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

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Foreign direct investment contributes to the Union's growth by enhancing its competitiveness, creating jobs and economies of scale, bringing in capital, technologies, innovation, expertise, and by opening new markets for the Union's exports. It supports the objectives of the Investment Plan for Europe and contributes to other Union projects and programmes.

(2) Article 3(5) of the Treaty on European Union (TEU) specifies that the Union, in its relations with the wider world, shall uphold and promote its values and interests and contribute to the protection of its citizens. Moreover, the Union and the Member States have an open investment environment, which is enshrined in the Treaty on the Functioning of the European Union (TFEU) and embedded in the international commitments of the Union and its Member States with respect to foreign direct investment.

(3) Pursuant to the international commitments undertaken in the World Trade Organization (WTO), in the Organisation for Economic Cooperation and Development, and in the trade and investment agreements concluded with third countries, it is possible for the Union and the Members States to adopt restrictive measures relating to foreign direct investment on the grounds of security or public order, subject to certain requirements. The framework established by this Regulation relates to foreign direct

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2019/452 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

investments into the Union. Outward investment and access to third country markets are dealt with under other trade and investment policy instruments.

(4) This Regulation is without prejudice to the right of Member States to derogate from the free movement of capital as provided for in point (b) of Article 65(1) TFEU. Several Member States have put in place measures according to which they may restrict such movement on grounds of public policy or public security. Those measures reflect the objectives and concerns of Member States with respect to foreign direct investment, and might result in a number of mechanisms which are different in terms of scope and procedure. Member States wanting to put in place such mechanisms in the future could take into account the functioning, experiences and best practices of existing mechanisms.

(5) There is currently no comprehensive framework at Union level for the screening of foreign direct investments on the grounds of security or public order, while the major trading partners of the Union have already developed such frameworks.

(6) Foreign direct investment falls within the field of the common commercial policy. In accordance with point (e) of Article 3(1) TFEU, the Union has exclusive competence with respect to the common commercial policy.

(7) It is important to provide legal certainty for Member States' screening mechanisms on the grounds of security and public order, and to ensure Union-wide coordination and cooperation on the screening of foreign direct investments likely to affect security or public order. That common framework is without prejudice to sole responsibility of Member States for safeguarding their national security, as provided for in Article 4(2) TEU. It is also without prejudice to the protection of their essential security interests in accordance with Article 346 TFEU.

(8) The framework for the screening of foreign direct investments and for cooperation should provide Member States and the Commission with the means to address risks to security or public order in a comprehensive manner, and to adapt to changing circumstances, while maintaining the necessary flexibility for Member States to screen foreign direct investments on grounds of security and public order taking into account their individual situations and national specificities. The decision on whether to set up a screening mechanism or to screen a particular foreign direct investment remains the sole responsibility of the Member State concerned.

(9) A broad range of 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 should be covered by this Regulation. It should, however, not cover portfolio investment.

(10) Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This 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

***Changes to legislation:** There are outstanding changes not yet made to Regulation (EU) 2019/452 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU.

(11) It should be possible for Member States to assess risks to security or public order arising from significant changes to the ownership structure or key characteristics of a foreign investor.

(12) To guide Member States and the Commission in the application of this Regulation, it is appropriate to provide a list of factors that could be taken into consideration when determining whether a foreign direct investment is likely to affect security or public order. That list will also improve the transparency of Member States' screening mechanisms for investors considering making or having made foreign direct investments in the Union. The list of factors that might affect security or public order should remain non-exhaustive.

(13) In determining whether a foreign direct investment may affect security or public order, it should be possible for Member States and the Commission to consider all relevant factors, including the effects on critical infrastructure, technologies (including key enabling technologies) and inputs which are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union. In that regard, it should also be possible for Member States and the Commission to take into account the context and circumstances of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes.

(14) Member States or the Commission, as appropriate, might consider relevant information received from economic operators, civil society organisations, or social partners such as trade unions, in relation to a foreign direct investment likely to affect security or public order.

(15) It is appropriate to lay down the essential elements of the framework for the screening of foreign direct investments by a Member State to allow investors, the Commission and other Member States to understand how such investments are likely to be screened. Those elements should at least include timeframes for the screening and the possibility for foreign investors to seek recourse against screening decisions. Rules and procedures relating to screening mechanisms should be transparent and should not discriminate between third countries.

(16) A mechanism which enables Member States to cooperate and assist each other where a foreign direct investment in one Member State could affect security or public order in other Member States should be set up. It should be possible for Member States to provide comments to a Member State in which such investment is planned or has been completed, irrespective of whether that Member State has a screening mechanism in place, or such an investment is undergoing screening. Requests for information, replies and comments of Member States should also be forwarded to the Commission. It should be possible for the Commission, where appropriate, to issue an opinion within the meaning of Article 288 TFEU to the Member State in which the investment is planned

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2019/452 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

or has been completed. It should also be possible for a Member State to request the Commission to issue an opinion or other Member States to provide comments on a foreign direct investment taking place in its territory.

(17) When a Member State receives comments from other Member States or an opinion from the Commission, it should give such comments or opinion due consideration through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of sincere cooperation laid down in Article 4(3) TEU.
The final decision in relation to any foreign direct investment undergoing screening or any measure taken in relation to a foreign direct investment not undergoing screening remains the sole responsibility of the Member State where the foreign direct investment is planned or completed.

(18) The cooperation mechanism should only be used for the purpose of protecting security or public order. For that reason, Member States should duly justify any request for information regarding a specific foreign direct investment in another Member State, as well as any comment they address to that Member State. The same requirements should apply when the Commission requests information on a particular foreign direct investment or issues an opinion to a Member State. Compliance with those requirements is also important in situations where an investor of a Member State competes with investors of third countries for making an investment in another Member State such as acquiring assets.

(19) Furthermore, it should be possible for the Commission to provide an opinion within the meaning of Article 288 TFEU with regard to foreign direct investments likely to affect projects and programmes of Union interest on grounds of security or public order. This would give the Commission a tool to protect projects and programmes which serve the Union as a whole and represent an important contribution to its economic growth, jobs and competitiveness. This should include in particular projects and programmes involving substantial Union funding or established by Union law regarding critical infrastructure, critical technologies or critical inputs. Those projects or programmes of Union interest should be listed in this Regulation. An opinion which is addressed to a Member State should also be simultaneously sent to the other Member States.
The Member State should take utmost account of the opinion received from the Commission through, where appropriate, measures available under its national law, or in its broader policy-making, and provide an explanation to the Commission if it does not follow that opinion, in line with its duty of sincere cooperation under Article 4(3) TEU. The final decision in relation to any foreign direct investment undergoing screening or any measure taken in relation to a foreign direct investment not undergoing screening remains the sole responsibility of the Member State where the foreign direct investment is planned or completed.

(20) In order to take into account developments relating to projects and programmes of Union interest, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to amend the list of projects and programmes of Union interest set out in the Annex to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work,

***Changes to legislation:** There are outstanding changes not yet made to Regulation (EU) 2019/452 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[(4)]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(21) In order to provide greater certainty for investors, Member States should have the possibility to make comments and the Commission should have the possibility to issue an opinion in relation to completed investments not undergoing screening for a period limited to 15 months after the completion of the foreign direct investment. The cooperation mechanism should not apply to foreign direct investments completed before 10 April 2019.

(22) Member States should notify their screening mechanisms and any amendment thereto to the Commission, and should report on the application of their screening mechanisms on an annual basis, including on decisions allowing, prohibiting or subjecting foreign direct investments to conditions or mitigating measures and on decisions regarding foreign direct investments likely to affect projects or programmes of Union interest. All Member States should report on the foreign direct investments that took place in their territory, on the basis of the information available to them. In order to improve the quality and comparability of information provided by Member States as well as to facilitate compliance with the notification and reporting obligations, the Commission should provide standardised forms considering, inter alia, relevant forms applied for the purpose of reporting to Eurostat, where appropriate.

(23) In order to ensure the effectiveness of the cooperation mechanism, it is also important to ensure a minimum level of information and coordination with regard to foreign direct investments falling under the scope of this Regulation in all Member States. That information should be made available by Member States for foreign direct investments undergoing screening as well as, upon request, for other foreign direct investments. Relevant information should include aspects such as the ownership structure of the foreign investor and the financing of the planned or completed investment, including, when available, information about subsidies granted by third countries. Member States should seek to provide accurate, comprehensive and reliable information.

(24) Upon request by a Member State where a foreign direct investment is planned or has been completed, the foreign investor or the undertaking concerned should provide the information requested. In exceptional circumstances, when, despite its best efforts, a Member State is unable to obtain such information, it should notify the Member States concerned or the Commission without delay. In such a case, it should be possible that any comment issued by another Member State or any opinion issued by the Commission in the framework of the cooperation mechanism be made on the basis of the information available to them.

(25) When making available the information requested, Member States are to comply with Union law and national law that complies with Union law.