

EUROPEAN CONTROL OF FOREIGN INVESTMENT AT THE EU LEVEL

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The EU framework for foreign direct investment (FDI) came into force in October 2020. It creates a “cooperation mechanism” that allows all Member States and the Commission to jointly assess potential threats to security and public order from FDI. This system builds on and complements existing control mechanisms in Member States. The regulation allows the Commission to issue opinions on specific foreign direct investments if it considers that they are likely to affect the security and public order of more than one Member State or are likely to adversely affect projects or programmes of interest to the EU on security or public order grounds. The final decision to reject, authorise or require mitigation measures rests with Member States. This new mechanism reflects a new assertiveness in EU trade policy that lies at the crossroads between economic and security considerations.

Strategic monitoring of trade and investment

One of the primary objectives of EU trade policy is that the bloc remains open to trade and investment without jeopardising its security. The EU has created stand-alone tools – two separate regulations – that address both sides

of the same coin. Looking inwards, FDI control prevents the acquisition of sensitive technologies and other critical infrastructure or inputs within the EU. Looking outwards, export controls restrict the export of sensitive goods, technology, information and services that could be used for military purposes and violate human rights in the destination countries. The EU has established a new regulation that includes provisions on dual-use items to reflect technological advances. It has been in force since September 2021.

These are two sides of the same coin: it would be inconsistent to have strict rules restricting access to key technologies in dangerous destinations while leaving the door open for investors based in those destinations to avoid export controls by buying production capacity in Europe.

The road travelled so far

The EU investment screening framework provides us with a clearer picture of the impact of FDI in other Member States or on important European projects. FDI screening controls the acquisition of sensitive technologies and other critical infrastructure or inputs within the EU. Cooperation on this issue within the EU is increasing.

The Commission receives a growing number of notifications every week: more than 400 cases were examined in 2021. This mechanism works extremely quickly, avoiding delays in investments as much as possible. More than 80% of all cases examined are closed very quickly within just 15 calendar days, without the need for in-depth assessments. Despite this speed, the Commission does scrutinise cases and transactions that are clearly sensitive. There have been very few cases where the Commission has issued a formal opinion (less than 3%). Member States have welcomed those that have been issued, however. Lastly, although the mechanism focuses on security, it does not hinder the EU's openness to FDI. Member States – which have the final say on each investment – block less than 3% of transactions.

The Commission covers the European aspects, where FDI has an impact on more than one Member State and/or projects or programmes relevant or beneficial to the EU (Galileo and Horizon Europe, for example). EU cooperation complements Member States' screening mechanisms; it does not replace them.

An initial assessment: the annual report

The regulation requires the Commission to report annually to the European Parliament and the Council on its implementation. The Commission's first report on screening foreign direct investment in the EU was approved on 23 November 2021. The report covers the following: FDI figures and trends in the EU; legislative developments in Member States; screening activities by Member States; and an assessment of how EU cooperation on FDI screening has worked since 11 October 2020, the date on which the EU FDI Screening Regulation came into force.

Turning to the main findings, the report highlights that the Commission reviewed 265 transactions notified by Member States up to the end of June 2021. A full 80% of transactions did not warrant further analysis and were therefore assessed by the Commission within just 15 days. Most screening notifications from Member States were linked to the manufacturing, information and communication technology, wholesale and retail sectors. Among those FDI cases notified to the Commission, the US, the UK, China, Canada and the UAE were the top five source countries for foreign companies seeking to invest in the EU. The Commission issued an opinion in less than 3% of the 265 cases examined. The first annual report showed that the EU remains open to foreign investment while protecting its security and maintaining public order, and that the cooperation mechanism works effectively and does not cause unnecessary delays to transactions.

The second annual report will cover 2021.

Responding to an ever-changing environment

By providing regular guidance to Member States, the Commission is trying to make it easier for the EU to adapt to changing environments. It is doing this in two ways.

Firstly, it has improved transparency and has made it easier for Member States to cooperate by providing a platform for sharing information.

Secondly, the Commission has provided policy guidance to assist Member States in developing national screening regulations and has supported them through a challenging period. The COVID-19 crisis has shown how FDI screening can be a valuable tool in mitigating the risks associated with certain foreign investments in Europe's critical healthcare assets. It can also protect other critical assets from volatility or undervaluation. In its March 2020 guidance, the Commission encouraged all EU Member States to adopt and use national screening mechanisms. On 5 April 2022, the Commission issued guidance to EU Member States on assessing and preventing threats to EU security and public order from Russian and Belarusian investments. The guidance highlights the increased risk of investments being controlled by the Russian or Belarusian government following the Russian invasion of Ukraine. It calls for close cooperation between the authorities involved in investment screening and those responsible for implementing sanctions. If they have not already done so, Member States are urged to put in place comprehensive investment screening mechanisms as a matter of urgency. They are also advised to enforce anti-money laundering rules to prevent the abuse of the EU financial system by Russian and Belarusian investors.

An increasing number of Member States have introduced their own screening mechanism: 18 now have a mechanism in place.

The international aspects of investment control

The Commission also plays a key role in the international aspects of foreign investment control. The EU-US Trade and Technology Council (TTC) has a specific working group on investment control. Russia's military aggression against Ukraine has focused EU and US attention on the importance of putting in place robust foreign investment control mechanisms. This working group provides an opportunity to improve understanding of each other's regimes and to share information and best practices. It also provides a clearer picture of the evolving threat landscape for certain foreign investments. The EU and the US recognise the security risks associated with certain investments

but have repeatedly stressed their commitment to remaining open to foreign investment, seeing it as a key driver of economic growth and innovation.

This EU-US cooperation has resulted in a joint work programme, and to date the investment control working group has held two meetings and a stakeholder awareness event. At the first meeting, the working group discussed investment trends with a bearing on security. Our discussions focused on general trends in foreign direct investment, investment trends and strategies of selected investor countries – including Russia – and trends in transaction structures of special interest. We also presented an overview of the implementation of FDI control regimes based on the consolidated information available in our respective publicly available reports. The working group's second meeting provided an opportunity to share best practices, with a focus on sensitive technologies and sensitive data issues, and present case studies supporting a more targeted discussion on risk analysis and risk mitigation measures.

The purpose of these meetings is not only to share information, but also to gain a better understanding of our

similarities and differences, to deepen the group's understanding of shared and individual risks, to emphasise the importance of investment control as an essential tool for dealing with security and public order risks, and to explore possibilities for further technical discussions to make future collaboration even more effective.

Next steps: continuing implementation and tackling the weak link

With just under two years of experience, the Commission's priority at this stage is still the successful implementation of the EU cooperation mechanism, working closely with Member States.

A chain is only as strong as its weakest link, so the Commission will continue to encourage all Member States to adopt a screening mechanism to strengthen the bloc's security. Right now, nine Member States have not yet implemented a screening mechanism, although many of them are in the process of doing so. Screening mechanisms also differ from one member state to another. We will continue to strive for greater convergence, for example through sharing best practices and working systematically with Member States.