

## FDI is here to stay: The European Commission prepares the revision of the FDI Screening Regulation

### Regulation 2019/452: The state of play

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 (commonly known as the “**FDI Screening Regulation**” or the “**FDI Regulation**”) seeks to establish a common framework allowing Member States to control, for reasons of security or public order, foreign direct investments that take place within the European Union and, at the same time, to establish a mechanism for cooperation both between Member States and between Member States and the European Commission regarding those foreign direct investments that may have an impact on **national security or public order**.

After three years of implementation, the European Commission has some experience and an assessment of the functioning of the instrument, and this has since enabled it to evaluate, among other issues, the level of investment in the European Union, through the reports it publishes annually. In this regard, on **19 October 2023, the Commission published its third report**.

This report, prepared on the basis of information provided by Member States, includes trends and figures relating to the screening of foreign direct investment in the EU; legislative developments in screening mechanisms at Member State level; screening activities by Member States; and issues relating to the EU cooperation mechanism in the area of foreign direct investment.

Highlights from the report include the following:

- 1) **At a global level, a decrease of almost 14%** in the levels of foreign direct investment in 2022 compared to 2021 levels, with a total volume of €1.2 trillion.
- 2) In the EU this **decline in foreign direct investment in 2022 represented a -199% drop from 2021 levels**. These figures contrast with the declines in foreign investment suffered by the US (-12%) and China (-41%).
- 3) In 2022, the **leading foreign investor continued to be the United States**, both in terms of acquisitions of shareholdings greater than 10% in EU companies (accounting for 32.2% of acquisitions), and in terms of investment in start-up projects (accounting for 46.5% of the total). The second largest investor is the UK.
- 4) Regarding the **acquisition of shareholdings of more than 10%**, the Member States to which most foreign investment went in 2022 are as

follows: Germany retains first place (17.2% of total investments), while Spain remains in second place (13.5%), followed by Italy (10.6%), France (10.2%) and the Netherlands (10%). Of particular note is the **strong growth in the number of acquisitions in Portugal**, with an increase of 30.6% compared to 2021 levels.

- 5) In relation to **greenfield investments**: Spain is in first position with 17.2% of total investments in this area (despite a decrease of 13.8% compared to the number of investments in start-up projects that took place in 2021); followed by France with 14%; and Germany, with 11.4% of the total investment. Also noteworthy is the strong increase in start-up investments in the Netherlands and Ireland, with respective increases of 25% and 25.7% compared to 2021 levels.
- 6) The **top five sectors for acquisitions** are the information and communication technologies sector, the manufacturing sector, the professional and scientific activities sector, the finance sector, and the retail sector, all of which are experiencing declines in investment levels compared to 2021 levels.
- 7) Regarding **legislative developments**, the Commission expects all Member States to put in place mechanisms to screen foreign direct investment in the EU. At the date of publication of the Third Report, only Bulgaria, Ireland, Greece, Croatia, Cyprus and Sweden had not adopted screening mechanisms (**on 13 October 2023, the Commission released an updated list of screening mechanisms reported by Member States**). The Commission has encouraged harmonisation in this area through technical and policy guidance, although the Commission's collaboration in this area will not prevent divergences between Member States' rules in terms of the scope of formal investment screening, screening deadlines, sectors screened and notification requirements.
- 8) Concerning the **total number of screenings carried out in 2022**, 1,444 requests for acquisition authorisations submitted by foreign investors and ex-officio cases were processed during the year. Of all the applications for authorisations, 55% (around 794 applications) were formally screened. Finally, of all those cases formally analysed and for which Member States have communicated a decision, 86% (around 683 cases) were authorised unconditionally, 1% (around 8 cases) were rejected, and in 4% of the cases (around 32 cases) the transaction was withdrawn by the parties.

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Finally, the **Judgment of the Court of Justice of the European Union of 13 July 2023, Case C-106/22, Xella Magyarország**, should be highlighted as it is the first time that the CJEU has interpreted Regulation 2019/452, establishing its scope of application and the concept of “foreign investor”, limiting the possibility of extending the investment screening regimes of the Regulation to cases where the last holder of an EU resident company making an investment in other EU companies may be a foreign company.

This is a judgment from a Hungarian preliminary ruling in a case where a **Hungarian company was prohibited from acquiring the entire shareholding of another Hungarian company considered to be “strategic”** under national rules that provide for a foreign investment screening mechanism.

The CJEU held that the TFEU provisions on freedom of establishment prevent a foreign investment screening mechanism which permits the prohibition of the acquisition of ownership of a **resident company**, considered to be strategic, by another resident company which is part of a group of companies established in several Member States and **in which a company from a third country has a decisive influence**, on the ground that such an acquisition harms or is likely to harm the national interest in ensuring security of supply in favour of the construction sector.

In particular, the Court noted the following:

- 1) Regulation 2019/452 is intended to establish a framework for the screening by Member States of “foreign direct investments” in the EU made by a “foreign investor”. Therefore, **the Regulation does not contemplate investments which take place between EU companies**.
- 2) Regulation 2019/452 does not cover investments between EU companies where, in relation to one of them, a company from a third State has a “decisive influence”.
- 3) The CJEU, following its previous jurisprudence (**Case C-563/17, Associação Peço a Palavra and others, paragraph 43**), held that freedom of establishment - applicable only within the EU - should apply in such cases, noting that, under Article 54 TFEU, companies with Member State nationality benefit from freedom of establishment regardless of the origin or nationality of their shareholders (natural and legal persons). Therefore, it concluded that the **reasons of public security invoked to justify the national legislation** in question were not based on a “genuine and sufficiently serious threat” that could be accepted, and, thus, declared it to be contrary to EU law.

This judgment is a warning to national authorities: Investment screening rules cannot be applied to companies established in the EU even if those companies are controlled or under the “decisive influence” of companies from third States. Accordingly, the **CJEU has established that it is not possible to interpret any foreign investment screening regime broadly** and beyond what is specifically provided for therein.

In this regard, although the Regulation recognises the possibility of assessing “**the ownership structure of the foreign investor**” as one of the factors in determining whether a foreign direct investment may affect the security or public order of a Member State, this possibility refers exclusively to third State companies that invest in the EU and not to EU companies investing in other EU companies.

On this basis, it is possible to reflect on whether or not the CJEU, through its judgment, has adopted an **excessively formalistic interpretation of the scope of application of the Regulation** that limits its effectiveness in practice, but what is certain is that the implications of this judgment will be taken into account in the future revision of the Regulation.

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### The review process of the FDI Screening Regulation: What can we expect?

The European Commission held a **public consultation between 14 June and 21 July 2023**, in order to assess the effectiveness and efficiency of the Regulation following its entry into force, as well as the possibility for the Commission to present improvements to the Regulation in the following areas: (i) the mechanisms for cooperation, both in technical and procedural terms; (ii) the degree of convergence between Member States' screening systems; (iii) the types of foreign direct investment covered by the Regulation; (iv) the transactions that could present the greatest risk to Member States' security and public order; and (v) the division of powers between the Commission and the Member States.

On 28 November 2023, the Commission published the document "**Summary of findings - Targeted consultation on the evaluation and review of Regulation (EU) 2019/452 (the "FDI Screening Regulation")**", containing the main conclusions of the public consultation conducted by the European Commission. Specifically:

- 1) There is widespread agreement that the power of foreign investment screening and the final say should be a **national power**, without prejudice to the need to maintain mechanisms for cooperation between Member States and with the European Commission.
- 2) There is considerable support for including the following in **the scope of the Regulation**: all those transactions where the direct investor is established in the EU but is in fact ultimately owned by a legal person or company from a third State, as well as a list of sectors for which Member States would be obliged to monitor foreign direct investments.
- 3) There is broad support for the development at Member State level of criteria that screening authorities can take into account when assessing whether a foreign direct investment is likely to affect security or public order. Such **national criteria** would complement and apply in parallel to those already recognised by the Regulation itself.
- 4) There is consensus that the lack of harmonisation of deadlines at EU level regarding **cooperation mechanisms** is one of the procedural aspects that most limit their effectiveness. To improve the effectiveness of these mechanisms, requirements could be included to determine which foreign direct investments must be reported to the European Commission and

other Member States, rather than having to report all investments that are subject to screening, as is currently the case.

- 5) There is broad agreement on the **main problems** with these mechanisms. For example: Member States are not obliged to adopt mechanisms for screening foreign direct investment; these mechanisms can be ex post; and the Member State in charge of screening is not obliged to inform the Commission and the other Member States of the outcome of its screening.
- 6) It is generally considered that there is **sufficient transparency**, but it would be beneficial to increase standardisation regarding the information to be submitted with the notification to the Commission and other Member States, by adopting minimum requirements in terms of content and methodology regarding the information to be submitted.

It will be necessary to wait for the Commission to present its proposal before being certain of the reform proposals that will be presented. Thereafter, the legislative procedure will begin, which is expected to extend beyond 2024.

#### FURTHER INFORMATION

- Summary of results - Targeted consultation on the evaluation and review of Regulation (EU) 2019/452 (the "FDI Screening Regulation").
- 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.
- European Commission public consultation: Foreign direct investment (FDI) screening: Evaluation and review of the EU framework.
- European Commission - FDI Screening webpage: Updated list of screening mechanisms notified by Member States.
- Third Annual Report on the screening of foreign direct investments into the Union (COM (2023) 590 final).
- Judgment of the Court of Justice of the European Union of 13 July 2023 - Case C-106/22, *Xella Magyarország*.



### Analysis

Any revision must maintain a balance between, firstly, openness to investment and the free movement of capital, and secondly, screening of foreign investment that may be strategic for a given country. Therefore, the use of concepts such as "security or public order" must be strict.



## Legislative developments

- **The new de minimis Regulations in the area of State aid**, which will enter into force on 1 January 2024. Specifically, these are:
  - i) Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [C (2023) 9700 final].
  - ii) Commission Regulation (EU) 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [C(2023) 9701 final].
- **The new extension of certain elements of the State aid Temporary Crisis and Transition Framework**. Specifically, this relates to the “Communication from the Commission - Modification of the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ C, C/2023/1188, 21.11.2023, [C (2023) 8045]”.

Highlights include:

- a. The Sections whose validity has been extended until **30 June 2024**: Specifically, Sections 2.1 (*Limited amounts of aid*) and 2.4 (*Aid for additional costs due to exceptionally severe increases in natural gas and electricity prices*).
- b. Sections whose validity has been prolonged until **31 December 2025**: Specifically, Sections 2.5 (*Aid for accelerating the rollout of renewable energy and energy storage relevant for REPowerEU*); 2.6 (*Aid for the decarbonisation of industrial production processes through electrification and/or the use of renewable and electricity-based hydrogen fulfilling certain conditions and for energy efficiency measures*); and 2.8 (*Aid for accelerated investments in sectors strategic for the transition towards a net-zero economy*).
- c. The remaining Sections of the Temporary Crisis and Transition Framework will cease to apply on **31 December 2023**: Specifically, Sections 2.2 (*Liquidity support in the form of State guarantees*); 2.3 (*Liquidity support in the form of subsidised loans*); and 2.7 (*Aid for additional reduction of electricity consumption*).

In addition, several **political agreements** have been reached between the European Parliament and the Council in the framework of the legislative

procedure, and the final texts of each regulation should be finalised and published in the OJEU in the coming months:

- The Proposal for a Regulation (EU, Euratom) 2022/... of the European Parliament and of the Council of ... amending Protocol No 3 on the **Statute of the Court of Justice** of the European Union [2022/0906 (COD)], submitted by the Court of Justice of the European Union on 12 December 2022. Proposal ratified by the European Commission through the Commission Opinion on the draft amendment to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 30 November 2022, 10.3.2023, [COM (2023) 135 final] - Provisional political agreement reached on 7 December 2023.
- The Proposal for a Directive of the European Parliament and of the Council on **Corporate Sustainability Due Diligence** and amending Directive (EU) 2019/1937 [COM (2022) 71 final] - Political agreement reached on 14 December 2023.
- The Proposal for a Directive of the European Parliament and of the Council on **liability for defective products** [COM (2022) 495 final] - Political agreement reached on 14 December 2023.
- **Proposals on electricity market reform**, including: (i) the Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1227/2011 and (EU) 2019/942 to improve the Union's protection against market manipulation in the wholesale energy market [COM(2023) 147 final]; and (ii) the Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design [COM(2023) 148 final] - Political agreements reached respectively on 16 November and 14 December 2023.
- Proposal for a Directive of the European Parliament and of the Council on **improving working conditions in platform work** [COM(2021) 762 final] - Political agreement reached on 13 December 2023.
- The Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (**Artificial Intelligence Act**) and amending certain Union legislative acts [COM(2021) 206 final] - Political agreement reached on 9 December 2023.

## Legislative developments

- The **Gas and Hydrogen Markets Package**, consisting of: (i) the Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen, [COM (2021) 803 final]; and (ii) the Proposal for a Regulation of the European Parliament and of the Council on the internal markets for renewable and natural gases and for hydrogen (recast) [COM (2021) 804 final] - Political agreement reached on 8 December 2023.
- The Proposal for a Directive of the European Parliament and of the Council on the **energy performance of buildings** (recast), of 15.12.2021, [COM(2021) 802 final] - Political agreement reached on 7 December 2023.
- The Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for setting **ecodesign requirements for sustainable products** and repealing Directive 2009/125/EC, of 30.3.2022, [COM (2022) 142 final] - Provisional political agreement reached on 4 December 2023.
- The Proposal for a Regulation of the European Parliament and of the Council on **horizontal cybersecurity requirements for products with digital elements** and amending Regulation (EU) 2019/1020, of 15.9.2022, [COM (2022) 454 final] - Political agreement reached on 30 November 2023.
- The **Proposals modernise the management of industrial emissions**: (i) the Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/75/EU of the European Parliament and of the Council, of 24 November 2010, on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC, of 26 April 1999, on the landfill of waste (Industrial Emissions Directive) of 5.4.2022, [COM (2022) 156 final 3]; and (ii) the Proposal for a Regulation of the Parliament and of the Council on reporting of environmental data from industrial installations and establishing an Industrial Emissions Portal [COM (2022) 157 final] - Political agreement reached on 28 November 2023.
- The Proposal for a Regulation of the European Parliament and of the Council on **shipments of waste** and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056, of 17.11.2023, [COM (2021) 709 final] - Political agreement reached on 16 November 2023.
- The Proposal for a Directive of the European Parliament and of the Council on the **protection of the environment through criminal law** and replacing Directive 2008/99/EC, of 15.12.2021, [COM (2021) 851 final] - Political agreement reached on 16 November 2023.
- The Proposal for a Regulation of the European Parliament and of the Council on the **reduction of methane emissions in the energy sector** and amending Regulation (EU) 2019/942, of 15.12.2021, [COM (2021) 805 final] - Provisional political agreement reached on 15 November 2023.
- The Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (**Critical Raw Materials Act**), of 16.3.2023, [COM (2023) 160 final] - Political agreement reached on 13 November 2023.
- The Proposal for a Regulation of the European Parliament and of the Council on **nature restoration**, of 22.6.2023, [COM (2022) 304 final] - Provisional political agreement reached on 9 November 2023.
- The Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a **European Digital Identity**, of 3.6.2021, [COM (2021) 281 final] - Final political agreement reached on 8 November 2023.

## Judicial developments

- **Judgment of the CJEU of 16 November 2023, Joined Cases C-583/21, C-584/21, C-586/21, NC:** Judgment of the Court of Justice in the context of a reference for a preliminary ruling from the Labour Court No. 1 of Madrid, on the interpretation of Directive 2001/23. This concerns a situation in which the holder of a notary's office succeeded the previous holder and took over the staff who had been working for the previous notary. The Court of Justice held that: (i) notaries carry on an economic activity within the meaning of the Directive; (ii) the change of holder must be regarded as a change of employer; and (iii) the Directive will apply where the national court found that the identity of that notary's office was maintained.
  - **Judgment of the General Court of 22 November 2023, Joined Cases T-302/20, T-303/20, T-307/20, T-304/20, T-330/20, Del Valle Ruíz and Others v JUR:** Judgment of the General Court in which the Court dismissed an action for the annulment of Decision SRB/EES/2020/52 of the Single Resolution Board (SRB). The Court held that the Decision established the potential award of compensation to the shareholders and creditors of Banco Popular Español, S.A., in respect of which the resolution measures had been adopted. The General Court, in essence, (i) rejected the lack of independence of the appraiser, despite having provided services to Banco Popular, (ii) held that obliging shareholders and creditors to submit their comments in a questionnaire did not infringe their right to be heard, even if there was a limit to the length of their responses, and (iii) concluded that the parties' rights of defence and property rights were not infringed, as they did not prove that the SRB made a manifest error in concluding that the shareholders and creditors would not have received better treatment in ordinary insolvency proceedings.
  - **Judgment of the CJEU of 5 December 2023, Joined Cases C-451/21 P and C-454/21 P, Luxembourg v Commission:** Judgment of the CJEU delivered in the context of an appeal against the judgment of the General Court of 12 May 2021, *Joined Cases T-516/18 and T-525/18*, dismissing the actions for annulment brought against a Commission decision concerning State aid in the form of advance tax rulings implemented by Luxembourg in favour of Engie. The CJEU upheld the appeals and annulled the Commission's decision. The CJEU held that: (i) the Commission is in principle bound to accept the interpretation of the relevant provisions of national law carried out by the Member State, except where it can provide another interpretation which is dominant in the caselaw or administrative practice of that Member State; and (ii) the choice of introducing provisions into national law and deciding how they are to be applied by the tax authorities falls within the Member States' own powers in the area of direct taxation in areas which have not been harmonised in EU law, and is therefore a manifestation of their tax autonomy. This is similar to the judgment of the CJEU of 14 December 2023, *Case C-457/21 P, Commission v Amazon.com and others*.
  - **Judgment of the CJEU of 14 December 2023, Joined Cases C-693/21 P and C-698/21 P, EDP Spain v Naturgy Energy Group and Commission:** Judgment of the CJEU annulling the Judgment of the General Court of 8 September 2021, *Case T-328/18*, and Decision C(2017) 7733 of the Commission. The CJEU found that a Commission decision to initiate the formal investigation procedure, although provisional in nature, insofar as it made a preliminary finding that the measure under examination constituted State aid and that there were doubts as to its compatibility with the internal market, had autonomous legal effects, namely the suspension of the measure under examination. Therefore, the Commission should have provided the reasons for considering that the measure had the effect of benefiting certain undertakings compared with others in a comparable situation. In this case, the Commission did not explain why the coal-fired power plants benefiting from the contested measure were in a comparable situation to other non-beneficiary plants, as the fact that they were competing undertakings was not sufficient justification.
  - **Judgment of the CJEU, of 21 December 2023, Case C-333/21, European Superleague Company:** Judgment handed down in the preliminary ruling requested by the 17th Commercial Court of Madrid, in relation to the case of the soccer Super League and the compatibility with Competition Law of the power attributed to FIFA and UEFA to authorize or oppose, by threat of sanctions to clubs and players, the organization of club soccer competitions such as the Super League. The CJEU states that: (i) the rules of FIFA and UEFA concerning the system of authorizations of competitions constitute both an abuse of a dominant position within the meaning of Article 102 TFEU and a decision by an association of undertakings within the meaning of Article 101 TFEU, and furthermore, it is contrary to the freedom to provide services in the EU, if their transparent, objective, non-discriminatory and proportionate nature cannot be guaranteed; and (ii) the regulations of these associations attributing to them exclusive responsibility for the marketing of the rights to competitions under their jurisdiction are contrary to Articles 101 and 102 TFEU. The national judge, however, must analyze whether or not the restrictions could be justified on the basis of convincing arguments and evidence.
- Also published this same day, in relation to the activity of sports federations, was the judgment in *Case C-124/21 P, International Skating Union v.*





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## Judicial developments

Commission, in which the CJEU declared that the rules of the International Skating Union by which it may authorize international skating competitions and sanction those athletes who participate in unauthorized competitions are contrary to competition law and illegal, as they are not subject to any guarantee of transparency, objectivity, non-discrimination and proportionality.

Also, it is worth highlighting the judgment in [Case C-680/21](#), Royal Antwerp Football Club, in which the CJEU considers that the requirement for a soccer club to have a minimum number of players from its youth academy could be contrary to the rules of competition law and the free movement of workers, depending on the circumstances of the case, a matter to be assessed by the national judge.

### MÁS INFORMACIÓN DE INTERÉS

-  [Full list of judgments issued by the Court of Justice of the European Union - November - December 2023](#)

