II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

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 [1]

(2022/C 151 I/01)

The European Union is open to foreign investment, which is essential for our economic growth, competitiveness, employment and innovation. Many European companies are well integrated in global supply chains, which need to be kept functioning. The EU will remain an attractive destination for foreign direct investment (FDI). But our openness is not unconditional and it needs to be balanced by appropriate tools to safeguard our security and public order.

In response to Russia"s unprovoked and unjustified military agression against Ukraine, supported actively by Belarus, the EU has adopted a large and robust package of restrictive measures ('sanctions') against both Russia and Belarus. The sanctions against Russia are designed to undermine the Kremlin"s ability to finance the war, impose clear economic and political costs on those in Russia"s political elite responsible for the invasion and diminish its economic base. In light of Belarus" material support to the Russian invasion, the EU has adopted further sanctions against Belarus. The sanctions against Belarus are designed to have a similar impact.

Regulation (EU) 2019/452 [2] ('FDI Screening Regulation') provides an essential EU-wide framework in which the European Commission and the Member States can coordinate their actions on foreign investments to ensure the protection of security and public order if such objectives are threatened by foreign direct investments. Member States may also screen investments that do not fall within the scope of application of the FDI Screening Regulation , provided such control is done in compliance with the Treaty provisions on free movement of capital and establishment.

While FDI screening and sanctions are distinct legal instruments, each with a different purpose, and with a different way of operating, Russia"s military agression against Ukraine calls for greater vigilance towards Russian and Belarusian direct investments within the Single Market. This goes beyond investments by persons or entities that are subject to sanctions. In the current circumstances, there is a heightened risk that any investment directly or indirectly related to a person or entity associated with, controlled by or subject to influence by the Russian or Belarusian government into critical assets in the EU may give reasonable grounds to conclude that the investment may pose a threat tosecurity or public order in Member States.

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[1] Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1) and its amendments and Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures concerning restrictive measures in view of the situation in Belarus (OJ L 134, 20.5.2006, p. 1) and its amendments.

[2] 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 (OJ L 79 I , 21.3.2019, p. 1).

Furthermore, EU sanctions apply to any person inside the territory of the Union, to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State, and to any legal person, entity or body in respect of any business done in whole or in part within the Union. Therefore, EU restrictive measures can affect direct investments from Russia and Belarus in several ways. For example, business transactions with designated persons and entities cannot legally be carried out unless the legislation exceptionally allows them, and EU banks shall freeze payments received from any designated Russian bank subject to an asset freeze. These rules are recalled in more detail in the Annex to this Communication.

In its past Communications, including the Communication on the Trade Policy Review - An Open, Sustainable and Assertive Trade Policy ([3]), the Commission has called on all Member States to set up and enforce fully fledged FDI screening mechanisms to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU. Doing so is all the more urgent in the current context.

In the existing institutional set-up, the responsibility for screening FDI rests with Member States. National screening mechanisms are already in force in 18 Member States ([4]). FDI screening should take into account the impact on the security and public order of the Union as a whole. In determining whether a foreign direct investment is likely to affect security or public order, Member States may also take into account, in particular whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or whether there is a serious risk that the foreign investor engages in illegal or criminal activities ([5]).

The scope of the FDI Screening Regulation is limited to cases where the acquisition of an EU entity involves direct investment by one or more entities established outside the Union. Conversely, cases only involving investments by one or more entities established in the Union in another Member State do not fall within the scope of the Regulation, except for transactions which are part of a scheme of circumvention set up with the objective result of avoiding the application of the Regulation. However, such investments may be subject to national controls or screening mechanisms and action may be taken in compliance with Union law and in particular the Treaty provisions on free movement of capital and freedom of establishment.

In the current circumstances, there is a significantly heightened risk that FDI by Russian and Belarusian investors may pose a threat to security and public order. Therefore, within applicable rules, such FDI should be systematically checked and scrutinized very closely. These risks may be exacerbated by the amount of Russian investments in the EU and the intensity of prior business relations between EU and Russian companies. Moreover, particular attention must be given to the threats posed by investments by persons or entities associated with, controlled by or subject to influence by the two governments because these governments have a strong incentive to interfere with critical activities in the EU and to use their ability to control or direct Russian and Belarusian investors in the EU for that purpose.

To this end, the European Commission calls upon Member States to:

— systematically use their screening mechanisms to assess and prevent the threats related to Russian and Belarusian investments on grounds of security and public order;

— ensure close cooperation between national authorities competent for sanctions ([6]) ('NCAs') and those competent for the screening of investments in the context of implementing EU sanctions, as well as identifying breaches and imposing penalties;

— implement fully the FDI Screening Regulation, including through active participation in the cooperation mechanism between Member States and between them and the Commission, to address risks related to security or public order related to FDI from Russia and Belarus;

([3]) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM/2021/66 final
([4]) For a full list of national screening mechanisms and links to national legislation, see http://trade.ec.europa.eu/doclib/html/157946.htm
([5]) Article 4 of the FDI Screening Regulation
([6]) The list of national competent authorities for sanctions is available under https://www.sanctionsmap.eu/#/main/authorities

— ensure full compliance with the requirements of the Anti-Money Laundering Directive ([7]) to prevent the misuse of the EU financial system; and

— ensure close cooperation between Member States screening authorities, NCAs and national promotional banks and institutions, as well as international financial institutions of which Member States are shareholders in order to identify investments, in particular from Russia and Belarus, that could affect security or public order in the EU and facilitate full compliance with the sanctions in activities supported by the aforementioned public investment entities.

For those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant FDI transactions or do not allow screening before investments are made, the Commission calls on them urgently to set up a comprehensive FDI screening mechanism and in the meantime to use other suitable legal instruments to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU.

For those Member States that are in the process of setting up such a screening mechanism, the Commission calls on them to accelerate its adoption and prepare its implementation, including supporting it with appropriate resources.

Finally, the Annex to this Communication also describes the conditions under which Member States may be permitted to impose restictions on the free movement of capital and freedom of establishment. Outside the EU framework for the screening of FDI, those Member States that have put in place measures according to which they may screen intra-EU investments to pursue, in a proportionate manner, legitimate public policy objectives are strongly encouraged to use those mechanisms to the fullest extent in relation to investments ultimately controlled by Russian or Belarusian persons, or entities, to address the risks highlighted in this Communication.

([7]) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

ANNEX

1. **Overview of Russian and Belarusian assets in the EU** ([1])

1.1. *Russian investments in the EU*

In view of the number of transactions completed between 2015 and 2021, Russia was the 11th foreign investor in the EU accounting for 0,9% of the number of investments and 0,7 % of the value of investments from all non-EU jurisdictions. This represents 643 deals with a total value of EUR 15bn (value is missing for 34 % of the deals) including mergers and acquisitions, minority, portfolio and greenfield investments. While in recent years the inflow of Russian investment appears relatively limited, based on 2020 data, Russian individuals or entities control about 17 000 EU companies ([2]), and have potentially controlling stakes ([3]) in another 7 000 companies and minority stakes in a further 4 000 companies ([4]). In many instances companies have multiple Russian shareholders, each of them with a percentage stake below 50 %, but all of them summing up to more than 50 % of the capital of the EU business. In 57,7 % of the EU companies under Russian control or influence, assets are held by a natural person, in 9,7 % by a company and in 1,1 % by a public authority/state.

Table 1

Number of EU27 companies with Russian influence or control, detail by type of controlling entity

Type of controlling entity (Global Ultimate Owner)	Number of companies	Share
One or more known individuals or families	17 510	57,7 %
Not available	9 204	30,4 %
Corporate companies	2 931	9,7 %
Public authorities, States, Governments	343	1,1 %
Financial company	149	0,5 %
Mutual & Pension Fund/Nominee/Trust/Trustee	83	0,3 %
Bank	81	0,3 %
Foundation/Research Institute	18	0,1 %
Insurance company	1	0,0 %
Private equity firms	1	0,0 %

Source: JRC analysis, based on Bureau van Dijk data. Figures based on 2020 balance sheets data. Data extracted in March 2022. In case of Russian influence (not control), the EU company can be controlled by an entity from any other country. The missing cases ('not available') refer to EU companies with Russian influence that do not report any majority shareholder.

Assets held by the Russian government are in 'corporate companies' ([5]) for 79,9 % of the cases, and in banks or other financial institutions for the remaining (Table 2).

([1]) For the purpose of this analysis, the term 'assets' refer to any company registered in the EU that is controlled/influenced by a Russian or Belarusian investor.

([2]) EU companies are approximately 23 million (latest available year 2018, Eurostat business demography)

([3]) This is the case of multiple Russian shareholders with an aggregated stake higher than 50 %, but where no one individually holds a stake above 50 %.

([4]) We observe an additional 2 000 companies with a reported non-controlling Russian shareholder, for which the amount of stake is not reported.

([5]) This category includes all companies that are not banks or financial companies nor insurance companies.

Table 2

Number of EU27 companies with Russian government control or influence, detail by type of controlled EU company

Entity type of the EU company	Number of companies	Share in total (%)
Corporate companies	262	79,9
Financial company	37	11,3
Bank	17	5,2
Mutual & Pension Fund	11	3,4
Private equity firms	1	0,3

Source: JRC analysis, based on Bureau van Dijk data. Figures based on 2020 balance sheets data. Data extracted in March 2022.

The sectors with the largest presence of Russian control are Wholesale, Real Estate, Professional Scientific and Technical activities and Finance and Insurance. The sectors with the largest presence of Russian influence are very comparable: Wholesale, Real Estate, Professional Scientific and Technical activities and Manufacturing (Table 3).

Table 3

Number of EU27 companies with Russian influence or control. Detail by target sector, 2020

EU27				
	Control	Influence		Total
Sector	Number of companies	Number of companies	Stake (*) %	Number of companies
Agriculture, forestry and fishing	137	137	62	274
Mining and quarrying	19	15	28	34
Manufacturing	904	883	56	1 787
Electricity, gas, steam and air conditioning	61	45	40	106
Water supply; sewerage, waste management	32	24	56	56
Construction	744	621	50	1 365
Wholesale and retail trade;	4 530	3 607	63	8 137
Transportation and storage	666	417	51	1 083
Accommodation and food services	612	675	52	1 287
Information and communication	763	668	55	1 431
Financial and insurance activities	1 199	625	46	1 824
Real estate activities	2 714	2 470	70	5 184
Professional, scientific and technical	1 721	1 272	60	2 993
Administrative and support services	886	746	55	1 632
Public administration and defence	1	6	35	7
Education	103	76	56	179

Human health and social work activities	70	56	46	126
Arts, entertainment and recreation	160	170	50	330
Other service activities	254	245	52	499

Source: JRC analysis, based on Bureau van Dijk data. Figures based on 2020 balance sheets data. Data extracted in March 2022. In case a company has several Russian shareholders holding minority stakes, the sum of stakes for all Russian shareholders for that company is computed.

(*) *The figures in the table are the average stakes across companies in each sector. In a conservative approach, we take into account only stakes at the first level of ownership (direct stakes), disregarding higher-level stakes, i.e. shareholders of shareholders.*

1.2. *Belarusian investments in the EU*

Based on 2020 data, Belarusian individuals and entities control about 1 550 EU companies, and have potentially controlling stakes ([6]) in another 600 companies and minority stakes in 400 companies ([7]). Similarly to Russian investments, some companies have multiple Belarusian minority shareholders which together hold more than 50 % of the capital of the EU business. In 63,2 % of the EU companies under Belarusian control or influence, assets are held by a natural person, in 5,1 % by a company and in 0,4 % by a public authority/state (Table 4).

Table 4

Number of EU27 companies with Belarusian influence or control, detail by type of controlling entity

Type of controlling entity (GUO)	Number of companies	Share
One or more known individuals or families	1 687	63,18 %
Corporate companies	135	5,06 %
Public authorities, States, Governments	11	0,41 %
Bank	1	0,04 %
Mutual & Pension Fund/Nominee/Trust/Trustee	1	0,04 %
Financial company	1	0,04 %
Foundation/Research Institute	1	0,04 %
Not available	833	31,20 %

Source: JRC analysis, based on Bureau van Dijk data. Figures based on 2020 balance sheets data. Data extracted in March 2022. In case of Belarusian influence (not control), the EU company can be controlled by an entity from any other country. The missing cases ('not available') refer to EU companies with Belarusian influence that do not report any majority shareholder.

Assets held by the Belarusian government are mainly in Wholesale as detailed below in Table 5.

Table 5

Number of EU27 companies controlled by state or public authority from Belarus, detail by sector of controlled company

Sector of activity of the EU company	Number of companies	Total assets (million euro)
Wholesale trade of motor vehicle parts and accessories	1	1,49

([6]) This is the case of multiple Belarusian shareholders with an aggregated stake higher than 50 %, but where no one individually holds a stake above 50 %.

([7]) We observe an additional 100 companies with a reported non-controlling Belarusian shareholder, for which the amount of stake is not reported.

Wholesale on a fee or contract basis	1	N.A.
Agents involved in the sale of fuels, ores, metals and industrial chemicals	1	2,80
Wholesale of agricultural machinery, equipment and supplies	2	38,98
Wholesale of solid, liquid and gaseous fuels and related products	2	26,14
Wholesale of chemical products	1	4,23
Air transport	1	N.A.
Passenger air transport	1	0,22

Source: JRC analysis, based on Bureau van Dijk data. Figures based on 2020 balance sheets data. Data extracted in March 2022.

The sectors with the largest presence of Belarusian control are Wholesale, Professional Scientific and Technical activities, Transportation and storage, and Real Estate. The sectors with the largest presence of Belarusian influence are very similar: Wholesale, Real Estate, Professional Scientific and Technical activities, and Manufacturing (Table 6) .

Table 6

Number of EU27 companies with Belarusian influence or control. Detail by target sector, 2020

	Control	Influence		Total
Sector	Number of companies	Number of companies	Stake (*) %	Number of companies
Agriculture, forestry and fishing	7	10	48	17
Mining and quarrying	1	0	N.A.	1
Manufacturing	73	100	51	173
Electricity, gas, steam and air conditioning	1	3	53	4
Water supply; sewerage, waste management	4	4	32	8
Construction	107	76	54	183
Wholesale and retail trade	568	377	60	945
Transportation and storage	122	91	61	213
Accommodation and food service	45	32	46	77
Information and communication	97	74	55	171
Financial and insurance activities	48	26	51	74
Real estate activities	109	108	53	217
Professional, scientific and technical	141	116	47	257
Administrative and support services	73	41	55	114
Education	7	4	75	11
Human health and social work activities	5	7	32	12
Arts, entertainment and recreation	17	5	69	22

Other service activities	22	22	54	44

Source: JRC analysis, based on Bureau van Dijk data. Figures based on 2020 balance sheets data. Data extracted in March 2022. In case a company has several Belarusian shareholders holding minority stakes, the sum of stakes for all Belarusian shareholders for that company is computed.

(*) *The figures in the table are the average stakes across companies in each sector. In a conservative approach, we take into account only stakes at the first level of ownership (direct stakes), disregarding higher-level stakes, i.e. shareholders of shareholders.*

2. **Effect of restrictive measures (sanctions) to foreign direct investments from Russia and Belarus and due diligence of EU companies**

EU restrictive measures apply, inter alia, to any person inside or outside the territory of the Union who is a national of a Member State, to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State, and to any legal person, entity or body in respect of any business done in whole or in part within the Union.

EU restrictive measures can affect foreign direct investments from Russia and Belarus in several ways. They can take the form of individual listings, or of sectoral measures.

Certain Russian and Belarusian persons and entities are targeted by individual financial restrictions, which include an asset freeze and a prohibition to make funds or economic resources available, directly or indirectly, to those listed persons and entities.

Designated persons or entities are unable to use their funds (i.e. financial assets and benefits of every kind) and economic resources (assets of every kind) that are frozen and no funds or economic resources shall be made available to them. This means that EU citizens and companies must not make payments or supply them with goods or other assets. In effect, business transactions with designated persons or entities cannot legally be carried out unless the legislation exceptionally allows them.

The Commission takes the view that the asset freeze extends to the assets of any non-designated entity, which is owned or controlled by a designated person or entity, unless it can be proven that the assets concerned are in fact not owned or controlled by the designated person or entity. Similarly, funds or economic resources should not be made available to a non-designated entity owned or controlled by a designated person or entity, unless it can be proven that the funds or economic resources will in fact not reach the designated person ([8]). Interest and dividends are considered 'funds' that are to be frozen.

In addition, banks incorporated or constituted under the law of a Member State or doing business in the EU shall freeze payments received from any designated person or entity (subject to an asset freeze) which is listed in Annex I to Council Regulation (EU) 269/2014. This means that transfers originating from a designated person, or originating from a non-designated person but made through a designated bank ([9]), are not rejected nor the funds are returned to the sender; rather, those funds remain frozen in the EU bank. It is possible to request from the national competent authority for sanctions the release of those funds, for instance under the derogation foreseen in Council Regulation (EU) 269/2014 ([10]) concerning the payment by a designated person or entity due under a contract concluded before the date of designation.

The Union has also adopted sectoral restrictive measures. For example, certain Russian and Belarusian banks have been decoupled from specialised financial messaging services, notably SWIFT, which greatly hinders their possibility to engage in international payments. Restrictive measures have also curbed financial inflows from Russia and from Belarus to the EU, by prohibiting the acceptance of new deposits exceeding certain values from Russian and

([8]) https://ec.europa.eu/info/sites/default/files/200619-opinion-financial-sanctions_en.pdf

([9]) https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190704- opinion-freeze-of-funds_en.pdf

([10]) Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78, 17.3.2014, p. 6).

Belarusian nationals or residents and legal persons, entities or bodies established in Russia or in Belarus, the holding of accounts of Russian and of Belarusian clients by the EU Central Securities Depositories, as well as the selling of euro-denominated securities to Russian or Belarusian clients. Moreover, EU operators are prohibited from providing financing, including equity capital, to non-EU operators active in the energy sector in Russia. This may indirectly affect foreign direct investment in the EU depending on the specific financing arrangement envisaged.

Furthermore, the release of controlled technology (including knowledge or intangible items) to foreign persons is a kind of Intangible Technology Transfer also known as a 'deemed export'. Council Regulation (EU) No 833/2014 and Council Regulation (EC) No 765/2006 and their subsequent amendments prohibit to sell supply, transfer or export, direct or indirectly, certain goods and technology subject to the measures to any natural or legal person, entity or body in Russia and Belarus, or for use in Russia and Belarus respectively. The requirements for the control of technical assistance also extends the control to foreign nationals in the EU. Therefore, companies should restrict the access of Russian and Belarusian staff to such knowledge or technology if such knowledge and technology would be used in Russia or Belarus.

EU companies are prohibited from participating, knowingly and intentionally, in activities the object or effect of which is to circumvent the restrictions. In all situations, EU companies, and in particular those with stakeholders of Russian or Belarusian nationality should perform adequate due diligence on their business partners and the final destination of funds or economic resources. These procedures may include screening, risk assessment, multi-level based due diligence and ongoing monitoring.

3. Screening of foreign direct investments from Russia and Belarus on grounds of security or public order under the framework set out in Regulation (EU) 2019/452

Regulation (EU) 2019/452 ([11]) (the 'FDI Screening Regulation') covers foreign direct investments from third countries, i.e. those investments *'which establish or maintain lasting and direct links between investors from third countries including State entities, and undertakings carrying out an economic activity in a Member State'* ([12]).

Cases only involving investments by one or more entities established in the Union do not fall within the scope of the Regulation. Such transactions could fall under the scope of the national screening laws of the Member States, within the limits of the provisions of the Treaty on the Functioning of the European Union (TFEU) on the right of establishment and capital movements. In particular, the Treaty allows the Member States to maintain measures necessary on grounds of public policy or public security or measures based on overriding reasons in the public interest recognised in the case-law of the Court of Justice of the European Union. The right of Member States to adopt such measures restricting the free movement of capital is explained further in the next section. The status of being established in the European Union i.e. a European Union company for the purposes of the TFEU is based, under Article 54 TFEU, on the location of the registered office, central administration or principal place of business and as well as the legal order under which the company is formed, not on the nationality of its shareholders. Investments by such companies do not fall within the scope of the FDI Screening Regulation. The FDI Screening Regulation provides one exception to this rule: investments by EU entities may come within the scope when they fall under the anti-circumvention clause. Circumvention is not defined by the Regulation as such; however, its Recital (10) specifies that anti-circumvention measures 'should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country'. Thus, it is important to ascertain whether the investor is part of a scheme of circumvention set up with the objective result of avoiding the application of the Regulation. Some foreign investors for instance specifically state that the direct investor is a European holding company that they have set up for the purpose of the proposed transaction. Such an arrangement might be created for legitimate business reasons. However, even if evidence of a subjective intention to circumvent the Regulation is not available, the lack of economic activity of the investor company and the objective capability of the arrangements to avoid the rules laid down in the Regulation are sufficient to create the presumption that the arrangement is artificial. The most common example of circumvention in the sense of Recital (10) is the case where foreign investment into the Union is channelled through an EU-based pure 'shell' or 'letterbox company', which has neither directly nor indirectly a genuine economic activity but serves

([11]) 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 (OJ L 79I , 21.3.2019, p. 1).

([12]) See Recital 9 of the FDI Screening Regulation.

solely the purpose of being the legal vehicle ([13]) for the investment. The existence of circumvention must be established on a case-by-case-basis, having regard to the specific circumstances of each case and on the basis of relevant evidence.

The FDI Screening Regulation applies to all sectors of the economy and is not subject to any thresholds. The need to screen a transaction is often independent from the value of the transaction itself. The Regulation empowers Member States to review investments within its scope on the grounds of security or public order, and to take measures to address specific risks.

The terms 'security' and 'public order' are not defined in the Regulation. Article 4 of the Regulation however specifies the factors for consideration when determining whether an FDI is likely to affect security and public order. These factors include the potential effects of the FDI on critical infrastructure, critical technologies, supply of critical inputs, access to sensitive information and the freedom and pluralism of the media. Aspects related to the investor are also relevant for this assessment, such as whether the foreign investor is controlled by a government. For example, in determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may take into account whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

The review and, when required, the adoption of measures prohibiting or conditioning an investment within the scope of the Regulation on grounds of security of public order is the ultimate responsibility of Member States. The Commission may address opinions recommending specific actions to the Member State where the investment takes place, in particular when there is a risk that the investment affects security or public order in more than one Member State or projects and programmes of Union interest.

In the current circumstances, there is a significantly heightened risk that FDI by Russian and Belarusian investors, in particular by government controlled entities may pose a threat to security and public order because the Russian and Belarusian government may have a stronger incentive to interfere with critical activities in the EU and to use their ability to control or direct Russian and Belarusian investors in the EU for that purpose. Therefore, such FDI should be systematically checked and scrutinized very closely in order to identify any possible threats.

While screening by Member States is usually undertaken before the completion of the FDI transaction, the FDI Screening Regulation allows Member States to maintain mechanisms which provide for the screening of an FDI transaction *after its completion*. If a Member State launches the formal screening of an FDI, it is subject to the cooperation mechanism irrespective of its planned or completed status. Furthermore, the cooperation mechanism may be initiated within 15 months after the investment has been completed when an investment is not subject to screening at national level ([14]), This may occur when the Member State does not have a screening mechanism or when the Member State maintains a screening mechanism but the specific FDI transaction was not submitted by the parties for ex-ante screening. This can lead to the adoption of measures by the Member State where the investment has taken place, including the necessary mitigating measures.

4. Possible actions to restrict investments within the limits provided for by the rules on free movement of capital and establishment

Article 63 TFEU provides for the freedom of capital movements not only within the EU but also between Member States and third countries. Similarly, Article 49 TFEU protects the freedom of establishment of nationals of a Member State in the territory of another Member State. Both provisions prohibit all restrictions on the movement of capital

([13]) To address the issue of shells in the EU, the Commission put forward a proposal on 22 December 2021 for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final. Member States may draw inspiration from the transparency standards the proposal establishes around the use of shell entities, such as income, staff and premises.

([14]) In practice, a foreign investment completed now (March 2022) could be subject to *ex post* comments by Member States or opinions by the Commission until June 2023 (15 months after completion of the investment).

unless they pursue legitimate public policy objectives. Such objectives are defined in the Treaty or in the case-law of the Court of Justice of the European Union as overriding reasons in the public interest. Such objectives should not be purely economic ([15]).

Member States may screen investments that do not fall within the scope of application of Regulation (EU) 2019/452, i. e. portfolio investments or intra-EU direct investments such as those ultimately controlled by Russian or Belarusian entities, provided such screening is done in compliance with Union law and in particular the Treaty provisions on free movement of capital and establishment. Portfolio investments, which do not confer the investor effective influence over management and control of a company might also be of relevance in terms of public policy or public security, depending on the circumstances.

Member States can rely on grounds of public policy and public security (set out in Article 65(1)(b) TFEU) to restrict investments only if there is a genuine and sufficiently serious threat to a fundamental interest of society ([16]) and if less restrictive measures are insufficient to address such threat.

The Court of Justice clarified that the concept of public security under Article 65(1)(b) TFEU covers both the State's internal and external security ([17]). Restrictions to capital movements may also be taken to address threats to financial stability ([18]).

In the analysis of justification and proportionality, restrictions on the movement of capital to and from third countries may be based on different considerations compared to restrictions to intra-EU capital movements ([19]). Consequently, under the Treaty, additional reasons justifying a restriction may be acceptable in the case of restrictions on transaction involving third country.

5. Compliance with anti-money laundering rules

Member States are urged to ensure full compliance with the requirements of the EU Anti-Money Laundering Directive (AMLD) ([20]) to prevent the misuse of the EU financial system, including in relation to customer due diligence and international cooperation. Moreover, an effective transparency of beneficial owners of legal persons and legal arrangements, as provided by the AMLD, is required to ensure effective application of sanctions.

In this context, this becomes even more crucial to improve the detection of suspicious transactions and activities, and to close loopholes used by criminals to launder illicit proceeds through the financial system. This is in line with the AML package adopted by the Commission in July 2021.

6. Cooperation between Member States' national competent authorities for sanctions, screening authorities and promotional banks and institutions as well as relevant international financial institutions

Member States' screening authorities and national promotional banks and institutions (NPBIs), as well as international financial institutions (IFIs) of which Member States are shareholders should exchange information and maintain close cooperation (via the ministries or bodies those institutions depend on and/or their governance bodies) in order to identify FDI, in particular from Russia and Belarus, that could affect security or public order in that Member State. Member States screening authorities are invited to raise awareness of the factors that may be taken into consideration to determine whether an FDI is likely to affect security or public order.

([15]) Case C-463/00, *Commission v Spain*, ECLI:EU:C:2003:272, para. 35

([16]) See Cases C-54/99, *Église de Scientologie*, ECLI:EU:C:2000:124, para. 17 and C-503/99, *Commission v Belgium*, ECLI:EU:C:2002:328, para. 47, C-463/00, *Commission v Spain*, ECLI:EU:C:2003:272, para. 72.

([17]) Case T-315/01, *Kadi v Council and Commission*, ECLI:EU:T:2005:332, para 110.

([18]) See the Commission Statement on the capital controls imposed by the Greek authorities of 29 June 2015, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_5271.

([19]) Case C-446/04, *Test claimants in FII Group litigation*, ECLI:EU:C:2006:774, para. 171.

([20]) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

Ensuring close cooperation between Member States' national competent authorities for sanctions, screening authorities, NPBIs and IFIs of which Member States are shareholders, including the European Investment Bank and the European Bank for Reconstruction and Development, will contribute to protect the Union's security and public order and facilitate full compliance with the sanctions in activities supported by the aforementioned public investment entities.