Council of the European Union

Brussels, 26 January 2024
(OR. en)

**Interinstitutional File:**
**2024/0017 (COD)**

**5882/24**
**ADD 2**

**POLCOM 32**
**COMER 23**
**FDI 7**
**RELEX 120**
**DUAL USE 16**
**RECH 36**
**ENER 42**
**ENV 94**
**CODEC 180**

**COVER NOTE**

| | |
|---|---|
| From: | Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director |
| date of receipt: | 25 January 2024 |
| To: | Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union |
| No. Cion doc.: | SWD(2024) 23 final |
| Subject: | COMMISSION STAFF WORKING DOCUMENT<br>EVALUATION 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<br>*Accompanying the document*<br>Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council |

Delegations will find attached document SWD(2024) 23 final.

Encl.: SWD(2024) 23 final

EUROPEAN
COMMISSION

Brussels, 24.1.2024
SWD(2024) 23 final

# COMMISSION STAFF WORKING DOCUMENT

# EVALUATION

**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**

***Accompanying the document***

**Proposal for a Regulation of the European Parliament and of the Council**

**on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council**

{COM(2024) 23 final} - {SWD(2024) 24 final}

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**Glossary**

| *Term or acronym* | *Meaning or definition* |
|---|---|
| ECA report | Special report by the European Court of Auditors: *Screening foreign direct investments in the EU: First steps taken, but significant limitations remain in mitigating security and public order risks effectively* (published on 6 December 2023)[1] |
| FDI | Foreign direct investment as defined in Article 2 of Regulation (EU) 2019/452 |
| FOI | The 'Freedom of Investment' process hosted by the OECD Investment Committee monitors investment policy developments in the 61 economies that participate in the process |
| INTA | International Trade Committee of the European Parliament |
| OECD | Organisation for Economic Cooperation and Development |
| OECD report | Report by the OECD Secretariat: *Framework for Screening Foreign Direct Investment into the EU: Assessing effectiveness and efficiency* (published in November 2022)[2] |
| TFEU | Treaty on the Functioning of the European Union |

[1] https://www.eca.europa.eu/en/publications/SR-2023-27
[2] https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf

# 1. INTRODUCTION

## 1.1 General introduction

On 19 March 2019, the European Parliament and the Council adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union ('the FDI Screening Regulation' or 'the Regulation'). The EU market is based on openness to FDI. However, there are certain risks that need to be tackled, such as where foreign investors seek to acquire assets critical to the EU's security or public order. The EU is an integrated market: any foreign investor established in one Member State can benefit from the internal market as an EU company. Due to the high degree of integration between Member States' markets, interconnected supply chains and common infrastructures between Member States, a foreign investment could pose a security risk for more than one Member State, hence the need for an EU-wide response. In this respect, the Regulation has played an important role by providing the EU with a framework to identify, assess and mitigate security and public order risks related to the acquisition or control of these critical assets.

The EU framework is not exactly the same as a national screening mechanism, as the latter gives a Member State the power to impose conditions on a transaction, or, as a last resort, prohibit its completion. The objective of the Regulation is rather to help Member States in their national screening decisions, by identifying and addressing security and public order risks that affect at least two Member States or the EU as a whole. It provides a cooperation mechanism between Member States and the Commission for exchanging confidential information and raising awareness about specific circumstances where an FDI may affect security or public order. It also allows recommending measures to the Member State where the FDI is planned or has already been completed to mitigate the risks identified.

## 1.2 Purpose and scope of the evaluation

Article 15(1) of the Regulation requires the Commission to evaluate the functioning and effectiveness of this Regulation and present a report to the European Parliament and to the Council by 12 October 2023, i.e. no later than 3 years after its full implementation. In line with the Better Regulation Guidelines[3], the Commission is assessing the relevance, effectiveness, efficiency, coherence and EU added value of the FDI Screening Regulation. Annex III lists in detail the evaluation criteria and questions for this evaluation.

The evaluation covers the period from the entry into force of the Regulation on 11 April 2019 until 30 June 2023 and covers the entirety of the Regulation ('reporting period').

[3] Brussels, 3.11.2021 SWD(2021) 305 final.

Where the analysis involved sensitive or classified information, the main findings are aggregated and anonymised to comply with the Regulation's confidentiality requirements[4].

The evaluation also builds on the findings of a report carried out by the OECD at the Commission's request and co-financed by the EU, which assessed the effectiveness and efficiency of the framework for screening foreign direct investment in the EU and was published in November 2022[5]. In addition, the Commission invited Member State screening authorities, private sector stakeholders and the general public to provide their views, including through a targeted public consultation and a call for evidence. Where relevant, this evaluation also integrates the findings of the very recent special report of the European Court of Auditors (ECA) on the screening of foreign direct investments in the EU.

This Staff Working Document provides a qualitative and quantitative analysis of the application of the Regulation and looks at lessons learned from its implementation. On the basis of the evaluation and the recognition that a 'chain is only as strong as its weakest link', the Commission proposes a revision of the Regulation to ensure that all Member States have a screening mechanism to address any missing links and proposes a number of improvements to address shortcomings experienced and loopholes identified following the 3-year implementation of the Regulation, during which the Commission and the Member States collectively assessed more than 1100 cases.

## 2. WHAT WAS THE EXPECTED OUTCOME OF THE INTERVENTION?

### 2.1. Policy context

In the years before the adoption of the Regulation, there had been growing concerns about certain foreign investors seeking to acquire control of or influence in EU firms where those investments could have had repercussions on technologies, infrastructure, inputs or sensitive information critical for more than one Member State or on a project of EU interest. Given the high degree of integration of the internal market, a foreign investment can pose a risk to security or public order 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 or public order of another Member State or to a project of EU interest, such as the EU's research programmes (Horizon 2020 and Horizon Europe), the Space Regulation or the trans-European networks for energy, transport, and communication. This is particularly the case when foreign investors are owned or controlled by the state, including control through financing or other means of influence[6].

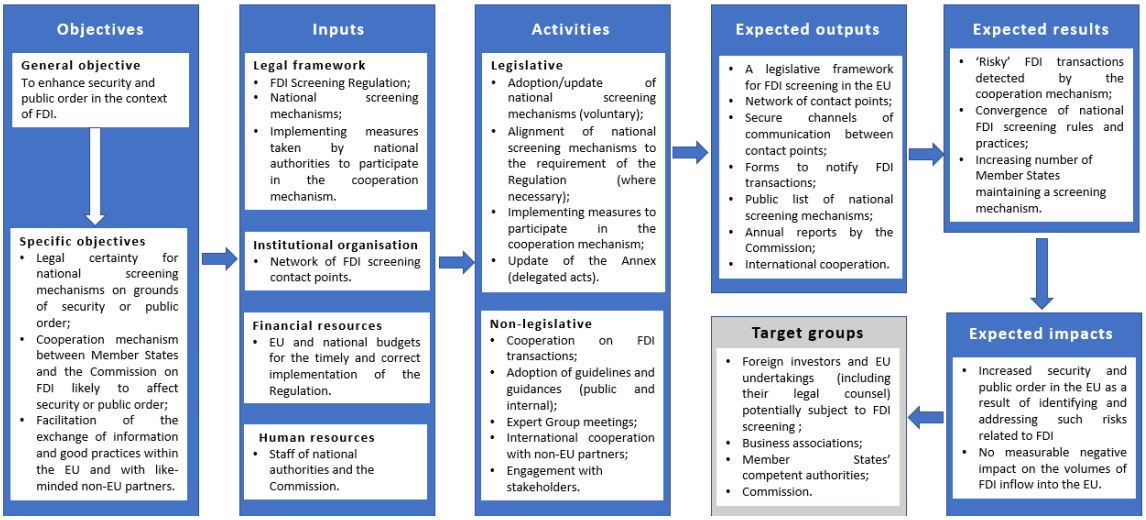
[4] Article 10 of the Regulation.
[5] https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf
[6] This was recalled in the Commission's reflection paper on 'Harnessing Globalisation' issued on 10 May 2017.

The proposal for the Regulation was accompanied by a staff working document[7] providing a factual description of foreign takeovers. In March 2019, the Commission presented an in-depth analysis of investment flows into the EU with a focus on strategic sectors or assets that may raise security or public order concerns[8]. The report confirmed a continuous rise in foreign-company ownership in key sectors in the EU and an increase in investments from emerging economies, such as China, Russia and countries of the Gulf Cooperation Council. It also illustrated the need for effective implementation of the FDI Screening Regulation.

### 2.2 Description of the Regulation and its objectives

This subsection describes the logic of the Regulation: its objectives, inputs and actions as well as the outcomes and impact that were expected to be achieved. It also explains how all these aspects are linked to each other. The framework ('intervention logic') used for this evaluation is summarised below.

*Figure A: Intervention logic*




The FDI Screening Regulation applies to inward FDI by any non-EU investor in any economic sector. It is not subject to any thresholds on the value of the investment. Recognising that concerns about security and public order can potentially arise from anywhere, non-discrimination among foreign (non-EU) investors is a key principle of the Regulation. The only criteria for screening an FDI are risks to security and public order, and the assessment needs to be carried out with due consideration of the circumstances of each case in a holistic manner.

[7] Commission Staff Working Document Accompanying the document 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 (SWD/2017/0297 final - 2017/0224) (COD).
[8] Commission Staff Working Document on Foreign Direct Investment in the EU Following up on the Commission Communication 'Welcoming Foreign Direct Investment while Protecting Essential Interests' of 13 September 2017 (SWD(2019) 108 final).

To achieve its overall objective to protect security and public order in the context of FDI, the Regulation provides six complementary measures.

1. Empowering Member States to review FDI on the grounds of security and public order and to take measures to address specific risks (Article 3).
2. Rules to align national screening rules and policies (Article 3 and, to some extent, Article 4).
3. A cooperation mechanism on specific individual FDI transactions via secure channels between Commission and the Member States, which underpins the assessment of FDI and facilitates the ultimate decision by the Member State where the FDI is planned or completed (Articles 6 to 9).
4. A forum (expert group) for the exchange of information and dissemination of good practices on the design and implementation of FDI screening mechanisms among Member State FDI screening experts (Article 12).
5. A legal basis for international cooperation with non-EU countries (Article 13).
6. Transparency rules (mainly in Articles 5 and 15).

The Regulation has been fully applicable since 11 October 2020, after an 18-month transitional period following its entry into force. While the Regulation is binding on all Member States, the decision on whether to set up a national screening mechanism remains a national one. Additionally, where a national screening mechanism is in place, the scope, processes and the decision whether to screen a particular foreign direct investment is the sole responsibility of the Member State where the investment is planned or completed. Member States are free to adopt and maintain a screening mechanism (or not), determine the design of the mechanism and decide whether a particular FDI that falls under the scope of their system should undergo formal screening. At the same time, participation in the cooperation mechanism is mandatory to the extent that Member States must notify the Commission and other Member States of any FDI in their country that they formally screen. Furthermore, Member States have to share information requested by the Commission or other Member States on any FDI through secure channels.

### 2.3 Points of comparison

Before the adoption of the FDI Screening Regulation, there was no formal EU-wide cooperation among Member States and the Commission on FDI that was likely to affect the EU's collective security. The Commission had no role in screening FDI in the EU and there was no instrument to identify security or public order risks from foreign investments in EU companies participating in flagship projects of Union interest. These projects or programmes relate to critical infrastructure, critical technologies or critical inputs, which are essential for security or public order such as the trans-European networks for energy, telecommunication and transport or research funded by the Horizon programme. This was because these wider European aspects were not taken into

consideration by national screening mechanisms when respective national authorities considered authorising a foreign investment in their country. Furthermore, there was a lack of legal certainty under EU law for Member States that maintained an FDI screening mechanism on security or public order grounds or intended to adopt such a mechanism. This was due to the EU's exclusive competence in the area of the common commercial policy, which includes FDI[9].

The intervention logic described in Section 2.2 explains how the **inputs** and **activities** required to meet the **objectives** of the FDI Screening Regulation are expected to **generate outcomes**, namely short-term **outputs**, medium-term **results** and long-term **impacts**. These will be used as the main points of comparison to assess the Regulation. The following points are directly linked to the evaluation matrix presented in Annex III.

- *Point 1: relation between the observed results (medium term) and impacts (long term) and the objectives of the FDI Screening Regulation.* This is the extent to which the main objectives of the FDI Screening Regulation have been achieved – measured through the **effectiveness** criterion (see Section 4.1.1 for the results of the evaluation). The analysis considered: (i) the most relevant success factors for implementation of the Regulation; and (ii) the gaps and challenges hindering the achievement of the objectives.
- *Point 2: relation between the inputs and activities put in place for the implementation of the Regulation and the observed outputs*. The costs borne to achieve the outcomes of the Regulation – measured through the **efficiency** criterion, i.e. the extent to which the provisions of the Regulation produced outputs at a reasonable cost (see Section 4.1.2).
- *Point 3: relation between the inputs and activities conducted to implement the Regulation and the problems to be addressed.* This is the extent to which the Regulation is complementary to other legislative and policy initiatives at EU and national levels – measured through the **coherence** criterion, i.e. the coherence of the Regulation with other legislative and policy interventions, identifying any complementarities or inconsistencies. In addition, an evaluation of the internal coherence of the Regulation was also carried out (see Section 4.1.3).
- *Point 4: the difference made by the EU in achieving the outcomes of the Regulation.* This is the extent to which EU-level action has produced outcomes that Member States could not have achieved on their own – measured through the **EU added value** criterion (see Section 4.2).
- *Point 5: relation between the inputs and activities conducted to implement the Regulation* and *the objectives.* This is the extent to which the Regulation is

[9] Foreign direct investment falls under the scope of the common commercial policy pursuant to Articles 3(1)(e) and 207(1) TFEU.

relevant to achieve its initial objectives – measured through the **relevance** criterion (see Section 4.3).

For each of these five points, the evaluation matrix[10] explains the key questions set out to perform the evidence-based assessment and describes the related indicators and data sources used to evaluate the performance of the FDI Screening Regulation.

## 3. HOW HAS THE SITUATION EVOLVED OVER THE EVALUATION PERIOD?

### 3.1. Changes in the geopolitical environment

In the period covered by this evaluation, we observe a changing security landscape and a heightened political awareness of FDI security or public order risks due to the COVID-19 pandemic and Russia's war of aggression against Ukraine.

The COVID-19 crisis revealed vulnerabilities in our critical healthcare-related assets and caused serious volatility or undervaluation of significant companies. In its **March 2020 guidance to Member States**[11], the Commission encouraged all Member States to adopt and use national screening mechanisms[12]. In the reporting period, the cooperation mechanism assessed almost 90 health-related and more than 50 biotechnology-related transactions, showing the importance of screening in the health sector.

Soon after Russia's full-scale invasion of Ukraine, in **April 2022**, the Commission published **guidance for Member States**[13] on addressing the heightened threats to the EU from Russian and Belarusian investments. It called for close cooperation between authorities involved in investment screening and those responsible for enforcing sanctions. It also called on Member States to urgently set up comprehensive investment screening mechanisms if they had not done so already. Until the end of the reporting period, the cooperation mechanism assessed approximately a dozen Russian and Belarusian cases, which showed the usefulness of the recommendations.

In June 2023, at the launch of the **Economic Security Communication**[14], Commission President Ursula von der Leyen stressed the importance of being 'clear-eyed about a world that has become more contested and geopolitical'. The Communication highlights FDI screening as one of the tools that the EU deploys to protect itself from commonly identified risks that affect its economic security. The Commission repeated the call to Member States who had not yet implemented national FDI screening mechanisms to do

[10] Annex III.
[11] 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).
[12] This call was repeated by the Commission in February 2021 in its 2021 Communication on the Trade Policy Review - (COM/2021/66 final).
[13] 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 (C/2022/2316).
[14] Joint Communication to The European Parliament, the European Council and the Council on 'European Economic Security Strategy' (JOIN/2023/20 final).

so without further delay. It also announced a legislative proposal to revise the FDI Screening Regulation.

*In brief, since 2017 the issue of security and public order has only grown in importance, driven by events, such as the COVID-19 pandemic, Russia's war of aggression against Ukraine and other geopolitical tensions. This calls for strengthening the EU framework for FDI screening.*

### 3.2. Trends of FDI in the EU[15]

This section highlights some key trends on FDI transactions (foreign acquisitions and greenfield investments) in the EU between January 2019 and June 2023 based on transaction-level data extracted, processed and analysed by the Commission's Joint Research Centre (JRC)[16].

The analysis found that 22.7% of foreign acquisitions and 20% of greenfield projects were in **Member States without a fully applicable investment screening mechanism** ('non-screening Member States')[17]. Based on its own methodology, the ECA report found that approximately 42% of the average FDI stock can be accounted for by non-screening Member States[18]. Most acquisitions by Russian investors went to **non-screening Member States**. It was also found that investors often use **subsidiaries registered in the EU** to conduct investments. Between 2019 and the first half of 2023, foreign entities invested using their EU subsidiaries in 31% of acquisitions and 28.2% of greenfield investments on average. This gives an indication of the volume of transactions currently not covered by the cooperation mechanism.

In brief, these findings confirm that a significant share of FDI into the EU goes to Member States without screening mechanisms; therefore, it is appropriate to require all Member States to have a screening mechanism.

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[15] The research carried out by the Commission's Joint Research Centre for this staff working document is available in Annex II. The annual reports of the Commission on the screening of foreign direct investments into the EU and the accompanying staff working documents provide more information about FDI trends into the EU. Ref. no: COM(2021) 714 final and SWD(2021) 334 final; COM(2022) 433 final and SWD(2022) 219 final; COM(2023) 590 final and SWD(2023) 329 final.

[16] Raw data on acquisitions of equity stakes and greenfield projects was retrieved from a commercial dataset (Bureau van Dijk's Orbis M&A and Orbis Crossborder database respectively), which was further elaborated by the JRC. This chapter does not rely on information available in the Commission's confidential database for FDI cases notified to the cooperation mechanism.

[17] For the purpose of this analysis, Member States without a screening mechanism between 2019 and the first half of 2023 are Belgium, Bulgaria, Cyprus, Estonia, Greece, Croatia, Ireland, Luxembourg and Sweden. For Member States that introduced mechanisms between those years (Malta in 2020, Czechia and Denmark in 2021, Slovakia in 2022 and Slovenia in 2023), the figures include transactions targeting those countries in the 'screening Member State' category from those years of implementation on. The analysis does not take into consideration differences in the scope (sectors and investors covered) and ownership thresholds of screening mechanisms, i.e. the fact that a transaction may not be subject to screening despite the Member State maintaining a screening mechanism. Therefore, the share of non-screened FDI is even higher.

[18] Point 35 of the ECA report.

### 3.3. Policy and legislative developments in Member States: adoption of and updates to national screening mechanisms

When the Commission's legislative proposal for the FDI Screening Regulation was tabled in September 2017, only 14 Member States (including the UK) had a screening mechanism[19].

As of June 2023, eight additional Member States adopted screening mechanisms[20], and two Member States with only sectoral mechanisms enacted broader cross-sectoral mechanisms[21].

Furthermore, by the end of the period covered by this evaluation, all Member States without a screening mechanism had initiated a policy discussion and, in most cases, a legislative procedure to set up a mechanism.

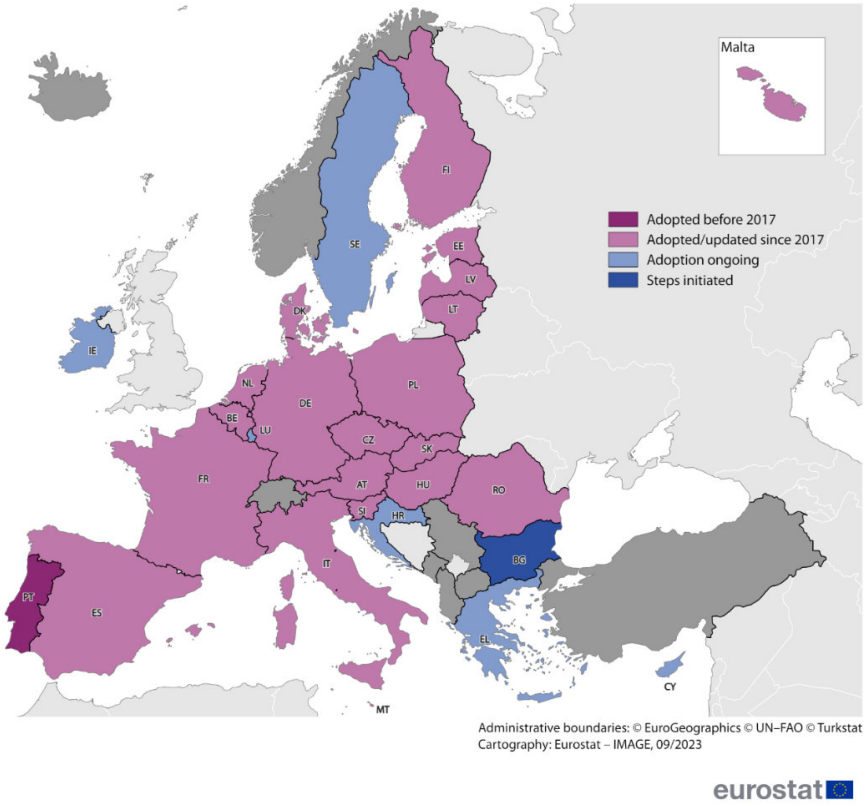
The Commission has strongly encouraged at all levels and facilitated the adoption of national screening mechanisms by providing technical and policy guidance to Member States. It has also organised meetings and information exchanges, particularly on best practices.

Against this background, even though the Regulation does not impose a formal obligation for Member States to adopt and maintain a screening mechanism, there is a clear trend in that direction.

The map provides an overview of the legislative situation of Member States as of 30 June 2023.

[19] Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, the Netherlands, Poland, Portugal, Romania, Spain, and the UK.
[20] Hungary (2018), Malta (2020), Czechia (2021), Slovakia (2022), Belgium (2023), Slovenia (2023), Estonia (2023, the mechanism started to apply on 1 September 2023), Luxembourg (2023, the mechanism started to apply on 1 September 2023).
[21] Denmark (2021), the Netherlands (2023).

*Figure B: Screening mechanisms and legislative activities of Member States (state of play on 30 June 2023)*




*Source: notifications by Member States to the Commission pursuant to Article 3(7) of the Regulation*

In addition, a number of Member States revised their screening mechanisms to tackle emerging security and public order risks from the COVID-19 crisis. Some Member States added biotechnology (e.g. Austria, France, Italy) and critical health infrastructure (e.g. Austria, Italy) to the sectors to which investment screening applies, while others started to apply tighter procedural rules in health-related sectors (e.g. Germany, Spain).

Four Member States adjusted their screening mechanisms to respond to heightened concerns about security and public order risks: France (approval is temporarily required for acquisitions of 10% interest instead of 25%), Hungary (lower and additional trigger-thresholds apply temporarily), Austria (extension in 2022 until 31 December 2023 of the 10% screening threshold for FDI in R&D in pharmaceuticals, vaccines, medical devices and personal protective equipment) and Italy (stricter rules temporarily apply to EU and European Economic Area investors). Two countries, Hungary and Slovenia, introduced new temporary mechanisms in response to the security and public order challenges arising during the pandemic[22]. Many of these measures were renewed over time.

[22] Source: Member States' annual reports to the Commission; Inventory of investment measures taken between 16 September 2019 and 15 October 2020. Report prepared by the OECD Secretariat, pp. 7-10, https://www.oecd.org/daf/inv/investment-policy/FOI-investment-measure-monitoring-October-2020.pdf.

In parallel, several Member States updated their rules to cover strategic assets (e.g. in 2021, Lithuania introduced updates to the list of companies and strategic infrastructure important to national security) or precise key definitions (e.g. in 2022, Spain amended some definitions such as 'critical technologies' and 'essential input').

*In brief, the direction many Member States are taking is clear, and there has been a significant increase in the number of Member States with a screening mechanism and an extension of their screening rules. Yet, there remains a number of missing links in the chain of protection against potentially risky FDI transactions due to the fact that not all Member State maintain and fully implement a screening mechanism.*

### 3.4. National trends in FDI screening activity

According to Member States' annual reports submitted to the Commission, the annual trends shown in table are observed in screening by national authorities.

| | 2020 | 2021 | 2022 |
|---|---|---|---|
| **Total number of requests for authorisations received** | 1 793 | 1 563 | 1 444 |
| **Share of cases formally screened** | 20% | 29% | 55% |
| **Share of formally screened cases authorised without conditions or mitigating measures** | 79% | 73% | 86% |
| **Share of formally screened cases authorised with conditions or mitigating measures** | 12% | 23% | 9% |
| **Share of formally screened cases blocked by the national authority** | 2% | 1% | 1% |
| **Share of formally screened cases withdrawn before a decision was taken** | 7% | 3% | 4% |
| **Share of top four Member States in the total number of authorisation requests** | 87% | 70% | 66% |

*Source: Member States' annual reports submitted to the Commission pursuant to Article 5(1) of the Regulation*

In summary, these findings give rise to the following observations.

- Although the total number of requests for authorisation has decreased, Member States have examined the requests with greater attention as the proportion of **formally screened cases** has steadily increased over time. This can be explained by a higher degree of scrutiny of what national authorities consider as potentially 'critical' as well as a change in overall investment trends.
- Authorisation requests have been unevenly distributed across Member States, but the share of the top four notifying countries has decreased in the reporting period. This is due to the increase in the number of Member States with a screening mechanism and an **expanding group of Member States actively using** their mechanisms.
- Most transactions screened were **authorised without conditions** or additional action required by the investor.
- The proportion of formally screened cases where **mitigating measures** were imposed has fluctuated between 9% (2022) and 23% (2021). In these cases, national screening authorities required certain action, assurances, and commitments by the investor and/or the target company before approving the planned FDI.

- Only 1% of the transactions were **blocked** by Member States in 2021 and 2022 (compared to 2% in 2020). This confirms that the EU is still open to FDI, and Member States prohibit only a relatively limited number of cases.

### 3.5. Implementation of the core part of the Regulation: cooperation on individual transactions

For this section, the Commission relied on its own internal confidential database, which records certain key information about transactions notified by Member States. In the period covered by this evaluation (11 October 2020-30 June 2023), the EU cooperation mechanism assessed 1 125 cases notified by Member States. Approximately 14% of these cases were FDI where the Commission could establish a link with projects and programmes of EU interest[23]. In the same period, less than 10 cases were initiated by the Commission or other Member States on FDI that had not undergone screening (Article 7).

Looking at cases notified, these were highly concentrated in just a few Member States: six Member States[24] account for 90% of the notifications, whereas the remaining 10% of notifications is divided among 11 Member States[25].

Approximately 27% of the total notifications concern transactions with a multi-country dimension, i.e. a transaction that was subject to a formal screening in more than one Member State. While, on average, these multi-country transactions were screened by two to four Member States, in some cases, the cooperation mechanism looked at transactions screened by up to seven Member States. This phenomenon was not anticipated when the Regulation was being prepared, hence the current rules do not offer a solution for handling these cases effectively and efficiently. These cases are assessed in parallel by several national authorities based on their own procedures, timelines and requirements without any coordination among them. This requires investors and their advisers to navigate these uncoordinated proceedings and wait until all of the authorities to approve the transaction so that the deal can be closed.

The Commission considered that approximately 70% of the notifications were eligible for their review under Regulation. The other 30% of notifications were either:

- Investments by EU investors where the criteria for circumvention, which could bring it into consideration at EU level, were not met;

[23] According to the Regulation, projects and programmes of Union interest include those projects and programmes that involve substantial EU funding or are covered by EU legislation on critical infrastructure, critical technologies or security of supply of critical inputs. They serve the EU as a whole and are an important contribution to growth, jobs and the competitiveness of the EU economy. Examples include Galileo, the trans-European networks for energy, transport and telecommunication, Horizon Europe and the European Defence Fund. The list of projects and programmes of Union interest is published as an annex to the Regulation and is updated by the Commission through delegated acts when necessary.

[24] Austria, Denmark, France, Germany, Italy and Spain.

[25] Czechia, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania and Slovakia.

- internal reorganisations of companies without a change to their ultimate owner/controller;
- investments where the foreign investor's aim to establish or maintain lasting and direct links with the EU target could not be identified.

Lastly, there were some transactions that were not inward investments.

The top foreign jurisdictions from where the direct investors came[26] were the US, the UK, Switzerland, China, Singapore and the United Arab Emirates. Approximately 4% of the transactions involved a direct investor from Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey.

Approximately 38% of the notifications were related to investments made directly by a single EU investor. The top three Member States where these investors came from were Luxembourg, the Netherlands and Germany, accounting for more than half of these intra-EU notifications. In those cases, where such intra-EU transactions were considered to be a structure enabling the direct investor to circumvent EU FDI controls, the case was considered eligible for the Commission's internal analysis and potentially a Commission opinion[27].

The top foreign jurisdictions from where the ultimate beneficial investor came[28] were the US, the UK, China, Canada, Japan and the United Arab Emirates. Approximately 10% of the transactions involved an ultimate beneficial investor from Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey.

Cases where the Commission considered that the foreign investor was directly or indirectly controlled by the government of a non-EU jurisdiction[29] accounted for approximately 10% of all notifications received.

The Commission considered approximately 12% of all the notifications to be potentially sensitive[30], and an opinion was issued for less than 3%[31] of all notifications. Of those opinions, approximately 20% were on projects or programmes of Union interest. In the period covered by this evaluation, the Commission did not adopt any opinions on investments that it looked at using its ex officio powers and which were not undergoing screening. This reflects the fact that either no risks were identified in light of the information provided by the Member State or the transaction changed course while the

[26] Jurisdictions of origin of foreign investors with more than 20 transactions.
[27] Article 3(6) of the Regulation.
[28] Jurisdictions of origin of foreign investors with more than 30 transactions.
[29] Article 4(2)(a) of the Regulation.
[30] This refers to notifications where the Commission requested additional information from the screening Member State pursuant to Article 6(6) of the Regulation.
[31] Pursuant to Article 6(6) of the Regulation, the Commission may issue an opinion where it considers that an FDI undergoing screening is likely to affect security or public order in more than one Member State or has relevant information in relation to that FDI. Therefore, the figure includes opinions sharing relevant information with the notifying Member State where the Commission did not establish a view on the likely impact on security or public order.

cooperation between the Commission and the relevant national authorities of the host Member State was ongoing.

Member States submitted comments on approximately 6% of the notifications[32], which is more than double the number of Commission opinions. These comments came from 12 Member States[33], which shows that less than half of the Member States have used the cooperation mechanism to formally signal concerns or provide information to the screening Member State. Most of these Member States had a screening mechanism in place, which shows that Member States without a mechanism were less active in sending comments. Additionally, some comments were issued by Member States on FDIs not being screened in other Member States.

*In brief, the overall cooperation between all national authorities and the Commission has been intense and has helped identify and tackle risky FDI transactions that would otherwise have been missed. However, the management of multi-jurisdiction notifications is complex and raises efficiency issues, in particular for foreign investors, EU target companies, their employees and shareholders.*

### 3.6. Implementation of the Regulation's other rules

The **Commission Expert Group on the Screening of FDI into the EU** was set up under the Regulation in November 2017[34], shortly after the Commission tabled its legislative proposal for the FDI Screening Regulation. The group held 17 formal meetings, and four meetings took place before the entry into force of the Regulation (between December 2017 and April 2019). These meetings were instrumental in preparing the full implementation of the Regulation and discussing related practical issues (for example, notification forms or technical matters about the exchange of sensitive information), receiving updates on policy and legislative developments in Member States, organising workshops with third countries (in particular, the US and Japan) and exchanging information on FDI screening and good practices. In addition to these formal meetings, the network of screening authorities benefited from informal exchanges coordinated by the Commission on good practices on the design and implementation of national screening rules. To strengthen the spirit of cooperation among the screening authorities involved in implementing the Regulation, the Commission organised two in-person events ('Screeners' Academy') in March 2022 and March 2023 with workshops and presentations covering a wide range of issues.

The cooperation mechanism described in Section 3.5 enables the Commission to identify and, if necessary, propose action when FDI in a project or programme of Union interest

[32] Pursuant to Article 6(5) of the Regulation, where a Member State considers that an FDI undergoing screening in another Member State is likely to affect its security or public order, or has information relevant for such a screening, it may provide comments to the Member State carrying out the screening.
[33] Austria, Belgium, Czechia, Denmark, France, Germany, Italy, Latvia, Lithuania, Malta, the Netherlands and Sweden.
[34] Commission Decision of 29.11.2017 setting up the group of experts on the screening of foreign direct investments into the European Union (C(2017)7866 final).

is likely to affect EU security or public order (see footnote 23 in Section 3.5 for more information). The **list of projects and programmes of Union interest** is annexed to the Regulation and, pursuant to Article 8(4), it is updated by the Commission by means of a delegated regulation when necessary. In the reporting period the Commission adopted two delegated regulations[35] to clarify the scope of projects and programmes of Union interest and update the list with the legal basis of newly adopted programmes, including initiatives covered by the 2021-2027 EU long-term budget (also known as the multiannual financial framework).

Article 9 of the Regulation sets out the requirements for information that Member States need to provide about the FDI transactions they screen as well as, upon request, other FDI planned or completed in their territory. After the first months of cooperating on FDI transactions, it has become clear that, in most cases, presenting detailed and accurate information in a standardised format helps the other national authorities and the Commission complete their assessment in the 15 calendar days following the receipt of a notification. Conversely, if the information provided is insufficient or ambiguous, the other 26 Member State authorities and the Commission may have to request further information from the notifying country and reserve the right to provide comments or an opinion respectively. This may have the effect of extending EU cooperation until the information requested by other Member State authorities or the Commission is provided and the additional 20-day period for the final analysis comes to an end. To facilitate gathering relevant, specific and targeted information to enable a faster assessment by the Commission and Member States, the Commission prepared, in close cooperation with Member State FDI Screening experts, **a template that Member States are encouraged to use when notifying an FDI undergoing screening to the cooperation mechanism**[36]. This form requests more information than is formally required under Article 9 of the Regulation. Although using the form is not mandatory, it has become a regular part of notifications, enabling a faster assessment of whether the transaction represents a risk to security or public order. It has helped to align practices across Member States.

- Investment screening is a confidential process in all Member States and national authorities do not usually comment publicly on specific transactions they screen. Similarly, the EU cooperation on individual FDI transactions is subject to strict confidentiality rules as they concern the national security of one or more Member States or the EU as a whole. To create the **technical conditions for the exchange of sensitive and classified information**, Article 11(2) of the Regulation requires the Commission to provide a secure

[35] Commission Delegated Regulation (EU) 2020/1298 of 13 July 2020 amending the Annex to 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 (C/2020/4721) and Commission Delegated Regulation (EU) 2021/2126 of 29 September 2021 amending the Annex to 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 (C/2021/6924).

[36] The template notification form is published on the Commission's website on investment screening, https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en

and encrypted system to support direct cooperation and exchange information between the contact points. To fulfil this obligation, the Commission implemented or initiated several measures to handle different categories of information from sensitive non-classified information to EU restricted or secret information, accompanied by appropriate technical solutions[37].

Article 5(3) of the Regulation requires the **Commission to report annually** on implementation of the FDI Screening Regulation. These reports provide transparency on the operation of FDI screening in the EU and inform the public about FDI screening developments in Member States. They contribute to the EU's accountability in an area where, given the security interests at stake, transparency of individual transactions is neither possible nor appropriate. The reports build on information provided by the Member States in their confidential annual reports to the Commission as well as information gathered from commercial sources and the Commission's own databases. The Regulation does not provide guidance on the scope and granularity of the EU or national reports. As a result, the Commission had to find the right balance between the different practices of Member States (many of whom do not report at all about their screening activities) and the obligation to inform the public about EU activities in this policy area[38]. In line with the requirements of the Regulation, the Commission has issued three annual reports in the reporting period of this evaluation[39].

As required under Article 3(7) of the Regulation, since June 2019, the Commission has **published the list of screening mechanisms notified by Member States**[40]. The list is updated immediately when a Member State notifies the Commission about the adoption of a new mechanism or an amendment to an existing mechanism.

As the exchange of FDI information in the cooperation mechanism regularly involves **processing personal data** (for example, names and addresses of natural persons involved in a transaction), the Member States and the Commission concluded a joint controllership arrangement, in line with data protection rules (particularly the GDPR[41] (Article 26), the EDPR[42] (Article 28), the FDI Screening

[37] The development of the IT solution for SECRET UE/EU SECRET information is currently in pilot phase and has been significantly slowed by external circumstances, such as travel restrictions and supply chain disruptions during the COVID-19 pandemic.

[38] The ECA report took the view that the Commission's annual reports do not contain enough information to assess the effectiveness and efficiency of the cooperation mechanism and that it should provide more information in general terms on the sectors affected and types of risks identified. (Point 57 of the ECA report).

[39] Reference number of the Annual Reports of the Commission on the screening of foreign direct investments into the Union and the accompanying Staff Working Documents: COM(2021) 714 final and SWD(2021) 334 final; COM(2022) 433 final and SWD(2022) 219 final; COM(2023) 590 final and SWD(2023) 329 final.

[40] The list is available on the Commission's website on investment screening: https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en

[41] 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).

Regulation (Article 14) and the underlying Commission Decision[43]. The joint controllership agreement is between Member States and the Commission on the processing of these personal data. It sets out the respective roles, responsibilities and practical arrangements[44]. The joint controllership agreement entered into force on 28 April 2022, and it was the first arrangement of this kind adopted by Member States and the Commission.

Article 13 of the Regulation encourages Member States and the Commission **to cooperate with the competent authorities of like-minded third countries** on issues on screening foreign direct investments on the grounds of security and public order. This cooperation includes sharing experiences, best practices and information on screening mechanisms and investment trends, but it does not allow cooperation on specific FDI transactions. The EU has pursued such cooperation bilaterally, including within dedicated working groups of the Trade and Technology Council with the US[45] and in the Trade and Technology Council with India[46]. Cooperation has also extended to other partners, for example, Japan, and in plurilateral formats, such as the G7 and the OECD.

*In brief, the cooperation mechanism's supporting arrangements, such as the Expert Group and the rules and tools for the confidential exchange of information have worked well. The recommended notification form became widely used by national authorities to notify transactions to the network, even though its use is voluntary. The annual reports of the Commission and the up-to-date list of national screening mechanisms have increased the transparency of screening in the EU. Through the adoption of delegated acts, the Commission ensured that FDI in EU companies critical for the functioning of newly adopted programmes of Union interest can be duly scrutinised. The Commission's engagement with like-minded countries have strengthened the EU's preparedness to address FDI through the exchange of information and good practices with international partners.*

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[42] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

[43] Commission Decision (EU) 2020/1502 of 15 October 2020 laying down internal rules concerning the provision of information to data subjects and the restriction of certain of their rights in the context of the processing of personal data by the Commission in the cooperation mechanism established by Regulation (EU) 2019/452 of the European Parliament and of the Council.

[44] Its main elements are available in the EU Register of the Data Protection Officer: https://ec.europa.eu/dpo-register/detail/DPR-EC-03306.

[45] More information about the activities of the EU-US TTC Investment Screening Working Group is available on the Commission's website: https://futurium.ec.europa.eu/en/EU-US-TTC/wg8

[46] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2728

### 3.7. Adoption and implementation of screening mechanisms among the EU's major trading partners

According to an analytical note by the OECD Secretariat[47], the number of countries that operate mechanisms to manage the security implications of foreign investment is growing steadily, and this is a trend that is unlikely to slow or stop in the medium term. The note found that, at present, over 80% of the 61 economies that participate in the Freedom of Investment Roundtables have some instruments in place to manage the security implications stemming from foreign investments. In addition, in over half of these economies, the mechanisms cover large parts of the economies or at least more than one sectors. The note also points out that most countries that operate investment screening mechanisms and report case statistics have used these mechanisms more frequently since 2017.

Among the top 10 trading partners of the EU[48], nine jurisdictions (the US, China, the UK, Russia, Norway, Türkiye, Japan, South Korea and India) maintain a screening mechanism[49], and Switzerland is in the process of establishing one[50].

*In brief, the EU has moved in the same direction as the rest of the world to protect itself against risky FDI.*

## 4. EVALUATION FINDINGS

This section summarises the findings of the external study presented by the OECD at the request of the Commission, the consultations organised by the Commission for the purposes of this evaluation[51] and the findings of the ECA Report that are relevant for the evaluation of the effectiveness, efficiency, coherence, EU added value and relevance of the Regulation. The Commission's own conclusions are set out in the next section.

### 4.1. To what extent was the intervention successful and why?

#### 4.1.1 Effectiveness of the Regulation

The OECD report and the consultations organised by the Commission found that the cooperation mechanism has broad support, not only from Member States but also from private sector stakeholders. National screening authorities considered that they take better informed screening decisions thanks to the exchange of transaction-specific information under the cooperation mechanism. The cooperation mechanism has also made several

[47] Investment policy developments in 61 economies between 16 October 2021 and 15 March 2023. https://www.oecd.org/daf/inv/investment-policy/Investment-policy-monitoring-April-2023.pdf
[48] Top trading partners 2022 by total trade (import and export) based on Eurostat Comext data.
[49] This information is based on the research note by the OECD Secretariat (May 2020): Acquisition- and ownership-related policies to safeguard essential security interests – Current and emerging trends, observed designs, and policy practice in 62 economies, https://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf
[50] https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-95018.html
[51] The contributions received in these consultations are summarised in Annex V.

Member State authorities aware of many transactions taking place in their own jurisdictions. This is because another Member State notifies to the cooperation mechanism the part of a transaction that it has dealt with or been involved in[52].

A significant majority of respondents to the targeted consultation[53] agreed with the statements below.

- The EU's framework for FDI screening has been effective in assessing the likely impact of specific FDIs on security and public order in the EU.
- The EU's framework for FDI screening has generally been effective in assessing the likely impact of specific FDIs on security and public order in the EU and in identifying and sharing information about FDIs in the EU both between the Member States themselves, and between the Member States and the Commission.
- The FDI Screening Regulation has enabled Member States and the Commission to correctly identify FDI transactions likely to have an adverse impact on projects or programmes of Union interest in cases where security or public order is affected.

However, views were more nuanced, albeit still positive, on whether the current EU framework – which leaves Member States free to decide on most of the parameters of their national screening mechanisms – has been effective in identifying risks to security and/or public order for projects and programmes of Union interest. There were similarly diverging views on whether the current EU framework has been effective in identifying cross-border risks to security and/or public order.

National screening authorities' responses to an additional consultation organised by the Commission highlighted the European aspect of security, the value of information exchange and the importance of obtaining the views of other Member States on specific transactions and the usefulness of informal exchanges on risks and how best to deal with them. Some Member States without a screening mechanism considered it a good way of informing policy decisions and prompting them to looking into security risks related to FDI.

However, a number of shortcomings were identified, which ultimately undermine the cooperation mechanism's ability to protect the EU's public order and security from risky FDIs.

**a) Issues related to the design of the Regulation**

The OECD report, the consultations organised by the Commission and the ECA report identified several **fundamental flaws related to the design of the Regulation,** likely to

[52] OECD report, point 135.
[53] In the targeted consultation the Commission received 47 responses, including 18 from Member State authorities involved in EU cooperation on FDI screening and, where applicable, the implementation of national screening mechanisms.

undermine the protection of the EU's security and public order. These flaws result in potentially risky transactions going unnoticed by the Commission and Member States, despite the risk that they could present.

- The OECD report found that **the absence of a screening mechanism** in some Member States results in these Member States having few or no effective means of managing risk related to FDI in the EU, in these Member States not building institutional capacity, and therefore not being able to benefit fully from information exchanges with other Member States and the Commission under the cooperation mechanism. More importantly, the absence of a screening mechanism impedes effectiveness. Problematic foreign investors wanting to invest in sensitive assets may choose non-screening Member States as a gateway into the internal market, relying on the freedoms granted by the internal market rules to companies established in any EU Member State[54]. The targeted consultation has confirmed that this is a major issue, with many respondents considering it a major impediment to the cooperation mechanism's effectiveness. The ECA report also concluded that the lack of screening mechanisms in all Member States is detrimental to the effectiveness of the EU framework[55].
- **Under the Regulation, Member States that screen FDIs are free to define the scope of their national screening mechanisms**[56]. According to the OECD report, Member States **with a too narrow definition of the scope have limited ways of identifying and addressing risks of transactions not screened**, with potential spill-over effects on the security and public order interests of other Member States. For sectors, transactions, or investors from certain non-EU jurisdictions not subject to screening, the consequences of this are similar to those of the total absence of a screening mechanism. The ECA report also took the view that Member States' freedom to determine the scope of their screening mechanisms in areas such as what investments to screen and which sectors to include as critical for security or public order result in significant differences in scope and approach between screening systems thus limiting the effectiveness of the EU framework[57]. On the other hand, the responses to the targeted consultation did not agree entirely with this assessment as most respondents considered a minor problem the fact that Member States are free to decide which sectors, assets (for example infrastructure, technologies, inputs) and economic activities they screen.
- The OECD report found **no clear reason why foreign investments made through an entity established in the EU, where the direct investor established in the EU is controlled by a non-EU person ('intra-EU transactions') should not be covered by the cooperation mechanism**[58]**.** These investments could carry

[54] For more information, see page 65 of the OECD report.
[55] Point 27 of the ECA report.
[56] For more information, see page 66 of the OECD report.
[57] Point 27 and 34 of the ECA report.
[58] For further details, see p. 81 of the OECD report.

the same risks to public order and security as FDIs carried out through a legal entity not established in the EU. The targeted consultation has confirmed an interest in clarifying and expanding the scope of the Regulation in this direction, with most respondents in favour of covering transactions where the direct investor is established in the EU but is ultimately owned by a natural person or an entity from a third country that can effectively participate in the management or control of the target company. Information Member States' screening authorities gave the Commission on a confidential basis has revealed that there are precedents for transactions falling outside the scope of the cooperation mechanism for this reason that the competent Member State nonetheless has prohibited or authorised with conditions since October 2020. This confirms that the current system does have 'blind spots' resulting from not covering intra-EU transactions. This limitation was also observed by the ECA report[59].

- According to the OECD report, **the Regulation contains very little possibility to hold the Member State ultimately deciding on the transaction in question accountable to the Commission or the other Member States, even if concerns about security or public order have been formally expressed**[60]. The Member State that decides on the transaction is only obliged to give due consideration to, or take utmost account of (as the case may be), comments and opinions. However, it is not required to inform the other Member States or the Commission (even if they have issued a comment/an opinion) of its course of action. Nor is it required to explain if, how and to what extent it has taken comments/opinions into account or if, how and to what extent it has not done so. This undermines the effectiveness of the Regulation and may deter other Member States from providing substantial input for the assessment of specific FDI transactions. The targeted consultation confirmed the seriousness of this issue, with many respondents considering the fact that the Member State screening the transaction does not have to report to other Member States or the Commission on the outcome of its assessment of security or public order risks a major impediment to the effectiveness of the Regulation. The ECA report reached the same conclusion[61].

**A second set of issues are procedural or technical**[62].

- The OECD report found that Member States with a screening mechanism have **very different rules for deciding when to start screening, and for deciding how long they have to screen before taking a final decision**[63]. These differences cause problems, especially in multi-country transactions, when, for example, clearance of the same transaction is requested in a number of Member States (in

[59] Point 29(b) of the ECA report.
[60] For further details, see p. 75 of the OECD report.
[61] Point 27 of the ECA report.
[62] Although these issues also affect the cooperation mechanism's efficiency and, to a certain extent, the coherence between the Regulation and national screening mechanisms, as they have a significant impact on the Regulation's effectiveness, they are presented in detail in this section on effectiveness.
[63] For more information, see p. 76 of the OECD report.

which subsidiaries are located), with the result that the same transaction is notified by several Member States because several entities of the target group of companies are concerned[64]. The OECD report states that the screening of such transactions is inefficient, time-consuming and unpredictable for the investor, the target group of companies, the screening authorities involved and the Commission. These transactions, a significant proportion of all notifications (27%), result in repeated, asynchronous and uncoordinated use of the cooperation mechanism, even if investors apply for authorisation at the same time in all Member States concerned.

- **Member States with a screening mechanism are free to determine their screening procedures[65].** Some national authorities screen (and notify to the cooperation mechanism) all the requests for authorisation they get, while others make a selection and formally screen (and notify) certain sensitive transactions. This creates an imbalance in Member States' use of the Regulation; inefficiencies because not all transactions notified would in principle warrant being assessed by the cooperation mechanism or the mechanism's being made aware of them; and ineffectiveness as some potentially sensitive transactions go unnoticed (they are not notified because they are never formally screened under national screening mechanisms).

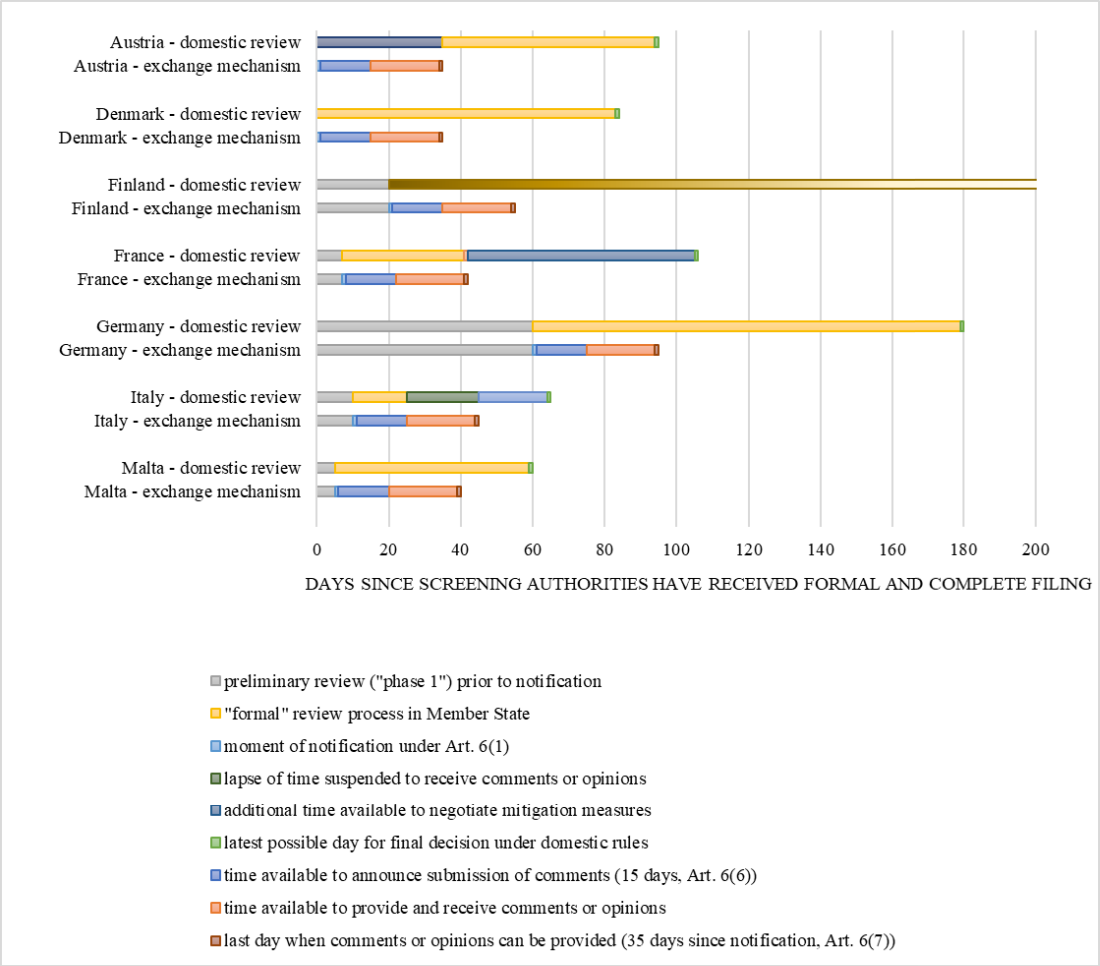
  The targeted consultation has confirmed this shortcoming, with only a few respondents in favour of maintaining the current rules for notifying FDI undergoing formal screening to the cooperation mechanism, leaving it to the Member State's discretion to decide what is formally screened and what is to be notified to the EU. On possible solutions, respondents have said they would prefer national screening authorities to notify only FDIs that meet certain criteria[66]. Considerably fewer respondents were in favour of the other option, whereby host Member States only notify FDIs that they had initially identified ('pre-screened') as potentially risky for security or public order.

- According to the OECD report, **challenges lie in the cooperation mechanism's deadlines[67]**. The deadlines for Member States to comment and for the Commission to issue an opinion on notified transactions are the same. As a result, the Commission may not have enough time to incorporate other Member States' comments into its assessment, if those comments are provided at an advanced stage of the Commission's assessment. Some national deadlines are also too short to incorporate Member States' comments or Commission opinions.

[64] For more information, see p. 82 of the OECD report.
[65] For more information, see p. 79 of the OECD report.
66 For example specific sensitive sectors, critical technologies, likely impact of the FDI on more than one Member State – for example due to significant cross-border sales or the existence of a 'sister company' of the target in one or more other Member States.
[67] For more information, see p. 76 of the OECD report.

The graph below shows the interplay between selected Member States' deadlines for decisions and deadlines specified in the Regulation. Day '0' in the visualisation corresponds to when Member State's screening authorities receive a formal and complete filing.

*Figure C: EU and selected Member States' deadlines: schematic presentation of the base scenario*



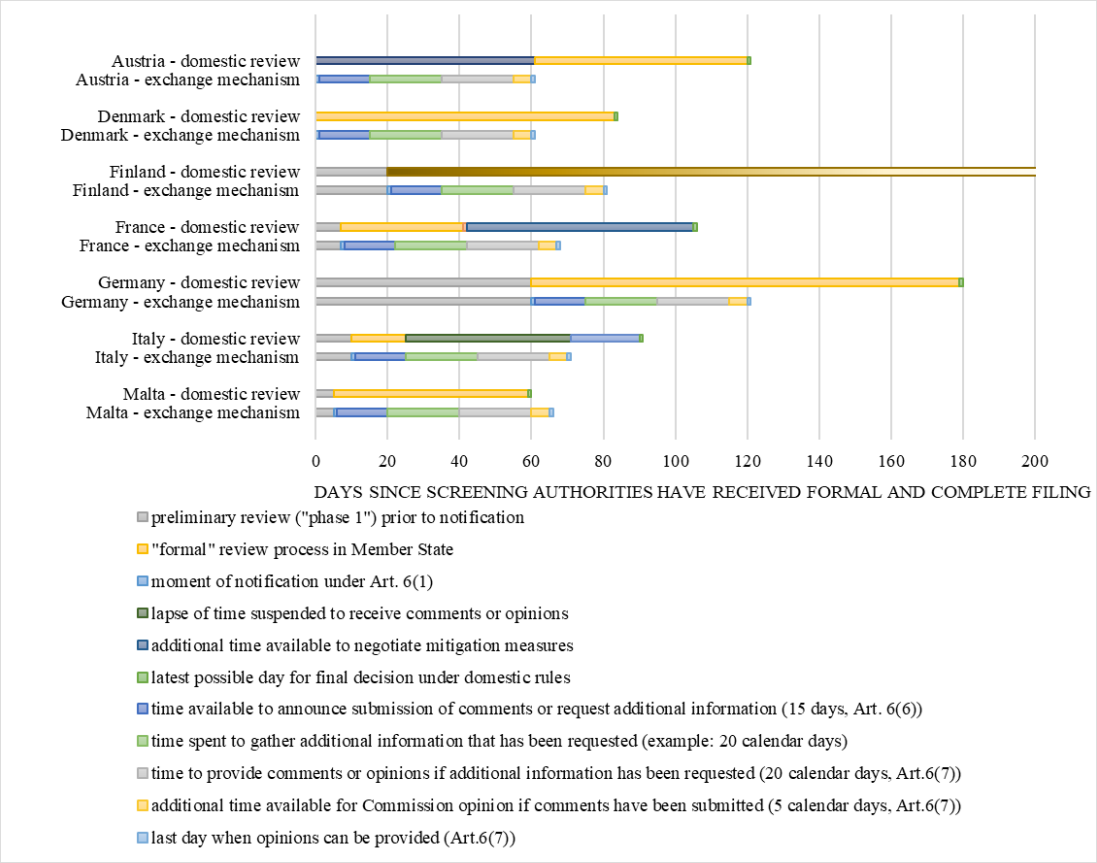

*Source: OECD Report, Figure 4 (p. 35). Finland has not set a timeline for decisions under its domestic screening mechanism under the Act on the Screening of Foreign Corporate Acquisitions (Act 172/2012 as amended) for companies in the defence and security sectors (shown on the graph).*

The OECD report found that some Member States, such as France, may need to announce their final decision before receiving comments from Member States or opinions from the Commission, even if no additional information is requested. This is mainly due to short national deadlines for decisions, set in some Member States before the Regulation was drafted or came into force.

Another difficulty for the Commission is that, in the scenario described in Article 6(7), Member States and the Commission are given the same amount of time – 35 days after receiving a notification – to issue comments or opinions. If Member States use the full 35 days, the Commission has no time to incorporate these comments into its own assessment, making it difficult for the Commission to issue an opinion if it considers, on the basis of these comments, that the security or public order of more than one Member

State risks being affected. If additional information is requested about a transaction undergoing screening, the domestically set timelines in some Member States' deadlines may have expired before the process under the cooperation mechanism has ended, preventing the screening Member State from having all the relevant information before taking its decision. The graph below shows this.

*Figure D: EU and selected Member States' deadlines where additional procedural steps are taken under the cooperation mechanism*




*Source: OECD report, Figure 5 (p. 36). 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 on the graph).*

Member States adopt different strategies to avoid situations in which they cannot take into account comments or opinions on a transaction for their final screening decision.

- Some have set deadlines for national screening that are long enough to accommodate the cooperation mechanism's deadlines, even if the deadlines are extended (e.g. Finland, Germany).
- Deadlines can be extended for transactions that fall under the scope of the Regulation or are extended automatically if a Member State or the Commission have indicated they intend to provide comments or opinions.
- The clock ticking for the screening decision is stopped or suspended for as long as comments or opinions can be received.

- The national screening process and its deadlines only apply once the cooperation process has fully ended[68].

The targeted consultation confirmed that the lack of harmonisation of Member States' deadlines for screening FDI transactions, and the fact that the timing of notifications to the cooperation mechanism is determined only by the start of formal screening (therefore determined by the Member State), are major problems. On how to make the cooperation mechanism more efficient in identifying and assessing threats to the EU's security or public order, many respondents were in favour of harmonising national deadlines for screening FDI transactions subject to the cooperation mechanism and harmonising deadlines for requesting additional information from the parties concerned and for submitting such information. Most respondents also called for the establishment of minimum common criteria to assess which transactions screened by the Member States pose a risk to public order or security. The ECA report reached the same conclusion, pointing out that the 'pre-screening' procedure used in some Member States and the different treatment of multi-country transactions had a negative impact on the efficiency and effectiveness of FDI screening at national and EU level[69].

In response to a Commission questionnaire, private sector stakeholders with proven direct experience of FDI screening procedures identified the following issues, partially related to national screening mechanisms, that undermine the effectiveness of the EU framework for FDI screening.

- Differences between key concepts, such as the definition of FDI (or the investments covered by national mechanisms) and the substantive test to determine if an FDI is likely to affect security or public order, including the risk factors related to the foreign investor.
- Differences between Member States' thresholds of influence over a target company that a foreign investor must meet to trigger a review.
- The lack of clarity about activities that fall under the scope of national mechanisms because the list of sectors covered is vague and non-exhaustive.
- Procedural differences between national mechanisms, such as filing deadlines that are too short, imposed by certain Member States, from the date a transaction is signed (such as the date a Share Purchase Agreement is signed); the significant divergence in deadlines among Member States and differences between national screening mechanisms and the cooperation mechanism (some Member States start their national screening procedures only after the cooperation mechanism has ended, while others conduct theirs at the same time as the cooperation mechanism, and, in some cases, Member States do not notify transactions to the cooperation mechanism at all if an in-depth investigation is not launched).

[68] For more information, see p. 37 of the OECD report.
[69] Point 34 of the ECA report.

- The lack of a legal basis for direct formal interaction between the investor/target company and other Member States and the Commission during the screening procedure.
- The lack of notifying parties' access to comments made by other Member States and Commission opinions.

**b) Issues stemming from the implementation and/or interpretation of the regulation by the Member States**

The OECD report, the consultations organised by the Commission and the ECA report found that the following issues also undermine the ability of the Member State deciding on a transaction to address the public order or security concerns identified by other Member States.

- The OECD report pointed out that only a **few Member States have equipped themselves with a legal basis and procedures to take into account or mitigate the security or public order risks identified by other Member States or the Commission**[70]**.** At national level, there is often no measure in place for the institutional review of Member States' comments or Commission opinions. Some national deadlines are too short to take the Commission's or other Member States' concerns into account; and many Member States do not have the legal means to impose mitigating measures with a cross-border effect (e.g. continuity of supply from the target company in the Member State hosting the investment to a client (for example, the armed forces) in another Member State).
- **Very few national screening authorities have the power to take into account the material public order or security concerns of other Member States in their screening decisions**[71]. With some limited exceptions, under national law, Member States can only prohibit a transaction or impose mitigating measures if their *own* public order or security is affected. Member States often make a security assessment before notifying (or not) transactions to the cooperation mechanism taking into account only their own security or public order interests, with the result that the mechanism may not even become aware of FDIs that may affect the security or public order of Member States other than the one hosting the transaction or projects or programmes of Union interest.
- **There are only limited possibilities for identifying and addressing FDIs which, for whatever reason, are not screened nationally** (e.g. no screening mechanism, narrow scope of the existing screening mechanism, transaction not filed by the parties concerned, etc.)[72]. In cases of non-notified transactions, many national screening authorities are not legally empowered, under national law, to

[70] For more information, see p. 76 of the OECD report.
[71] For more information, see p. 71 of the OECD report. Page 49 of the OECD report gives an overview of explicitly legislated powers to act in the interests of other Member States or projects or programmes of Union interest.
[72] For more information, see p. 68 and p. 70 of the OECD report.

obtain from the parties to the transaction information requested by other Member States or the Commission.

The Regulation does not make the provision of information conditional on the fact that a transaction is undergoing screening. In practice, this means that very little use can be made, and is made, of Article 7 of the Regulation, which allows cooperation on any FDI not screened by a Member State. As a result, transactions that could affect the EU's public order or security could go unnoticed and, even if identified thanks to the cooperation mechanism, might not be investigated and addressed because the host Member State does not have a legal basis for doing so.

In their responses to a Commission questionnaire, most national screening authorities took the view that cooperation on non-screened FDI is only effective if the Member State where the transaction takes place maintains a screening mechanism that can address the concerns raised. Without an applicable screening mechanism, the Member State where the transaction is planned or completed is unlikely to have the necessary means to take measures in response to a Commission opinion or other Member States' comments.

One respondent believed that if the 'host' Member State does not have the power to at least investigate a transaction, other Member States may be less inclined to comment on the transaction. Some respondents pointed out that the obligation for all Member States to maintain a screening mechanism would address this shortcoming.

The ECA report found out that, although the Commission may assess FDI not undergoing screening at its own initiative, these provisions have limited value, given the lack of information available on the FDI transactions taking place, except for information that is in the public domain[73].

The OECD report and the Commission consultations have not revealed shortcomings in the arrangements and mechanisms complementing the cooperation mechanism, such as the expert group on the screening of FDI into the EU, the rules on the confidential handling of sensitive information and the arrangements for international cooperation with like-minded partners, such as the US, Japan and the G7 countries[74].

### 4.1.2 Efficiency of the Regulation

Efficiency covers the resources used by an intervention (in this case, the FDI Screening Regulation) to obtain the desired outcome. The evaluation has identified two main types of costs of FDI screening: the administrative costs borne by public administrations and businesses in order to comply with the Regulation, and the possible decrease of FDI inflows due to the adoption and implementation of the EU framework for FDI screening.

[73] Point 27 of the ECA report.
[74] Canada, France, Germany, Italy, Japan, UK, US.

On **administrative costs**, according to stakeholders interviewed for the OECD report, the EU framework has not significantly changed the processes or deadlines for, or outcomes of, investment screening in Member States. Responses to a Commission questionnaire confirm this. Like Member States, most private sector respondents were unable to provide **detailed cost estimates for the administrative burden of EU cooperation on FDI screening**. Their replies indicated that the cooperation mechanism's average costs were rather limited compared to the overall costs of most FDI reviews. However, several respondents reiterated that where a transaction is notifiable in more than one Member State, the lack of procedural alignment among national mechanisms and the different national requirements and practices have substantial cost implications and administrative burden (including legal and consulting fees, compliance efforts and administrative overheads).

Asked if the EU framework for FDI screening **deterred investors from investing in the EU**, all Member State respondents considered that the Regulation and national mechanisms did not have a dampening effect on FDI. Most private sector respondents shared the view that the EU framework for FDI screening, while not without flaws, had, on the whole, not deterred investors from investing in the EU.

Another private sector respondent who contributed on behalf of a foreign investor said that the workflow to get clearance from FDI screening authorities had become heavier than the workflow to get merger control clearances.

As part of the evaluation, the Commission assessed whether it was methodologically feasible to give a quantitative estimation of the likely current, past or future impact of the FDI Screening Regulation and its possible amendments on the economy and society and on FDI inflows. The conclusion arrived at was that this was not possible for the reasons explained in Section 2.4 of Annex II.

### 4.1.3 Coherence of the Regulation

#### Internal coherence

The evaluation found that the provisions of the Regulation are generally internally coherent and work well together to achieve its objectives. The Regulation's various obligations fit well together, with minimal rules and a lot of flexibility on the design and implementation of national screening mechanisms by Member States. National screening authorities' responses to a Commission questionnaire confirmed this as they considered that the purpose of the Regulation was on the whole coherent with the provisions for its implementation (for example: the confidentiality of information exchanged, the Commission expert group on the screening of FDI into the EU, and the list of projects and programmes of Union interest annexed to the Regulation).

#### Coherence with Member States' legislative frameworks

To achieve the Regulation's objective, the screening by Member States of FDI likely to affect security or public order is of paramount importance. The OECD report therefore

examined the screening mechanisms maintained by the Member States and concluded that certain definitions and provisions of the Regulation were being interpreted and applied in different ways across Member States (for example, who is considered a 'foreign investor' and what constitutes 'formal screening')[75].

Furthermore, the Regulation only has minimal rules (primarily procedural requirements) on designing screening mechanisms[76]. This means that differences in the sectoral scope of national mechanisms, or the application of rules to greenfield investments, or their exemption from those rules, could be seen as an inconsistency.

Finally, the lack of certain Member States' explicit competences to act effectively on other Member States' comments or Commission opinions could be seen as inconsistent with the obligation to take these comments and opinions into 'due consideration' or take 'utmost account' of them. These obligations concern behaviour, not outcomes, but certain Member States' inability to act in line with the Regulation can also be considered to be related to coherence.

The consequences of different scopes and definitions, or the consequences of certain Member States' inability to take action in the interests of other Member States have repercussions on the effectiveness of the Regulation. These shortcomings were evaluated in detail in the section on efficiency. The ECA report considered the lack of definitions or the uniform interpretation of key concepts (such as 'likely' or 'security or public order') a shortcoming of the Regulation[77]. However, the Commission consultations did not receive comments suggesting this was very problematic in practice.

In response to a Commission questionnaire, national screening authorities considered that the Regulation had promoted the **adoption** of, and a certain degree of **similarity among, national screening mechanisms.** At the same time, respondents pointed out that differences remained among national screening mechanisms, for example in the sensitive economic sectors subject to screening and deadlines. Generally, national screening authorities were in favour of promoting greater harmonisation of national rules without affecting the responsibilities of Member States in screening.

**Coherence with relevant EU interventions**

The Regulation clarifies that its application is without prejudice to the application of Article 21(4) of Regulation (EC) No 139/2004 (the Merger Regulation), and both the Regulation and Article 21(4) of Regulation (EC) No 139/2004 should be applied consistently[78]. It clarifies that the Regulation does not affect EU rules on the prudential assessment of acquisitions of qualifying holdings in the financial sector, which is a distinct procedure with a specific objective[79]. The Regulation also states that it is

[75] Paragraphs 161-165 of the OECD report.
[76] These rules are set out in Article 3(2)-(6).
[77] Points 29 and 33 of the ECA report.
[78] Recital (36).
[79] Recital (37).

consistent with and without prejudice to other notification and screening procedures set out in sectoral EU law[80].

In the reporting period, the Commission has not become aware of specific cases in which a transaction was subject to multiple authorisation procedures, and these were carried out in a conflicting manner. However, the respondents to the targeted consultation were almost evenly divided on the overall consistency of the processes required by the FDI Screening Regulation with other scrutiny and authorisation procedures.

In response to a Commission questionnaire, many private sector respondents called for greater consistency between nationality criteria (used to determine an investor's country of origin and ultimate ownership) and other EU instruments, in particular the EU sanctions regime, anti-money laundering and EU merger control rules, and key concepts, such as 'control' and the consideration given to security and public order (in particular in the context of EU merger control rules).

The evaluation found that the Regulation was cited in several relevant EU policy instruments[81], but no major inconsistencies or overlaps were identified between the Regulation and these instruments, whose purpose is distinct from that of the FDI Screening Regulation. Rather, the evaluation showed that there was a certain degree of complementarity between the Regulation and the EU instruments applicable to sectors or actions relevant for security or public order.

Finally, the evaluation found that the Regulation was consistent with EU restrictive measures (sanctions), which, on the basis of Article 215 of the TFEU, take precedence over other EU regulations and may prohibit or stand in the way of authorising FDI by certain third countries or nationals of third countries. On FDI not prohibited by EU restrictive measures, the Commission has called for systematic scrutiny of FDI by or related to Russian or Belorussian persons, with particular attention to the threats posed by investments by persons or entities associated with, controlled by or subject to influence by the governments of these two countries[82].

[80] Recital (38).

[81] For example:

- Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market;
- Regulation (EU) 2021/696 establishing the Union Space Programme and the European Union Agency for the Space Programme;
- Proposal for a regulation establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act) (COM/2022/46 final); and
- Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy on 'European Economic Security Strategy' (JOIN/2023/20 final).

[82] 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 (C/2022/2316).

### 4.2. How did the EU intervention make a difference and to whom?

The evaluation found that the Regulation had generated more added value than Member States could individually have achieved when it comes to the screening of potentially risky investments on the grounds of EU security or public order. Respondents to the targeted consultation generally agreed that the FDI Screening Regulation had increased the effective protection of EU security and public order from the risks posed by certain FDIs more than Member States could individually have done. In particular, respondents said that the Regulation:

- provided security-relevant information to Member States that they would not otherwise have access to (without the cooperation mechanism);
- had an impact on the decision taken by the Member State screening a transaction[83];
- had increased convergence among Member States on what may constitute a risk to security or public order;
- had increased convergence among Member States on how risks to security or public order should be assessed; and
- had promoted the adoption or modernisation of national screening mechanisms[84].

Responses were more nuanced about the degree to which the Regulation had generated added value by increasing convergence between national rules on what may constitute a risk to security or public order, how such risks are assessed, and the procedural aspects of national screening mechanisms.

In response to a Commission questionnaire, national screening authorities said that the Regulation had increased their awareness of cross-border risks to security or public order and drawn their attention to the security relevance of EU projects and programmes, as well as the potential risks to the continuity of these projects and programmes from certain FDI. Overall, Member State respondents considered that the Regulation and the cooperation mechanism had allowed the Commission and Member States to became more familiar with screening mechanisms in the EU, and increased awareness of FDI risks, and the cooperation mechanism had made it more difficult for parties to transactions to hide risky investments from Member States. Furthermore, even when assessing FDI made in only one Member State, more attention is paid to possible impacts at EU level.

[83] The lack of information on the outcome of national screening procedures notified to the cooperation mechanism meant that it was not possible to do a comprehensive factual evaluation of how Commission opinions and Member States' comments have influenced the outcome of national screening investigations, for example by providing information or drawing attention to considerations not identified by the screening Member State. This was also pointed out in the ECA report (point 29.c), which presented it as a limitation of the effectiveness and efficiency of EU-wide screening.

[84] This was confirmed by the OECD report. For more information, see paragraphs 44-46 of it.

On the same matter, private sector respondents to a Commission questionnaire saw the Regulation's added value in the following areas.

- It has prompted Member States to establish, where necessary modernise, and effectively implement, their national screening mechanisms. However, two respondents considered that in a way, the Regulation had decreased legal certainty by promoting the use of screening on grounds of security and public order in a way that gives Member States too much discretion to determine the scope of sectors or economic activities covered by their screening mechanism, the notification triggers, the procedural framework and screening deadlines, as well as the substantive concerns assessed.
- It has increased the efficiency of risk assessment by the Member States, and given Member States security-relevant information on FDI transactions subject to screening.
- It has improved awareness of cross-border security risks, as well as risks on security and public order grounds to projects and programmes of Union interest.
- It has fostered a degree of consistency and convergence in the approach to FDI screening across the EU – without the coordinated framework, it is reasonable to assume that newly adopted screening rules would vary more widely in terms of criteria, procedures and thresholds.
- It has drawn political attention in Member States to the importance of FDI screening, which may have resulted in additional resources being allocated to the implementation of screening mechanisms, which in turn might have improved the quality of risk analysis.
- It has increased the private sector's awareness to and understanding of national screening mechanisms.

Lastly, the Commission's annual reports on FDI screening in the EU, which provide information about FDI trends, national screening activities, legislative and policy developments in Member States and the implementation of the EU cooperation mechanism, increase the transparency of screening in the EU. At the same time, the ECA report considered that the Commission's reports contained insufficient information and data and recommended that they focus more on critical risks and approaches to mitigating them, and that, in cooperation with Member States, the Commission also improve the scope and quality of the underlying data[85].

### 4.3. Is the intervention still relevant?

The evaluation found that the Regulation's objective of protecting the EU's security and public order from risky FDI remained very relevant, particularly given the evolving geopolitical situation (presented in Section 3.1), the trends of FDI in the EU (presented in

[85] Points 57 and 66 of the ECA report.

Section 3.2), and the international policy context (presented in Section 3.7). The increasing number of Member States maintaining and updating their screening mechanisms (presented in Section 3.3), and the more than 400 cases reviewed by the cooperation mechanism each year, confirm the continued relevance of FDI screening as a policy tool, and of EU cooperation, for identifying and addressing the cross-border risks of FDI to security or public order. Respondents to the targeted consultation confirmed this assessment.

The shortcomings found by the OECD report, the consultations organised by the Commission and the ECA report point to three key shortcomings limiting the current rules' relevance.

- Firstly, the gap between the aggregated number of cases received and screened by Member States and the number of cases reviewed by the cooperation mechanism raises the question of whether the **scope of investors covered by the Regulation and the criteria for notifications to the cooperation mechanism** remain relevant. The comparative analysis of national screening mechanisms and the annual reports published by some Member States found that several Member States went beyond the scope of investors covered by the Regulation by screening certain intra-EU investments[86], which can pose the same security and public order risks as FDI the Regulation covers. This was confirmed by national screening authorities, whose confidential replies to a Commission questionnaire showed that there were precedents for transactions outside the scope of the cooperation mechanism that were prohibited or authorised with conditions since October 2020. This confirms that the current system has 'blind spots' and that the Regulation could be improved by covering investments by investors established in the EU and controlled by third country investors. This may be particularly relevant given patterns of past investment by investors from countries of potential concern in the EU predating the current focus on screening.
- Secondly, given the difference between the proportion of transactions that Member States find risky under their national systems and the proportion of notified transactions in which the Commission or another Member State intervened, it appears that the **trigger for mandatory notification to the cooperation mechanism** often results in very low-risk cases being brought to the attention of the network of screening authorities, while relevant cases go unnoticed due to the limitations concerning intra-EU FDI. The OECD report pointed out that the current design resulted in both oversharing (the notification of transactions that are manifestly irrelevant for other Member States who are themselves unlikely to contribute useful information) and undersharing, whereby a transaction likely to affect the security or public order of other Member States is not brought to their attention, with varying practices in Member States being

[86] For more information, see paragraphs 166-167 of the OECD report.

another contributing factor[87]. The ECA report also highlighted the overburdening of the system with ineligible (out of scope) and low-risk cases[88].

- Thirdly, because Member States may decide not to maintain and implement a screening mechanism, the **current system leaves leeway for circumventing national FDI mechanisms** if a foreign investor establishes a subsidiary in a Member State without a screening mechanism, then organises its future investments through that subsidiary, or if the target company's assets are transferred, before the actual FDI is made, to an entity in another Member State without a screening mechanism or with less stringent screening procedures.

In response to a Commission questionnaire, national screening authorities were in favour of maintaining the cooperation mechanism while addressing the shortcomings in its efficiency and effectiveness. Several private sector respondents acknowledged that the Regulation had played a major role in promoting a degree of harmonisation and coherence that might not have existed across the EU otherwise. At the same time, they took the view that the current system could be improved, with greater harmonisation to provide clarity, and that screening in the EU could be made more consistent. They suggested some rules and practices, where harmonisation or alignment would be beneficial. These recommendations are set out in Annex V.

## 5. WHAT ARE THE CONCLUSIONS AND LESSONS LEARNED?

The overall objective of this staff working document is to evaluate the FDI Screening Regulation using the five standard evaluation criteria of the better regulation toolbox: effectiveness, efficiency, coherence, EU added value and relevance. This section presents the main findings of the Commission and the lessons learned from the evaluation.

### 5.1 Conclusions

On **effectiveness**, the evaluation shows that the Regulation has had a positive impact on protecting EU security or public order from risky FDI. It also shows that the Regulation itself has not slowed down or deterred the inflow of FDI into the EU. That said, several shortcomings were identified that result in blind spots in the system (such as Member States without a screening mechanism or the lack of screening of foreign-controlled intra-EU investments), ultimately undermining the ability of the Commission and Member States to identify a wide scope of potentially risky transactions. This may undermine the protection of security or public order in the EU, including in but not limited to the Member State where the investment takes place. These shortcomings are described in detail in the next section on lessons learned.

On **efficiency**, the evaluation concluded that the administrative burden of implementing the Regulation is reasonable, both for Member State public authorities and for parties to

[87] For more information, see p. 79 of the OECD report.
[88] Point 38 of the ECA report.

transactions undergoing screening. However, the evaluation found that certain procedural aspects of the cooperation mechanism limit its efficiency. These are, for example, the lack of harmonisation of Member States' timelines for screening FDI transactions, the lack of predictability of the stage of national screening at which EU cooperation is initiated because their start is only determined by the start of formal screening by the Member State concerned, and the lack of an efficient cooperation procedure for transactions screened by multiple Member States. As the number of Member States screening FDI increases, the Commission expects these problems to increase significantly, which may undermine the functioning of the market for investments and 'corporate control' of EU legal entities. This calls for an appropriate regulatory solution in the upcoming revision of the Regulation.

The evaluation shows that the Regulation is **internally coherent** to a satisfactory degree. No significant inconsistencies were identified in relation to the cooperation mechanism and between the cooperation mechanism and other aspects of the Regulation. At the same time, the evaluation revealed that the minimum requirements for national screening mechanisms are insufficient to achieve the necessary level of coherence (consistency) between the FDI Screening Regulation and national screening mechanisms (and between national mechanisms themselves) for the efficient and effective functioning of the cooperation mechanism. On **external coherence**, no procedural inconsistencies were found between the Regulation and other EU legislation and policies, while certain stakeholders pointed out the lack of harmonisation of certain concepts and the consideration given to security or public order, which could result in inconsistencies when the same FDI transaction is subject to more than one authorisation procedure.

The evaluation shows that the Regulation has provided **added value** by setting up a cooperation mechanism, which has increased the effective protection of security and public order from the risks posed by certain FDIs beyond what would have been achieved by Member States each operating individually.

On **relevance**, the evaluation found that the objective of the Regulation (protecting security and public order from the risks posed by certain FDIs) remains relevant. That said, the relevance of the current system is limited by the shortcomings identified in the evaluation concerning the limitations to the origin of investors and the trigger set by the Regulation for notifying transactions to the cooperation mechanism.

### 5.2 Lessons learned

The main lessons learned and some possible solutions are set out below. These are not exhaustive and are without prejudice to future decisions to be taken by the Commission in its proposal for a revision of the Regulation.

**Lesson 1: The lack of '*ex ante*' screening mechanisms in some Member States and the divergence between existing mechanisms undermine the effectiveness of the Regulation.**

The absence of screening mechanisms in some Member States that make it possible to scrutinise transactions before they are completed ('*ex ante*') 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 risks related to foreign investment in the EU, do not build institutional capacity, and cannot benefit fully from exchanges under the cooperation mechanism[89]. Furthermore, the evaluation concluded that limitations to 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 by narrowly defining their sectoral scope or exempting investors associated with certain non-EU jurisdictions – have limited effective means to manage risks related to foreign investment in the EU. This may have spillover effects on EU security or public order interests in other Member States and on projects or programmes of Union interest.

In the absence of a common scope of transactions subject to screening in all Member States or other ways to harmonise the conditions that should trigger screening at national level, the number and scope of notifications that the cooperation mechanism receives from the Member States are likely to continue to vary greatly. Furthermore, foreign investors may continue taking advantage of jurisdictions in the EU that do not have an FDI screening mechanism or whose mechanism does not apply to the sector concerned.

Under the current system, such FDI might be identified, and assessed if an *ex officio* cooperation is initiated under the mechanism provided by Article 7 of the Regulation. However, the evaluation has revealed a very limited use of this cooperation compared to the number of transactions assessed pursuant to a national screening procedure. Hence, the whole cooperation mechanism is only as strong as its weakest link.

*Possible measures*

- In line with the positions taken by the Commission in its relevant communications since March 2020 and the recommendation of the ECA report[90], a revised Regulation could require all Member States to adopt an '*ex ante*' screening mechanism.

[89] Some national mechanisms only carry out *ex post* screening of FDI, which deprives these Member States of an important tool if they (or the Commission or another Member State) identify a risk in relation to an FDI undergoing screening in another Member State and there is a subsidiary of the same company in their jurisdiction.

[90] Point 60 of the ECA report.

- These mechanisms should meet certain substantive criteria[91], otherwise there is a risk that the current inefficiencies will prevail (e.g. minimum scope of sectors or economic activities where the transaction cannot be completed without authorisation; types of investments and investors covered).

**Lesson 2: The current definition of FDI is too limiting.**

The evaluation found that the current scope of the Regulation (covering transactions that fall under its definition of 'foreign direct investment') excludes certain important transactions and transaction types. The most consequential issue is the definition of 'foreign investor' in the Regulation, which means that the cooperation mechanism cannot be used for investments by non-EU investors if these investors invest via an entity set up in the EU, even though the public order or security implications of such transactions can be the same as in scenarios where the foreign investor directly invests from abroad. The only exception to this is the case of circumvention of the screening mechanism, for example by using an EU shell company. Member States confirmed to the Commission that they had prohibited or conditioned certain intra-EU transactions since October 2020 that were not notified to the cooperation mechanism before the national decision, as the transaction fell outside the scope of FDI as defined by the Regulation. In relation to these transactions, the other 26 Member States and the Commission were not able to make their own analysis and share possible concerns, as they were not aware of the transaction undergoing screening.

*Possible measure*

- A revised Regulation could explore extending the cooperation mechanism to cover intra-EU transactions where the EU direct investor is controlled by a foreign investor. The screening of such intra-EU transactions should be carried out in full conformity with the principle of proportionality and other principles enshrined in the Treaties and the objective of preserving an open and inclusive internal market in the EU.

**Lesson 3: Notification of all transactions undergoing screening is a suboptimal filter to identify risky transactions across the EU.**

The current set-up, where Member States are required to notify to the cooperation mechanism all FDIs that they screen, creates several shortcomings. These issues result in a mechanism that assesses a significant number of transactions (including many non-critical FDIs) and devotes resources to checking the eligibility of transactions that are found to be ineligible or obviously non-critical, while still risking overlooking potentially critical transactions.

- First, the evaluation found that an overwhelming number of transactions notified to the cooperation mechanism have no impact on public order or security of the

[91] It should be noted that point 61 of the ECA report recommends that the Commission assesses whether national screening mechanisms comply with the standards set out in Article 3 of the Regulation.

notifying Member State or other Member States, or through projects and programmes of Union interest.

- Second, there are no harmonised conditions to determine what may or must constitute a formal screening of a transaction at national level, which is the trigger for Member States to notify transactions to the cooperation mechanism. As a result, certain transactions might be dismissed when they are considered non-sensitive by the screening Member State from a purely national security perspective while they could be relevant to other Member States or projects or programmes of Union interest. It is not appropriate for the screening Member State to decide on its own criteria for determining which transactions should be withheld from the cooperation mechanism.

These shortcomings severely impair the effectiveness of the Regulation while undermining the efficient use of resources in national administrations and creating unnecessary administrative burden for businesses.

*Possible measures*

- Laying down some common criteria for the transactions that Member States must notify to the cooperation mechanism, for example a common minimum scope of sectors or transactions that need to be screened and notified to the cooperation mechanism. This would allow the cooperation mechanism to focus on the most critical transactions.
- The list of minimum criteria could be further developed over time to adapt to changing risks or new technologies.
- In addition to this, a mechanism could be put in place to avoid missing transactions considered critical by one or more Member States but falling outside of the common minimum scope.

**Lesson 4: The differences between national screening mechanisms can seriously undermine the effectiveness and efficiency of the cooperation mechanism.**

The Regulation provides very little framing as regards the scope ('what actually needs to be screened'), the objective and criteria in light of which the screening takes place. In the absence of harmonised EU rules, the evaluation found significant conceptual differences between national screening legislations with regard to the expression of concepts such as 'security', 'public order', 'national security' and 'essential security interests', as well as the probability thresholds to indicate the likelihood of an adverse effect on impact on security and public order ('likely, 'disrupt', 'threaten', 'may affect')[92]. The ECA Report suggested improvements in this regard to ensure that investors are not discriminated against and that the free movement of capital is not unduly restricted[93]. Given the current vague safeguards, some Member States may justify prohibiting a transaction in a

[92] Page 57 of the OECD report.
[93] Point 60 of the ECA report.

situation underlying the Xella case[94], where the European Court of Justice was very clear on the breach of the freedom of establishment committed by such refusal. The continued lack of alignment of the scope, objective and criteria of national screening mechanisms combined with an increasing number of such mechanisms risk infringing the Treaty free movement rules and create obstacles to the Treaty freedoms.

In addition to the lack of alignment of substantive rules procedural divergences also create further problems for the cooperation mechanism. Member States with a screening mechanism are free to determine their timeframes for screening and the moment when they notify the cooperation mechanism of a specific transaction. This issue is notably problematic in the case of multi-country notifications, i.e. when several Member States notify their respective national screening procedure of the same broader transaction. As a result, transactions that are screened in several Member States because the target company has subsidiaries in these Member States are not necessarily notified simultaneously to the cooperation mechanism. In the evaluation period, these multi-country transactions accounted for about 25% of the transactions reviewed by the cooperation mechanism.

However, the timelines of EU cooperation are such that the Commission and the other Member States need to assess each leg of the transaction upon receipt of the notification. Consequently, they may assess the same transaction at several points in time with an uneven level of information, and after the respective deadline, they may not have the possibility to reopen the assessment of a transaction notified earlier.

This has consequences for resources and leads to duplication of work, but most importantly, it compromises the quality of the risk assessment. The worst-case scenario would be for the Commission or Member States to close their assessment of the first leg(s) of a transaction without identifying a concern, and identifying a risk only after a later notification by a Member State in relation to its own leg of the transaction. As the completion of a transaction is subject to the receipt of screening authorisation from all Member States where the parties filed a request, aligning the timelines would not delay the completion of transactions.

*Possible measures*

- Harmonisation could be considered for the scope of screening mechanisms and the threshold for what is to be screened on the basis of which criteria, and what sort of finding can trigger Member States' decisions that impose conditions or prohibit a transaction.
- Member States could be required to notify the cooperation mechanism within a specified time following receipt of the filing by the investor.
- Further procedural harmonisation could be considered for 'multi-country notifications' to ensure a parallel and possibly coordinated handling of

[94] Judgment of 13 July 2023, *Xella Magyarország,* C-106/22, EU:C:2023:568.

transactions (including their assessment and the final decision) in all Member States concerned. This action was also recommended by the ECA report[95].

**Lesson 5: The information provided to the cooperation mechanism about individual transactions is not sufficient.**

Currently, the scope of the information that must be provided in the notification to the other Member States and the Commission under the Regulation is rather limited. The notification form, which was prepared by the Commission in close cooperation with the Member States, goes beyond the formal initial information requirements under the Regulation and it has proven useful and widely used by Member States. However, it does not address the fact that certain transactions may require more than one request for information from the screening Member State, and in some cases, the necessary information is only known to Member States other than the one screening the transaction.

*Possible measures*

- The revised Regulation could formalise and standardise the information requirements provided in the notification template currently in use.
- The revised Regulation could explicitly allow the Commission and Member States to ask questions to other Member States than the one hosting the transaction, if the assessment of a case requires this.
- The revised Regulation could provide more flexibility for requesting additional information from the screening Member State (or through them from the investor) with safeguards against abuse and unjustified delays.

**Lesson 6: The timelines of the cooperation mechanism are too short for potentially critical transactions, and they are suboptimal for the cooperation between the Commission and Member States.**

In general, the timelines of the cooperation mechanism appear too short, in particular for potentially critical transactions. Furthermore, the fact that the Member States and the Commission are bound by identical timelines to make comments or issue an opinion prevents the Commission from factoring in the assessment of Member States concerned by a transaction when assessing the impact on security or public order in more than one Member State. The Commission may only become aware of a Member State's security concern on the day it is supposed to issue an opinion. Given the time required for internal procedures, the current timeframes do not leave sufficient room for concluding the substantive analysis.

*Possible measure*

- In potentially sensitive cases, the Commission should have more time to conclude its assessment under the cooperation mechanism than the Member States. This would allow the Commission to take due account of Member States' comments

[95] Point 61 of the ECA report.

when preparing an opinion, without unduly delaying the screening procedures at national level.

**Lesson 7: Member States do not have sufficient power to address the interests or concerns of other Member States.**

The evaluation found that a number of Member States with an FDI screening mechanism believe they do not have the power to take into consideration the protection of security or public order of other Member States or the EU. They argue they do not have the power to ask questions to foreign customers, suppliers or competitors of targets on their territory. They also argue they do not have the possibility to impose mitigating measures with a cross-border effect. This seriously undermines the effectiveness of the Regulation, whose aim is precisely to address the concerns expressed by other Member States. Only if Member States can effectively address the concerns of others, the whole cooperation mechanism is worth the effort and the resources for all stakeholders involved.

*Possible measure*

- The obligation for the Member State hosting the FDI to at least take into account concerns of other Member States is already enshrined in the Regulation. The revised Regulation could improve this.

**Lesson 8: The network of screening authorities does not have sufficient information about the outcome of national screening procedures notified to the cooperation mechanism.**

The current Regulation does not require screening Member States to provide information about the outcome of their screening decisions, for example a copy of their final decision, even when the Commission issued an opinion or other Member States made comments based on their security interests or concerns. As a result, the network of screening authorities has only limited information, if any, about FDIs that were considered risky by one or more Member States or the Commission and even less information is available about the reasons for Member State intervention in specific transactions. Furthermore, this limitation prevents the Commission from monitoring whether screening decisions are strictly motivated by public order or security concerns and meet the risk threshold required by the Regulation.

*Possible measures*

- The revised Regulation could require a Member State that has received comments or opinions to provide an explanation of its course of action in specific transactions to increase accountability within the cooperation mechanism (this would be in line with the recommendation of the ECA report)[96].
- Member States could be required to provide information, on a confidential basis, about the outcome of screening of transactions notified to the cooperation

[96] Point 66 of the ECA report.

mechanism, on the basis of which the Commission could publish general or aggregate information in its annual reporting (this would be in line with the recommendation of the ECA report[97] and could improve the scope and quality of underlying data for the Commission's annual reports, also recommended by the ECA report)[98].

In brief, the evaluation found that several missing or weak links remain in the EU's 'chain' of protection against risky FDI transactions. While the cooperation between all national authorities and the Commission has been intense and has helped in identifying, assessing and addressing risky FDI transactions that would otherwise have been missed[99], it is appropriate for the Commission to propose a revision of the Regulation to ensure that the chain does not have missing links and all links have the same sufficient level of strength.

[97] Point 60 of the ECA report.
[98] Point 66 of the ECA report.
[99] In the reporting period, the Commission and the relevant Member State authorities reviewed more than 1 100 transactions.

## ANNEX I: PROCEDURAL INFORMATION

### 1. Lead DG, D*e*cide planning / Commission work programme references

This evaluation forms part of the initiative to evaluate and possibly revise the FDI Screening Regulation, which was published by the European Commission's Directorate-General for Trade (DG TRADE) on the Commission's 'Have your say' website[100] on 12 February 2023. The agenda planning (Decide) reference assigned to the evaluation is PLAN/2023/92. The evaluation was required under Article 15 of the Regulation and was announced in the Commission work programme for 2023.

The report prepared by the OECD and co-funded by the EU assessed the effectiveness and efficiency of the cooperation mechanism almost 2 years after the full entry into force of the Regulation. The OECD started its work under a delegation agreement in October 2021 and published its report in November 2022.

### 2. Organisation and timing

In line with the better regulation guidelines, an existing interservice steering group of the Commission oversaw the evaluation. This steering group includes almost 20 Commission Directorates-General that play a part in the Commission's analysis of FDI transactions on a case-by-case basis where their specific expertise is required.

The steering group is led by DG TRADE. In the course of the evaluation, it was consulted on the questionnaire for the targeted consultation and the evaluation questions and indicators summarised in the evaluation matrix (Annex III).

### 3. Limited exceptions to the better regulation guidelines

In conducting the evaluation, an exception was granted to certain procedural requirements of public consultations described in the better regulation guidelines due to the specialised focus of the instrument. These exceptions concerned the duration (4 weeks instead of 12 weeks) and the language of publication of the online questionnaire (English only). Otherwise, the targeted consultation published by the Commission complied with better regulation rules for public consultations.

### 4. Consultation of the Regulatory Scrutiny Board

Not applicable. Tool #3 of the better regulation toolbox concerning the role of the Regulatory Scrutiny Board provides that the Board scrutinises only selected evaluations. This report has not been selected for scrutiny.

[100] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework_en

## 5. Evidence, sources and quality

DG TRADE used an external contractor to support the evaluation of the FDI Screening Regulation. The OECD Secretariat (Investment Division of the Directorate for Financial and Enterprise Affairs) carried out a study on the effectiveness and efficiency of the FDI Screening Regulation and offered conclusions and broad recommendations on how to address the shortcomings identified in the study[101]. The study was co-financed by the Commission and was carried out between October 2021 and June 2022. It reflects information as of 30 June 2022.

The analytical work carried out by the OECD Secretariat was based on desk research and interviews with Member State authorities, the Commission and other stakeholders (mainly legal advisers) involved in FDI screening. The OECD interviewed experts from all Member States. However, because of resource constraints, the study focuses on 15 of them only[102]. They were selected with a view to achieving a balance between smaller and larger economies, and a presentation of all situations under the current Regulation: long-standing FDI screening mechanism, recent FDI screening mechanism and absence of FDI screening mechanism.

The study assesses the ability of the cooperation mechanism to screen and address FDIs that likely affect the security or public order of Member States or projects or programmes of Union interest (effectiveness). It also assesses the ability of the system to fulfil its objectives while keeping the administrative burden for investors and other stakeholders proportionate to the policy goals and relevant security or public order concerns (efficiency). The study reports that the cooperation mechanism enjoys broad support, not only from Member States but also from stakeholders. National screening authorities notably consider that they take better informed screening decisions thanks to the exchange of transaction-specific information under the cooperation mechanism. Stakeholders consider that the EU framework has not significantly changed processes, timelines, or outcomes of investment screening in Member States. Nevertheless, as mentioned above, the study has identified several shortcomings that diminish the effectiveness and efficiency of the screening of FDIs in the EU. Some of these shortcomings stem from the design of the Regulation, others from the interpretation and implementation of the Regulation by Member States. The study's findings and final recommendations have helped the Commission to identify the key problems and set out the priorities for the revision of the FDI Screening Regulation.

The evaluation also considers evidence provided by Member States in their annual reports to the Commission pursuant to Article 5(1) of the Regulation.

[101] The study was published in November 2022: https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf.

[102] Austria, Belgium, Croatia, Czechia, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Slovakia, Slovenia, Spain and Sweden.

The Commission published a targeted consultation and a call for evidence that ran between 14 June and 21 July 2023. The Commission received 47 replies to the consultation[103] and 10 contributions to the call for evidence[104]. Member States and stakeholders (law firms, business associations and businesses) with proven experience in implementing the EU rules on FDI screening were invited by DG TRADE to provide further written input based on a questionnaire. These replies were collected between 3 August and 1 September 2023. A summary of replies is available in Annex V.

[103] The summary report of the targeted consultation is available on the Commission's website: https://policy.trade.ec.europa.eu/consultations/screening-foreign-direct-investments-fdi-evaluation-and-possible-revision-current-eu-framework_en#consultation-outcome.

[104] Contributions to the call for evidence are available on the Commission's website: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework/feedback_en?p_id=32186570.

## ANNEX II. METHODOLOGY AND ANALYTICAL MODELS USED

### 1. Methods and sources

#### 1.1 External report and consultation activities

The evaluation relied on a supporting study provided by an external contractor (OECD Secretariat)[105]. The supporting study was based on information collected from multiple sources, such as:

- desk research, based on information from publicly accessible government sources, in particular legislation, parliamentary documentation and public reports, and conversations with experts and practitioners during and before the research period; and
- 27 semi-structured interviews with 65 different interlocutors from Member State governments and authorities, the Commission, as well as legal counsels involved in international transactions that were screened in Member States.

In addition, DG TRADE has carried out the following activities for the purpose of this evaluation report:

- an open consultation – namely the targeted public consultation with a mix of open and closed questions and a call for evidence launched by the Commission – held between 14 June and 21 July 2023;
- targeted surveys with open questions to Member State screening authorities and stakeholders (law firms, businesses and business associations) with proven practical experience in screening FDI transactions – open between 3 August and 1 September 2023;
- desk research relying on confidential data concerning the FDI transactions notified to the cooperation mechanism; and
- desk research relying on open-source information about FDI transactions, legislation and policy developments at EU and national level.

The results of the stakeholder consultations are summarised in Annex V.

The evaluation is thus based on a combination of extensive desk research and a broad range of stakeholder feedback from consultations carried out by the external contractor and by the Commission. These provided a solid basis for the findings of the evaluation.

#### 1.2 Analysis of FDI trends between 2019 and the first half of 2023

This section presents a detailed description of trends in FDI flows in the EU between January 2019 and June 2023, prepared by the Commission's Joint Research Centre (JRC). A

[105] Further information about this study is available in Annex I, point 5.

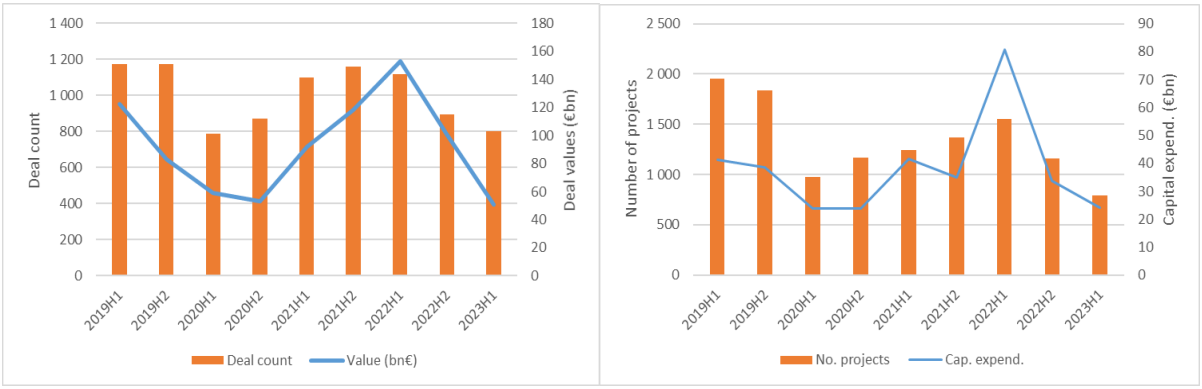
summary of this section is available in Chapter 3.2 of the main report. The figures shown are based on detailed transaction-level data for acquisitions of equity stakes above 10% of the capital of the EU-based target company and greenfield investments[106].

Since 2019, 9 084 foreign acquisitions have taken place in the EU, with a total value of more than EUR 832 billion. In the same time period, a higher number of greenfield projects (a total of just over 12 000 projects) were recorded, however with a lower associated total value of EUR 342.5 billion[107].

The number of acquisitions declined in the beginning of 2020, corresponding with the beginning of the COVID-19 pandemic and related public health restrictions, with a year-on-year reduction of 29.4% in 2020 compared to 2019 (**Figure 1, left**). In line with global FDI trends[108], foreign acquisitions experienced post-COVID-19 growth and recovered gradually through 2021 (with a 36.4% year-on-year increase in 2021 compared to 2020). However the increasing trend was interrupted in early 2022, linked to higher interest rates and the trade tensions following Russia's war of aggression against Ukraine. Despite this, at the end of the reporting period, foreign acquisitions in the EU remained above 2020 levels.

The decline in investment coinciding with the beginning of the COVID-19 pandemic was even more dramatic for foreign greenfield projects (**Figure 1, right**), with a 43% drop in projects and a 40% drop in values between 2019 and 2020. Foreign greenfield investments also started a post-COVID-19 recovery in 2021, which lasted until the end of 2022. However, and in contrast with foreign acquisitions, foreign greenfield investments did not reach pre-pandemic levels. Finally, the number of foreign greenfield projects remained stable in 2022 (with a small 4% increase compared to 2021). However, a declining trend started at the end of 2022, which continued in the beginning of 2023.

*Figure 1: Number of transactions and value of foreign investments in the EU – acquisitions (left) and greenfield projects (right), trend*

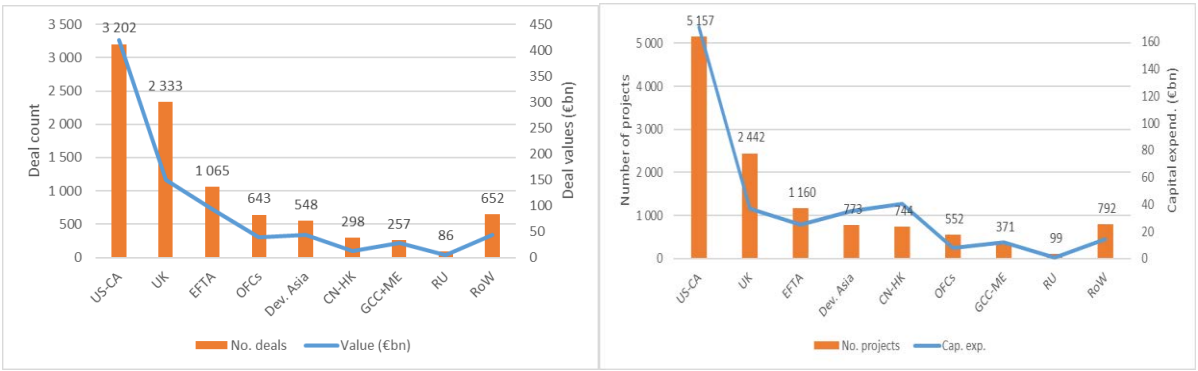



[106] See the end of the analysis for details on the datasets used and the methodology, and for definitions.
[107] Values are available for 32% of acquisitions, and roughly 95% of greenfield projects.
[108] Pitchbook, *2022 Annual Global M&A Report*, January 2023.

*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. The spike in the value of foreign greenfield projects in the first half of 2022 was largely due to two Intel investments in semiconductor manufacturing plants in Magdeburg (Germany), worth EUR 17 billion; and in Leixlip (Ireland), worth EUR 12 billion: https://www.intel.com/content/www/us/en/newsroom/news/eu-news-2022-release.html.*

The US and Canada, carrying out 3 202 acquisitions worth a total of EUR 419.5 billion, were the main countries of origin of foreign acquisitions in the EU between 2019 and the first half of 2023, accounting for 35.2% of transactions and 50.4% of the total value (**Figure 2, left**). The UK and European Free Trade Association (EFTA) countries followed, accounting for 25.7% and 11.7% of total acquisitions, respectively. Firms originating in China and Hong Kong carried out 298 acquisitions of EU firms, with an observed value of EUR 12.2 billion (1.5% of the total value, which corresponds to 3.3% of the total number of acquisitions). For foreign greenfield projects, a similar pattern in terms of main foreign jurisdictions of origin can be observed (**Figure 2, right**). The most important origin jurisdiction was the US and Canada, which accounted for a share of 42.7% of greenfield projects in the period analysed (and almost 50% of the total value). The UK and EFTA countries followed in second and third place, accounting for 20% and almost 10% of total foreign greenfield projects, respectively. Finally, China and Hong Kong were the fifth most important origin jurisdiction, accounting for just over 6% of total foreign greenfield projects.

*Figure 2: Number of acquisitions of equity stakes, and values (left); number of greenfield projects, and values (right) – by foreign jurisdiction (January 2019-June 2023)*



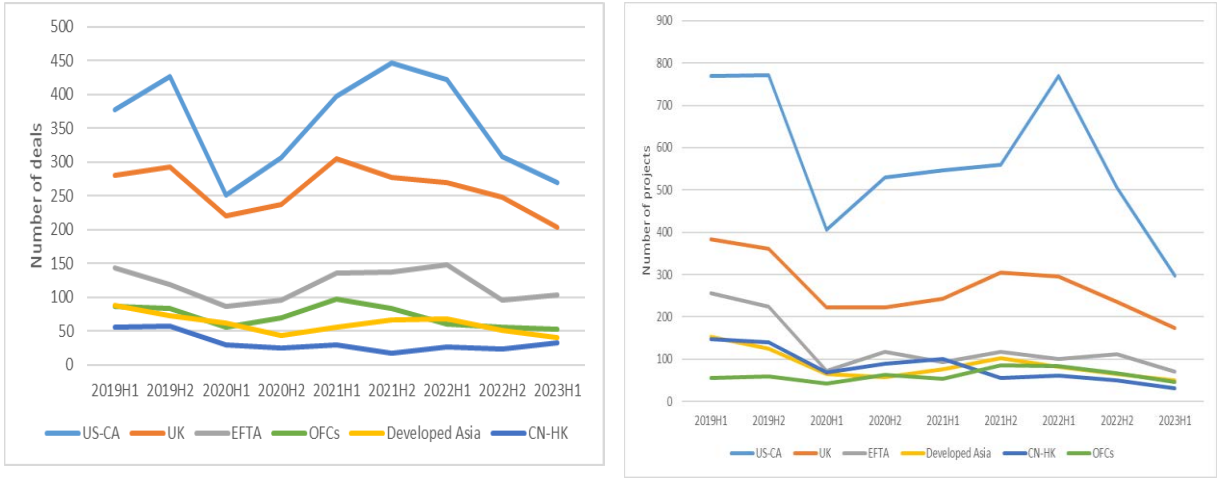

Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. OFCs: offshore financial centres[109]. EFTA includes Iceland, Norway and Switzerland. Developed Asia includes Japan, Singapore, Taiwan and South Korea. GCC-ME (Gulf Cooperation Council and Middle East) includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Iran, Iraq, Israel, Jordan, Lebanon, Palestine, Syria, Türkiye and Yemen. RoW: rest of the world.

Foreign investment originating in all foreign jurisdictions experienced somewhat comparable trends between 2019 and the first half of 2023, which largely followed the general trends depicted in Figure 1. In terms of foreign acquisitions, all jurisdictions experienced a year-on-year decline in 2020 compared to the previous year (**Figure 3, left**), with acquisitions originating in China and Hong Kong (-52.6%) and Russia (-60%) experiencing a particularly steep decline. Foreign greenfield projects originating in EFTA countries experienced the

[109] Offshore financial centres (OFCs) include Andorra, Antigua and Barbuda, Barbados, Bermuda, Bahamas, Gibraltar, Saint Kitts and Nevis, Cayman Islands, Liechtenstein, Monaco, Marshall Islands, Panama, Seychelles, Saint Vincent and the Grenadines, and British Virgin Islands.

largest drop (-60%) in 2020 compared to 2019 (**Figure 3, right**). In 2021, acquisitions originating in the US and Canada and Russia recovered at the fastest pace, increasing in number by 51.3% and 158%, respectively, by the beginning of 2022 compared to 2020. For greenfield projects, transactions originating in the US and Canada also recovered in 2021 compared to 2020 (+18%).

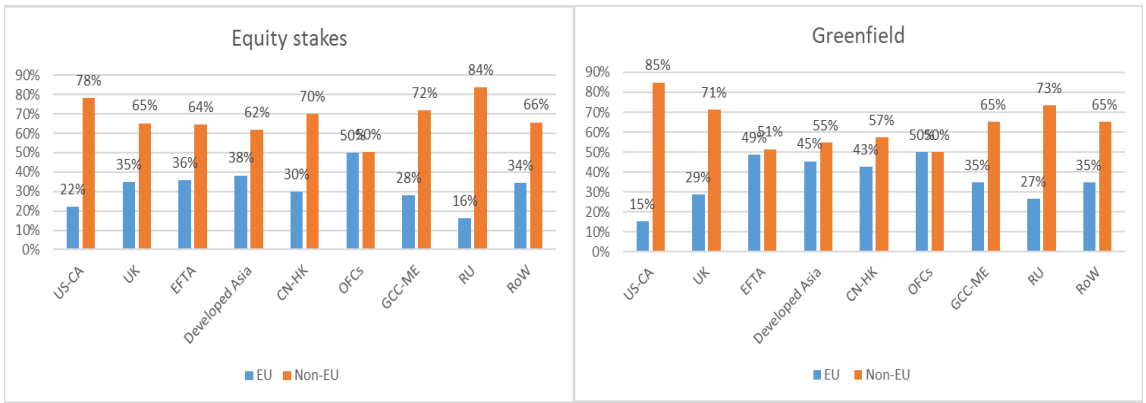
*Figure 3: Number of acquisitions (left) and greenfield projects (right) – trend by foreign jurisdiction (top 5)*




*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. OFCs: offshore financial centres. EFTA includes Iceland, Norway and Switzerland. Developed Asia includes Japan, Singapore, Taiwan and South Korea.*

Investors often use subsidiaries registered in other countries to make investments. Between 2019 and the first half of 2023, foreign entities used their EU subsidiaries for 31% of foreign acquisitions, and 28.2% of greenfield investments identified in the reporting period, on average (**Figure 4**). Looking at the geographical breakdown by investor origin, the use of EU subsidiaries ranges from 21.9% of acquisitions by investors originating in the US and Canada (15% for greenfields) to 49.8% of acquisitions by investors originating in offshore financial centres (50% for greenfields).

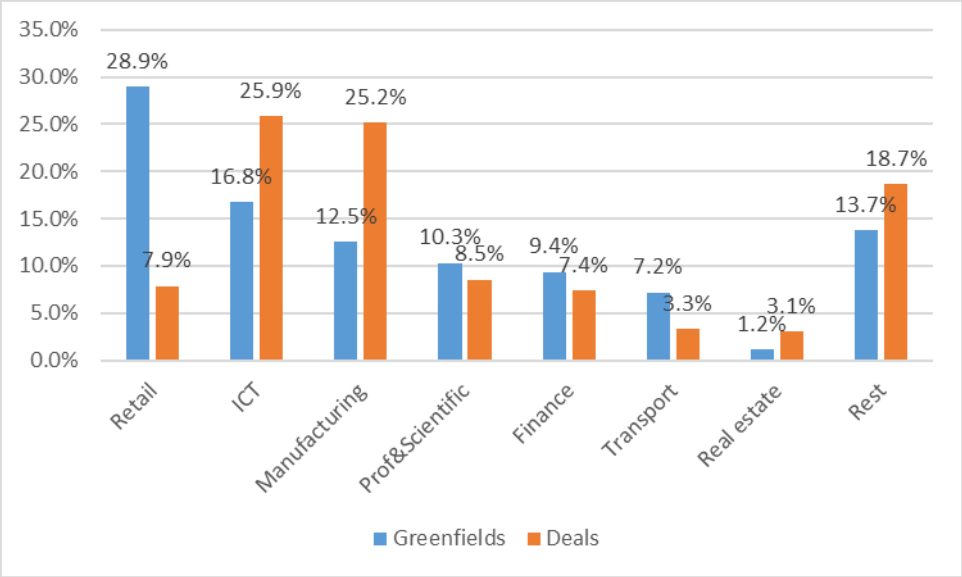
*Figure 4: Share of transactions performed by EU-based and non-EU-based direct investors in total transactions, by origin of the investor's controlling parent (January 2019-June 2023)*



*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. OFCs: offshore financial centres. EFTA includes Iceland, Norway and Switzerland. Developed Asia includes Japan, Singapore, Taiwan and South Korea. GCC-ME (Gulf Cooperation Council and Middle East) includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Iran, Iraq, Israel, Jordan, Lebanon, Palestine, Syria, Türkiye and Yemen. RoW: rest of the world. Shares calculated by dividing the amount of transactions performed by EU-based and non-EU-based direct investors, respectively, by the total amount of transactions for each foreign jurisdiction.*

Information and communication (ICT) and manufacturing account for about half of total acquisitions (**Figure 5**), making up 25.9% and 25.2% of total acquisitions between 2019 and the first half of 2023, respectively. As regards foreign greenfield projects, retail accounted for the largest share of total foreign projects (28.9%), followed by ICT (16.8%) and manufacturing (12.5%).

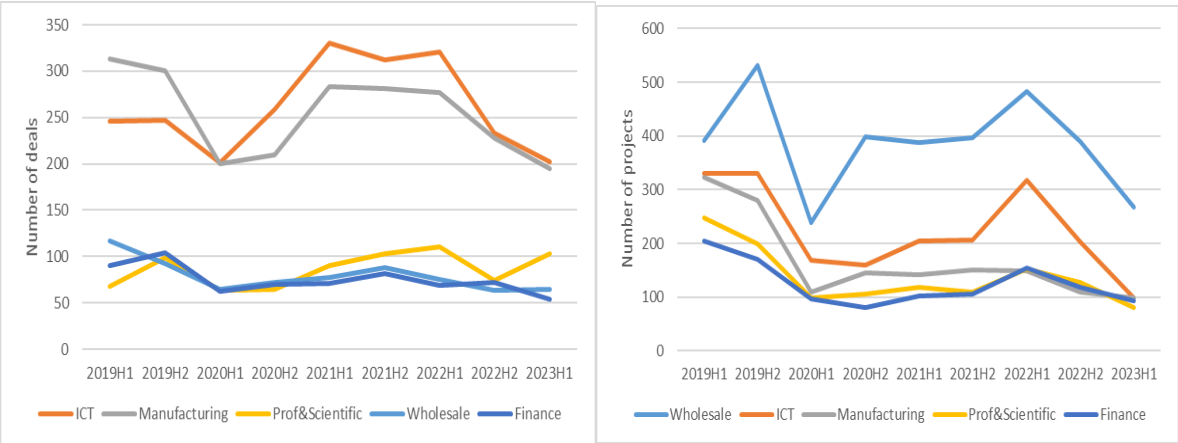
*Figure 5: Share of acquisitions and greenfield projects in total acquisitions and greenfield projects – by sector (January 2019-June 2023)*




*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. Prof&Scientific stands for professional, scientific and technical activities (NACE Rev. 2, Section M); it contains research and development facilities, among other things. ICT corresponds to NACE Rev. 2, Section J. Retail stands for wholesale and retail trade (NACE Rev. 2, Section G). Finance stands for financial and insurance activities (NACE Rev. 2, Section K). Transport stands for transportation and storage (NACE Rev. 2, Section H). Manufacturing corresponds to NACE Rev. 2, Section C. Real estate corresponds to NACE Rev. 2, Section L.*

Looking at trends in the number of acquisitions, ICT surpassed manufacturing in early 2020 and remained at the top in 2021 and the first half of 2022, while in the second half of 2022 and the first half of 2023 a similar number of transactions were observed in the two sectors (**Figure 6, left**). Retail remained the sector that received the highest number of foreign greenfield projects in the whole time period (**Figure 6, right**), while ICT remained the second most important sector for greenfield projects. The number of acquisitions in high-tech sectors (such as ICT and professional, scientific and technical activities) remained relatively high from 2019 to the first half of 2023, while the number of greenfield projects in the same sectors dropped significantly below 2019 levels in the following years (with a partial exception in the first half of 2022).

*Figure 6: Number of acquisitions (left) and greenfield projects (right) – trends by main sectors*

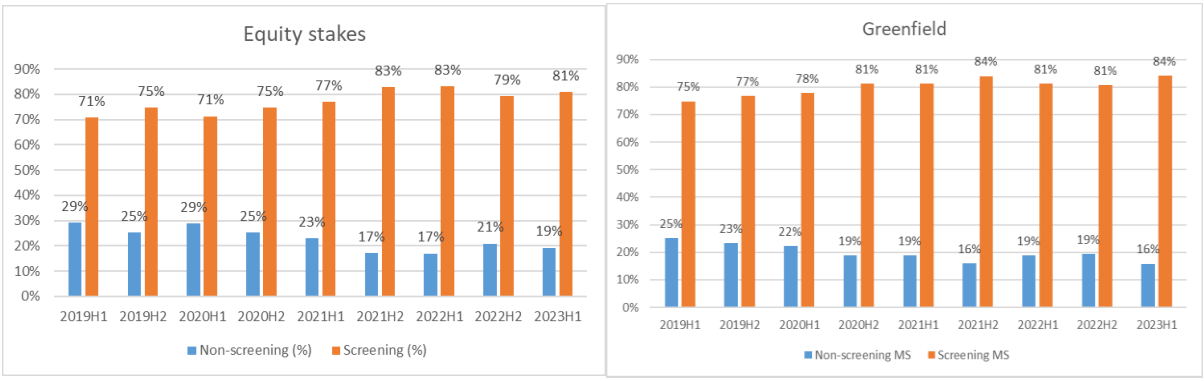



*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. Prof&Scientific stands for professional, scientific and technical activities (NACE Rev. 2, Section M); it contains research and development facilities, among other things. ICT corresponds to NACE Rev. 2, Section J. Retail stands for wholesale and retail trade (NACE Rev. 2, Section G). Finance stands for financial and insurance activities (NACE Rev. 2, Section K). Manufacturing corresponds to NACE Rev. 2, Section C.*

Between 2019 and the first half of 2023, the share of total foreign acquisitions in the EU that targeted Member States **without** a fully applicable investment screening mechanism ('non-screening Member States')[110] was 22.7%, with a decrease in the number of foreign acquisitions targeting non-screening Member States from 341 in the first half of 2019 to 154 in the same period of 2023 (a 54.8% decrease) (**Figure 7a, left**). Similarly, 20% of greenfield projects targeted non-screening Member States in the same time period, down from 493 projects in the first half of 2019 to 126 in the first half of 2023 (a 74% decrease) (**Figure 7a, right**). Most of the reduction in numbers was due to a general negative trend in transactions, affecting screening and non-screening Member States similarly. The share of investments taking place in non-screening Member States declined from 29% (25%) in the first half of 2019 to 19% (16%) in the first half of 2023 for acquisitions (greenfields). This decline can be further explained by the progressive introduction of investment screening mechanisms in several Member States in the period considered, which means that the cluster of non-screening Member States became smaller.

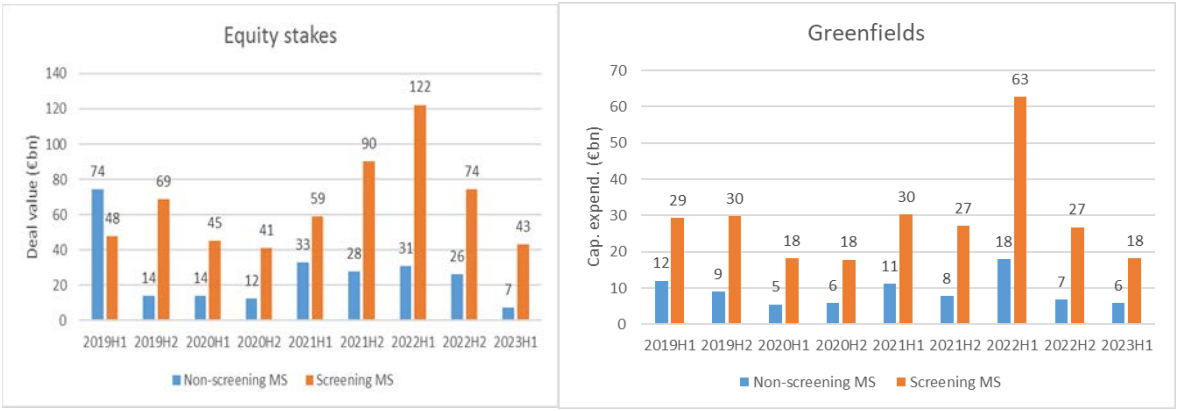
[110] For the purpose of this analysis, Member States without a screening mechanism between 2019 and the first half of 2023 are: Belgium, Bulgaria, Cyprus, Estonia, Greece, Croatia, Ireland, Luxembourg and Sweden. For Member States that introduced their mechanisms in this period (Malta in 2020, Czechia and Denmark in 2021, Slovakia in 2022 and Slovenia in 2023), the figures include transactions targeting these countries in the screening Member State category from these implementation years on. The analysis does not take into consideration the difference between the scope (sectors and investors covered) and ownership thresholds of screening mechanisms, i.e. the fact that a transaction may not be subject to screening, despite the Member State maintaining a screening mechanism. Therefore, the actual share of non-screened FDI is even higher.

*Figure 7a: Screening and non-screening Member States' shares in number of transactions, trends – acquisitions (left) and greenfield (right)*




*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. Shares calculated by dividing the amount of transactions in non-screening (and screening) Member States by the total amount of transactions in each half-year.*

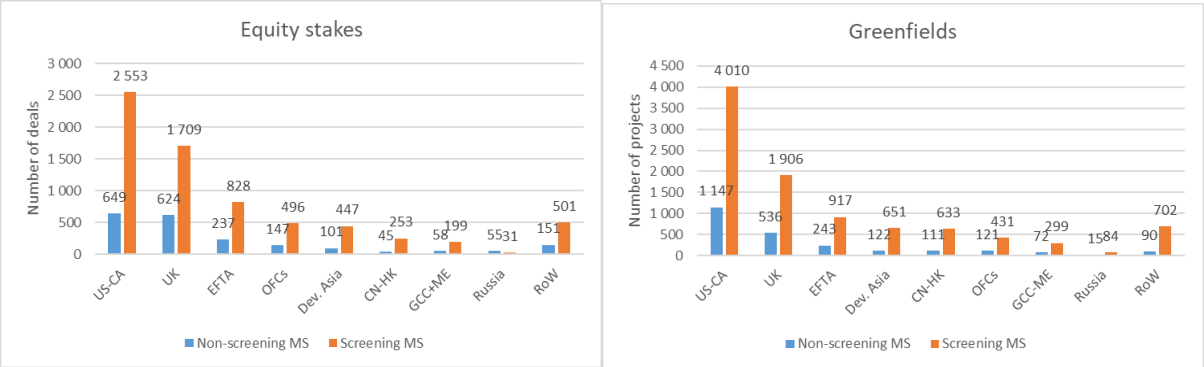
*Figure 7b: Value of foreign acquisitions (left) and greenfield projects (right) in screening and non-screening Member States – trend*




*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder.*

The US and Canada accounted for 31.4% of deals (649 investments) in non-screening Member States between 2019 and the first half of 2023 (**Figure 8, left**), almost the same level observed for the UK (30.2%). Almost half (46.7%) of greenfield projects in non-screening Member States were completed by investors from the US and Canada, while the UK and EFTA countries had much smaller shares (21.8% and 9.9%, respectively). Most acquisitions by Russian investors went to non-screening Member States.

*Figure 8: Number of acquisitions (left) and greenfield projects (right) in screening and non-screening Member States – by foreign jurisdiction (January 2019-June 2023)*



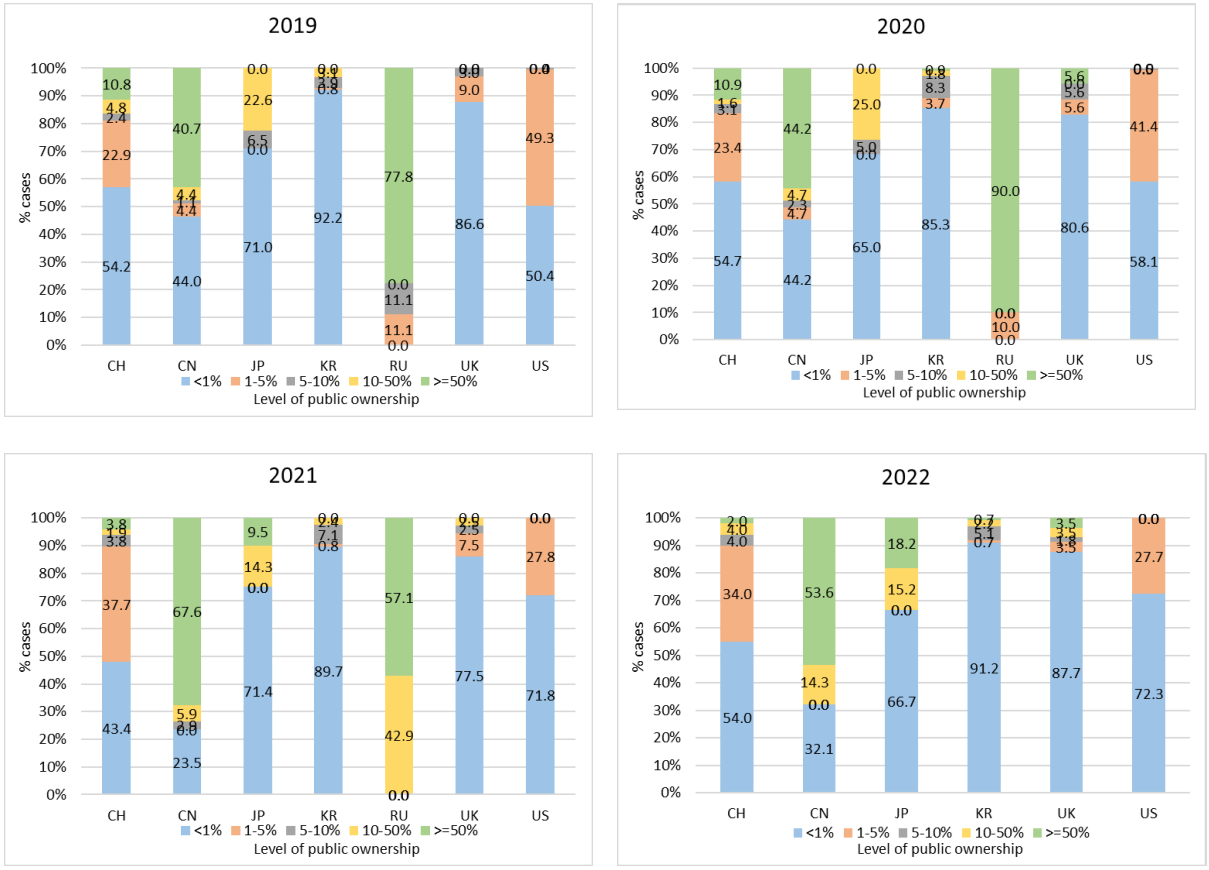

*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. OFCs: offshore financial centres. EFTA includes Iceland, Norway and Switzerland. Developed Asia includes Japan, Singapore, Taiwan and South Korea. GCC-ME (Gulf Cooperation Council and Middle East) includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Iran, Iraq, Israel, Jordan, Lebanon, Palestine, Syria, Türkiye and Yemen. RoW: rest of the world.*

**Figure 9** reports **public shareholding** in FDI transactions (both deals and greenfield projects) between 2019 and 2022. Public shareholding (this encompasses state-owned companies) occurs when a state-controlled entity holds (control or minority) stakes in a foreign investor. We focus the analysis of public shareholding on foreign investors coming from the main jurisdictions of origin of investments in the EU (i.e. Switzerland, China, Japan, South Korea, Russia, the UK, and the US).

The percentage of foreign acquisitions of equity stakes in the EU where the presence of public shareholding from any of the main foreign jurisdictions was identified decreased from 16% in 2019-2020 to 13.7% in 2022. For greenfield investments, the trend was quite stable, with a small increase in public shareholding, ranging from 10.5% in 2019 to 11.4% in 2022.

During these years, public shareholding was present through minority stakes; therefore, focusing only on control stakes would give a limited picture of public shareholding of foreign investments in the EU. Between 2019 and 2022, the overall average shares held by public entities were around 7% (8% for acquisitions and 6% for greenfields).

*Figure 9: Foreign acquisitions and greenfield investments with public participation, share by amount of participation and country – by year*




*Source: JRC elaboration based on Bureau van Dijk data, extracted on 13 July 2023 from Orbis M&A and Orbis Crossborder. Russia is not included in the chart for 2022 as available information was only based on one data point. Note that data on public influence depends on the reconstruction of ownership links between subsidiaries. This can be very difficult for certain jurisdictions (for example China) due to the use of offshore subsidiaries to enter the EU, or to their complex nested structures not fully captured by Bureau van Dijk raw data.*

Between 2019 and 2022, the pattern of public shareholding varied somewhat across the selected foreign jurisdictions.

Overall, in the time frame analysed, the largest proportion of transactions with public shareholding (42%) originated in the US, with this proportion increasing from 39.8% in 2019 to 45.3% in 2022. These transactions mainly occurred through federal and local funds controlled by public bodies, which usually hold small stakes (on average below 1% between 2019 and 2022) in foreign companies investing in the EU.

The second largest proportion between 2019 and 2022 originated in South Korea (22.3%, again increasing from 18.8% in 2019 to 24.4% in 2022), with average stakes of around 1.4% in this time period.

Similarly, all other foreign jurisdictions present very small average public shares in the period analysed, with averages ranging from 2.1% for the UK to 8.3% for Switzerland. The main

exception is China with about 45%. However, the proportion of transactions originating in China decreased from 13.4% in 2019 to 5% in 2022.

**Methodology of and sources for the analysis of FDI trends**

Raw data on acquisitions of equity stakes and greenfield projects comes from Bureau van Dijk datasets (Orbis M&A and Orbis Crossborder, respectively). Data was retrieved on 13 July 2023, and has been further elaborated by the JRC.

The term 'foreign investor' is used whenever an investor is ultimately controlled by a non-EU entity (either a company or an individual). When the ultimate owner cannot be established, the location of the investor applies. This definition differs from the one of the FDI Screening Regulation[111]. Throughout this text, the term 'acquisition' means the acquisition of equity stakes in EU companies, be it mergers and acquisitions or stakes below 50% but above 10% of the capital. The term 'transactions' means the sum of acquisitions and greenfield investments. The data provider regularly updates the raw data (including on old deals and projects), so data extraction for the same time window, done at different points in time, can lead to different figures due to update lags.

Values are only available for a fraction of the acquisitions because companies are not obliged to report the deals' financial details. For greenfield investment projects, the expected investment is almost always available[112].

Deals include mergers, majority acquisitions, joint ventures, and minority acquisitions of shares above the 10% threshold. All types of greenfield projects are accounted for in this document, including construction of new sites, relocation of a foreign presence, and expansion of existing sites. All tables and figures are based on announced and completed transactions but report them with their announced date. Rumours and postponed deals/projects are excluded. A multi-deal, i.e. a deal with multiple targets and/or multiple investors, is considered a sum of multiple deals. For example, if a foreign investor acquires two companies, this is recorded as two deals. Conversely, if a foreign investor acquires a company with multiple subsidiaries (in different countries), the deal remains unique and is attributed to the parent company's country. Deals with multiple targets and multiple investors (a negligible amount) are disregarded, as it is very difficult to devise a general rule to attribute the transaction. This classification rule is also applied to greenfield investments that are multi-purpose projects as part of which several sites are built and/or projects with multiple investors.

In the analysis of public shareholding, for each investor, the ownership information available at the time of the deal/project is used. Where not available for 2022, the ownership information used is that of 2021, the latest information available.

[111] See Article 2(2) of Regulation (EU) 2019/452.
[112] Values are available for 32% of acquisitions, and roughly 95% of greenfield projects.

## 2. Limitations

The evaluation took place under favourable conditions. There was a high degree of interest from Member State screening authorities and stakeholders, in particular certain law firms and businesses with direct experience of FDI screening, or associations with a membership of such companies.

However, certain limitations affected the findings. These are described in the following sections.

### 2.1 Limitations due to the confidentiality of FDI screening procedures and the design of the FDI Screening Regulation

FDI screening is a confidential process in all Member States. Some Member States disclose certain information about the functioning of their screening mechanisms[113], but this information is typically aggregated, and due to a lack of agreed methodology and comprehensive data, it is not suitable to serve as a basis for an EU-level analysis.

The Commission has access to certain data due to its participation in the cooperation mechanism. However, due to the lack of an 'accountability mechanism' (the obligation of Member States to report on the outcome of screening procedures notified to the cooperation mechanism) and the lack of data provided in Member States' annual reports to the Commission[114], the Commission cannot gather comprehensive information about the outcome of transactions subject to the cooperation mechanism, i.e. whether the transaction was authorised with or without conditions, prohibited, or withdrawn before the conclusion of the national screening procedure, and on what grounds the national decision was taken (for example, whether the Commission's opinion or comments received from other Member States influenced this decision). Due to this limitation, information was not available on the impact of FDI screening cooperation on transactions subject to screening, and on the extent to which national decisions are aligned with the outcome of the cooperation.

### 2.2 Lack of metrics to measure security and public order

Since security and public order are not objective conditions, there is no agreed methodology to measure their level in a society in a way that could serve as an indicator for this evaluation. Furthermore, as the ultimate objective of FDI screening is to avoid the manifestation of possible future risks, it was not possible to develop clear scenarios to serve as hypothetical points of comparison to assess the functioning of the FDI Screening Regulation.

[113] According to information provided by the Member States in their annual reports to the Commission, the following Member States publish (or will publish) a report about the implementation of their screening mechanism: Austria, Czechia, Finland, Italy, Malta, the Netherlands, Romania and Slovakia. In addition, France, Germany and Spain publish an overview with key figures. Further information about these reports is available in the staff working document accompanying the third annual report of the Commission on the screening of foreign direct investments into the Union (SWD(2023) 329 final).

[114] This limitation was also pointed out in the ECA report (point 57).

### 2.3 Lack of directly applicable methodological models or widely used practices for evaluating FDI screening mechanisms

Several countries evaluate or plan to evaluate the performance of their screening mechanisms to assess if a legislative revision is necessary or justified. However, to the Commission's knowledge, there is no internationally established practice regarding evaluation questions, criteria and indicators related to the functioning of FDI screening mechanisms that the methodology of this evaluation report could draw on.

According to information provided by the Member States for the purpose of this report, some of them are legally obliged to evaluate their screening mechanisms while others are planning to conduct an evaluation without being legally required to do so. However, by the time of this evaluation, only Germany had carried out and published the results of an internal evaluation by the FDI screening division of the Federal Ministry for Economic Affairs and Climate Action (BMWK) in cooperation with the Federal Statistical Office[115]. The evaluation drew on transaction-level data recorded in the BMWK's own database for the purpose of implementing the German screening mechanism, and on a survey of the business community and the federal ministries concerned on the legal changes and the workload for the administration and businesses associated with the enforcement of the regulations, carried out in March 2023. The evaluation was thus interlinked with the review of the administrative burden. The survey of the business community was conducted based on randomised samples. As the parties to the transactions (investor and target company) are usually represented by law firms, the BMWK considered them an appropriate group of experienced stakeholders for assessing the impact of the legal changes on the economy. The survey of the law firms covered a significant part of the relevant cases, and the law firms surveyed were those that had a high degree of specialisation and particular expertise in the field of FDI screening due to the high number of cases handled during the evaluation period.

### 2.4 Limitations to quantifying the impact of FDI screening and/or the FDI Screening Regulation and its possible future amendments on the economy, society and the inflows of foreign investment

From a methodological point of view it is rather difficult (if not impossible at all) to give a quantitative estimation of the likely current, past or future impact of the FDI Screening Regulation and its possible amendments on the economy, society and the inflows of foreign investments. Anticipating future effects is particularly challenging for several reasons. First, FDI inflows cannot be forecasted as they depend on aspects such as global economic conditions, geopolitical events, and technological advancements, which are very difficult to foresee. Second, the EU rules leave the final decision on any FDI with the Member State where the transaction is planned or completed. Therefore, the Regulation's impact on specific transactions can only be indirect. Third, the adoption or modernisation of screening

[115] https://www.bmwk.de/Redaktion/DE/Publikationen/Aussenwirtschaft/evaluierung-gesetze-aenderung-aussenwirtschaftsgesetze-verordnung.pdf?__blob=publicationFile&v=2

mechanisms promoted (but not legally required) by the FDI Screening Regulation took place at a different pace in the Member States concerned. This makes it extremely difficult to single out and assess the likely effects of the EU framework for FDI screening on FDI flows. Additionally, even if a flow of FDI could possibly be forecasted, it would be difficult to make a quantitative estimation of the future impact of the revision of the current EU rules due to: (1) the magnitude of changes in FDI flows (past experience suggests that changes in FDI flows are likely too small to have a visible effect in certain types of evaluation models); (2) the short length of time series of FDI transactions after the entry into force of the Regulation; and (3) the difficulty to construct a sound 'no-change' scenario for comparison purposes considering that the full implementation of the Regulation almost coincided with the macroeconomic effects of the COVID-19 pandemic (making it impossible for quantitative models to distinguish between effects of the pandemic and effects of the Regulation).

**Methodological approaches to a quantitative Impact Assessment**

Three different types of models are available to carry out a quantitative impact assessment. Section 1 and 2 explain why it was not possible for the Commission to anticipate the economic impact of the current FDI Screening Regulation before its adoption, and why the same constraints apply when quantifying the impact of possible amendments to improve the current rules. Section 3 elaborates on the limitations to providing an *ex post* evaluation of the current Regulation based on econometric estimation.

*1. Macroeconomic models*

**Macroeconomic models** are generally used to forecast changes in macroeconomic variables, such as gross domestic product or employment, or to simulate changes in structural parameters (e.g. FDI inflows) that describe the economy[116], resulting from a policy change. Macroeconomic models are based on equations describing the links between aggregated production, consumption and trade in an economy. Due to these aggregated characteristics, only relatively large shocks, i.e. changes in one of the variables/parameters, can have sizeable effects in the forecasts. In order to be able to use these types of models, the change in FDI as a result of a policy measure should be large enough to produce results in a macroeconomic forecast or simulation. Therefore, targeted measures such as the FDI Screening Regulation (which by design concerns only a very small share of the total number and value of investment transactions in the EU) would not produce a visible effect in a macromodel.

*2. Cost-benefit analysis*

A second method for estimating the impact of future changes is an ***ex ante*** **cost-benefit** analysis (CBA)[117]. The objective of this family of models is to quantify the likely impact of a new policy based on assumptions of what is likely to occur when the new policy is put in

[116] Computable general equilibrium models are often used to evaluate trade policies, for example.
[117] We refer to *ex ante* CBA, which implies the assessment of the likely effect of policy changes on a target variable (here FDI inflows), and the associated quantification of future costs and benefits.

place. This usually entails creating scenarios and estimating the costs and benefits of these different hypothetical policy options.

The difficulty of gathering accurate and reliable data quantifying the costs and benefits related to the Regulation[118] constitute an obstacle to applying a policy evaluation model based on CBA.

A proper evaluation model should not only be able to carefully consider and quantify these costs and benefits, but also to **quantify the likely effects** of proposed changes to the Regulation on FDI inflows. However, the literature provides limited guidance on the appropriate modelling approach. The literature evaluating the effects of screening measures (which may include investment restrictions beyond pure national security considerations) is still scarce and provides contradictory results.

Mistura and Roulet (2019)[119] find a negative effect of restrictions on international investments in a dataset covering 60 advanced and emerging countries over the period from 1997 to 2016. Results of this paper suggest that reforms liberalising FDI restrictions by about 10% as measured by the OECD FDI Regulatory Restrictiveness Index could increase bilateral FDI in stocks by 2.1% on average. However, this Index does not score measures taken for reasons of public order and essential security interests, such as screening mechanisms enabled by the FDI Screening Regulation[120]. In contrast, Gregori and Nardo (2021) [121] do not find a negative effect of screening procedures per se on average when looking at EU countries in the period from 2011 to 2018. They find a reduction in FDI inflows only for mergers and acquisitions when the investor is from a 'tax haven' jurisdiction[122]. This paper also suggests that a reduction of FDI inflows, if at all, is rather linked to a country's regulatory settings and the presence of specific measures such as limitations on setting up branches or profit repatriation,

[118] In this methodological framework, costs would include the fixed costs borne by Member States and the Commission to manage any potential changes due to the likely increase in the number of transactions subject to screening, or the costs borne by companies to learn and comply with the new set of rules. Benefits of FDI screening include lowering the risk to security or public order related to FDI transactions. Additional potential benefits of improved EU cooperation could include convergence of screening procedures in Member States, peer learning on policy design and implementation, and improvement in information sharing leading to increased efficiency and lower costs of screening at national level, greater knowledge about FDI trends, and better detection of non-notified transactions. Some of these benefits arising from a potential reform of the FDI Screening Regulation were already highlighted by the OECD report.

[119] Mistura, Fernando, and Caroline Roulet. 'The determinants of Foreign Direct Investment: Do statutory restrictions matter?' OECD (2019).

[120] Kalinova, B., A. Palerm and S. Thomsen (2010), 'OECD's FDI Restrictiveness Index: 2010 Update', *OECD Working Papers on International Investment*, No 2010/03, OECD Publishing, Paris, https://doi.org/10.1787/5km91p02zj7g-en.

[121] Gregori, Wildmer Daniel, and Michela Nardo. 'The effect of restrictive measures on cross- border investment in the European Union.' *The World Economy* 44.7 (2021): 1914-1943.

[122] Andorra, Anguilla, Barbados, Bermuda, Bahamas, Belize, Cook Islands, Cyprus, Grenada, Guernsey, Hong Kong, Saint Kitts and Nevis, Cayman Islands, Liechtenstein, Liberia, Monaco, Marshall Islands, Montserrat, Mauritius, Maldives, Nauru, Niue, Panama, Seychelles, Turks and Caicos Islands, Saint Vincent and the Grenadines, British Virgin Islands, U.S. Virgin Islands, Vanuatu and Samoa.

and not to the presence of a screening mechanism per se. Albori et al. (2021)[123] specifically consider restrictions on foreign investments motivated by national security considerations, and they find no significant impact on FDIs flows.

All papers cited above observe transactions through time to be able to detect the effect of changes in national policies on investments. This is not possible for the FDI Screening Regulation, as it is a recent instrument and its quantitative effects on FDI flows, if present, have still to materialise. Besides, as the final say on transactions and possible redressing measures has remained with the Member States, the FDI Screening Regulation cannot be considered a regulatory barrier comparable to a screening mechanism. Therefore, according to the literature, it is reasonable to consider its influence on FDI inflows marginal (if any).

Additional data-related problems jeopardise the possibility of conducting a CBA. Besides the uncertainty in determining the target variable (i.e. the change in FDI inflows due to the entry into force of the FDI Screening Regulation), both costs and benefits have 'qualitative' features. Quantifying the advantages associated with indicators such as peer learning, increased coordination, or decreased incentive to invest, is near to impossible.

Below is a list of additional technical problems when designing an IA based on CBA to simulate the impact of possible changes to the FDI Screening Regulation.

- **It is difficult to construct a counterfactual scenario**: when evaluating policy changes, one needs to find a benchmark for comparison, i.e. an alternative scenario. Typically, this counterfactual is the 'no-change' situation. However, even in a 'no-change' situation, it would be reasonable to assume that many Member States – against the background of geopolitical tensions and crisis situations – would continue taking measures to set up or strengthen national screening mechanisms, and that they would pay increased attention to their full implementation and enforcement. Therefore, it is impossible to disentangle the portion of changes in FDI inflows due to possible changes to the Regulation from the portion that would have been observed anyway due to the tightening of national screening rules and their implementation.
- **Certain risky transactions[124] identified and addressed by the revised Regulation would not materialise** in the EU knowing that the revised Regulation is indirectly tightening controls by increasing the awareness of Member States and the Commission of relevant risks. Quantifying this deterrence *ex ante* is practically impossible as it would imply guessing how many transactions would not be observed only because investors are discouraged by the revised Regulation (and not by other regulatory, geopolitical or economic factors).
- **Changes depend – at least partly – on Member States**. Any direct effect on FDI inflow ultimately depends on Member States' readiness for and timeliness in

[123] Albori, M., Corneli, F., Nispi Landi, V., & Schiavone, A. (2021). 'The impact of restrictions on FDI.' *Bank of Italy Occasional Paper*, (656).
[124] Those affecting security or public order.

adopting, modernising and making full use of their national screening mechanisms to identify and address risky transactions, including those that are likely to affect the security of other Member States or the collective security of the EU through strategic assets[125].

*3. Ex post evaluation based on econometric estimation*

A third option for a quantitative impact assessment is using the family of ***ex post*** **evaluation models.** These make it possible to quantify the likely impact of a new policy (or a policy reform) based on past experience of (and data on) similar policies. It looks for evidence of causal effects between the policy and the outcomes (social, economic and environmental changes).

This causal impact is usually estimated using counterfactual impact evaluation methods[126]. Counterfactual impact evaluation replies to the fundamental question of 'what would have happened if the Regulation had not been implemented'. The answer is based on a comparison between two different groups: a 'treated group', which is formed by those, who were affected by the measure and a 'control group', who have not experimented with the Regulation but have the same characteristics as those in the treated group. However, for the FDI Screening Regulation, it is not possible to identify distinct treated and control groups.

While the Regulation is binding in its entirety and directly applicable in all Member States, which implies that the treated group is the entire EU, this is not necessarily the case in practice (Riela, 2023)[127]. As the Regulation does not require Member States to set up a screening mechanism, and it is supplementary to any existing national mechanism, the impact of the EU screening framework depends crucially on the presence and effectiveness of national policies (OECD, 2022). Therefore, any estimation of the effect of the FDI Screening Regulation is likely to depend on the existence and efficiency of national mechanisms, but disentangling the two is not possible from an econometric point of view. Additionally, differences in national screening mechanisms lead to heterogeneous treatment of companies (foreign investors investing in the EU but also EU companies receiving foreign investments) in different Member States in a way that is difficult to model and measure. Furthermore, identifying the control group would also be difficult because Member States without a screening mechanism have very different economic characteristics when compared to those with a screening procedure in place. Besides, the FDI Screening Regulation is a very recent tool and its medium- and long-term effects have still to materialise. Further complicating the identification of any effects of the Regulation on FDI inflows, the COVID-19 pandemic drastically changed the economic and social landscape in 2020-2021, which coincides with

[125] This term refers to projects and programmes of Union interest.

[126] See, for example, Heckman, James J., and Edward J. Vytlacil. 'Econometric evaluation of social programs, part I: Causal models, structural models and econometric policy evaluation.' *Handbook of econometrics* 6 (2007): 4779-4874.

[127] Riela, Stefano. 'The EU's foreign direct investment screening mechanism two years after implementation.' *European View* 22.1 (2023): 57-67.

the start of EU cooperation on FDI screening. Therefore, any effect of the Regulation on FDI inflow cannot be really disentangled from the effects of the pandemic (e.g. some countries adopted temporary travel restrictions due to lockdowns; this brought greenfield investments down to zero). Finally, the lack of comprehensive reporting by Member States about their screening decisions concerning transactions notified to the cooperation mechanism[128] represents a serious obstacle to understanding the volume and legal effect (i.e. prohibition or authorisation with conditions) of actual restrictions to FDI on grounds of security or public order. For these reasons, it is not possible to quantify the economic impact of the Regulation for the purpose of this evaluation.

[128] See further details in Section 2.1 of this Annex.

## ANNEX III. EVALUATION MATRIX

The table below summarises the evaluation matrix, which is structured around the five 'better regulation' evaluation criteria (effectiveness, efficiency, relevance, coherence, EU added value) and corresponding evaluation questions.

Stakeholders' responses to the targeted consultation (which included questions on each criterion), and in response to the call for evidence, were considered data sources for all questions, so they are not mentioned in each line of the matrix.

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| 1. EFFECTIVENESS | | | | |
| Q1.1 How successful has the Regulation been in achieving its objective[129]? | Q1.1.1 To what extent has the Regulation helped to identify FDI-related risks to security or public order in more than one Member State? | The Regulation has achieved its objective of improving the identification of FDI-related risks to security or public order in the EU. | • Number of transactions notified to the cooperation mechanism.<br>• Number of opinions issued by the Commission and comments from Member States.<br>• Number of transactions not in the scope of the Regulation that could be risky for security or public order (estimate).<br>• Number of transactions reported by Member States that would not have known about certain transactions without the cooperation mechanism (including transactions subject to it under Article 7 of the Regulation). | • Desk research.<br>• Public reports of national authorities if available and relevant.<br>• OECD report.<br>• Questionnaire for screening authorities of Member States. |
| | Q1.1.2 To what extent has the Regulation helped to address FDI-related risks to security or public order in more than one Member State? | The Regulation has achieved its objective of better addressing FDI-related risks to security or public order in the EU. | • Number of transactions notified to the cooperation mechanism over time.<br>• Number of opinions issued by the Commission and comments from Member | • Desk research.<br>• Questionnaire for screening authorities of Member States.<br>• OECD report. |

[129] To improve security and public order in the context of investment screening.

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| | | | States.<br>• Member States' views on the mechanism's usefulness.<br>• Examples of risky transactions not in the scope of the Regulation.<br>• (In)ability in national legislation to impose cross-border obligations, and/or take into account other Member States' concerns if there is no risk to a Member State's own public order or security, and/or to seek information from economic operators in other Member States. | |
| | Q1.1.3 To what extent has the Regulation helped to identify FDI-related risks to EU projects and programmes that are critical for security? | The Regulation has correctly identified the relevant EU projects and programmes that are critical for security. | • List of projects and programmes annexed to the Regulation based on the definition in Article 8 of the Regulation.<br>• Number of transactions notified to the cooperation mechanism where the target company participated/-s in an EU project or programme.<br>• Number of transactions not in the scope of the | • Desk research |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| | | | Regulation that could be considered risky. | |
| | Q1.1.4 To what extent has the Regulation helped to address FDI-related risks to EU projects and programmes that are critical for security? | The Regulation has helped to better address FDI-related risks to EU projects and programmes that are critical for security. | • Number of transactions notified to the cooperation mechanism related to FDI in companies benefiting from EU projects and programmes.<br>• Opinions issued by the Commission and comments from Member States on FDI in companies benefiting from EU projects and programmes. | • Desk research<br>• Obtaining the views of lead DGs managing projects and programmes of Union interest. |
| | Q1.1.5 To what extent has the effectiveness of the Regulation been undermined because not all Member States adopt or maintain screening mechanisms? | The effectiveness of the Regulation has been negatively affected by the fact that not all Member States maintain a comprehensive screening mechanism. | • Number of Member States who adopted a screening mechanism or have reformed their system since 2019.<br>• Number of cases not screened by the Member States but notified to the cooperation mechanism that were likely to affect security or public order. | • OECD report<br>• Annual reports by Member States submitted to the Commission.<br>• Desk research.<br>• ECA report.<br>• Statistical/aggregated data on inward FDI (proportion of FDI going to non-screening Member States divided by the total FDI flows into the EU). |
| | Q1.1.6 To what extent does the absence of harmonisation of national screening mechanisms (procedural | The differences in national screening mechanisms and between them and the EU Regulation undermine the | Differences between:<br>• the scope and type of investments covered,<br>• the sectors and economic activities covered, | • OECD report<br>• Desk research (comparative analysis of national screening rules).<br>• Questionnaire for |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| | and substantive differences) undermine the effectiveness of the Regulation? | effectiveness of the Regulation. | • the nationality criteria for foreign investors,<br>• the ability to take into account comments from other Member States or the Commission's opinion in the final decision,<br>• deadlines. | stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening.<br>• Questionnaire for national screening authorities. |
| | Q1.1.7 To what extent does the design of the cooperation mechanism (Article 6, 7, 8) undermine the achievement of the Regulation's objective? | The cooperation mechanism has certain limitations and shortcomings that undermine the efficiency of the system. | Impact of:<br>• the obligation to notify all transactions undergoing formal screening to the cooperation mechanism,<br>• the lack of clarity on what constitutes formal screening of an FDI (which triggers mandatory notification to the cooperation mechanism),<br>• deadlines,<br>• information requirements throughout the cooperation procedure,<br>• the legal effect of comments and opinions,<br>• lack of information about the outcome of national procedures. | • OECD report.<br>• Questionnaire for national screening authorities. |
| Q1.2 What have the quantitative and qualitative effects | Q1.2.1 Has the EU framework for FDI screening become a | The Regulation has not affected the EU's openness to FDI. | • Impact of the Regulation on FDI inflows.<br>• Perception of Member | • Desk research (literature review of methodologies for measuring the impact of |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| of the Regulation been? | deterrent to FDI in the EU? | | States.<br>• Perception of businesses. | security screening mechanisms on FDI inflows).<br>• Questionnaire for national screening authorities.<br>• Questionnaire for stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening. |
| | Q1.2.2 What is the effect of the minimum requirements (Article 3) on the functioning of the cooperation mechanism? | The minimum requirements applicable to national screening mechanisms are not sufficient to ensure that the cooperation mechanism is effective. | • Compatibility of national screening mechanisms and screening practices with the requirements of the cooperation mechanism set out in Articles 6, 7 and 8, including timing; the cross-border reach of mitigating measures; the procedural and legal grounds for considering input from the Commission or other Member States; the absence of legal means in Member States without a screening mechanism to act in cases initiated by the Commission or other Member States pursuant to Article 7; the fact that even Member | • OECD report.<br>• Desk research.<br>• Questionnaire for national screening authorities. |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| | | | States with a screening mechanism are unable to provide information in Article 7 cases. | |
| | Q1.2.3 Is the EU screening framework fit for increasing the use of investment screening by the EU's major trading partners? | The EU's screening rules are comparable to those of its main trading partners. | • Factual information about the screening mechanisms of key trading partners of the EU. | • Desk research.<br>• OECD analytical documents on investment policies related to national security. |
| 2. EFFICIENCY | | | | |
| Q2.1 To what extent has the implementation of the Regulation been cost-efficient for different stakeholders? | Q2.1.1 How proportionate is the administrative burden on Member States' administrations and on the Commission compared to the possible adverse consequences for security or public order? | The administrative burden is reasonable. | • Costs of notifying cases to the cooperation mechanism (where applicable).<br>• Costs of assessing cases notified by other Member States. | • Questionnaire for national screening authorities.<br>• Desk research. |
| | Q2.1.2 How proportionate is the administrative burden on businesses (in particular parties to transactions undergoing screening) compared to the possible adverse consequences for security or public order? | The administrative burden is reasonable. | • Costs of providing information required by the EU cooperation mechanism (in addition to the information provided for national screening procedures).<br>• Costs of accessing information about the requirements and | • Questionnaire for stakeholders (law firms, businesses and business associations) with proven practical experience with FDI screening. |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| | | | functioning of EU cooperation on FDI screening.<br>• Costs of the absence of alignment with national procedures, in particular the divergent timeframe for the assessment of multi-country notifications. | |
| Q2.2 Have any inefficiencies been identified? What is the simplification and cost reduction potential? | Q2.2.1 To what extent does the following indicative list of features of the Regulation enable the cooperation mechanism to efficiently assess transactions: deadlines, the factors for screening, the secure and encrypted IT system provided by the Commission, and the mandatory notification of all FDI undergoing screening? | The efficiency of the Regulation's implementation could be improved by changing certain features. | • Impact of these factors on the quality of the collective assessment of transactions by all authorities participating in the cooperation mechanism. | • Questionnaire for national screening authorities.<br>• Desk research.<br>• OECD report<br>• Questionnaire to stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening |
| 3. RELEVANCE | | | | |
| Q3.1 To what extent do the scope and objective of the Regulation continue to be relevant, considering the evolving policy and | Q3.1.1 Have the objectives of the Regulation been relevant, considering evolving policy developments and the regulatory context? Have | The Regulation has complemented other policy developments and regulatory initiatives in achieving its broader objectives. | Relationship of the Regulation to policy developments, such as:<br>• the Communication on Economic Security,<br>• EU restrictive measures (sanctions), in particular | • Desk research: review and analysis of related EU policy and legislation.<br>• Desk research on case trends and relevant Commission guidance. |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| the regulatory context? | recent developments, such as the COVID-19 pandemic and Russia's war against Ukraine, increased FDI-related security risks? | The COVID-19 pandemic and Russia's war against Ukraine have made it all the more important to effectively screen FDI in the EU. | those concerning Russia and Belarus[130].<br><br>Relationship of the Regulation to regulatory developments, including:<br>• the Foreign Subsidies Regulation,<br>• the EU Chips Act,<br>• the Critical Raw Materials Act.<br>Number/proportion of cases in which the risks highlighted in the relevant Commission guidance were assessed. | |
| | Q3.1.2 Has the scope of investments (limited to FDI as defined by Article 2 of the Regulation) been relevant, considering FDI trends in the EU, including ownership structures and foreign investors' strategies? | The Regulation is still relevant today, considering FDI trends and foreign investors' strategies. | • Factual information and stakeholders' perception of whether most of the investors and investments that can be relevant for security or public order are included in the scope of the Regulation. | • Desk research.<br>• Questionnaire for national screening authorities.<br>• Questionnaire for stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening. |
| Q3.2 To what extent do the needs addressed by the Regulation continue | Q 3.2.1 To what extent do the identification and assessment of FDI transactions that | The Regulation has helped to identify and assess FDI transactions that represent a risk to | • How the EU cooperation mechanism has helped to identify risks to security or public order in the EU, in | • Desk research.<br>• Questionnaire for national screening authorities. |

[130] All restrictive measures in force are available at www.sanctionsmap.eu.

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| to require action at EU level? | represent a risk to security or public order continue to require action at EU level? | security or public order at EU level. | particular where it gave the competent national authority additional information. | |
| | Q 3.2.2 To what extent is it necessary to take action at EU level to ensure a certain degree of consistency of national screening mechanisms in the EU, as well as their consistent implementation? | The Regulation has helped to ensure a certain degree of consistency of national screening mechanisms in the EU, as well as their consistent implementation. | • How the Regulation has contributed to coherent rules and practices in the EU concerning the screening of FDI transactions. | • Questionnaire for national screening authorities.<br>• Questionnaire for stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening. |
| 4. COHERENCE | | | | |
| Q4.1 To what extent is the Regulation coherent with other EU and national interventions that have similar objectives? | Q4.1.1 To what extent is the Regulation coherent with national screening mechanisms? | The Regulation is coherent with national screening mechanisms. | Coherence of the<br>• scope,<br>• transactions covered,<br>• reasons for screening,<br>• deadlines. | • OECD report (comparative analysis of national screening mechanisms).<br>• Questionnaire for stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening. |
| | Q4.1.2 To what extent is the Regulation coherent with other authorisation procedures in EU law? | The Regulation is coherent with:<br>• merger control (Article 21(4) of Regulation (EC) | Coherence (lack of conflict) of objectives and procedures. | • Desk research.<br>• Questionnaire for stakeholders (law firms, businesses and business associations) with proven practical experience of FDI |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| | | 139/2004),<br>• rules on the prudential assessment of acquisitions of qualifying holdings in financial sector entities (Directive 2016/36/EU),<br>• the certification of transmission system operators of electricity and natural gas networks in the EU (Article 10 of Directive 2009/72/EC and Article 10 of Directive 2009/73/EC),<br>• EU restrictive measures (sanctions) based on Article 215 TFEU. | | screening. |
| Q4.2 To what extent are the various parts of the Regulation coherent with one another? Are there any incoherent parts of the Regulation in terms of its goals and provisions? | | The different obligations and mechanisms of the Regulation work well together to achieve its | • Coherence between the cooperation mechanism for FDI undergoing screening (Article 6) and for FDI not | • Desk research on the Regulation.<br>• Questionnaire for national screening authorities. |

| Evaluation question | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|
| | main objective. | undergoing screening (Article 7).<br>• The current definition of 'projects and programmes of Union interest', the list in Annex I and the procedure for screening FDI affecting security or public order through projects or programmes is coherent with the Regulation's objectives.<br>• Coherence between the Regulation's objective and the legal basis for international cooperation (the impossibility of sharing case-specific information with like-minded partners under specific arrangements).<br>• Coherence between the purpose of the Regulation and the provisions for implementing it (confidentiality of information, Commission expert group on the screening of FDI into the EU). | |
| Q4.3 To what extent is the Regulation coherent | The Regulation is | Legislation, communications, | • Desk research on relevant |

| Evaluation question | | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|---|
| with current EU policies and priorities? | | coherent with other relevant EU policies and priorities. The notion of FDI-related security or public order risks is also reflected in those policies/actions. | guidelines referencing the FDI Screening Regulation. | proposals, legislation and policy documents, such as Commission communications. |
| 5. EU ADDED VALUE | | | | |
| Q5.1 Could the objective of the Regulation have been achieved sufficiently by the Member States acting alone? | Q5.1.1 Could Member States identify FDI affecting the security or public order of other Member States or EU projects and programmes by implementing only their national screening mechanisms? | The Regulation generates added value compared to the results that could have been obtained by implementing national screening mechanisms in terms of identifying and addressing FDI-related risks to security or public order. | • Greater awareness of cross-border risks to security or public order (for example, FDI that is risky for other Member States but not necessarily the screening Member State, or transactions that are critical for another Member State for reasons other than those for the screening Member State.<br>• Greater awareness of the security relevance of EU projects and programmes and the potential risks to their continuity from certain FDI. | • Questionnaire to screening authorities of Member States.<br>• Desk research on transactions in which EU companies participating in EU projects or programmes were involved. |
| Q5.2 Has the implementation of the Regulation increased legal clarity and certainty in FDI screening? | | Article 3(1) of the Regulation and the list of screening mechanisms published by the Commission have | • Level of awareness of national rules.<br>• Greater clarity and consistency of national screening rules adopted or | • Desk research.<br>• Questionnaire for stakeholders (law firms, businesses and business associations) with proven |

| Evaluation question | Judgement criteria | Indicators and descriptors | Data sources |
|---|---|---|---|
| | increased legal clarity and certainty for businesses. | revised after the Regulation entered into force. | practical experience of FDI screening. |
| Q5.3 What is the Regulation's added value?<br><br>Is it still valid to think that the Regulation's objective can best be achieved by EU action? | The Regulation has added value compared to the results that could have been obtained through national interventions to adopt and implement screening mechanisms.<br><br>Identifying cross-border risks to security or public order requires an EU coordination mechanism. | • Number of Member States with a screening mechanism.<br>• Convergence of screening mechanisms (rules and implementation).<br>• Better and more efficient risk assessment by the Member States.<br>• Awareness of cross border risks to security or public order.<br>• Awareness of security or public order risks affecting projects or programmes of Union interest. | • Desk research.<br>• Questionnaire for national screening authorities.<br>• Questionnaire for companies involved in transactions undergoing screening. |

## ANNEX IV. OVERVIEW OF BENEFITS AND COSTS

The table below summarises the costs and benefits of implementing the Regulation. A discussion of the Regulation's efficiency, and of the limitations of the collection of data on costs, were presented in Section 4.1.2 and Annex II to the evaluation report. The information in this annex draws on responses to the targeted consultation and additional surveys of Member States and private sector stakeholders with practical experience of FDI screening in the EU.

| *Overview of costs and benefits identified in the evaluation* | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | Citizens/Consumers | | Businesses | | Administrations | |
| | | Quantitative | Comment | Quantitative | Comment | Quantitative | Comment |
| **Cost: compliance costs related to the cooperation mechanism** | **Recurrent** | Not applicable. | The Regulation does not impose obligations on citizens or consumers. | No quantification possible. | No reliable data or methodology were identified to measure the compliance costs for businesses (in particular the party/-ies filing for screening authorisation). The Commission consultations concluded that the average costs related to the cooperation mechanism were limited compared to the overall costs of FDI reviews (see details in Annex V Section 3). | No quantification possible. | The consultations carried out by the Commission did not provide comprehensive information about the costs for national administrations of complying with the Regulation. Information provided by the Member States suggests that the financial burden of the Regulation is minimal (see Annex V Section 3).<br><br>For the reporting period, the compliance costs borne by the Commission can be summarised as follows.<br>• Approximately EUR 2.7 million in **operational expenditure,** most of which was to purchase IT equipment for secure communication with Member States, including the workstations to be used in the Member States).<br>• Approximately EUR 50 000 in **administrative expenditure** (to reimburse Member States' travel costs for the meetings of the Commission expert group on the screening of FDI into the EU ).<br>• Approximately EUR 1.5 million in **HR expenditure** in the coordinating DG (DG |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | | TRADE), based on the standard costs for FTEs in 2021. |
| **Cost: indirect costs of deterring certain FDI transactions** | **Recurrent** | Negligible indirect costs (if any) and impossible to quantify. | The results of consultations carried out by the Commission concluded that the Regulation had not deterred FDI.<br>No reliable data or methodology were identified to measure the indirect costs, if any, for citizens and consumers of deterring FDI. | No precise quantification possible and anecdotal evidence suggests that the cost is very low. | The results of consultations carried out by the Commission concluded that the Regulation had not deterred FDI (see Annex V Section 3).<br><br>While the existence or implementation of a screening mechanism may, in theory, deter a very limited number of EU companies from accepting certain investments, there are no reliable data or methodology to measure these costs for the economy as a whole (see Annex II Section 2.2). | Not applicable. | Not applicable. |
| **Benefit: greater security and public order** | **Recurrent** | No quantification possible. | The results of consultations carried out by the Commission concluded that, overall, the Regulation had helped improve security and public order in the EU by increasing awareness of security risks related to FDI and promoting the adoption of screening mechanisms in Member States.<br><br>No reliable data or methodology identified to measure these benefits for society as a whole. | Not applicable. | Not applicable. | Not applicable. | Not applicable. |

## ANNEX V. STAKEHOLDER CONSULTATION – SYNOPSIS REPORT

This section presents the consultations undertaken by the Commission to evaluate the FDI Screening Regulation. Consultations by the OECD Secretariat to get information for their review are described in paragraphs 19-22 of the OECD report.

The number and profile of respondents to the open consultations confirm that FDI screening is a targeted instrument, and it only applies to investments made by a limited and well identified group of stakeholders who are well informed about its procedural aspects.

### 1. Targeted consultation

The targeted consultation on the evaluation and revision of the FDI Screening Regulation ran between 14 June and 21 July 2023. The European Commission received 47 contributions, including 18 from Member State authorities involved in the EU cooperation on FDI screening and, when applicable, the implementation of the national screening mechanism. The summary report of the consultation is published on the Commission's website along with the contributions received[131].

### 2. Call for evidence launched by the European Commission

The call for evidence was open from 14 June to 21 July 2023 and 10 contributions were submitted in total[132]. By category of respondent, contributions were submitted by business associations (5), companies/businesses (2), a public authority (1), an EU citizen (1) and other (1). The respondents were from the following countries: Belgium (4), Germany (2), Sweden (1), Slovakia (1), Luxembourg (1) and Spain (1).

None of the respondents questioned the need for national FDI screening or for a comprehensive EU framework that complements national mechanisms. Responses' recurring themes can be summarised as follows.

General comments

- Maintaining the EU's openness to FDI is important because FDI drives growth, innovation and competition.
- FDI in the EU should be assessed on grounds other than those of security or public order. For example, a reciprocity check should be done to assess openness to FDI in the third country from which FDI originates. Also, among the criteria

[131] https://policy.trade.ec.europa.eu/consultations/screening-foreign-direct-investments-fdi-evaluation-and-possible-revision-current-eu-framework_en#consultation-outcome

[132] All the responses received are on the Commission's Have Your Say portal: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework/feedback_en?p_id=32186570.

for determining if a country represents a risk to security or public order, the EU should include the criterion of respect for fundamental rights.

Comments on the design and implementation of national screening mechanisms

- All Member States should adopt screening mechanisms on grounds of security and public order.
- There is scope for further alignment of national screening mechanisms, in particular definitions, deadlines, criteria and the parameters of the substantive assessment and triggering events. A common sectoral scope for mandatory screening (for example FDI in 'critical infrastructure' and 'critical technologies' relevant to the transportation sector, critical raw materials and net zero industries) should be considered. The administrative efficiency of screening should be improved through standardised notification forms.
- The outcome of national FDI screening mechanisms should be predictable and the development of common European guidelines should be considered. When a transaction is subject to screening in more than one Member State, the assessment should be based on similar standards and each assessment's outcome should be consistent.
- Businesses said that FDI screening reviews should be confidential, given the possible reputational risks for investors. EU action could prevent inconsistent disclosures and intentional information leaks. The citizen who responded to the call for evidence called for greater transparency of screening decisions.

Comments on EU cooperation on FDI screening

- The FDI Screening Regulation should cover investments in which the direct investor is an EU business but investors from non-EU countries are indirectly involved.
- The criteria for transactions to be notified by national authorities to the EU cooperation mechanism should be clarified, possibly by adding a definition of 'pre-screening', which does not entail an obligation to notify.
- Member States should be required to provide feedback to the relevant Member States and the Commission on whether their comment/opinion was followed up on or not, and, if it was followed up on, how so, and if not, why.
- If the Commission believes that an FDI is likely to affect the security or public order of more than one Member State, all Member States concerned should have access to the Commission's opinion and be informed if and how the opinion was followed up on, and if not, why.
- The list of projects and programmes of Union interest should be extended to other initiatives that allocate a significant amount of EU funding to boosting investments in critical infrastructure or technologies.

- There is scope for increasing the Commission's involvement in FDI screening in cases where projects or programmes of Union interest are at stake.

### 3. Targeted surveys

In addition to the open targeted consultation, the Commission sought the views of national screening authorities and private sector stakeholders (law firms, businesses and business associations) with proven practical experience of FDI screening on certain matters related to the five evaluation criteria (effectiveness, efficiency, relevance, consistency, EU added value). The consultation ran from 3 August to 1 September 2023. It took the form of a questionnaire with open questions based on the themes identified in the evaluation matrix (Annex III).

The Commission received responses from 15 Member States (Belgium, Bulgaria, Czechia, Estonia, Finland, France, Germany, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia and Spain) and 13 private sector stakeholders, including lawyers experienced in representing notifying parties in screening procedures (9), business associations with a broad membership of EU companies (3), and one business whose investments have undergone several screening authorisation procedures in the EU.

On effectiveness, Member States with an operational screening mechanism confirmed the cooperation mechanism's usefulness. Their replies highlighted the EU aspect of security, the value of exchanging information and obtaining the views of other Member States on specific transactions, and the usefulness of informal information exchanges on risks and how to deal with them. Some Member States without a screening mechanism believed that the cooperation mechanism had limited usefulness, while others found it a useful way of informing policy decisions and prompting them to look into FDI-related security risks. Asked about transactions outside the scope of the cooperation mechanism that the Member States had prohibited or authorised with conditions since October 2020, more than one Member State reported on relevant transactions. This confirms that the current system does have 'blind spots'.

Member States' responses to the questionnaire echoed the shortcomings undermining the **effectiveness and efficiency of the system** identified in the OECD report and the targeted consultation, namely:

- the lack of screening mechanisms in all Member States;
- the diverging scope of economic activities screened by Member States;
- the diverging scope of investments covered by national screening mechanisms (for example, whether greenfield investments are covered or not);
- the diverging and sometimes unclear stance of Member States on what constitutes 'formal screening' and the filtering criteria they might have for notifying cases to the cooperation mechanism;

- the scope of the Regulation excluding investments by foreign-controlled EU investors;
- the 'over-notification' of non-critical cases to the cooperation mechanism, which may have the negative result of potential risks being overlooked due to a shortage of human resources;
- the lack of coordination of multi-country transactions in the cooperation mechanism;
- the lack of information about the outcome of national procedures given to other Member States and the Commission in cases in which Member States made comments and/or the Commission issued an opinion;
- some Member States' lack of legal power to protect the security of other Member States and projects or programmes of Union interest, including the ability to impose cross-border obligations in addition to measures to mitigate possible risks to the security or public order of the screening Member State.

In addition to these points, private sector stakeholders' responses indicated the following issues, partially related to national screening mechanisms, that undermine the effectiveness of the EU framework for FDI screening.

- Differences between key concepts, such as the definition of FDI (or investments covered by the national mechanism) and the substantive test to determine whether an FDI is likely to affect security or public order, including a foreign investor's risk factors.
- Differences between Member States' thresholds of influence over a target company that a foreign investor must reach to trigger a review.
- The lack of clarity about the activities within the scope of national mechanisms due to the vague and non-exhaustive list of sectors covered.
- Procedural differences between national mechanisms, such as filing deadlines imposed by certain Member States that are not far away enough from the signing dates, the significant difference in deadlines among Member States, and the different interplay between the national screening mechanisms and the cooperation mechanism (some Member States start their national screening procedures only after the EU cooperation mechanism has ended, while others conduct them in parallel with the cooperation mechanism and, in some cases, Member States do not notify transactions to the cooperation mechanism at all unless an in-depth investigation is launched).
- The lack of a legal basis permitting direct formal interaction between the investor/target company and other Member States and the Commission during the screening procedure.
- Notifying parties' lack of access to comments from other Member States and Commission opinions.

On the **effectiveness of cooperation on non-screened FDI** (Article 7 of the Regulation), most Member State respondents took the view that it was effective only if the Member State in which a transaction takes place maintains a screening mechanism that can address the concerns raised. In the absence of an applicable screening mechanism, the Member State in which an investment is planned or completed is unlikely to have the means necessary to take measures to follow up on a Commission opinion or other Member States' comments. One respondent believed that in a situation where the 'host' Member State does not have the power to at least investigate a transaction, other Member States may be less motivated to comment. Some respondents pointed out that the obligation on all Member States to have a screening mechanism would address this.

On whether the legal basis for **international cooperation** contributes to achieving the objectives of the Regulation, Member State respondents confirmed that the exchange of information on the design and implementation of screening mechanisms and the exchange of good practices with like-minded partners was beneficial. Most respondents took the view that the impossibility of sharing case-specific information under specific arrangements did not undermine the effectiveness of the Regulation, while others suggested that international cooperation could be beneficial for assessing transactions and exchanging case-specific information without compromising the confidentiality of commercially sensitive information, and that the screening procedure could improve effectiveness in the future. Many respondents said that the Member State screening a transaction may always contact the non-EU partner about it bilaterally if necessary.

Asked **if the EU framework for FDI screening deterred investment**, all Member State respondents believed that the Regulation and national mechanisms did not have a dampening effect on FDI. Some pointed out that short deadlines and greater convergence of national mechanisms made the rules less cumbersome. Two Member State respondents took the view that the Regulation and national mechanisms (whose establishment was incentivised by the EU framework) effectively deterred potentially risky FDI. Most private sector respondents shared the view that the EU framework for FDI screening, while not without its flaws, had not deterred FDI. Some respondents believed that the EU framework had prompted investors to adopt a more cautious stance, especially investors from countries of geopolitical concern and in sectors subject to screening authorisation (although financial investors may decide to reduce their investment threshold to stay below applicable notification thresholds). Other private sector respondents believed that the EU framework had become a deterrent to some extent, due to the lack of transparency and procedural fairness as regards case-specific information exchanged under it (for example, the lack of rules on transaction parties' rights to access information on their transaction), the administrative burden of multiple filings for FDI authorisation in the EU, and the unpredictable deadlines that can result in significant delays in processing transactions. One private sector respondent estimated that it took approximately 3-6 months to process a transaction due to the decentralised nature of screening in the EU, depending on the number of Member States to be cleared. However, any evidence appears anecdotal, drawing mainly on respondents' experience.

Most Member States could not give an **estimate of the cost of participating in the cooperation mechanism** (notifying cases and assessing cases notified by other Member States). One Member State considered the financial burden minimal (between EUR 5 000 and EUR 10 000/year), whereas another estimated the annual cost of assessing cases notified to the cooperation mechanism to be EUR 48 000/year. A few other respondents mentioned the cost of one or two employees, without specifying a value. Some respondents considered the current administrative burden to be disproportionate due to the obligation to notify all cases undergoing screening. Another respondent pointed out that processing all the information received through the cooperation mechanism was very resource-intensive, but beneficial not only for the case-specific information but also for creating consistency among national systems. Some respondents recognised the usefulness of templates for notifications in reducing the administrative burden on Member States.

Like Member States, most private sector respondents were unable to provide **detailed cost estimates for the administrative burden of EU cooperation on FDI screening**. Their responses indicated that the average costs of the cooperation mechanism were rather limited compared to the overall costs of most FDI reviews. One respondent (a lawyer) said that filling in the form for EU cooperation (in addition to the national application) took approximately 4-8 hours, which, depending on hourly fees, could cost approximately EUR 2 000-5 000. Another lawyer said that the English translation of the filing and the EU notification form did not increase their administrative burden.

Several respondents reiterated that, where a transaction is notifiable in more than one Member State, the lack of procedural alignment of national mechanisms and the different national requirements and practices resulted in substantial costs and a heavy administrative burden (including legal and consulting fees, compliance and administrative overheads). One respondent said that the additional legal fees due to the coordination required between the screening procedures launched in different Member States could amount to EUR 100 000-1 million, even without the potential financial implications in case of interim financing and delayed closing. One private sector respondent suggested developing and implementing a central submission system for transactions that are notifiable in three or more Member States to streamline and synergise the process, while the interlocutor of the applicant would remain the screening authority of the Member State initially concerned.

The same respondent proposed a jurisdictional referral system, so parties to a transaction or the competent Member States could request EU screening when assessing an investment's impact. In this scenario, the case could be referred for review to the Commission, which would be responsible for taking the final decision, taking the position of the Member States concerned into account. On the other hand, another private sector respondent was against increasing the Commission's responsibilities in individual FDI transactions, saying that the security and public order implications of an FDI were most relevant for the Member State in which the transaction was planned or completed,

and that national authorities were therefore the best guardians of the national security and public order of the Member State concerned.

Overall, Member State respondents were satisfied with the **current deadlines** of the cooperation mechanism and the **indicative list of factors** that may be taken into consideration in the screening of an FDI[133]. One Member State was in favour of developing guidelines on interpreting factors.

On **relevance**, Member State respondents took the view that the Regulation covered most transactions that could be relevant for security or public order. However, most Member State and several private sector respondents believed that extending the Regulation to cases where the direct investor is an EU company and its ownership chain includes foreign persons or companies – structures that are often used for legitimate business interests – would also be a good idea. One law firm pointed out that, under the current system, national FDI screening mechanisms can be circumvented if the target company's assets are transferred, before the actual FDI is made, to an entity in another Member State without a screening mechanism or with less stringent screening procedures. At the same time, a number of private sector respondents believed that it was not necessary to broaden the scope of investors and investments subject to the Regulation.

One Member State respondent took the view that, for risks originating elsewhere (for example R&D agreements or certain joint ventures), identifying and addressing them would require specific, bespoke tools other than FDI screening. On the relevance of the cooperation mechanism, Member State respondents were in favour of maintaining it and addressing the shortcomings identified in relation to efficiency and effectiveness, and maintaining a high level of confidentiality for the protection of sensitive information. Several private sector respondents acknowledged that the Regulation had played a major role in promoting a degree of harmonisation and coherence that might not otherwise have existed across the EU. At the same time, private sector respondents took the view that **the relevance of the current system could be improved with more harmonisation** to provide clarity and promote more consistency in FDI screening in the EU. Their responses said that the degree of harmonisation or alignment of the following rules and practices should be increased.

- The notion of FDI.
- An exhaustive catalogue of sensitive sectors or activities subject to screening, focused on those with a plausible link to security or public order.
- An agreed set of European criteria for determining whether an FDI is likely to affect security or public order instead of the current indicative list of factors in Article 4.
- Greater convergence of whether national authorities have the right to initiate the screening of a transaction, and whether (or in which sectors) filing is voluntary or mandatory.

[133] Article 4 of the Regulation.

- Alignment of the ownership thresholds above which a transaction is subject to screening by the competent Member State.
- Greater convergence of the substantive assessment by the Commission and Member States (including the notion of 'criticality').
- Obliging national authorities to justify their screening decisions.
- Procedural alignment (including better harmonisation of information requested from the parties to a transaction at the time of the request for screening authorisation, possibly using a harmonised filing form for national authorities, better aligning deadlines and the stages of national screening at which EU cooperation is initiated, and possibly a deadline for parties to a transaction to respond to requests for additional information from the Commission and other Member States under the cooperation mechanism).
- Mitigating measures.
- Greater transparency of national screening decisions with the publication of national decisions (with redaction of information relevant for national security or business-sensitive information) or standardised annual reports detailing some of the reasoning followed in national decisional practice, as well as statistics on the decisions adopted, the sectors concerned and investors' origin.
- Regulating the right of the notifying parties to access information on their transaction.

Private sector respondents also called for publicly available EU and national guidelines to improve the transparency and legal certainty of screening mechanisms and screening decisions. One private sector respondent suggested that Member States issue guidelines, possibly based on a template provided by the Commission, on factors triggering notification obligations, substantive FDI concerns and the circumstances in which a deal is considered likely to jeopardise national security, possible remedies (mitigating measures), and the practical interplay between the EU Merger Regulation and FDI screening.

On coherence, Member State respondents believed that the Regulation had brought about a certain degree of **similarity among national screening mechanisms.** This similarity was created by the minimum requirements for screening mechanisms set out in Article 3, the list of factors in Article 4, and the formal and informal exchange of good screening practices facilitated by the Commission. At the same time, respondents pointed out that differences remained among national screening mechanisms, for example with regard to the scope of sensitive economic sectors subject to screening and deadlines. Generally, respondents were in favour of promoting more harmonisation of national rules without affecting the responsibilities. On **the internal coherence of the Regulation**, Member States considered that its purpose was coherent with the provisions on its implementation (for example, the confidentiality of information exchanged, the Commission expert group on the screening of FDI into the EU, and the list of projects and programmes of Union interest annexed to the Regulation). Many private sector respondents called for greater consistency of nationality criteria (used to determine an investor's country of origin and

ultimate ownership) with other EU instruments, in particular the EU sanctions regime, the rules on anti-money laundering and EU merger control, and key concepts, such as 'control' and the consideration given to security or public order (in particular EU merger control rules). On the interplay with the Foreign Subsidies Regulation, one private sector respondent requested that disclosure requirements and thresholds for subsidies not exceed the notification requirements for concentrations under the Foreign Subsidies Regulation, to avoid creating an additional administrative burden. Some business associations that responded to the questionnaire took the view that the FDI Screening Regulation should be consistent with the recently adopted trade-related autonomous tools (such as the International Procurement Instrument and the Foreign Subsidies Regulation), and that investments in the EU should be assessed based on reciprocity and their contribution to ensuring a level playing field for EU investors abroad.

One private sector respondent suggested integrating security and public order considerations into industry-specific approval regimes (for example, as part of a 'fit and proper' or equivalent assessment), relieving companies and national administrations of the burden of using resources for multiple separate reviews.

On **EU added value**, Member State respondents said that the Regulation had increased their awareness of cross-border risks to security or public order and drawn their attention to the security relevance of EU projects and programmes, as well as the potential risks to the continuity of those projects and programmes from certain FDI. Respondents added that, thanks to the Regulation, national screening procedures now take the EU aspect into account much more than they did before October 2020. The cooperation mechanism also gives Member States and the Commission a clearer picture of investments in the EU as a whole, and has made it easier to identify patterns in foreign investors' behaviour and FDI-related risks in certain sectors across the EU. They also confirmed the Regulation's added value with respect to:

- the increasing number of Member States maintaining and implementing a screening mechanism;
- the convergence of screening rules and their implementation in the EU, improvements in the efficiency of risk assessment by Member States (in this regard, the usefulness of the Commission's substantiated opinions on critical transactions, and of the cooperation mechanism as an additional source of information, were mentioned); and
- the greater awareness of cross-border risks to security and public order, including those affecting projects and programmes of Union interest.

Overall, Member State respondents believed that the Regulation and the cooperation mechanism had enabled the Commission and Member States to become more familiar with screening mechanisms in the EU, and increased awareness of FDI-related risks, and that the mechanism made it more difficult for parties to transactions to hide risky investments from Member States. Besides all that, even when assessing investments that

take place in only one Member State, more attention is paid to possible impacts at EU level.

On the same matter, private sector respondents saw the Regulation's added value in the following areas.

- It has prompted Member States to establish, and where necessary to modernise and effectively implement, their national screening mechanisms. However, two private sector respondents believed that the Regulation had decreased legal certainty by promoting the use of screening on grounds of security or public order, giving Member States too much discretion to determine the scope of sectors or economic activities covered by their screening mechanism, the notification triggers, the procedural framework and screening deadlines, and the substantive concerns assessed in their procedures.
- It has increased the efficiency of risk assessment by Member States and given them security-relevant information on FDI transactions subject to screening.
- It has improved awareness of cross-border security risks and risks to projects and programmes of Union interest.
- It has brought about a degree of consistency and convergence in the approach to FDI screening across the EU: without the coordinated framework, it is reasonable to assume that newly adopted screening rules would vary more widely in terms of criteria, procedures and thresholds.
- It has drawn political attention in Member States to the importance of screening, which may have resulted in additional resources being allocated to the implementation of screening mechanisms, which in turn might have improved the quality of risk analysis.
- It has increased stakeholders' awareness and understanding of national screening mechanisms.