

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 aims at informing 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.

Objective of the regulation

1. Does the regulation change the EU's openness to foreign investment?

No, the EU remains open to foreign direct investment. Welcoming FDI is very important for the EU's continued economic growth, for innovating and creating jobs. The EU is among the most attractive places to invest in the world, and among the least restrictive, as acknowledged by the OECD. The FDI screening regulation will address concerns strictly limited to security and public order.

Looking at existing security screening mechanisms, there is no indications that they reduce foreign direct investment flows. However, by ensuring that there is a possibility to intervene in case of concerns relating to security and public order, the regulation will also increase trust in the functioning of the EU market and in the benefits of keeping it open.

2. Does the regulation target any specific country?

No. Concerns relating to security and public order can potentially arise from anywhere. Non-discrimination among foreign 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.

3. 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. It sets up a cooperation mechanism among Member States, and with the European Commission. It provides for a formal channel of information exchange to raise awareness on cases where a foreign direct investment may affect security or public order, and to suggest steps to address the concerns.

In addition, whereas existing screening mechanisms by EU member states address FDI solely within their own territories, the EU framework will help identifying and addressing security risks that affect several Member States or the Union as a whole.

Scope of the regulation

4. What kind of investments are covered?

The regulation covers any foreign direct investment. This means, as defined by the European Court of Justice, 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 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.

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.

5. Will 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.

6. Does the regulation allow the screening of foreign direct investment on economic grounds?

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

7. What is the sectoral coverage of the regulation?

The regulation applies to all sectors. It includes a list of indicative 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.

Screening mechanisms of Member States

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

No. The new regulation complements the existing screening mechanisms of Member States and enhances their effectiveness. It is designed to help Member States and the Commission to assess collectively 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 keep the final decision as to whether an investment is authorised in their territory and under which conditions.

9. 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 procedure will however slightly differ, depending on whether the foreign investment is undergoing a screening procedure at national level or not. For instance, Member States which have a screening mechanism will notify the Commission and the other Member States when a transaction is screened, by providing information on that transaction.

10. Does the regulation require Member States to set up screening mechanisms at national level?

No. The regulation does not oblige Member States to set up a screening mechanism at national level.

Functioning of the cooperation mechanism

11. 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 confidential 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.

However, some elements are voluntary, such as issuing comments on a foreign direct investment taking place in another Member State.

12. 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. This ensures that the host Member State assesses the comments received before it takes a decision on a foreign direct investment at stake.

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.

13. Will the cooperation mechanism also apply to investments already completed?

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

(2) 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.

14. 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.

15. 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. The list of projects and programmes of Union interest is

published as an annex to the regulation. The Commission is empowered to update this list when necessary.

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

No. Opinions and comments relating to a specific FDI will not be disclosed as this would undermine the protection of information relevant for security, potentially defence and military matters as well as international relations. It could also undermine the commercial interests of a natural or legal person, or privacy. However, once the regulation is fully applicable, the Commission will publish annual reports on the implementation of the regulation.

Entry into force and start of application

17. When will the cooperation mechanism start to apply?

The cooperation mechanism will apply from 11 October 2020.

18. Why is there a transitional period of 18 months?

Investment screening is a new policy area for the EU and for many MS. The transitional phase will ensure that all legislative and administrative arrangements are put in place at Member States' level and within the Commission, before the Regulation is operational. This includes, inter alia, adaptation of national screening laws, establishment of contact points and secured channels of information exchange.

Relations with stakeholders/businesses

19. 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. Under the regulation the Commission is required to provide a secured and encrypted system of communication between Member States and the Commission.

20. Does the regulation require that businesses notify any transaction to the Commission? Is the Commission empowered to contact investors or undertaking directly?

No. Businesses (investors or target undertakings) are not required to notify transactions to the Commission or to other MS. Only the Member State that undertakes the screening of a transaction is under an obligation to notify. The Commission will assess risks to security or public order on the basis of information received from the host Member State or from other available sources. At the same time, Member States that are under obligation to provide information to the Commission or other Member States, may request such information directly from businesses.

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

Once the regulation is fully applicable, the Commission will publish annual reports on the implementation of the regulation. Such reports will provide aggregated information about the use of

the cooperation mechanism, while preserving the confidentiality of information submitted by individual Member States on the implementation of their national screening mechanisms.

22. What information will the Commission publish and when?

No later than 10 August 2019, the Commission will publish a list of Member States' screening mechanisms on its [website](#). This list will be updated each time a Member State notifies to the Commission that it has modified or set up its national screening mechanism.

Once the regulation is fully applicable, the Commission will each year provide a public report on the implementation of the regulation.

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.

International cooperation and Group of experts

23. What do you mean by international cooperation?

The regulation encourages Member States and the Commission to cooperate with the responsible 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 format, such as the G7 or the OECD. This may include sharing experiences, best practices and information regarding investment trends.

24. 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 have a national screening mechanism.

25. Does the Group of experts discuss individual screening cases?

No. It does not discuss individual transactions. Its objective is to discuss issues of common concern related to foreign direct investments and exchange best practices and lessons learned from screening investments at national level. The Group is also empowered to advise the Commission on systemic issues relating to the implementation of the regulation and it can be consulted on draft delegated acts updating the list of projects and programmes of Union interest annexed to the regulation.

Analysis of foreign direct investments into the EU

26. What about the commitment to publish a study on FDI flows?

The [in-depth analysis on foreign direct investments in the EU](#) was published on 13 March 2019. The Commission intends to continue monitoring EU-wide FDI trends with a view to report regularly on the matter.