

UPDATE: On March 5, 2019, the Council of the EU approved a regulation (the Regulation) establishing a framework for screening of foreign direct investments into the EU. The final text of [the Regulation](#) was agreed by all three major EU institutions (i.e., the European Parliament, European Commission and Council of the EU representing governments of all EU member states) during inter-institutional negotiations in November 2018. As further explained in the following publication, the new regulation facilitates enhanced cooperation and exchange of information between EU member states and the European Commission. The new regulation could affect businesses and investors, as well as their interactions with government entities at the EU- and member state-levels since all foreign investment undergoing screening in any EU member states could be opinioned by other EU member states and the European Commission. The Regulation is expected to be operational by the end of 2020.

The EU goes ahead with a European framework, similar in intents and purposes as the Committee for Foreign Investments in the United States (CFIUS), for screening incoming foreign direct investments...extra scrutiny over foreign investments that might affect public order and security.

On December 10, 2018, the European Parliament Committee on International Trade (INTA) approved the EU Regulation establishing a framework for screening of foreign direct investments into the European Union ([the Regulation](#)). The final text of the Regulation was agreed by all three major EU institutions (the European Parliament, European Commission and Council of the EU representing governments of all EU member states) in November 2018, based on the [proposal](#) of the European Commission published in September 2017. The new Regulation could affect businesses and investors, as well as their interactions with government entities at the EU- and member state-levels, as further elaborated in this document.

The new Regulation provides both EU member states and the European Commission (the Commission) with a coordination mechanism to allow for the better and more coherent screening of incoming foreign direct investment (FDI) that could potentially affect the security and public order of the EU and its member states. However, the proposed mechanism does not unify screening mechanisms that are already in place in EU member states, or require member states to set up such a screening mechanism.

Upcoming Procedure for EU-wide Coordination of National Investment Screenings

The new Regulation does not replace national screening procedures. It leaves discretion with EU member states as to whether they opt for any screening mechanism, and the discretion to determine its scope and any qualitative or quantitative thresholds triggering the screening.

While member states are free to determine their own FDI process, the Regulation does allow the European Commission and other EU member states to intervene in the course of screening proceedings carried out in other member states. First, each member state is required to inform – as soon as possible – the European Commission and other member states about investments undergoing review. Second, each member state that considers the investment to be a risk to its security or public order will have the possibility to address comments to the member state conducting the review. Third, the European Commission will be obliged to look into all investments screened at the national level. In case it considers the investment affects public order or security in more than one member state, it may issue a non-binding opinion.

The right of EU member states and the European Commission to submit their comments/opinions is limited in time. They can do so only after the prior notification of such intent is filed to the member state conducting review within 15 days of that member state notifying the relevant parties of the ongoing screening. As part of this, member states are entitled to request additional information if justified and necessary.

Although the new Regulation reconfirms that the final say on the admission of an investment will still lie with EU member states, the new coordination mechanism may have a significant impact on national screening procedures and lead to longer processing times. It may also result in the blocking of certain investments due to the negative opinion of the Commission and position of other EU member states based on their potential political weight and influence.

Division of Powers Between European Commission and EU Member States

The new Regulation redefines the role of the European Commission in comparison to the initial proposal presented in September 2017: the Commission will not have a right to issue an opinion in case security and public order concerns are relevant only to one EU member state. The role of the Commission is, therefore, limited to the screening of those investments that can undermine security or public order in a cross-border setting. The Commission will not have any power to interfere in screening processes where there is no impact on the security and public order in other EU member states.

In addition, the new Regulation strengthens the voice of other EU member states on screening procedures in other EU member states. When at least one third of EU member states considers that the investment affects their security or public order, the European Commission will have to intervene and issue an opinion. On top of this, independently, each EU member state will have a right to request the Commission to issue an opinion on the screening procedure carried out by another EU member state.

EU Will Supervise Investment Not Subject to National Screening Procedures

The EU supervision of FDI will also be extended to all investments within the EU that may affect official EU projects or programs of Union interest. Where the Commission identifies any new investments that affect projects and programs of the Union on grounds of security or public order, it will issue an opinion to the EU member state hosting the investment. The list of Union projects subject to the enhanced protection under this scheme is agreed and provided in an Annex to the compromised draft and covers projects such as Galileo, Horizon 2020 and Trans-European Networks.

Furthermore, the Commission and other EU member states will have a right to issue an opinion on an investment that is not subject to screening at the national level. In such cases, the power of other EU member states and the Commission to interfere with this investment will be analogue to the powers conferred on them in the coordination mechanism but will be extended to investments completed within the last 15 months.

Criteria for Screening

The new Regulation provides a non-exhaustive list of factors that the Commission and member states may consider while screening foreign investments. These include, for example, an investment's impact on:

- Physical and virtual critical infrastructure (e.g., energy, transport, water, health, communication, media, data processing or storage, aerospace, defense, electoral or financial infrastructure or sensitive facilities such as land or real estate)
- Critical technologies and dual use items (e.g., artificial intelligence, robotics, semiconductors, dual use technologies, cybersecurity, quantum, defense, energy storage, nanotechnologies or biotechnologies)
- The security of critical inputs such energy, raw materials or food security
- The access or control over sensitive information and personal data
- The freedom and pluralism of the media

FDI Screening Mechanisms in EU Member States

The EU proposal will not replace the FDI screenings that already exist in EU member states, and all currently enforceable procedures will remain applicable to any incoming investments. EU member states differ in their approaches to the supervision of incoming investments. They also differ in the level of scrutiny and choice of transactions subject to screening. The new EU regulation will, therefore, not amend these national mechanisms, but will add an additional level of scrutiny relevant for all in-coming investments that could affect the security or public order interests of any EU member state.

Path Forward

It is expected that the compromised text will be adopted during the plenary session of the European Parliament in February 2019. The adoption of the final text in the European Parliament opens the door for the Council of the EU to approve the final text. After this approval, the new Regulation will be published in the *EU Official Journal*. It will be applicable after 18 months from its entry into force – thus, at around end 2020 or early 2021 from today's perspective.

Implications for Business

The new Regulation provides for an EU-wide coordination of foreign investment screening but is silent on rights of new investors in the screening process at the EU level. The screening process at the EU level is designed as a member state-to-Commission and member state-to-member state mechanism. Under this scheme, investors will not need to request any approval from the European Commission, and it will not have any power to request additional information directly from investors or to make a new investment subject to any conditions. We can also expect that the European Commission might make this process strictly confidential. The [EU Regulation no. 1049/2001](#) regarding public access to Commission documents allows the Commission to refuse access to documents where disclosure would undermine *inter alia* public security, defense and military matters or/and commercial interests of a natural or legal person, including intellectual property.

This does not mean, however, that new investors in the EU will not see any impact of the new Regulation. First, especially in cases where national laws of EU member states do not provide for strict timelines, screening processes on a national level could be extended to allow for an exchange of opinions with the European Commission and other EU member states. Second, certain investments could be highly scrutinized by other EU member states. The new Regulation will provide them with a legal instrument to put a hosting member state under political pressure to restrict certain investments. This expectation is based on the recent political debate in the EU that was caused by certain investments in the energy sector. Third, the Regulation does not prohibit new investors, their potential competitors or other stakeholders from engaging directly with the Commission if they expect that a new investment may raise EU-wide concerns or implications.

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Resources to Strengthen Compliance

We encourage you to visit our blog, [The Trade Practitioner](#), where you will find additional updates and information on export controls, sanctions and national security-focused investment screenings, as well as other international trade regulatory and policy topics. To our knowledge, *The Trade Practitioner* houses the largest database of publicly known Committee on Foreign Investments in the United States (CFIUS) filings and their statuses. We also offer a CFIUS handbook with helpful guidelines on navigating the evolving CFIUS process, upon request. In addition, organizations engaged in the trade of items specially designed for military or space applications are encouraged to download our complimentary [ITAR Practitioner's Handbook](#), which covers the International Traffic in Arms Regulations and the US Department of Commerce “600 Series.”

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