open to foreign investments?

The Regulation is not about closing markets or restraining activities in the Union. Rather, it is about **identifying and addressing potential threats to security or public order**, which may be caused by foreign investments.

It will be for Member States and the Commission to assess, on a case-by-case basis, whether a specific acquisition threatens security or public order and, if so, to suggest **appropriate measures to mitigate those risks**.

6. How does the new EU framework compare with national screening mechanisms of EU Member States?

The EU framework is **not fully equivalent to a national screening mechanism**. Its aim is to help identifying and addressing security risks that affect at least two Member States or the Union as a whole by establishing a cooperation mechanism between the Member States and the European Commission. It provides for a formal channel of exchange **to raise awareness** on cases where a foreign direct investment may affect security or public order, and to suggest steps to address the specific concerns.

7. How might FDI screening play a role in coping with the COVID-19 crisis?

The COVID-19 emergency has made our vulnerability in some areas clearer, including the resilience of our critical industries in their capacity to respond to the vital needs of citizens.

As part of the overall economic response to the COVID-19 crisis, the Commission has adopted a **Commission Communication providing guidance on the Foreign Direct Investment Screening Regulation**. Against the backdrop of the public health crisis and related economic vulnerability, the aim of this guidance is to encourage Member States to be vigilant to preserve EU companies and critical assets, notably in areas such as health, medical research, biotechnology and infrastructures essential for our security and public order. This, of course, without undermining the EU's general openness to foreign investment, which remains crucial for the economic recovery in the aftermath of the current crisis. The Commission has called upon the remaining Member States to set up a fully-fledged screening mechanism and in the meantime to consider all options, in compliance with EU law and international obligations, to address potential cases where the acquisition or control by a foreign investor of a particular business, infrastructure or technology would create a risk to security or public order in the EU.

II. Scope of the regulation

8. What kind of foreign investment is covered?

The cooperation on FDI screening between Member States and the Commission covers **any foreign direct investment**. As defined by the European Court of Justice, this can be an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the target company in order to carry out an economic activity in a Member State. Foreign investor means a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment.

While portfolio investments are not part of the scope of the Regulation, the Regulation does not establish quantitative criteria for the delimitation of portfolio investment and FDI.

Foreign direct investment can take two different forms: greenfield, and mergers and acquisitions (M&As). International **greenfield investment** typically involves the creation of a new company or establishment or facilities abroad, whereas an international **merger or acquisition** amounts to transferring the ownership of existing assets to an owner abroad.

9. Does the Regulation apply to public procurement transactions?

No. The purpose is **not to regulate public procurement** in the EU. It is about identifying and addressing potential threats to security or public order, which may be caused by foreign investments.

10. Does the Regulation allow the screening of foreign direct investment on economic grounds?

The EU framework **does not allow** for the screening of foreign direct investment based on other concerns than security and public order.

11. What is the sectoral coverage of the regulation?

The Regulation **applies to foreign direct investments in any sector**. It includes an indicative list of **factors** that Member States and the Commission may take into account when assessing whether a foreign direct investment is likely to affect security or public order.

In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on, e.g. critical infrastructure, critical technologies and the supply of critical inputs. Access to sensitive information, including personal data, or the ability to control such information, the freedom and pluralism of the media may also be taken into account, regardless of the sectoral activity of the investor or the target undertaking.

12. What is the status of the UK?

During the transition period under the [Withdrawal Agreement](#), i.e. until 31 December 2020, unless specifically provided otherwise, Union law is applicable to and in the United Kingdom. Accordingly, the Union law produces in respect of the United Kingdom the same legal effects as those which it produces within the Union and its Member States. Therefore, **during the transition period under the Withdrawal Agreement, UK investments into the EU are considered as 'intra-EU investments'** and not 'foreign' in the meaning of the Regulation. As such, UK investments should not be subject to screening of foreign investments or any assessment under the EU cooperation mechanism.

Notably, the Withdrawal Agreement provides for derogations in specific cases. On the basis of one of such derogations, the [Commission recognised](#) that the **UK shall not be part of the cooperation mechanism** on FDI Screening.

As of 1 February 2020 the **UK has not been participating** in the [Group of Experts](#) on the screening of FDI into the EU.

III. Screening mechanisms of Member States

13. Will the EU mechanism replace the screening mechanisms maintained by EU Member States?

No. The new regulation **complements screening mechanisms of Member States and strengthens their effectiveness**. It is designed to help Member States and the Commission to collectively assess potential cross-border threats to security and public order arising from a foreign direct investment. This is regardless of whether a Member State has a screening mechanism or not. It does not substitute existing national screening mechanisms. In particular, the Member States retain the final decision as to whether an investment is authorised in their territory and under which conditions.

14. Does the Regulation apply to all EU Member States or only to those who maintain a screening mechanism at national level?

The Regulation **applies to all EU Member States**, regardless of whether they have a screening mechanism or not.

The cooperation between the Commission and Member States will differ slightly depending on whether the foreign investment is undergoing screening at national level or not. If the **investment is screened at national level**, the Member State is **obliged to notify** the Commission and the other Member States by providing information on that transaction. Where another Member State considers that this

transaction is likely to affect its security or public order, it may issue a comment. Where the Commission considers that a transaction is likely to affect security or public order in more than one Member State, it may issue an opinion. Comments by Member States and the opinion by the Commission are addressed to the Member State where the investment is planned or completed.

Comments and opinions are not shared with the other Member States except where the opinion concerns a foreign direct investment likely to affect projects or programmes of Union interest on grounds of security or public order. All exchanges under the cooperation mechanism are subject to strict rules on confidentiality.

Member States can also issue comments on each other's inward investments by third country investors and the Commission can issue opinions with respect to foreign direct investments **not undergoing screening**. This may be the case for Member States without a screening mechanism, or investments that do not fall under the scope of the host Member State's national mechanism. This can also be the case if a Member State decides not to screen a particular investment. In that case, the host Member State is required - in case of questions from other Member States or the Commission - to provide a minimum level of information without undue delay through confidential channels.

15. Does the Regulation require Member States to set up screening mechanisms at national level?

The decision on whether to set up a national screening mechanism and design its scope and process, or, where a national screening mechanism is in place, whether to screen a particular foreign direct investment **remains the exclusive responsibility of the Member State** where the investment is planned or completed.

The adoption of the Regulation triggered a constructive discussion about investment screening in Europe and **several Member States are currently reforming their screening mechanisms, or adopting new mechanisms**. In its guidance of March 2020, the Commission calls upon that those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, set up a fully-fledged screening mechanism.

16. Where can I get information about Member States' screening mechanisms?

Member States shall notify the Commission of any newly adopted screening mechanism or any amendment to an existing screening mechanism within 30 days of its entry into force. The **Commission publishes a list of screening mechanisms** notified by the Member States.

17. After the screening process, who makes the final decision about whether or not a particular FDI will go ahead?

The final decision on whether a foreign investment is authorised **remains with the Member State** where the investment takes place. While other Member States or the Commission may raise concerns, they cannot block or unwind the investment in question. When a Member State receives comments from other Member States or an opinion from the Commission, it should give such comments or opinions due consideration through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of sincere cooperation.

18. Can the Commission or other Member States prohibit a transaction or unwind an investment already completed in a Member State?

The final decision on whether a foreign investment is authorised remains with the Member State where the investment takes place. While other Member States or the Commission may raise concerns, they cannot block or unwind the investment in question.

IV. Functioning of the cooperation mechanism

19. Is it mandatory or voluntary for Member States to take part in the cooperation mechanism?

The cooperation is **mandatory** to the extent that Member States have to **notify** the Commission and other Member States of any foreign direct investment in their territory that is **undergoing screening** and have to **share certain information through secure channels**.

When a Member State or the Commission considers that a foreign direct investment **not undergoing screening** in another Member State is likely to affect its security or public order, it may request information from the host Member State. This host Member State has to ensure that a **minimum level of information is made available** to the Commission and the requesting Member State without undue delay through confidential channels.

Some elements are voluntary, such as issuing comments or an opinion on a foreign direct investment taking place in another Member State.

20. Does the cooperation mechanism also apply to investments already completed?

When an investment is subject to a national screening mechanism, the cooperation mechanism will also apply to a completed investment if the national screening mechanism allows it (however, most mechanisms are based on ex-ante notification by the investor).

When an investment is not subject to screening at national level, the cooperation mechanism may be initiated **within 15 months** after the investment has been completed.

21. What are the obligations of a Member State that receives comments from other Member States or an Opinion of the Commission?

All Member States are bound by the duty of sincere cooperation. Under the cooperation mechanism a Member State has to give "**due consideration**" to the comments from other Member States and the opinion of the Commission and consider, where appropriate, measures available under its national law, or in its broader policy-making. This ensures that the host Member State assesses the comments received or the Commission's opinion before it takes a decision on a foreign direct investment.

In the context of projects or programmes of Union interest affected by foreign direct investments, the Commission's Opinions must be taken into "**utmost account**" by host Member States. This means that, by default, the Member States must follow the opinion, or must provide reasons for not doing so.

22. What are the projects and programmes of Union interest?

Projects and programmes of Union interest **involve a substantial EU funding or are established by Union legislation regarding critical infrastructure, critical technologies, or security of supply**

of critical input. They serve the Union as a whole and represent an important contribution to growth, jobs and competitiveness for the Union's economy, such as Galileo, the Trans-European Networks for energy, transport and telecommunication, but also Horizon 2020, and the defence industrial development programme.

The list of projects and programmes of Union interest is published as an [annex to the Regulation](#) and it was [updated](#) in 2020 prior to the full application of the Regulation.

The Commission keeps the list up-to-date by means of Delegated Regulations.

23. Will the Commission's opinion or other Member States' comments be published?

The cooperation mechanism is **subject to strict rules on confidentiality** as it concerns the security or public order of one or more Member States or the functioning of an EU project or programme relevant for the security of the EU as a whole. Screening undertaken by the Member States is confidential and the EU cooperation shall respect the same rules. Lack of confidentiality would make it difficult to share sensitive information, which is essential for a meaningful cooperation.

Therefore, the Commission does not disclose information related to individual FDI transactions, to the screening of any FDI transaction nor to any opinion issued on any given FDI transaction. But the Commission will publish an annual report about the implementation of the Regulation, which will be based on, e.g., annual reports submitted by the Member States to the Commission.

V. Entry into force and start of application

24. The EU framework for the screening of foreign direct investments officially entered into force on 10 April 2019 - so what happens on 11 October 2020?

The cooperation mechanism established under the EU framework on FDI screening **applies from 11 October 2020**. As of this date, Member States and the Commission **will formally cooperate** on FDI, including sharing of information and expressing concerns, if there is a risk for security or public order in another Member State or in relation to a Union project.

The obligation to notify FDI undergoing screening applies to transactions where the decision to screen is taken by the Member States on, or after, 11 October. Screening procedures in progress are not to be notified to the Commission and other Member States on 11 October.

25. Why was there a transitional period of 18 months between the entry into force of the Regulation and its full application?

Investment screening is a new policy area for the EU and for a number of Member States. The transitional phase ensured that **all legislative and administrative arrangements are put in place by the Member States and within the Commission**, before the Regulation is fully operational. This includes, e.g. the adaptation of national screening laws, the establishment of contact points and putting in place secure channels for information exchange.

As part of the overall economic response to the Covid-19 crisis, the Commission has singled out the issue of FDI screening by adopting a Communication providing [guidance](#) on the Foreign Direct Investment Screening Regulation. In April 2020, at the initiative of some Member States, **informal cooperation was launched between the Member States and the Commission** to monitor foreign acquisitions

pending the full application of the Regulation. This facilitated coordination on FDI where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU.

VI. Relations with stakeholders/businesses

26. How does the Regulation ensure the protection of confidential information?

The Regulation obliges the Member States and the Commission to protect information obtained in the application of the Regulation in accordance with Union and national laws. The Commission and Member States will use **secure and encrypted means of communication** to exchange sensitive and classified information on individual FDI transactions, in full compliance with EU and national rules.

27. Does the Regulation require that businesses notify transactions to the Commission?

No. Businesses (investors or target undertakings) **are not required to notify** transactions to the Commission or to other Member States. Only the Member State that undertakes the screening of a transaction is under an obligation to notify. This is without prejudice to obligations pursuant to other EU or national rules.

28. May the Commission contact investors or undertaking directly?

The Commission will assess risks to security or public order based on information received from the Member State where the FDI is planned or completed, or from other available sources. While the **Commission will not contact investors or other stakeholders directly**, Member States that are under obligation to provide information to the Commission or other Member States, may request such information directly from businesses.

29. Will the Commission report on the application of Member States' screening mechanisms and the cooperation mechanism?

The Commission will publish **annual reports** on the implementation of the regulation, which will be based on, e.g. annual reports submitted by the Member States to the Commission. Commission reports will provide aggregated information about the use of the cooperation mechanism while protecting the confidentiality of information submitted by individual Member States on the implementation of their national screening mechanisms.

By 12 October 2023 and then every five years, the Commission will **evaluate** the functioning and effectiveness of the Regulation and present a report to the European Parliament and to the Council. This report will be made public.

VII. International cooperation

30. What is meant by “international cooperation”?

The Regulation encourages Member States and the Commission to cooperate with the **competent authorities of like-minded countries** on issues relating to the screening of foreign direct investments on grounds of security and public order.

International cooperation 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.

VIII. Group of Experts

31. Who takes part in the Group of Experts on the screening of foreign direct investments into the EU?

The [Group](#) is chaired by the Commission and is composed of representatives of Member States' authorities. **All Member States take part in the Group**, including those that do not currently have a national screening mechanism.

The [mandate](#) of the Group is to discuss issues of common concern related to foreign direct investments and exchange best practices and lessons learned from investment screening at national level. The Group is [also empowered](#) to advise the Commission on systemic issues relating to the implementation of the Regulation and it is consulted on draft delegated acts updating the list of projects and programmes of Union interest annexed to the Regulation.

32. Does the Group of Experts discuss individual screening cases?

The Group **does not discuss individual FDI transactions**. Its mandate is limited to systemic issues related to the implementation of the Regulation.

IX. Protection of personal data

33. How does the Regulation ensure protection of personal data?

Under the FDI Screening Regulation, the Commission and the Member States will exchange information on foreign direct investments. This information might include personal data (e.g. identification and contact data, professional data and data related to foreign direct investment). The processing of such data in the Commission and in the Member States is subject to data protection rules. The Commission and Member States are **working closely to develop instruments to ensure compliance with GDPR¹ and Regulation (EU) 2018/1725** while respecting the confidentiality of the cooperation, which is essential for its effectiveness.

Last update: 9 October 2020

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)