

# Proposal for a new EU Regulation on the screening of foreign investments and other initiatives to strengthen economic security in the European Union

On 24 January 2024, the European Commission adopted **five initiatives to strengthen the EU's economic security** in the areas of export controls, outbound investments, support for research and development of technologies with dual-use potential, enhancing security of research and foreign investment in the European Union.

The latter is accompanied by a **new Proposal for a Regulation on the control of foreign investment** that would introduce **significant amendments** to EU Member States' screening frameworks and the EU cooperation mechanism.

The European Commission (the "**Commission**") adopted on 24 January 2024 **five initiatives** to strengthen the economic security of the European Union ("**EU**"), in line with the **European Economic Security Strategy** published in June 2023. The initiatives adopted aim to:

- strengthen the protection of EU security and public order by proposing **improved controls on foreign investments into the EU**;
- stimulate discussion and action for **heightened European coordination in the area of export controls**, while respecting existing multilateral regimes and Member States' prerogatives;
- consult Member States and stakeholders to identify potential risks stemming from **outbound investments in a narrow set of technologies**;
- promote further discussions on how to support **research and development involving technologies with dual-use potential**; and
- propose that the Council recommend **measures** to **enhance research security** at national and sectoral levels.

## 1. MEASURES ADOPTED BY THE COMMISSION

### 1.1 LEGISLATIVE PROPOSAL TO STRENGTHEN FOREIGN INVESTMENT SCREENING

Building on the experience gained under Regulation (EU) 452/2019 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 "**Regulation (EU) 452/2019**") and an extensive evaluation of its functioning, the

Commission has submitted a [proposal for a Regulation](#) (discussed in section 2 below) to [improve the efficiency of screening mechanisms](#) in the EU and to [address some of the existing shortcomings](#) in this area.

## 1.2 MORE EFFECTIVE EU CONTROL OF DUAL-USE ITEMS

The current geopolitical context requires action at the EU level to improve the [coordination of export controls on items with both civil and defence uses](#) – such as advanced electronics, toxins, nuclear or missile technology. The Commission has published a [White Paper on export controls](#) in which it proposes both short and medium-term actions, respecting the existing rules at both the European and multilateral level.

The Commission proposes introducing [uniform EU controls](#) on those items that were not adopted by the multilateral export control regimes due to the blockage by certain members, thus avoiding a patchwork of divergent national approaches. In this regard, it foresees a [senior level forum](#) for political coordination and a [Commission Recommendation](#) is announced for summer 2024 with a view to improving the coordination of national control lists (prior to the planned adoption of national controls). The [evaluation of Regulation \(EU\) 2021/821](#) setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items is brought forward to 2025.

## 1.3 MONITORING AND ASSESSMENT OF OUTBOUND INVESTMENT RISKS

The Commission has prepared a [White Paper on outbound investments](#) to identify the potential risks resulting from EU companies investing in third countries in a narrow set of advanced technologies. These investments may represent a risk of [leakage of technologies and know-how](#) that could be used to enhance the military and intelligence capabilities of actors who may use these capabilities against the EU or to undermine international peace and security.

This is currently neither monitored nor controlled at an EU or Member State level. A step-by-step analysis is therefore proposed, which will include a [stakeholder consultation](#) and a 12-month period of [monitoring and assessing outbound investments](#) which will contribute to a joint risk assessment report. Based on the findings, the Commission and Member States will determine the most appropriate policy response.

## 1.4 OPTIONS TO SUPPORT RESEARCH AND DEVELOPMENT IN TECHNOLOGIES WITH DUAL-USE POTENTIAL

The EU aims to achieve a [competitive edge in critical and emerging technologies with potential use for both civil and defence purposes](#). To that end, a public-consultation period (open until 30 April 2024) has been launched in conjunction with the publication of a [White Paper on options for enhancing support for research and development \(R&D\) of technologies with dual-use potential](#). This measure aims to explore alternative ways for the EU to support such technologies in the future (in particular by reviewing existing EU funding programmes to assess whether they remain sufficient and appropriate).

## 1.5 ENHANCE RESEARCH SECURITY ACROSS THE EU

Finally, in order to mitigate [research security risks](#) (e.g. critical-technology transfers) and to ensure that international research and innovation cooperation is both open and safe, the Commission has put forward

a proposal for a Council Recommendation to provide additional clarity, guidance and support to Member States and the research and innovation sector in general. In its proposal, the Commission provides a number of guidelines and supporting measures to raise awareness and improve resilience across Europe.

In view of its practical significance, the main lines of the proposal for a Regulation on the screening of foreign investments in the EU are set out below.

## 2. PROPOSAL FOR A NEW REGULATION ON THE SCREENING OF FOREIGN INVESTMENT IN THE UNION

The Commission has published its proposal for a new Regulation on the screening of foreign investments in the Union (the “Proposal”) that, in turn, will repeal Regulation (EU) 452/2019. Although it has yet to be adopted, the Proposal would introduce significant amendments regarding the minimum content of the screening mechanisms that should be established – now mandatorily – by all EU Member States and in relation to the EU cooperation mechanism.

### 2.1 WHAT THE PROPOSAL RESPONDS TO: GEOPOLITICAL AND LEGAL FRAMEWORK

The review of Regulation (EU) 452/2019, which had already been planned for the last quarter of 2023, also forms part of the comprehensive package of measures under the European Economic Security Strategy, published in June 2023.

Furthermore, the judgment of the Court of Justice of the European Union (“CJEU”) in the case C-106/22 (*Xella Magyarország*) has also prompted some of the changes put forward in the Proposal, in particular regarding the control of indirect foreign investments in the EU. Note that the CJEU ruled that Regulation 452/2019 only applied to investments in the EU by third-country companies and therefore excluded its application in cases in which the direct investor was resident in the EU, even if controlled by a third-country investor, which would constitute a potential threat for the Commission.

The Proposal reflects a global trend towards the ongoing review of foreign-investment controls, with a view to strengthening countries’ national economic security vis-à-vis third-country investments in sectors they consider strategic.

### 2.2 WHAT ARE THE MAIN CHANGES THE PROPOSAL WOULD INTRODUCE TO THE SCREENING OF FOREIGN INVESTMENT IN THE EU?

The purpose of the reforms that the Proposal would introduce is threefold, and intend to:

- strengthen the EU’s framework for screening foreign direct investment;
- harmonise criteria, deadlines and processes for all screening mechanisms in EU Member States; and
- enhance the cooperation mechanism for the purposes of assessing risks to public security and public order and strengthening the “comply or explain” principle.

The main new features include the following:

- (A) **Requirement to establish a screening mechanism.** Member States must implement or adapt their screening mechanisms such that authorisation is at least required for investments in the areas set out in Annex I and Annex II to the Proposal (see section 2(C)(v) below).
- (B) **Scope of application.** The Proposal contains specific definitions to include within the scope of the future Regulation investments in EU companies made by Member State companies in which a third-country company holds decisive influence, in the wake of the CJEU's ruling in case C-106/22.
- (C) **Minimum procedural requirements.** Member States shall ensure that their screening mechanisms comply with a number of minimum conditions, including the following:
  - (i) adequate procedure must be in place for reviewing foreign investment filed for authorisation that allows for an initial review of the investment transaction to determine whether public security or public order may be affected, to be followed by, where necessary, an in-depth investigation – in particular to determine whether to impose mitigating measures on or prohibit a foreign investment;
  - (ii) Member States' screening authorities shall be empowered to start screening foreign investments by its own initiative for at least up to 15 months after completion of a foreign investment that is not subject to an authorisation requirement where there exist grounds to consider that public security or public order may be affected;
  - (iii) the investor must be informed prior to mitigating measures being taken regarding the authorisation or prohibition of its investment, and must be allowed to make its views heard before such a decision is taken – which was also relevant in case C-106/22;
  - (iv) screening authorities shall be empowered to impose mitigating measures to, prohibit or unwind foreign investments subject to an authorisation requirement (see section (v) below) that were not filed – or were filed after the transaction was completed; and
  - (v) in any case, investments in which the target company of the foreign investment (i) is part of – or participates in – one of the projects or programmes of “Union interest” (listed in Annex I to the Proposal); or (ii) is economically active in any of the activities listed in Annex II to the Proposal, which enumerates sectors of particular importance for the security and public order of the Union, must be subject to authorisation.
- (D) **Cooperation mechanism.** The transactions that must be notified on a mandatory basis through this mechanism are defined and harmonised deadlines are set depending on whether another Member State issues comments or the Commission issues an opinion. In addition, the principle of “comply or explain” is made explicit with regard to how Member States are to deal with comments and opinions received in relation to the screened foreign investment. This means that if a Member State does not comply with the Commission's observations, it must explain the reasons for not doing so.

- (E) **Criteria for risk assessment.** Develops the objective and subjective criteria to be taken into consideration when determining whether a foreign investment may affect public security or public policy, partially replicating the factors that may already be taken into account by Member States and the Commission under Regulation (EU) 452/2019.

### 2.3 WHAT IS THE PROPOSAL'S LIKELY IMPACT ON THE EXISTING FRAMEWORK IN SPAIN?

The Proposal, if approved in its published terms, would significantly impact Spain's current foreign investment screening framework; a summary of which is available in our newsletter issued 5 July 2023, which remains available at [this link](#).

In particular, the procedure for requesting foreign-investment authorisation should be adapted to reflect the **initial review and in-depth investigation** phases and to take into account the Member State's capability to **initiate – at its own initiative – the review** of transactions for at least 15 months after closing. In addition, the **deadlines that the new Regulation would establish** for other Member States' comments and the Commission's opinions as regards authorisation decisions should be taken into account as well as the fact that the **objective scope** of the sectors covered **may be revised** in light of the list contained in Annex II to the Proposal.

Foreign-investment screening **does not prohibit foreign investments in Spain** – rather, it involves mandatory authorisation procedures to be carried out prior to closing specific transactions, **not signing**.

In short, given the importance of investment screening in most M&A transactions, attention should be paid to the approval of the new Regulation and the terms under which it is adopted.

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