

New European framework for screening of foreign direct investments

Newsletter | Regulation (EU) 2019/452 of European Parliament and of Council of March 19, 2019, for screening of foreign direct investments into Union

March 2019

Regulation (OJEU March 21, 2019) establishes a new legal framework to evaluate the risks of foreign investments on the grounds of security or public order of the European Union ("EU").



Relevant aspects

- > **Screening mechanisms:** Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order. They must notify their screening mechanisms and any amendments to the EC.
- > **Information on foreign investments:** Member States must report any foreign direct investment undergoing screening to the EC and all other Member States.
- > **Cooperation mechanism:** The EC and the Member States concerned may request information and make comments to the Member State receiving the investment.
- > **No veto rights are included:** The decision on the investment remains the sole responsibility of the recipient Member State.
- > **Strategic sectors:** The regulation takes into consideration critical infrastructure, technologies and dual-use items, critical inputs, access to sensitive information, and the media.
- > **Key factors:** Key factors include the screening of the foreign investment by the government of a third country, activities affecting security or public order, and the risk of criminal or illegal activities.



Objectives and scope of the regulation

- > The new rule establishes a **framework for the screening of foreign direct investments** on grounds of security or public order, providing legal certainty for Member States' screening mechanisms and ensuring Union-wide coordination.
- > The **final decision** on establishing a screening mechanism or screening a foreign direct investment will correspond exclusively to the Member State receiving the investment.

Screening mechanisms of Member States

- > Member States may adopt, maintain or amend **mechanisms to screen foreign direct investments in their territory on the grounds of security or public order**, using instruments to “*assess, investigate, authorize, set out the terms, prohibit or unwind foreign direct investments*”.
- > **Notification to the EC:** Existing screening mechanisms at the entry into force of the regulation must be notified to the EC by May 10, 2019. Any new screening mechanism or any amendment must also be notified to the EC within 30 days of the entry into force of the newly adopted screening mechanism or of any amendment to an existing screening mechanism. The EC will make a list of Member States' screening mechanisms publicly available.
- > **Screening mechanism characteristics:** Screening mechanisms must (i) be transparent, (ii) not discriminate between third countries, (iii) apply timeframes that take into account the comments of other Member States and the EC, (iv) protect confidential information and commercially-sensitive information, and (v) ensure the possibility for foreign investors to seek recourse against national authority screening decisions.

Strategic sectors and key factors

- > A non-exhaustive list is established of **strategic sectors** aimed at guiding the Member States and the EC when determining whether a foreign direct investment is likely to affect security or public order based on its potential effects.



Strategic sectors

- > **Critical physical or virtual infrastructure:** energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, as well as land and real estate crucial for the use of this infrastructure.
 - > **Critical technologies and dual-use terms:** artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.
 - > **Supply of critical inputs:** energy, raw materials, and food security.
 - > **Information:** access to or screening of sensitive information and personal data.
 - > **Media:** influence on the freedom and pluralism of the media.
-
- > **Factors** are also established that may be taken into account in determining whether a foreign direct investment is likely to affect security or public order.

Factors

- > **Control of the foreign investor:** direct or indirect by the government of a third country (non-EU). Assessment of the ownership structure and funding of the investor.
 - > **Characteristics of the foreign investor:** participation in activities that affect the security or public order of a Member State, and whether there is a serious risk that it engages in criminal or illegal activities.
-

Cooperation mechanisms

- > The regulation establishes a **cooperation mechanism** among Member States and the EC to facilitate the exchange of information and contribute toward a coordinated monitoring of the investments assessed by the authorities, distinguishing among:
 - i. **Foreign direct investments that are subject to screening:**
 - Member States must notify the EC and the other Member States of any foreign direct investment in their territory that is undergoing screening, by providing the information referred to in Article 9 of this regulation (for example, ownership structure or economic activity of the investor). As part of the notification, and where applicable, the Member State conducting the screening will endeavor to indicate whether it considers that the foreign direct investment undergoing screening is likely to fall within the scope of Regulation (EC) No. 139/2004, of January 20, on the control of concentrations between undertakings ([link](#)).



- If a Member State considers that a foreign direct investment in another Member State may affect its security or public order, it may send comments to the Member State receiving the investment. The EC may also issue an opinion to the Member State in which the investment is planned or has been completed.
 - Where appropriate, any additional information requested must be duly justified.
- ii. **Foreign direct investments that are not subject to screening:**
- Where a Member State considers that a foreign direct investment in another Member State may affect its security or public order, it may send comments to the Member State receiving the investment. The EC may also issue an opinion addressed to the Member State in which the investment is planned or has been completed. Where appropriate, duly justified requests for information on the investment referred to in Article 9 of the regulation may be made.
 - To provide greater certainty for investors, Member States must be able to make comments and the EC must be able to issue an opinion relating to completed investments not undergoing screening for a period of 15 months after completion of the foreign direct investment.
- **Decision:** The Member State receiving the investment must “*give due consideration*” to any comments from other Member States and the opinion from the EC and take, as appropriate, measures available under its national law or consider them in its own general policy-making. However, the final decision in relation to any foreign direct investment remains the sole responsibility of the Member State where the foreign direct investment is planned or completed.

Information on investments

- The information that Member States receiving a foreign direct investment undergoing screening in their territories must notify the EC and the other Member States, or any that, where investments are not undergoing screening, may be requested by the EC or other Member States, may be classified as follows:



- **Financial information:** ownership structure of the foreign investor and of the target undertaking, including information on the ultimate investor and participation in the capital; information on the funding of the investment and its source.
 - **Trade information:** products, services and business operations of the investor and of the undertaking in which the investment is planned or completed; Member States affected by the operation.
 - **Information on the transaction:** approximate value of the investment and date on which it is planned or has been completed.
- > **This information may be requested by the Member State receiving the investment from the foreign investor or from the undertaking in which the foreign direct investment has been planned or been completed, which must be provided without undue delay.**
 - > The confidentiality will be ensured of any information transmitted.

Projects or programs of interest for the EU

- > If the EC considers that the foreign investment may affect **projects or programs of interest for the EU**, it may issue an opinion of its own volition addressed to the Member State receiving the investment, and the latter will be bound to “*take utmost account of this*” and provide an explanation to the EC if its opinion is not followed.
- > For these purposes, projects or programs of special Union interest are those that involve a significant share of Union funding, or those projects relative to critical infrastructure, technologies or inputs subject to Community law. The complete list of projects of Union interest appears in **Annex I** of the regulation, and is subject to periodic updates by the EC.

Entry into force

- > The regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union (March 21, 2019) and **will apply from October 11, 2020.**



For additional information on the contents of this document, please contact your usual contact at Cuatrecasas.

©2019 CUATRECASAS

All rights reserved.

This newsletter is a compilation of legal information prepared by Cuatrecasas. The information does not constitute legal advice.

The intellectual property rights to this document belong to Cuatrecasas. Any reproduction, distribution, assignment or any other full or partial use of this newsletter is prohibited, unless with the consent of Cuatrecasas.