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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}

INTRODUCTION

This Report is the first Annual Report by the European Commission regarding the application of the EU Foreign Direct Investment (FDI) Screening Regulation (the "FDI Screening Regulation", or the "Regulation").

Prior to the entry into force of the FDI Screening Regulation on 11 October 2020, there was no EU-wide formalised cooperation among Member States and the European Commission on these matters. The European Commission had no role in the screening of FDI into the EU.

The past years have seen a clear change in investor profiles and investment patterns, i.e. increasingly non-OECD investors, occasionally with government backing or direction, whose motivation for a particular investment might not always be exclusively commercial[1]. The FDI Screening Regulation - and individual EU Member State screening legislation and mechanisms - reflect a strong focus on protecting security or public order, and, a strong awareness of the criticality of certain investment targets, e.g. critical infrastructure and inputs, including certain technologies, certain sectors such as the health sector, and the risks that investments by certain investors may pose.

This Report provides transparency around the operation of FDI screening in the EU, and developments in national screening mechanisms. It contributes to the accountability of the Union in an area where, given the security interests at stake, transparency regarding individual transactions is neither possible nor appropriate.

This first Annual Report, based on the reports by the 27 Member States and other sources, confirms the clear value-added of the Regulation and the cooperation mechanism.

The Report consists of four Chapters:

- Chapter 1 on figures and trends for FDI into the EU;
- Chapter 2 on legislative developments in Member States;
- Chapter 3 on screening activities by Member States;
- Chapter 4 on the functioning of the EU cooperation on FDI screening.

This Annual Report is adopted simultaneously with the Annual Report on Dual Use Export Controls. Both FDI Screening and Export Controls are important tools for strategic trade and investment controls in order to ensure security in the European Union.

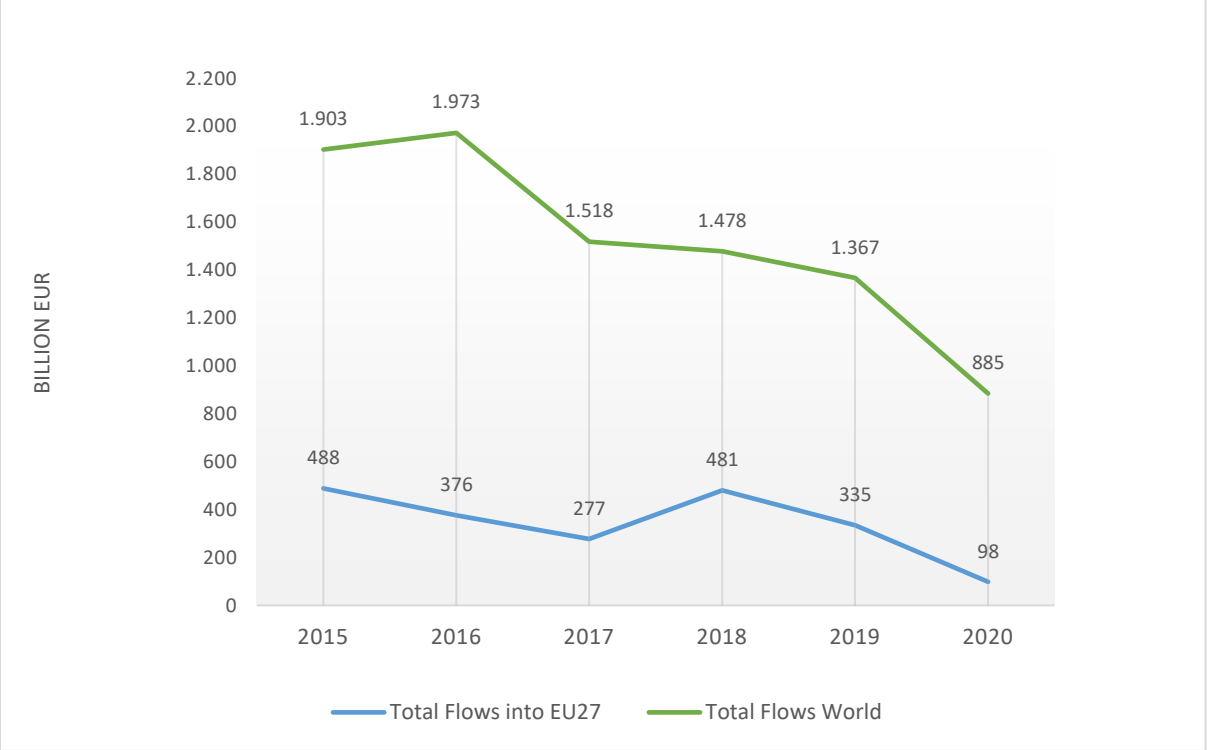
[1] For this, see e.g. Welcoming Foreign Direct Investment while Protecting Essential Interests, COM(2017) 494 final – 13 September 2017.

CHAPTER 1 - FOREIGN DIRECT INVESTMENT INTO THE EUROPEAN UNION – TRENDS AND FIGURES[2]

The particular characteristics of 2020, and their impact on FDI, including for the European Union, are best understood when placed within a broader time-frame[3]. This allows a contrast against both the pre-COVID-19 pandemic environment and developments, as well as the indications, of some rebound in economic activity globally for the first quarter of 2021, including FDI transactions.

In 2020, as shown in *Figure 1* below, global FDI flows fell sharply to €885bn, meaning 35% less than in 2019, which was already significantly lower than the 2018 levels[4]. In the EU, the COVID-19 pandemic produced even harsher effects when compared to the world average, with inward FDI falling by 71% to €98bn in 2020, down from €335bn in 2019. In 2020 inward FDI accounted for a mere 0.7% of EU27 GDP, sharply down from 3.6% in 2018[5].

Figure 1: World and EU FDI flow



Source: OECD data, extracted on 20 May 2021.

The word "uneven" captures developments well. The negative impact on FDI activity has been uneven depending on the origin of the foreign investor, the host EU Member State, and the sectors

[2] This Chapter covers the period from 1 January 2019 through 31 March 2021

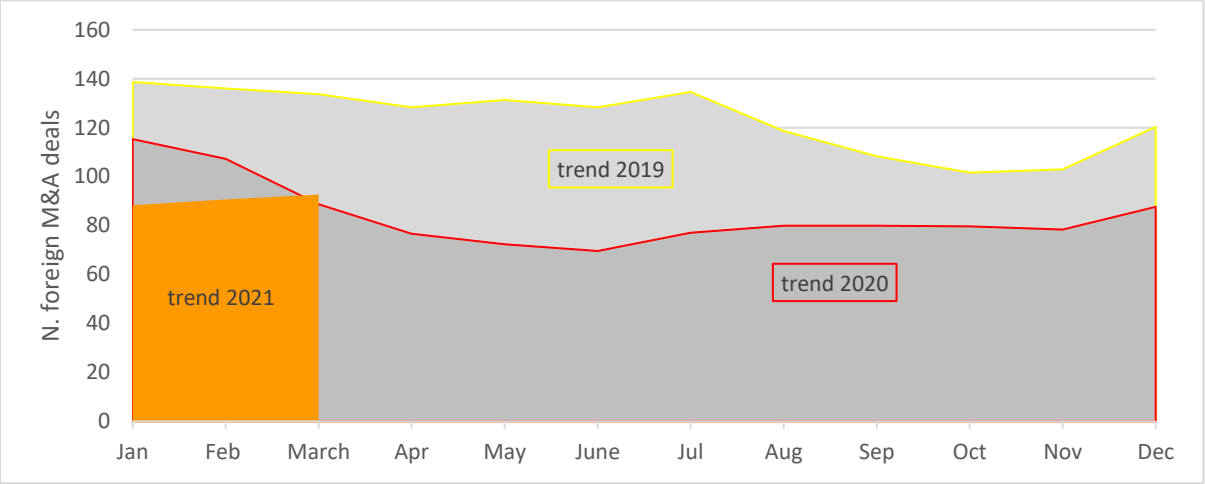
[3] For FDI flows from National Account figures (*Figure 1*) the time window 2015-2020 allows to see the effect of COVID-19 within an already decreasing trend in flows. The rest of the Chapter, based on the number of deals, covers the time-period of January 2019 through first quarter of 2021.

[4] Global FDI flows corresponds to the inflows FDI value reported by the OECD.

[5] Source: OECD, data extracted in May 2021.

at issue (see *Figures 2* and *3* and *Table 1* below, which zoom in on mergers and acquisitions deals in the EU[6]). In 2020, 34% fewer foreign[7] M&A deals were announced as compared to 2019. Deal-making recovered slowly by end-2020 and in the first quarter of 2021 (+4.5% with respect to the first quarter of 2020), but remained 30% below the 2019 level (*Figure 2*).

Figure 2: General trends of foreign M&A deals into the EU from January 2019 to March 2021



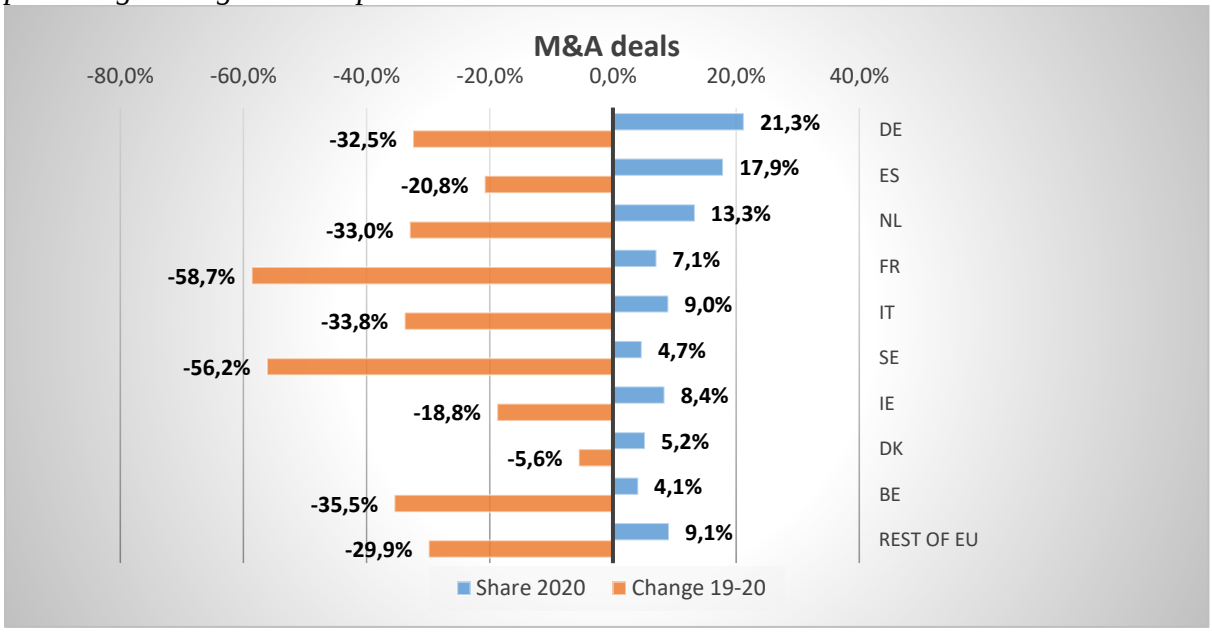
Source: JRC calculations on Bureau van Dijk data extracted on 6 May 2021. Trend refers to 3-months rolling average. Foreign M&A deals indicate deals where the investor is ultimately owned by a non-EU entity.

All EU Member States saw a drop in the number of M&A transactions (*Figure 3*), with France and Sweden particularly affected. Germany, with a more contained drop in the number of M&A transactions, witnessed reduced Chinese and US investments, while in Spain and the Netherlands deals from EFTA countries and from Korea and Japan lost ground in 2020 as compared to 2019.

6 The terms *deals* and *transaction* are used interchangeably when referring to mergers and acquisitions (henceforth M&A).

7 The term *foreign*, when associated to M&A deals or to greenfield projects, refers to transactions made by non-EU investors in Europe. An Investor is classified as non-EU when it is majority owned by a non-EU entity (person or company). In the absence of a majority ownership, the location of headquarters will define the nationality of the investor.

Figure 3: Number of foreign M&A deals by target EU country: share over the total in 2020 and percentage change with respect to 2019.



Source: JRC calculations on Bureau van Dijk data extracted on 6 May 2021.

A large share of foreign investments in Europe in 2020 originated in the United States (US) and Canada, with nearly 35% of M&A transactions in the EU, followed by the United Kingdom (UK) with 30.5%[8]. EFTA countries follow next with 12.1% (with 7.5% from Switzerland). China, with 2.5% (down from 4% in 2019), was the fourth foreign investor in the EU in 2020 (*Table 1*)[9].

Table 1. Foreign M&A transactions in 2020 by nationality of the investor's ultimate owner. Percentage change in 2020 as compared to 2019, and share over total in 2020.

	Percentage change 2020 over 2019	**Share over total (in %), 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

[8] The figure for US and Canada follows the country grouping used in the analysis accompanying the FDI screening Regulation (see the SWD(2019) 108 final). For 2020 the US and the UK were the largest investors with 30.5% each of all non-EU investments in the EU (for the US down from 31% in 2019). In 2021 Q1, the US share reaches 37.1%.

[9] Chinese figures include Hong Kong and Macao.

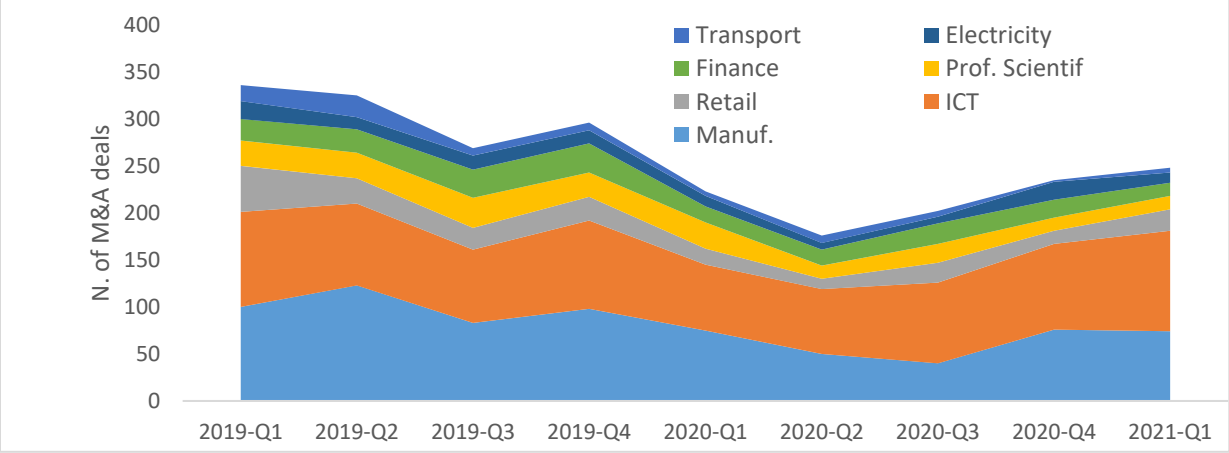
Central & S. America	-37	1.7
India	-44	1.4
AUS and NZ	-50	1.2
Gulf Coop Countries	0	1.2
Turkey and other ME	-50	0.9
Other Asia	-73	0.4
Russian Federation	-83	0.1
Rest of the World	-54	0.6

Source: JRC calculations on Bureau van Dijk data extracted on 6 May 2021[10]

While accounting for a relatively small share of deals, Chinese outward investments into Europe have shown the sharpest reduction starting from November 2019, i.e. two months prior to the lock-down in Wuhan (China) at end-January 2020, and this regardless of the early re-opening of the Chinese economy in mid-2020.

It is noticeable that economic sectors in Europe were not equally impacted by COVID-19 (*Figure 4*). Some sectors such as medical supplies, pharma manufacturing, and e-commerce saw unprecedented surges in deal-making, while others such as tourism, leisure, aviation and marine transportation were adversely affected. The hardest-hit sector was accommodation with a drop of more than 70% in the number of foreign deals.

Figure 4: Foreign M&A deals by target EU sector, 2019-Q1 – 2021-Q1



Source: JRC calculations on Bureau van Dijk data extracted on 6 May 2021

[10] Acronyms: CAN (Canada), EFTA (Switzerland, Norway, Iceland, Liechtenstein), AUS (Australia), NZ (New Zealand), ME (Middle East). The main Offshores by number of deals or greenfields are (in alphabetical order) Bermuda, British Virgins Islands, Cayman Islands, Mauritius and the United Kingdom Channel Islands. For a list of Offshore Financial Centres, see e.g. Commission Staff Working Document - Following up on the Commission Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests" – SWD(2019) 108 final – 13 March 2019. Developed Asia includes: Japan, Korea, Singapore and Taiwan; Gulf Cooperation Countries include: United Arab Emirates, Qatar, Saudi Arabia, Kuwait, Oman, and Bahrain. Other ME includes Israel and Lebanon.

Representing a quarter of all foreign M&A transactions, manufacturing suffered a 40% drop in 2020 deal numbers as compared to 2019, and continued to show a cloudy outlook in the first quarter of 2021 with a year-on-year performance rounding -1.3%.

Information and Communication Technologies (ICT) is the sector least affected by the pandemic and other challenges, with a modest drop of 12% in 2020 as compared to 2019. In 2020 ICT totalled 35% of all M&A deals into the EU, surpassing manufacturing for the first time ever. ICT also drives the recovery in the first quarter of 2021, with a year-on-year 53% increase in M&A transactions, which brings the number of deals in this sector to its pre-COVID level.

Further details

Further details on the above numbers, impact and recovery per Member State and sector, greenfield investment, origin of foreign investors in the EU, and, foreign state participation in foreign investors in the EU are provided in the accompanying Commission Staff Working Document, Section 2.

CHAPTER 2 – LEGISLATIVE DEVELOPMENTS IN MEMBER STATES SINCE 2019[11]

The journey so far

The adoption of the EU FDI Screening Regulation on 19 March 2019 and its full implementation from 11 October 2020 opened a new era.

When tabling the European Commission proposal in 2017, the number of Member States with a national FDI screening mechanism, whether sector-specific or of broader scope, stood at 11.[12] As of 1 July 2021, the figure stands at 18 (*see Map hereunder*). In addition to the increase in Member States with a screening mechanism, there has also been an adjustment and broadening of the scope of existing mechanisms with Member State screening mechanisms increasingly reflecting, sometimes verbatim, key elements of the Regulation.[13]

The EU FDI Screening Regulation and EU Member State FDI screening mechanisms

While the Regulation deliberately does not set out, in every detail, what should be the form and content of EU Member State FDI screening mechanisms, it does set out certain key elements to be reflected in any national FDI screening mechanism.

In particular, Article 3 of the FDI Screening Regulation sets out an obligation for any EU Member State with an FDI screening mechanism to ensure that such mechanisms have defined timeframes; are transparent and non-discriminatory; allow for taking into consideration any comments by other Member States and the opinion of the European Commission; allow relevant parties to seek

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11 This Chapter covers the time-period from 1 January 2019 through 31 July 2021.

12 Austria, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, Poland, Portugal, Spain, not including the United Kingdom.

13 For three illustrative examples, see the recently adopted Danish screening law and related mechanism Act on screening of certain foreign direct investments, etc. in Denmark (The Investment Screening Act), the Italian law and related mechanism, e.g. Italian Governmental Decrees No. 179 and No. 180, and, the Lithuanian law and related mechanism: The Law On The Protection Of Objects Of Importance To Ensuring National Security, No. IX-1132.

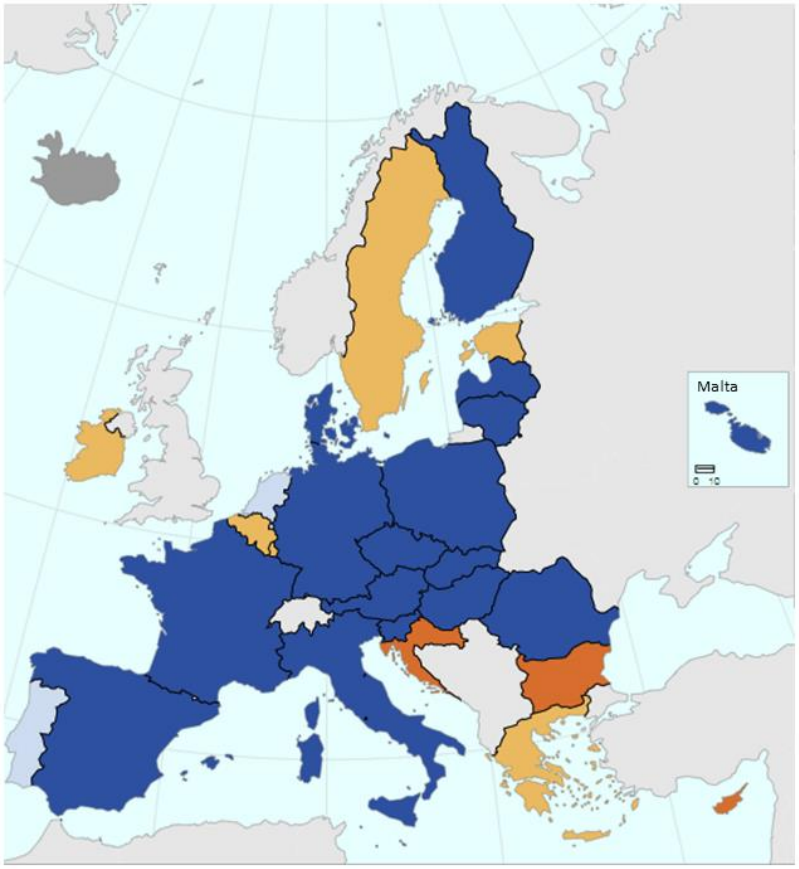
recourse against an adverse decision by an FDI screening authority; and maintain measures to prevent circumvention of FDI screening mechanisms and related decisions.

The European Commission has called on all Member States to have a national screening mechanism in place, most recently in its Communication on the Trade Policy Review[14]:

"In the security field, under the FDI Screening Regulation, the Commission restates its call to all Member States to set up and enforce a fully fledged FDI screening mechanism 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. The Commission will continue implementing the cooperation mechanism with Member States' authorities to protect security and public order from risky foreign direct investments and consider enhancing the cooperation mechanism established by the FDI Screening Regulation".

[14] Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final –18 February 2021.

MS with screening mechanism/legislative activities
As of 1 August 2021



Administrative boundaries: © EuroGeographics © UN-FAO © Turkstat
Cartography: Eurostat - IMAGE, 09/2021

0 200 400 600 800 km

EU MS with a screening mechanism
EU MS with a screening mechanism in the process of updating the existing mechanism
EU MS without a screening mechanism considering, planning or in the process of adopting a mechanism
EU MS without a screening mechanism, and without any legislative developments aiming at setting up a mechanism

Member States' notification to DG TRADE

It remains the European Commission's strong expectation that all 27 EU Member States will put national FDI screening mechanisms in place. A national screening mechanism in all 27 Member States serves to safeguard all individual Member States against potentially risky foreign investments from third countries. It will also provide the necessary links for the cooperation mechanism under the FDI Screening Regulation, ensuring that all 27 Member States and the Commission screen relevant FDI, keeping in mind the collective security of the Member States and Union as well as the security of single market and the very high level of economic integration which it allows.

In addition to their respective national screening mechanisms of a more general nature, five Member States also adopted temporary measures on FDI linked to COVID-19 vulnerabilities and depressed EU asset prices, i.e. France, Italy, Hungary, Poland, and Slovenia[15].

Developments in EU Member States - FDI screening mechanisms

During the reporting period 24 out of 27 EU Member States either:

- adopted a new national FDI screening mechanism;
- amended an existing mechanism;
- or initiated a consultative or legislative process expected to result in the adoption of a new mechanism or amendments to an existing one.

Member States having adopted a new national FDI screening mechanism	Czechia, Denmark, Malta, Slovenia, the Slovak Republic
Member States having adopted amendments to an existing mechanism	Austria, France, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Spain
Member States having initiated a consultative or legislative process expected to result in the amendments to an existing one	the Netherlands, Portugal
Member States having initiated a consultative or legislative process expected to result in the adoption of a new mechanism	Belgium, Estonia, Greece, Ireland, Luxemburg, Sweden
Member States with no publicly reported initiative underway	Bulgaria, Croatia, Cyprus

Article 3.7 of the FDI Screening Regulation sets out an obligation for Member States to notify to the European Commission their screening mechanisms and any amendments to same. Article 3.8 sets out an obligation for the European Commission to make a list of Member States' screening mechanisms publicly available and to update the list, as necessary[16]. Despite a number of important similarities between national screening mechanisms, they also show significant degrees of variation in terms of what constitutes formal screening of investment, applicable timelines, coverage, notification requirements and other elements. As explained in further detail below (Chapter 4.3), the Commission is launching a study to examine such variations between relevant Member State legislation and their policy consequences on the effectiveness and efficiency of the EU cooperative mechanism. The Staff Working Document accompanying this report provides a

[15] On 25 March 2020, as part of measures taken in connection with the Covid-19 emergency, the European Commission provided guidance to Member States on how to use FDI screening in times of public health crisis and economic vulnerability in the EU. The Commission Communication is available here: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf

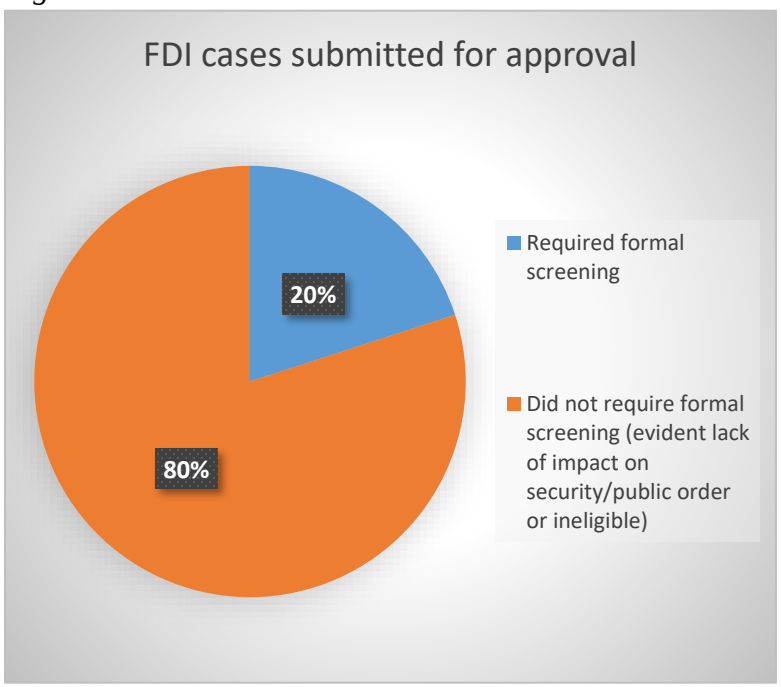
[16] The updated list of Member States' screening mechanisms is available on the Commission's website, here: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

succinct description of any legislative developments in Member States regarding the applicable national legislations.

CHAPTER 3 – MEMBER STATE SCREENING ACTIVITIES IN 2020[17]

While the FDI Screening Regulation establishes a cooperation mechanism for FDI screening between the Commission and EU Member States, the decision on which investments to screen, approve, condition or block is taken by the screening Member States under their respective rules and screening mechanism. This Chapter thus relies on, and aggregates, data provided by Member States on cases screened under their own legislation and screening mechanisms during the whole year of 2020.[18] For 2020, in reporting to the Commission pursuant to Article 5 of the Regulation, Member States have reported to have reviewed 1.793 investment dossiers upon request for approval. These dossiers relate to FDI into seven of the reporting Member States.

Figure 5



Source: Member State reporting

Of these investment dossiers, about 80% were not formally screened, either because of an evident lack of impact on security or public order, or because they fell outside the scope of the national screening mechanism (i.e. ineligible) (see *Figure 5*).

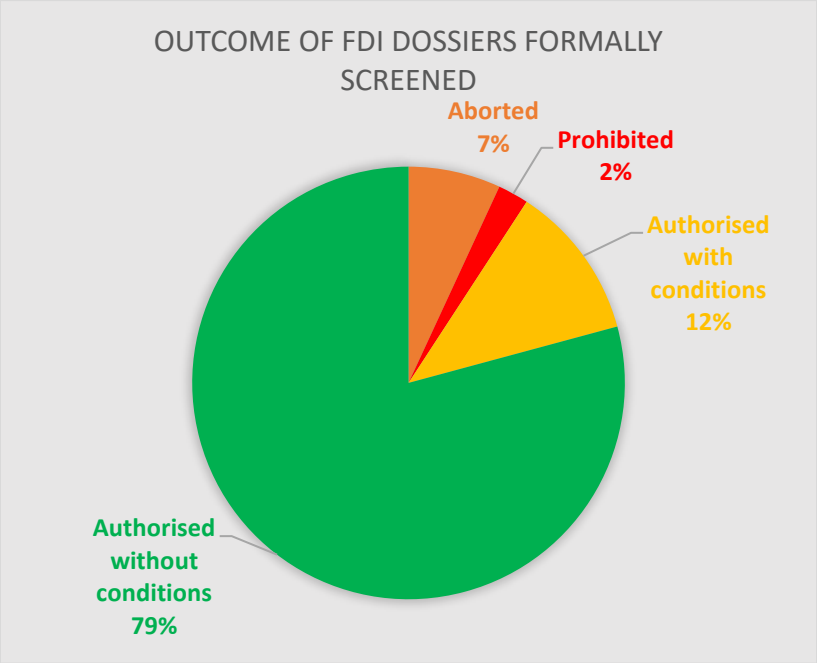
The remainder of the cases (20%) underwent formal screening in the reporting Member States. *Figure 6* offers a breakdown of the outcome of the assessment of those cases formally screened.[19]

17 This Chapter covers the time-period from 1 January through 31 December 2020.

18 Four Member States did not report any cases under their screening legislation and one Member State reported one general figure of cases formally screened but no disaggregated data due to national legal constraints.

19 Note: from the total reported number of cases formally screened (362 = 20% of 1.793), a number of cases were subtracted to produce the data shown in *Figure 6*. Indeed, those (subtracted) cases were reported by one Member State, which did not indicate, due to national legal constraints, what the outcome was of these cases.

Figure 6



Source: Member State reporting

Figure 6 shows that 91% of the dossiers formally screened were approved, the large majority without conditions (79%), some with conditions (12%). A very small portion (2%) were prohibited, and 7% were aborted by the parties for unknown reasons, hence not requiring any decision by the national authorities.

Overall, these numbers clearly illustrate that, for 2020:

- Member States applied their respective national FDI screening laws, meant to address potential risks to security and public order;
- a very high share of dossiers were speedily approved (80%);
- of the remaining 20% of cases, which were formally screened, again a very high share were approved without conditions (79%) and a small share (12%) were approved with conditions;
- prohibitions remained a small exception (2%) among formally screened dossiers;
- Member States screening foreign investments, and the European Union at large, remain very open to FDI, intervening only in a very small proportion of cases to address deals likely to affect security or public order.

CHAPTER 4 – EU COOPERATION ON FDI SCREENING[20]

1. Notifications and other actions taken under the FDI Screening Regulation

From 11 October 2020 through 30 June 2021 a total of 265 notifications were submitted by 11 Member States pursuant to Article 6 of the FDI Screening Regulation. More than 90% of these cases were notified by five Member States, namely Austria, France, Germany, Italy and Spain. As will appear from the detail set out below, the transactions notified vary greatly in terms of sector of the investment target, the origin of the ultimate investor, and the value of the transaction.

[20] This Chapter covers the time-period from 11 October 2020 through 30 June 2021.

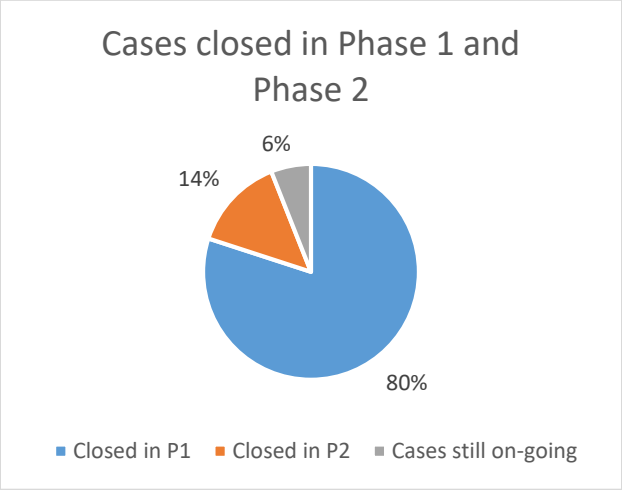
The Regulation foresees that assessment of FDI transactions is undertaken under two possible phases. All notified transactions are assessed under Phase 1, with only a limited number of transactions proceeding to Phase 2[21]. Phase 2 implies a more detailed assessment of cases that could possibly affect security or public order in more than one Member State, or create risks to projects or programmes of Union interest.

The three sectors with the highest number of transactions were Manufacturing, ICT, and, Wholesale and Retail[22].

Looking at the transactions' value, the majority of the transactions had a value within the range of €10-100ml, with transactions in the ICT sector representing the highest deal value, and transactions in the sector of "Other service activities" representing the lowest value range[23].

The transactions notified show a broad range in terms of value, with the lowest deal-value indicated at €1.200, and the highest approximately €34bn.

Figure 7



Source: Member State notifications

Of the 265 cases notified, 80% of the cases (212) were closed by the Commission in Phase 1, with the remaining 14% cases (36) proceeding to Phase 2 with additional information being requested from the notifying Member State. 6% of the cases were still ongoing on the cut-off date.[24]

Additional information requested by the Commission when opening Phase 2 varies significantly, depending on the specific transaction and the detail and quality of the information supporting the notification[25].

The information requested 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. This information is requested in order to better assess the criticality of the target or the potential threats posed by the investor.

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21 For an overview and explanation of the two Phases and applicable timelines, please refer to Section 1 of the accompanying Staff Working Document.

22 Categorised under the NACE codes C, J and G respectively.

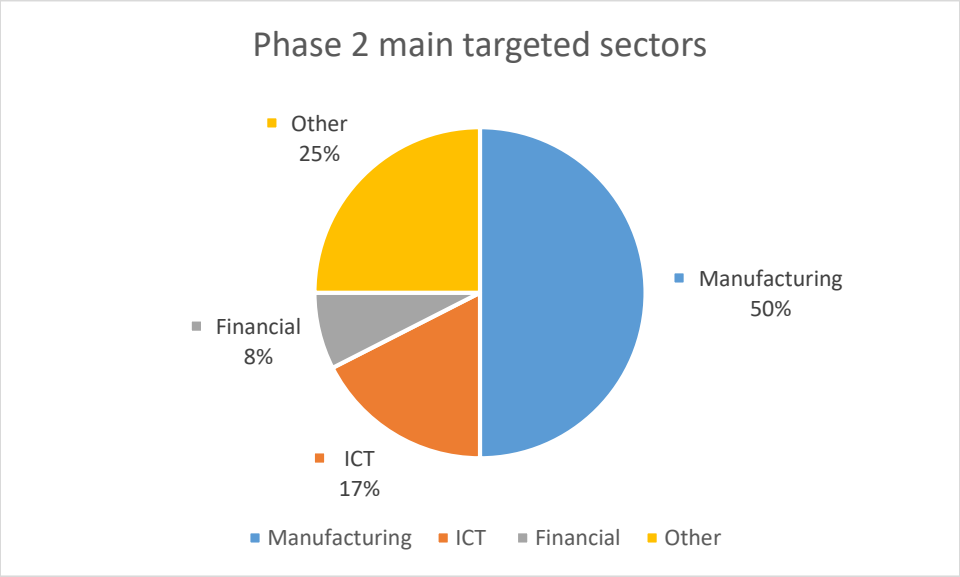
23 The value, where available, relates to the target company which may be an EU-based subsidiary of a larger corporate target.

24 As of 1 July 2021, of the 265 cases notified, 17 were still ongoing.

25 The notification form for information from an investor for purposes of a notification pursuant to Article 6 of the Regulation, and the updated Frequently Asked Questions document, serve to ensure some degree of uniformity and minimum level of information about the investor and the investment target provided in notifications under the Regulation. Both documents are available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=2006

The main sectors at issue in Phase 2 cases were Manufacturing, ICT, and, Financial service activities. Manufacturing and ICT accounted for 67 % of all Phase 2 cases.

Figure 8: Phase 2 main targeted sectors

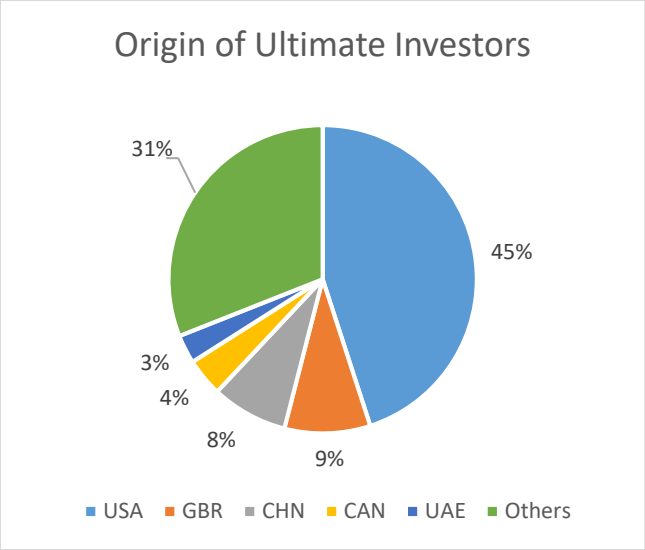


Source: Member State notifications

Six Member States accounted for the 36 Phase 2 cases. For all Phase 2 cases, the average duration from the date the Commission reserved the right to issue an opinion to the date it received the additional information requested from a notifying Member State has been 31 calendar days, with a range from 2 to 101 calendar days.

As for the origin of the ultimate investor, in the 265 cases notified, the five main countries of origin were the US, the UK, China, Canada and the United Arab Emirates.

Figure 9



Source: Member State notifications

Of the 265 cases notified, 29% constituted multi-jurisdiction FDI transactions because they concerned several Member States[26]. The main sectors that were the subject of such notifications were Manufacturing, ICT, and, Wholesale and Retail.

In addition to the 265 cases notified pursuant to Article 6 of the Regulation, the Commission has also made use of Article 7 of the Regulation.

As for the issuance of Commission opinions pursuant to either Article 6, 7 or 8 of the Regulation, such opinions remain confidential pursuant to Article 10 of the Regulation.

Opinions have been issued in less than 3 % of all cases notified and are issued only when and if required by the circumstances of a case, more specifically the risk profile presented by the investor and the criticality of an investment target. When issued, any recommended mitigating measures are proportionate and specific to the risks and criticality identified.

Commission opinions may also consist of sharing relevant information with a screening Member State, and may also suggest potential mitigating measures to address identified risks.

It will ultimately be for the screening Member State to decide on the transaction being screened, including in the light of any Commission opinion.

The data above allows for a number of preliminary conclusions to be drawn.

First and foremost, the cooperation mechanism is functioning well with Member States submitting notifications pursuant to the Regulation. Of the 265 notifications received, the vast majority (80%) were closed in Phase 1, i.e. very quickly, with only 14% of the cases proceeding to Phase 2, and a much lower number of cases resulting in a Commission opinion.

Second, while most cases are assessed rapidly in Phase 1, within the prescribed 15 calendar days, the duration of cases entering Phase 2 shows significant variation given the time needed by Member States to provide answers to a Commission request for additional information, often depending on the investor for the requested information.

Third, the main sectors (manufacturing, ICT, and wholesale and retail) at issue and origin of the ultimate investor (the US, UK, China, Canada and United Arab Emirates) involved in cases

[26] "Multi-jurisdiction FDI transactions" refers in this context to FDI transactions where the investment target is a corporate group with a presence in more than one Member States (and possibly also third countries), either by way of subsidiaries in more than one Member State, or by the target company providing goods or services in more than one Member State. Depending on the circumstances, and also the particularities of the screening mechanism of the relevant Member States such deals are notified by more than one Member State, albeit rarely in a coordinated and synchronised manner.

notified under the Regulation, largely reflects the findings in Chapter 1 and Section 2 of the accompanying Staff Working Document regarding main sectors and origin of the ultimate investor.

Fourth, a significant number of cases notified by Member States involved one or more of the factors for consideration listed in Article 4 of the Regulation, including but not only critical infrastructure, technology and dual use items, and access to sensitive information, as well as possible government ownership or control of, or influence over, the foreign investor. The cases notified have also included a number of health-related investments. i.e. investments into a sector warranting careful scrutiny in light of the current pandemic.

2. Observations by EU Member States on the value and functioning of the FDI Screening Regulation

For this first Annual Report, Member States were invited to offer their views on three subjects: a) the value-added of the FDI Screening Regulation and the cooperation mechanism, b) any significant procedural issues encountered, and, c) possible ways of addressing any such issues. The quotes set out below are quotes from a range of Member States, some with – and some without – a national screening mechanism.

Value of the FDI Screening Regulation and the cooperation mechanism

All Member States uniformly pointed to the Regulation and the cooperation mechanism as a very valuable tool for gaining a comprehensive overview of FDI into the EU, including particular investment targets and investor profiles.

> *"The cooperation mechanism is a very useful instrument as it challenges Member States (MS) to consider the implications for itself of investment operations in other MS, which has the effect of increasing the awareness of the implications for the other MS of the FDI operations happening on its own backyard. As such the added value should not be, in our view, measured quantitatively in the short term, but qualitatively in the long run through better considered and prepared policy and decision-making".*

More specifically, several Member States have pointed to the option of asking questions and offering comments to a screening Member State as a positive feature of the Regulation. Several Member States also highlighted the benefits of the formal and informal cooperation, including the Expert Group composed of relevant Member States and Commission officials and established under the Regulation, which allows for an exchange of views and best practices among Member States.

As noted by several Member States, the Regulation and the cooperation mechanism is providing a valuable learning experience, including as regards the approaches and tools deployed by other Member States for especially critical sectors. This has been directly applicable and of significant importance for several Member States when devising or updating their own screening legislation, including any sectoral focus of that legislation.

> *"[…] as multinational companies grow and spread, FDI screening mechanisms are becoming more dependent on the reporting from other States with a similar regulation. The coordination mechanism has become an efficient procedure to react to FDI concerns and to issue opinions in this regard".*

One Member State emphasised that notifications under the FDI Screening Regulation can provide "awareness" of transactions that may not have been notified under a given national mechanism, but rightly should have been, or, which may prompt "*ex officio*" action on the part of a screening authority. Another Member State noted that the exchange of information allows Member States to detect potential risks from an FDI transaction at an earlier stage, while another Member State noted that for larger or wider transactions with implications in several Member States, the cooperation mechanism "supported the final decision-making process and a better common and coordinated response".

> *"The information about FDIs undergoing screening in other Member States have contributed significantly to the design of our own analytical capabilities and deepened and broadened our situational awareness with the very beneficial international context".*

> *"The cooperation mechanism facilitates discussions and exchange among Member States on horizontal topics of FDI screenings, such as semiconductors".*

Significant procedural issues encountered

One, more general, issue raised by a number of Member States is the impact of the renewed attention to FDI screening on staff levels. Several pointed to resource constraints, especially for smaller Member States and screening authorities, also given the complex multi-jurisdiction transactions notified under the FDI Screening Regulation, as well as the very tight deadlines set therein. Other Member States pointed to a perceived inconsistency of what is notified under the FDI Screening Regulation, suggesting that too many FDI transactions are notified, including FDI transactions with no relevance for, or impact on, other EU Member States, thereby tying up resources.

> *"To limit the number of notifications within the cooperation mechanism that have no cross-border impact, it may be reasonable to discuss a common set of criteria – which lead if met – to the decision to not notify that specific FDI screening case. This would not only reduce the overall number of notifications but free up additional resources to focus on critical FDI's".*

Another issue raised by several Member States is timelines. Several have noted that the timelines established under the FDI Screening Regulation are too short, including to assess complex FDI transactions properly and ask questions or make comments. One Member State noted that the different timelines between Member States' national mechanisms and the FDI Screening Regulation create additional complications.

While the possibility for Member States to provide comments is seen as positive, some Member States noted that they are simply informed that comments have been provided and that there is no information provided about the content of such comments, and no obligation for the notifying Member State receiving the comments to explain how comments received have been taken into account in their final decision.

One Member State noted that some requests for additional information are "overly burdensome", and that Member States and the European Commission should remember that such requests should

be duly justified, limited and proportionate to the purpose of the request, and, not unduly burdensome for the Member State from whom the information is requested.

Possible ways of addressing significant procedural issues

As for suggestions for addressing significant procedural issues encountered, on the issue of staff levels/human resources, suggestions included discussion – and possible guidelines – on what requires notification under the FDI Screening Regulation to sharpen the focus and avoid "overloading" the system. One, more concrete, suggestion is a practice whereby the more important FDI transactions among those notified would somehow be flagged for the attention of other Member States. Suggestions also included clarification of time-lines and monthly statistical overviews produced by the European Commission, including comments provided by Member States under the Regulation.

> *"There is a risk that the requirement to notify the Commission and the other Member States of any foreign direct investment that is undergoing formal screening may dilute the cooperation mechanism and affect its effectiveness" […] "propose that the Commission initiates a discussion among Member States on the potential for developing guidelines on which cases shall be notified and if Member States can avoid notifying some cases e.g. if the cases clearly do not have any cross border effects".*

One Member State suggested additional clarification or articulation of some key aspects of the FDI Screening Regulation, i.e. the trigger date for notifications, the definition of foreign investor and foreign direct investment, and, the scope of Opinions or comments. The same Member State encouraged the European Commission to look at the "broader picture" (i.e. the European impact of a transaction), regardless of any confirmed interest of more than one Member State in the transaction, and also noted that the FDI Screening Regulation would have an increased added-value if synergies could be created between the FDI Screening Regulation and other relevant current or future tools.

Finally, one Member State suggested joint notifications where an FDI transaction has been submitted for authorisation in more than one Member State.

European Commission reactions to Member States' views

The European Commission shares the views of Member States that the FDI Screening Regulation and the cooperation mechanism provides a unique tool for monitoring and assessing FDI into the European Union for the possible risk that such FDI may pose to the security or public order of more than one Member State, or to projects or programmes of Union interest.

As for the specific challenges raised – and suggestions made – by Member States, the European Commission notes that:

- In terms of resource constraints, the Commission is conscious of these constraints which it shares. It has already taken a number of concrete steps to facilitate work, including appropriate electronic means. Discussions in the Expert Group also serve to address issues raised by Member States in seeking a common understanding on certain issues within the limits of what is possible without changing the Regulation, including eligibility of transactions and the calculation of time-lines under the Regulation. The Commission has already allocated additional resources to its services for the purpose of conducting FDI screening, and Member

States are strongly encouraged to do likewise. This is all the more important as new or amended national screening mechanisms are expected to enter into force over the coming months.

- As for agreeing possible limitations, or filtering criteria, on which transactions are notified under the Regulation, what may not seem to be a sensitive transaction to one Member State could well be sensitive to another, just as some Member States are legally obliged under their respective national legislation to notify all screened transactions. The Commission recalls that Article 6.1 of the Regulation obliges Member States to notify "any foreign direct investment in their territory that is undergoing screening".
- On further clarification of concepts such as foreign direct investment and foreign investor, the Commission has provided an updated Frequently Asked Questions document which provides further detail on the concepts under the Regulation. The Commission stands ready to update this document as necessary.
- As regards differing timelines – between Member States' legislation and between the Regulation and Member States' legislation – the Commission notes that the Regulation did not harmonise timelines and that Member States' national screening mechanisms contain significant variations. The cooperation mechanism, and both formal and informal contacts, can help minimise the unintentional consequences of these differences, but adjusting the formal timelines under the Regulation that may be considered excessively tight would require a change to the Regulation.
- On the further clarification of the interplay between various instruments, e.g. the more exact interplay between the Regulation and other policy instruments and regulators, e.g. merger control and prudential controls, for example, in relation to financial services, the Commission agrees that this is an issue that could be discussed further, inter alia, within the Expert Group.
- Finally, on the issue of multi-jurisdiction FDI transactions, i.e. where the investment target has a presence in several EU Member States (either as a result of subsidiaries in more than one EU Member State, or because it provides goods or services in more than one Member State), these transactions are likely to give rise to multiple screenings by different Member States and an exchange of questions/comments between them. Such cases raise a number of challenges, including differing timelines under different national legislation which may prevent synchronisation of notifications and assessment under the Regulation. The Regulation, at present, does not explicitly address the issue. However, experience has already shown scope for closer informal coordination between relevant Member States and the Commission, as already done for a number of notified FDI transactions. However, given the significant share (29%) of such multi-jurisdictional FDI transactions and related challenges, the Commission believes that it warrants careful consideration in the future.

3. Steps taken after 11 October 2020, and looking further ahead

Despite the FDI Screening Regulation only having been fully applied since 11 October 2020, some preliminary conclusions can be drawn based on the experience so far, just as certain steps have already been taken to support the effectiveness of the Regulation and cooperation mechanism.

Specifically, in order to facilitate the effective implementation of the Regulation and ensure a higher degree of conformity and completeness of notifications submitted by Member States pursuant to Article 6 of the Regulation, the Commission has provided updated versions of the notification form for investors and the Frequently Asked Questions document. The notification form, which has also been published by several Member State screening authorities on their

websites, serves to provide more detailed information by an investor about a notified transaction, including the elements required by Article 9(2) of the Regulation. This serves a dual purpose of allowing a more detailed assessment of notified transactions in Phase 1, as well as limiting the need for requests for additional information and Phase 2 assessments for some transactions.

More generally, and as confirmed by Member States, the Regulation and the cooperation mechanism have already proven a valuable and efficient tool. They have been reliable, with no reported leaks regarding notifications, opinions or other action under the Regulation. Appropriate handling and protection of any information submitted for purposes of Article 6, 7 and 8 of the Regulation is vital to ensure the necessary trust and confidence between all parties involved, i.e. the parties to an investment transaction, the notifying Member State, the 26 other Member States and the Commission. The Regulation and the cooperation mechanism have also proven useful and effective for the overriding policy objective, namely safeguarding our collective security and public order, as well as projects and programmes of Union interest.

However, the experience so far also shows that there is scope for further improvement, including in areas identified by Member States.

As indicated above, the Commission has launched a comprehensive study. The overall objective of the study is to ensure that the Member State FDI screening mechanisms, as well as the EU cooperation mechanism, are effective and efficient, including their interaction[27].

In due course, the Commission will give serious consideration to the possible issuance of guidelines for the benefit of Member State screening authorities and investors. The concept of guidelines has proven valuable in other areas of regulation and enforcement, including competition policy. The Commission would envisage consultation of the broader public with respect to any proposed guidelines for the area of FDI screening.

The steady increase in Member States with a national FDI screening mechanism along with an expected increase in FDI into the EU will inevitably result in an increase in notifications under the Regulation. The Commission will carefully consider ways to streamline procedures to utilise Commission and Member State resources in the most optimal manner, including a clear focus on those FDI transactions that are more likely to pose a risk to the security or public order of more than one Member State, or to projects and programmes of Union interest. This will include consideration of how, given the current Regulation, multi-jurisdiction FDI transactions are best handled, including possible alignment of notifications by two or more Member States.

As for any future amendments to the Regulation itself, this is still early days. However, Article 15 of the Regulation provides an obligation for the Commission to *"evaluate the functioning and effectiveness of this Regulation and present a report to the European Parliament and to the Council"* by 12 October 2023, and for the Commission to recommend amendments to this Regulation, where required. In light of further experience gained in the application of the

[27] The specific objectives of the study are (i) to present an overview of the existing legislation of the Member States which currently have a screening mechanism; (ii) review how the national legislations and the FDI Screening Regulation regulate the interaction between national authorities and with the European Commission within the cooperation mechanism set up by the FDI Screening Regulation; (iii) identify any significant problems in the current system of national laws and the FDI Screening Regulation which may lead to less effective and/or less efficient outcomes in light of the policy goals of the FDI Screening Regulation, and, (iv) the need to keep administrative burden for investors and other stakeholders proportionate to the policy goals and relevant security or public order concerns.

Regulation, the Commission will be ready to make proposals for amendments if and when required, as also made clear in the recent Trade Policy Communication (February 2021): "*The Commission will continue implementing the cooperation mechanism with Member States' authorities to protect security and public order from risky foreign direct investments and consider enhancing the cooperation mechanism established by the FDI Screening Regulation."*

This not only makes clear the intention of the Commission to continue implementing the FDI Screening Regulation with Member States and to consider enhancing the cooperation mechanism. The Communication also stresses the fundamental policy objective of the FDI Screening Regulation, i.e. to contribute to safeguarding the collective security and public order of all 27 Member States and the EU. The FDI Screening Regulation and the cooperation mechanism are important tools to increase the EU's resilience. While the EU remains open to FDI, as also clearly evidenced by the data in Chapter 3, it is vital that all Member States actively and directly contribute to the attainment of this shared security objective. The Commission firmly expects that by the next Annual Report additional Member States will have adopted and strengthened national FDI screening legislation and related mechanisms for potentially risky foreign investments from non-EU countries and that it is merely a question of time before all 27 Member States have such legislation and mechanisms in place.