



2024/0017 (COD)

Revised FDI screening in the EU

Executive Summary

- AK welcomes efforts to **increase vigilance regarding controversial acquisitions and to expand the screening powers of public authorities**. At the same time, it criticises the **lack of legal impact assessment of the proposal for a new FDI screening regulation**.
- An **improved early warning system** shall address these three points in particular:
 1. Instead of loopholes in the protective shield and a narrow focus on security risks: **ensuring comprehensive public policy space** for investment screenings.
 2. Instead of delayed review options in the event of a takeover: **designing review thresholds coherently across Europe** by starting from a 10 percent share.
 3. Instead of a non-transparent black box: **public participation** in the screening process **and publicly available information** on screening cases **must be fundamentally improved**.
- The proposal **contains serious weaknesses** in this respect and **urgently needs to be revised**.

Background to the proposal

In 2024, the European Commission presented a [proposal](#) for a new version of the regulation on the screening of foreign investments in the EU. This is part of the EU strategy to enhance “economic security”. Negotiations on the new proposal have recently been controversial, including during the Hungarian Presidency of the Council. The timetable for a conclusion in 2025 is still questionable. Irrespective of this, a framework for the screening of foreign investments in the European Union is already in place since 2019 with [Regulation \(EU\) 2019/452](#).

The **global trend towards the expansion of investment screenings** is also continuing at Member State level. 24 Member States now have such a review mechanism in place. There are plans to introduce one for the remaining three (Croatia, Cyprus, Greece). The Member States’ options for reviewing, imposing conditions or, in extreme cases, completely rejecting disputed acquisitions have so far been subject to restrictive limitations.

For example, the Member States’ options for investment reviews may conflict with priority rules for the freedom of capital and freedom of establishment (based on the EU treaties) or [liberalisation obligations](#) imposed by international free trade and investment agreements.

The general **objective of this proposal** is to protect security and public order as regards foreign investments. To this end, the proposal aims for a higher degree of harmonisation within the EU. The proposal is based on the problem diagnosis that the existing differences between the Member States lead to “regulatory fragmentation”. The review mechanisms of the Member States “[differ in respect to their scope \(the types of activities and sectors covered\), their procedural deadlines \(duration of assessment and decision by the national authority\), procedural requirements, and the criteria applied for assessing security and public order risks](#)”. In addition to ensuring review mechanisms in all Member States, these key points should be achieved: a sectoral minimum scope of application as well as procedural improvements to the European cooperation mechanism and an extended review of investments attributable to foreign-controlled companies based in the EU. Against the background of these harmonisation efforts, the EU Commission also states that the Member States would continue to have leeway for their specific national security considerations.

AK's Position

1) Increase vigilance and enhance early warning system

AK **welcomes efforts to expand the screening powers of public authorities and the control of controversial foreign investments.** Vigilance towards acquisitions in critical areas (such as infrastructure, technology, crisis capacities) and the protection of strategically important industrial companies from a sell-off must be increased in any case. Investment screenings should be an integral **part of an active strategic foreign economic policy that focuses on the protection and development interests of society as a whole.** To this end, it may be necessary to enforce public control over central economic sectors, crisis and contingency capacities and services of foundational social interest. Investment screenings are a potentially important lever for bringing more transparency to disputed acquisition processes, safeguarding public interests vis-à-vis buying investors and being able to ward off predatory buying of strategic assets. The relevance of well-developed investment screening tools has recently been highlighted by various crisis developments. These relate, for example, to the COVID-19 pandemic and the lacking security of supply in the healthcare sector, the increasing geo-economic tensions between the EU, China and the USA, the Russian war against Ukraine or controversial acquisitions of public services by international financial investors. In addition, there is a reappraisal of the room to manoeuvre for active economic policy, which also includes the strategic use of investment screening, e.g. by imposing conditions to ensure security of supply and protection against the relocation of production facilities. This happens against the background of discussions on strategic foreign trade and industrial policy as well as the imperatives of socio-ecological transformation.

The **role as an early warning system and protection instrument for public interests** shall therefore be strengthened. In the event of an emergency, investment screenings have the potential to make disputed acquisition processes more verifiable for public authorities and to introduce protective measures at an early stage. They can therefore make a significant contribution to counterbalancing the loss of public control due to previous privatisation and liberalisation. However, this cannot replace more far-reaching measures such as the expansion of public ownership and control (e.g.

through public funds in the event of controversial takeovers in areas of critical social and economic infrastructure). At the same time, it cannot be ignored that the EU significantly pushed liberalisation and privatisation by means of restrictive fiscal policies in recent decades. For example, the austerity policy following the 2008 financial crisis resulted in an increased influence of foreign investors on strategic transport hubs in the EU. Consequently, repercussions of short-sighted crisis policies and public investments gaps must be considered at an early stage.

Increased vigilance is also required above all in the areas of primary industries, high technology, crisis capacities and public services. Healthcare, water, transport, energy, telecommunications, etc. must be protected from the shopping interests of offensive financial investors and corporations. That is why their **sell-offs must be stopped "with bite"**. Against this background AK has been repeatedly involved in the [debate on expanding and improving investment screenings in recent years](#).

2) Lack of legal impact assessment is problematic

In large parts of its proposal, the EU Commission has fundamentally revised the FDI Screening Regulation from 2019 and intends to replace the existing regulation. As a result, it would be all the more necessary to explicitly outline and justify the specific legal changes in comparison to the existing regulation. **The fact that these specific justifications are not provided is neither conducive to publicly comprehensible regulatory changes nor to well-founded assessments of legal consequences.** In addition, AK has repeatedly pointed out the legal tension that exists for the protection of public policy space and [well-being oriented economic policy](#) due to excessive European and international liberalisation obligations (as for example in the case of priority rules for the freedom of movement of capital granted in the EU treaties or the straitjackets imposed by free trade and investment agreements).

There has clearly been a fundamental shift in the priorities for action in areas such as industrial policy, crisis capacities and services of general interest in recent years. The more active role of the public sector in economic development and resilience means that states are increasingly evaluating foreign investments

from the perspective of socio-economic benefit criteria (e.g. technological development from an industrial policy perspective). Against this backdrop, AK emphasised at an early stage that **excessive liberalisation obligations with regard to foreign investments must not unnecessarily restrict the public policy space for investment screenings**. In this context, the guidelines published by the EU Commission during the COVID-19 crisis on the protection of strategic companies and infrastructures from sell-offs (2020) had an important signalling effect: Among other things, they explicitly refer to public services and a number of justifications for restrictions that go beyond a narrow understanding of security or public order in the case of aggressive purchases of strategic assets (e.g. public health, financial stability, consumer protection, achieving of policy social objectives). This is a rudimentary step forward from the restrictive stance that the EU Commission has taken in the past. However, also pending issues such as the green industrial policy turn or the reappraisal of active public economic policy make clear: The **one-sided focus on geopolitical and security risk considerations is now once again in danger of not adequately reflecting public protection interests in the ongoing revision of the FDI Screening Regulation**.

The **lack of submission of legal impact assessments** has also recently become more salient because the Commission and the ECJ have recently interpreted the existing options for investment screening restrictively. However, the proposal of the Commission offers no evaluation of the **legal risks** that the controversial "[Xella case](#)" poses **for the screening options of the Member States**. In this context, for example, this pending question is highly relevant: What legal risks are at stake for Member States that have already established comprehensive review options for so-called "[indirect acquisitions in their national regulations](#)"? To date, however, there has been a lack further clarification as to whether these regulations are in line with European law. These existing regulations are aimed at ensuring that an investment review cannot be blocked by the interposition of an EU-based company (and in some cases do not require the justification of a circumvention). Moreover, the Advocate General clarified in the Xella case that "indirect" foreign direct investments are already covered by the current FDI Screening Regulation. Consequently, a revision of the FDI Screening Regulation should also include a careful assessment of these pending legal issues.

3) Expand screening options to include socio-economic risk assessments and close holes in the protective shield

It is incomprehensible why the draft regulation shows no reference to **Commission's guidelines on the protection of strategic companies and infrastructures against sell-offs** (see the corresponding [Communication 2020/C 99 I/01](#)). In return, it is urgently recommended that an explicit reference to these guidelines shall be included. Its signalling effect for the extended scope of investment screenings has already been mentioned above. This communication is also characterised by two aspects that go beyond an overly narrow and passive understanding of investment screenings: On the one hand, the EC calls on the Member States to be more vigilant against sell-offs. In the broadest sense, the call concerns the protection of strategically important industries and critical production capacities and supply in the areas of public services (such as healthcare). This increased vigilance and understanding of investment screenings as a preventive early warning system in dynamically developing crisis situations will continue to be of utmost importance. On the other hand, the EC explicitly refers in this context "to ensuring the security of supply" and protecting the "provision of essential public services". These references are therefore valuable anchor points for **supporting comprehensive protection interests for security of supply as well as crisis capacities and public services**.

Unfortunately, no agreement could be reached between the European Commission and the Member States in the run-up to the new proposal to a joint legal act for better control of foreign investment within the EU ("inbound") and investment activities of European companies outside the EU ("outbound"). While the draft regulation now only contains "inbound" investments, "outbound" investments have been subject to far less binding recommendations. This **split in the screening of "inbound" and "outbound" investments is incoherent**: increased vigilance, due diligence obligations and, consequently extended, application options are required in both cases. It is therefore not plausible to limit the examination of outbound investments to a very narrow set of sectors (such as semiconductor, quantum or AI technology) and narrow security concerns. Instead, in the case of relocations, for example, it is important to be able to carry out more comprehensive screenings and risk assessments in the interest of the economy and society as a whole. These may relate, for example, to the risk of technological leakage and the development of dependencies in much broader areas. Consequently, these concerns relate to investment activities inside and outside the EU: safeguards for public and socio-economic screening interests go beyond a narrow, first and foremost geopolitical fra-

ming of security risks. More transparency and review options are not least necessary in view of problematic outsourcing, offshoring and carbon leakage strategies of transnational corporations.

The screening process must therefore also include potential threats to security of supply and employment, risks associated with investment activities for climate protection and human rights due diligence, technological independence and strategically important components from an industrial policy perspective. In this context, it should also be remembered that the understanding of “economic security” and “weaponized interdependencies” must go far beyond a primarily geo-economic risk assessment. For example, the [International Labour Organisation \(ILO\) was quick to point out](#) that **“economic security” must not exclude the protection of social infrastructure and employment security**. The lack of coherence between “inbound” and “outbound” screenings also hinders the effectiveness of existing provisions on the potential reversal of acquisition processes. This can come into play in extreme cases, e.g. if an acquisition requiring authorisation was carried out behind the back of public investment screening authorities. However, a coherent interlocking of the scope and review factors of inbound and outbound investment screenings is then particularly essential in the case of relocation. Otherwise, the reverse transaction option for acquisitions associated with relocation and circumvention of controls will remain ineffective. AK calls therefore to overcome this split and to **review “inbound” and “outbound” investments within a coherent framework**.

4) Ensure ability to act at an early stage and improve capacities for strategic economic policy

Although the new draft regulation problematises “regulatory fragmentation”, it is remarkable that no efforts have been made to ensure earlier screening options and thus an improved information basis for transeuropean cooperation. In regard to EU-wide minimum requirements, it is highly relevant to organise the screening thresholds in a coherent manner and to trigger review options at an early stage of acquisition. The existing Regulation contains no regulation in this regard. The **discrepancy that exists between different thresholds in the Member States thwarts an effective early warning system** and proactive review options for critical acquisitions (e.g. if review activities for different investment screening authorities could start only from a 25 per cent share acquisition). This can also lead to considerable gaps in EU-wide coordination if action is to be taken at an early stage to counter the increased influence of a problematic investor, e.g. in critical infrastructure and technology

sectors. In addition, the Member States should also be encouraged to pursue a more proactive approach to their investment screening activities and not to obstruct control options by setting thresholds too high. This is because the risk of an actual acquisition of control and a significant influence by a problematic investor may well materialise at an earlier stage. To ensure greater consistency in intra-European coordination and to prevent potential loopholes, a **threshold of 10% shall be anchored in the regulation as a minimum requirement**. Consequently, AK calls for the review options of investment screenings not to fall below [the internationally recognised 10% benchmark definition of the OECD](#).

The inclusion of **greenfield investments in the draft regulation is expressly welcomed**. Recent attempts to remove them from the scope of the regulation and to weaken the recommendation to review greenfield investments must therefore be rejected. Requirements imposed on foreign investors and their greenfield investments will continue to gain relevance for strategic foreign trade policy. The inclusion of greenfield investments means that the applicability of investment screenings is no longer limited to acquisitions of an already existing company. The possibility of also being able to carry out investment screenings in the case of newly established production facilities is expedient, not least in key areas of the green transition (such as battery technology). Investment screenings should therefore also be used more strategically to promote technology cooperation between non-European industry leaders and European companies (e.g. in the form of joint ventures). This **expansion of the scope and tools for strategic foreign trade policy** coincides with the [recommendations from the Draghi report](#) to utilise the potentials for know-how transfer through foreign direct investments more actively (e.g. on the basis of joint ventures). Consequently, requirements that are imposed by investment screening authorities in areas such as preventing offshoring or security of supply can also be extended to new production sites and areas like technology cooperation. As a result, investment screenings could unfold their potential as a strategic lever for promoting social and economic development.

AK also calls for comprehensive investment screening options to be guaranteed in the following areas in particular: Firstly, it must be possible to comprehensively scrutinise indirect acquisitions of shareholdings and thus the actual influence behind acquisition transactions. In this context, it is particularly important that the scrutiny is not only focussed on the ownership structure of the acquiring company or investor in a narrow sense, **but that the ultimate beneficial owner is actually determined in an ownership cascade**.

Sufficient safeguards are therefore needed to ensure that an investment review does not fail due to the interposition of an EU-based company. As a result, problematic investors must not be able to evade an investment review due to a lack of verifiability of investors from the EU. On the other hand, the potential risks posed by a passive acquisition of control and a creeping takeover strategy must be adequately covered by the review options. These relate, for example, to cases in which a foreign investor acquires a controlling influence without having effected this through immediate actions such as a direct acquisition of shares. This is relevant, for example, if the inspecting screening authority previously assumed that control was in the hands of another shareholder anyway (but this shareholder now sells its shares via the stock exchange). The controlling authority should therefore have sufficient legal options to impose countervailing conditions. Taken together, these complex review requirements highlight the need for a fundamental evaluation of existing investment screening practice at work. However, corresponding case documentation is not accessible due to the restrictive information policy of screening authorities. This once again emphasises the importance of fundamentally improving the public accessibility of investment screenings (see section 6).

5) Enabling flexibility and strengthening public interests

The current FDI Screening Regulation is based on an explicitly open-ended list of screening factors and does not provide for an exhaustive definition of potential screening areas. This high degree of flexibility is clearly stated, for example, by the wording “inter alia” (cf. Art. 4). In the new Commission’s proposal, however, this formulation has been deleted without further justification. In this context, the draft falls short of the clarity of the existing regulation. The design of a revised FDI Screening Regulation must in any case protect public policy space against a restrictive framing of its sectoral scope, of potential threats to a fundamental interest of society and of its applicability as an early warning system. In contrast, **AK calls for the extension of screening factors and risk assessments in the public interest.**

In addition to retaining an explicitly open-ended list of potential effects and areas (e.g. by including “inter alia”), the risk standard should be kept as broad and precautionary as possible. Formulations in the existing regulation that refer to “likely to affect security or public order” and “potential effects” (cf. Art. 4) are clearly preferable to more narrowly formulated regulations (such as “likely negative impact on security and public order” Art. 13, proposal of the EC). From these two points of view in particular, it is important to ensure comprehensive review options: Firstly, the need

for investment screening goes far beyond a narrow understanding of “security and public order”. The latter is unsuitable for adequately reflecting the socio-economic and social protection interests that underpin the recent rise of investment screening tools. This is all the more relevant against the backdrop of **dynamic risk and crisis developments**, which demand seamless early warning systems and options to scrutinise problematic acquisition processes at an early stage. On the other hand, it is short-sighted to focus exclusively on foreign investors under (in)direct state influence with regard to the explicitly emphasised screening factors. Alternatively, an integral **economic and societal risk perspective must also include different types of investors with offensive financial interests**. For example, transnational, shareholder-oriented investors are particularly likely to pose a threat to fundamental social interests such as security of supply or resilient universal services (e.g. [private equity funds or multinational utility corporations](#)).

On this basis, AK is calling for these changes in particular to be made in the current draft:

- The comprehensive protection of **crisis capacities and public services** must be ensured by retaining the open enumeration character of the previous regulation. In addition, the reference to “public services” in the EC’s previous guidelines on protecting strategic assets and infrastructures from being sold off ([Communication 2020/C 99 I/01](#)) should be used to explicitly enshrine this. In addition, the incorporation of [Protocol 26 of the European Treaties](#) (“On Services of General Interest”) is urgently recommended in order to ensure extended discretionary powers for investment screenings.
- The non-exhaustive, merely indicative list of **critical infrastructures** should be retained – analogous to the existing regulation. This is an important precaution against an understanding of critical infrastructures that is narrowed down in terms of security policy and primarily focussed on security incidents. The latter is unsuitable for adequately reflecting the socio-economic and public interests in fully applicable investment screenings. Against this background, the reference made in the draft regulation to the recently adopted EU Directives [2022/2557](#) and [2022/2555](#) should be deleted.
- Among the explicit **review factors**, health, social, economic and regional cohesion, security of employment and supply, human rights due diligence, macroeconomic stability, technological independence, climate protection and corresponding industrial policy objectives must also be included (see in particular Art. 13 para. 3).

6) Open the black box and create public transparency

AK has repeatedly criticised the **lack of public transparency of investment controls and the lack of orientation towards public information requirements**. In particular, the lack of publicly accessible information on specific screening cases has so far stood in the way of these requirements.

The expansion of European cooperation shall therefore be used to **open up the non-transparent black box** of investment screenings. In this respect, the following wording from the existing regulation offers a starting point for improvements by changing “as appropriate, might consider” to “must” (recital 14 of the current regulation, cf. recital 32 in the EC proposal): “Member States or the Commission **must** consider relevant information received from economic operators, civil society organisations, or social partners such as trade unions, in relation to a foreign direct investment”.

AK calls for comprehensive public reporting obligations to be established and for public participation procedures to be strengthened. This must include publicly transparent and comprehensible information on specific screening cases and associated screening measures by public authorities (such as imposed conditions). To this end, the **annual reporting at Union level must also be fundamentally expanded**. The current, restrictive information policy is excessive and not least hinders the public evaluation of control practice.



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About us

The Austrian Federal Chamber of Labour (AK) is the legal body which represents the interests of approximately 4 million employees and consumers in Austria. It represents its members on all social, educational, economic and consumer policy-related issues at national level and at EU level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.