

# First Review Of The EU FDI Screening Regulation

## *Testing the waters, spike in burden*

February 17, 2022

The European Commission (“EC”) recently published its first annual report on the new European cooperation mechanism regarding the screening of foreign direct investment (“FDI”) into the EU (the “Report”).<sup>1</sup> The Report shows that four out of every five FDI filings screened at the EU level were quickly resolved within Phase I, while the remaining filings were pushed to Phase II (or were pending at the time of the Report) subject to additional information being requested from the notifying Member State. The EC issued a formal opinion in 3% of the screened notifications (although the ultimate outcome of these cases was not reported). It is, though, too early to draw any meaningful conclusions out of these initial statistics.

While the EC and Member States have overall deemed the EU FDI cooperation mechanism efficient and reliable, it has also attracted criticism by Member States due to associated burden and procedural issues driven by variations among the Member States’ FDI rules.

Transaction parties are well-advised to carefully consider how best to navigate this continually developing FDI framework in the EU.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

### BRUSSELS

**François-Charles Lapr v te**  
+32 499 532 479  
[fclaprevote@cgsh.com](mailto:fclaprevote@cgsh.com)

**Vladimir Novak**  
+32 474 828 240  
[vnovak@cgsh.com](mailto:vnovak@cgsh.com)

**Remco Bernaerds**  
+32 494 758 311  
[rbernaerds@cgsh.com](mailto:rbernaerds@cgsh.com)

### ROME

**Giuseppe Scassellati-Sforzolini**  
+39 066 952 2220  
[gscassellati@cgsh.com](mailto:gscassellati@cgsh.com)

**Francesco Iodice**  
+39 066 952 2697  
[fiodice@cgsh.com](mailto:fiodice@cgsh.com)

### PARIS

**S verine Schrameck**  
+33 140 746 936  
[sschrameck@cgsh.com](mailto:sschrameck@cgsh.com)

**Aur le Delors**  
+ 33 140 746 933  
[adelors@cgsh.com](mailto:adelors@cgsh.com)

### FRANKFURT

**Michael J. Ulmer**  
+49 699 710 3180  
[mulmer@cgsh.com](mailto:mulmer@cgsh.com)

**Mirko von Bieberstein**  
+49 699 710 3204  
[mvonbieberstein@cgsh.com](mailto:mvonbieberstein@cgsh.com)

### WASHINGTON D.C.

**Chase Kaniecki**  
+1 202 974 1792  
[ckaniecki@cgsh.com](mailto:ckaniecki@cgsh.com)

<sup>1</sup> Report from the Commission to the European Parliament and the Council: First Annual Report on the screening of foreign direct investments into the Union, SWD (2021) 334 final of November 23, 2021.



## Background and context<sup>2</sup>

The past few years have shown a growing concern regarding the scope and nature of inbound investments by foreign actors, leading to a proliferation of new FDI regimes globally. The Covid-19 pandemic further accelerated this trend, primarily driven by fear of jeopardizing the survival of strategic businesses and exposing them to predatory take-overs by foreign investors.

The EU followed the global trend by adopting, in 2019, a regulation establishing a new European framework to facilitate the cooperation among Member States screening foreign investments in their jurisdictions and, to a limited extent, coordinate their domestic FDI regimes (“**FDI Screening Regulation**”),<sup>3</sup> which entered into force in October 2020. In parallel, the EC repeatedly urged all Member States to either use or enhance existing, or adopt new, FDI regimes to protect critical technologies and infrastructures in the EU.<sup>4</sup>

Unlike well-established FDI regimes in the United States, Canada, and Australia, the EU does not have the power to review and authorize foreign investments nor, more generally, act as an overarching regulator. Instead, the EC facilitates the cooperation among Member States screening foreign investments under their national FDI screening processes, and provides views and opinions for the Member States consideration where relevant. In practice, Member States must notify the EC and all other Member States of FDI undergoing screening. The EC or other Member States can intervene if they wish by providing an opinion within a statutory period of 35 calendar days (this normally suspends the course of the national screening). If a third of Member States consider a particular FDI to likely

affect security or public order in a Member State or in the EU, the EC must provide its opinion. While such opinion is not binding, this process creates pressure on the host Member State, which should take due account of the EC opinion.<sup>5</sup>

On November 23, 2021, the EC published the Report, summarizing the state of affairs close to the first anniversary of the FDI Screening Regulation.

## A “new era” for FDI mechanisms in EU Member States...

The FDI Screening Regulation has arguably further fostered the emergence of national FDI regimes. In this respect, the Regulation sets out certain minimum standards (e.g., transparency, non-discrimination, timeframes, confidentiality, and judicial review), but otherwise leaves Member States free to determine their own strategic FDI policy, including sectors of interest, and to screen the FDIs in their own jurisdiction. This effort has succeeded – in the period from January 2019 to July 2021, five additional EU Member States introduced a national FDI regime bringing the total to 18 Member States, and six more EU Member States are in the process of doing so, which would bring the total to 24 out of 27 EU Member States. The EC is optimistic that all EU Member States will have an FDI regime in place in the foreseeable future.<sup>6</sup>

<sup>2</sup> For a more thorough description of the FDI Screening Regulation, refer to our alert memorandum of October 16, 2020. See <https://www.clearygottlieb.com/news-and-insights/publication-listing/eu-foreign-direct-investment-regulation-comes-into-force>.

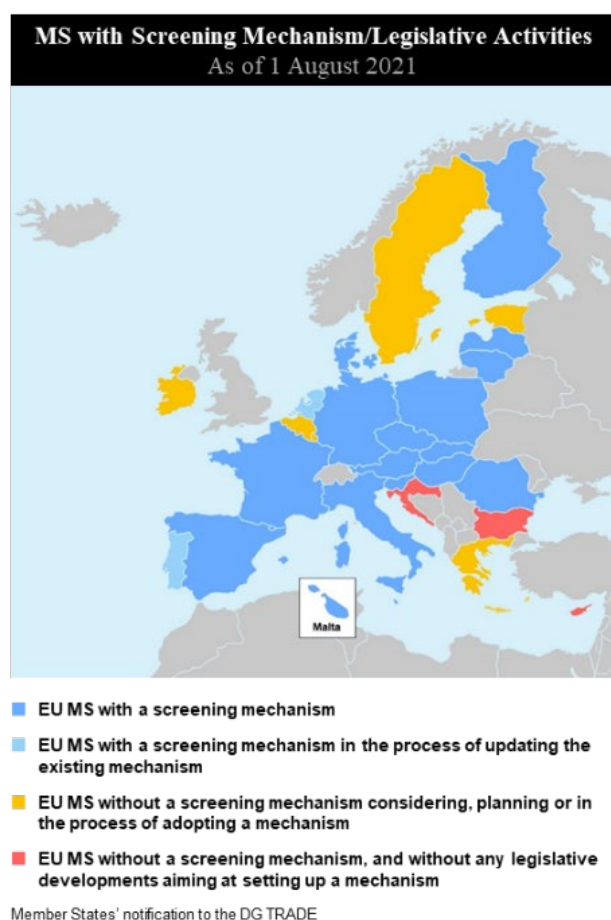
<sup>3</sup> European Parliament and Council regulation establishing a framework for the screening of foreign direct investments into the Union, OJ L 791.

<sup>4</sup> 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 (25.3.2020, C(2020)).

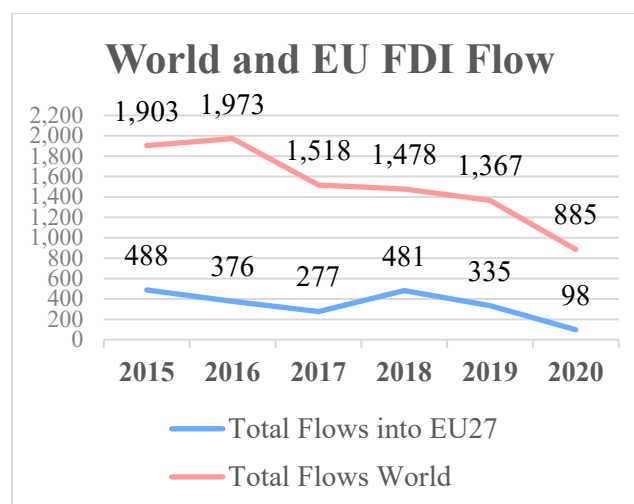
<sup>5</sup> In case the investment concerns EU-relevance projects (e.g., Copernicus, Horizon), Member States must take “utmost” account of the EC opinion and provide an explanation if the opinion is not followed.

<sup>6</sup> Report, page 6.



### ... During a substantial decline in EU FDI

The rise of EU national FDI mechanisms coincided (rather incidentally) with a dramatic fall in EU FDI value – a 71% decline (from €335 billion to €98 billion) between 2019 and 2020. We would, though, caution against connecting the dots here as the decline is likely primarily driven by the pandemic (as also indicated by a similar decline in global FDI). Indeed, given that the M&A and FDI volumes increased rapidly in 2021, the next edition of the Report might show that the rise of FDI screening across the EU has no material impact on FDI flow into the EU.



In the reporting period, most foreign investments into the EU continued to originate from the EU's closest "allies", particularly the United States, Canada, the U.K., and the EFTA countries. In contrast, China's share of EU FDI declined by more than 60% (from 4% in 2019 to 2.5% in 2020).

	PERCENTAGE CHANGE 2020 OVER 2019	SHARE OVER TOTAL 2020
USA and CAN	-35	34.9%
UK	-21	30.5%
EFTA	-25	12.1%
Offshores	-34	6.9%
Developed Asia	-47	5.6%
China	-63	2.5%

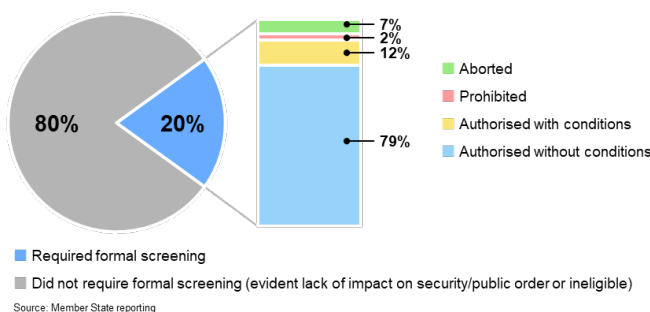
The level of foreign investment varied considerably between sectors. For example, FDI into medical supplies, pharmaceuticals, and e-commerce increased, while FDI into tourism, leisure, and accommodation diminished.

### FDI screening followed the "Pareto Principle"

Over the 12-month period of 2020, which largely predated the October 2020 entry into force of the FDI Screening Regulation, EU Member States reported to have reviewed 1,793 FDI notifications. The national screening process followed the "80/20" Pareto

Principle, with c. 20% of the filings (~362 cases) undergoing formal screening in the reporting Member States (not all FDI notifications are subject to formal screening). The 80/20 principle applied within the formal screening sample too – 79% of the screened investments were cleared unconditionally, while the remaining 21% required some form of intervention. Specifically, 12% were approved with conditions, 7% were abandoned (likely due to regulatory concerns although this is not specifically disclosed), and 2% were prohibited. A 20% intervention rate within the screening sample appears quite significant. However, the intervention rate drops to c. 4% when considered out of both screened and non-screened FDI filings in the relevant period. This is also directionally similar to the EC’s usual 5-8% intervention rate out of all EU merger control filings.<sup>7</sup>

**FDI Cases Submitted for Approval**

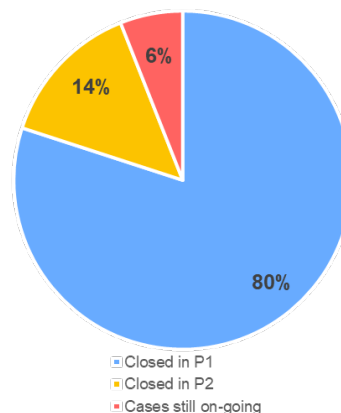


In addition, the Report provides an overview of notifications submitted at the EU level during a ~9-month period following the entry into force of the FDI cooperation mechanism (*i.e.*, October 11, 2020 through June 2021). In this period, 265 notifications were submitted by 11 Member States. Austria, France, Germany, Italy, and Spain accounted for 90% of these notifications. The five main countries of origin were the

United States, the U.K., China, Canada, and the United Arab Emirates.

Even under the FDI Screening Regulation, the review process maintained the 80/20 principle, with c. 80% of these notifications closed in Phase I,<sup>8</sup> while the remaining 20% were either closed in Phase II<sup>9</sup> (14%) subject to additional information being requested from the notifying Member State,<sup>10</sup> or were pending at the time the Report was finalized (6%). The Report does not disclose the ultimate outcome of these Phase II cases (which are under the control of the Member States) leaving the FDI practitioners in a *Schrödinger’s cat* territory for now.

**Cases Closed in Phase 1 and Phase 2**



The Phase II reviews focused on manufacturing (50%), information and communications technologies (17%), and financial (8%) sectors.

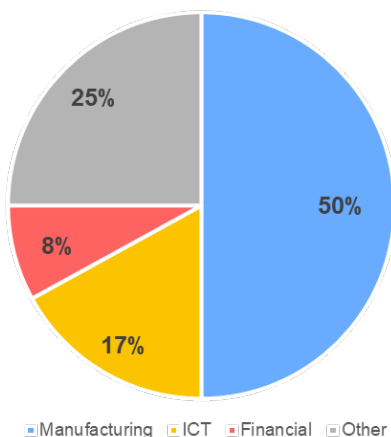
<sup>7</sup> See Christopher J Cook, Sven Frisch, Vladimir Novak, ‘Recent Developments in EU Merger Remedies’ (2020), *Journal of European Competition Law & Practice*.

<sup>8</sup> For the purposes of the Report, “Phase I” means that neither the EC nor any Member State expressed intention to issue an opinion (or make comments) nor requested additional information within relevant time period.

<sup>9</sup> For the purposes of the Report, “Phase II” means that the EC (or another Member State) expressed intention to issue

an opinion (or make comments) or requested additional information within relevant time period.

<sup>10</sup> The information requested in Phase II typically includes one or more of the following subjects: data on products and/or services of the target company; possible dual-use classification of any products involved; customers, competitors and market shares; the IP portfolio and R&D activities of the target company; and additional defining characteristics of the investor.

**Phase 2 Main Targeted Sectors**

### EC opinions – targeted approach so far

The EC issued its confidential opinion<sup>11</sup> in less than 3% of the 265 notified cases. These opinions are typically triggered by the risk profile presented by the investor and the criticality of an investment target. The limited use of the opinion tool may reflect that the vast majority of recent FDI originated from EU's closest allies. That said, it remains to be seen in practice to what extent the EC will actively engage in informal discussions that could shape the outcome of reviews without reaching the stage of a formal opinion.

### EU Member States feedback – consider burden & timing concerns

The Report indicates that EU Member States deem the FDI Screening Regulation an efficient and reliable tool. There is, though, significant room for improvement on the procedural front. The following reported concerns are noteworthy:

- The discrepancies between EU Member States timelines creates logistical issues;
- The screening procedural timeline is too short to carry out the FDI screening in complex transactions;
- The requests for information sent between the EU Member States authorities are voluminous; and

- The number of FDI notifications within the framework of the FDI Screening Regulation is too high.

### But the EC is cautious to react too quickly

The EC deems a formally standardized timeline unfeasible and reiterates the continued obligation to report all FDI filings. Nevertheless, the EC recently launched a study to examine the variations between national FDI mechanisms and associated impact on the efficiency of the EU FDI screening process,<sup>12</sup> and is considering adopting guidelines and technical facilitation measures (e.g., updated versions of the online notification form and FAQs). These initiatives might eventually prompt future amendments to the FDI Screening Regulation, though this is unlikely to materialize in the short to medium term.

### Conclusion

Introducing a transnational coordination regime in a matter as sensitive as FDI control naturally entails significant challenges that need to be ironed out, reflecting on the ground experience. But the EU's screening cooperation mechanism is arguably a step in the right direction to ensure a more harmonized FDI review process within the EU. The EC has therefore largely adopted a wait-and-see approach before considering any major changes, which would anyway require strong political support.

The initial statistics helpfully show that the vast majority of screened cases involving the EC were resolved quickly. That said, long-term statistics are needed to form a more conclusive view.

Going forward, transaction parties are well-advised to carefully consider how best to navigate this continually developing FDI framework, including by anticipating early whether an FDI screening could apply and whether it could raise specific issues in certain jurisdictions.

...

CLEARY GOTTlieb

<sup>11</sup> Article 10 of the FDI Screening Regulation.

<sup>12</sup> Report, page 19.