Suggested amendments to the proposal for a new regulation on the screening of foreign investments

Executive summary

The European Commission's proposal for a new regulation on the screening of foreign investments aims to reduce divergences between national investment screening regimes and create stronger procedural safeguards for investors. As summarised in the proposal's Explanatory Memorandum, the existing divergences between national regimes have created significant 'obstacles to investments made within the EU' and a more unpredictable regulatory environment for investors. The U.S. is the biggest source of FDI for the EU, creating a significant number of jobs and growth, stimulating innovation, and developing the EU's high tech manufacturing base. In 2022, U.S. investors accounted for more than 30% of FDI into the Union and close to 50% of greenfield investments. The introduction of more consistent screening rules would bring much-needed certainty to US investors and to their EU partners, notably in the context of mergers and acquisitions. However, the regulation should go further in codifying the ambitions outlined in the Explanatory Memorandum. In addition, the regulation could result in increased scrutiny of low-risk transactions, inadvertently raising barriers to positive investments that are critical for the EU's competitiveness, and overwhelming Member State agencies whose resources should be focussed on high-risk transactions. The most recent European Commission statistics (for 2022) show that close to 60% of FDI Is in ICT, manufacturing and retail. Because the vast majority of cases currently submitted for foreign direct investment (FDI) screening have a tenuous or no link to national security, the proposal should aim to expedite the clearance of transactions while ensuring adequate resources can be deployed to properly screen investments with a clear national security or public order dimension. If adopted, the following list of suggested amendments would ensure Member States are better equipped to focus screening on higher-risk investments, facilitate efficient screening of beneficial transactions and bring about **legal clarity, proportionality, due process and greater consistency between national rules**. To achieve these objectives, the amendments seek to better align the regulation with existing, well-understood notification regimes and procedures under EU law – including merger control, dual-use export controls and the Foreign Subsidies Regulation – and ensure that the regulation's risk criteria focus on the specific profile and characteristics of Union targets rather than broad sector-based lists.

Suggested amendments

RECITALS	
Recital 12	
Commission text	**Proposed amendments**
(12) Screening foreign investments should be carried out in accordance with this Regulation, taking into account all factual information available and adhering to the principle of proportionality and other principles enshrined in the Treaties. […]	(12) Screening foreign investments should be carried out in accordance with this Regulation, taking into account all factual information available and adhering to the principle of proportionality and other principles enshrined in the Treaties. Member States should ensure that their screening mechanisms limit administrative burdens and delays for foreign investors, for example by creating simplified procedures and

	reduced review timelines for investments without particular economic significance. […]
Justification	
While the proposal seeks to encourage better administration, particularly for cases referred to the cooperation mechanism, it fails to streamline the clearance of the vast majority of low-risk investments that are not referred to the cooperation mechanism. The proposed amendment would encourage Member States to consider potential burdens for investors when developing their national investment screening rules. Furthermore, it is consistent with existing language in Regulation (EU) 2022/2560 (Foreign Subsidies Regulation) and Council Decision 2009/370/EC.	

Recital 16 **(To be read with article 2(1) and article 4(2)(a))**	
Commission text	**Proposed amendments**
(16) Foreign investments that create or maintain lasting and direct links between investors from third countries (including state bodies) and Union targets carrying out an economic activity in a Member State should fall within the scope of this Regulation. This should apply where those investments are directly carried out from third countries or by a Union entity with foreign control. However, the framework should not cover the acquisition of company securities intended purely for financial investment without any intention to influence the management and control of the undertaking (portfolio investments). Restructuring operations within a group of companies or a merger of more than one legal entities into a single legal entity do not constitute a foreign investment, provided that there is no increase in the shares held by foreign investors, or the transaction does not result in additional rights that may lead to a change in the effective participation of one or more foreign investors in the management or control of a Union target.	**Alternative 1:** (16) Foreign investments that create or maintain lasting and direct links between investors from third countries (including state bodies) and Union targets carrying out an economic activity in a Member State should fall within the scope of this Regulation. This should apply where those investments are directly carried out from third countries or by a Union entity with foreign control. However, the framework ~~should~~ shall not cover investments where these do not lead to the possibility of exercising decisive influence on a Union target pursuant to the concepts of control found in the EU Merger Regulation and the EU Foreign Subsidies Regulation. Further, this should exclude the acquisition of company securities intended purely for financial investment without any intention to influence the management and control of the undertaking (portfolio investments). Restructuring operations within a group of companies or a merger of more than one legal entities into a single legal entity do not constitute a foreign investment, provided that there is no increase in the shares held by foreign investors, or the transaction does not result in additional rights that may lead to a change in the ~~effective participation of one or more foreign investors in the management or~~ quality of control of a Union target.

	<u>Alternative 2:</u> (16) Foreign investments that create or maintain lasting and direct links between investors from third countries (including state bodies) and Union targets carrying out an economic activity in a Member State should fall within the scope of this Regulation. This should apply where those investments are directly carried out from third countries or by a Union entity with foreign control. However, the framework should not cover the acquisition of company securities intended purely for financial investment without any intention to influence the management and control of the undertaking (portfolio investments). Restructuring operations within a group of companies or a merger of more than one legal entities into a single legal entity do not constitute a foreign investment, provided that there is no increase in the shares held by foreign investors, or the transaction does not result in additional rights that may lead to a change in the effective participation of one or more foreign investors in the management or control of a Union target.
Justification	
We propose two alternative approaches to defining 'foreign investments' which require amendments to recital 16, article 2(1) and article 4(2)(a). Our full reasoning can be found in the justification of Article 2(1).	

Recital 18(a)	
Commission text	**Proposed amendments**
	(18)(a) To ensure procedural predictability and consistency with transaction approval processes that often occur simultaneously to foreign investment screening, Member States should specify and adhere to clear and reasonable review timelines. In particular, Member States should endeavour to screen investments under this Regulation on a similar timeline to those defined in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations and Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14

	December 2022 on foreign subsidies distorting the internal market, or under national merger control rules.
Justification	
Transactions in the EU are often subject to merger control, foreign subsidies screening, and foreign (direct) investment screening simultaneously. While the Foreign Subsidies Regulation laudably aligns its screening timelines with that of the EU Merger Regulation (EUMR), the proposal as written does not. This creates a unique uncertainty for investors in the field of foreign investment screening which can lead to a chilling effect on investment. Encouraging Member States to adopt screening timelines aligned with the Foreign Subsidies Regulation and EU Merger Regulation, or alternatively with national merger control regimes, would help create clear and predictable timelines. Timing predictability would significantly lessen procedural uncertainty, and would be especially beneficial for investments which are also notifiable under other transaction screening regimes. Aligned review timelines also enable investors to submit applications simultaneously, or in close sequence, which will facilitate coordination amongst Member States and the Commission.	

CHAPTER 1: GENERAL PROVISIONS	
Article 2 (Definitions)	
Article 2(1) **(To be read with recital 16 and article 4(2)(a))**	
Commission text	**Proposed amendments**
(1) 'foreign investment' means a foreign direct investment or an investment within the Union with foreign control, which enables effective participation in the management or control of a Union target;	**Alternative 1:** (1) 'foreign investment' means a foreign direct investment or an investment within the Union with foreign control, which enables the possibility for the investor to exercise decisive influence on ~~effective participation in the management or control of~~ a Union target pursuant to Article 3(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Article 20(5) of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market; **Alternative 2:**

	(1) 'foreign investment' means a foreign direct investment or an investment within the Union with foreign control, which enables effective participation in the management or control of a Union target;
Justification	
It is essential that Member States align on the definition of 'foreign investment'. According to the Court of Justice of the EU, only investments leading to control or effective participation in an entity should be considered in scope. Consequently, the concept of foreign direct investment, as enshrined in article 207(1) TFEU, excludes minority or short-term investments (See Case C-106/22, *Xella*, at para 24). There are currently significant divergences of jurisdictional thresholds at the Member State level. Divergent and/or unclear jurisdictional thresholds create significant concerns for investors where identifying reporting obligations currently require a separate, detailed, analysis in 27 Member States. There can be no justification for Member States to maintain wildly different approaches to what constitutes a reportable investment. Further, investment screening constitutes one of three main transaction reviews faced by investors: (i) merger control, (ii) FSR review, and (iii) investment screening. The EUMR and FSR rely on long-standing, well-accepted concepts from EU merger control (the ability to exercise decisive influence), where transactions where the investor is unable to exercise meaningful voting or corporate governance rights (eg board seats and veto rights over certain types of transactions) do not constitute reportable transactions. We urge Member States to consider the definition found in the well-established EUMR practice and the extensive guidance found in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. This would provide greater regulatory uniformity for investors who frequently must manoeuvre several layers of regulatory scrutiny while also not preventing Member States from screening or notifying additional transactions that have a relevant link with security or public order, as outlined in article 1(3) and under recitals 9 and 13.	

Article 2(9)	
Commission text	**Proposed amendments**
(9) 'Union target economically active in one of the areas listed in Annex II' means an Union target active or intending to be active in technologies, assets, facilities, equipment, networks, systems, services and economic activities of particular importance for the security or public order interests of the Union, listed in Annex II, including through ownership, use, production or supply thereof;	(9) 'Union target economically active in one of the areas listed in Annex II' means a~~n~~ Union target ~~active or intending to be active in~~ whose core business lines, representing material sources of its revenue and profit, relate to the design, development or production of technologies, assets, facilities, equipment, networks, systems, services and economic activities of particular importance for the security or public order interests of the Union, listed in Annex II~~, including through ownership, use, production or supply thereof~~;
Justification	
If the co-legislators maintain the Commission's original text and the reference to annex II in article 4(4), it is important to clarify the definition in article 2(9). It is currently unclear whether the term 'economically active' would apply to any activities related to the critical technology areas listed (eg 'use') or whether this is meant to be limited	

to more substantive activities such as research and development or production. As a result, the regulation's authorisation requirements could potentially cover investments targeting all companies using technologies that have become ubiquitous (eg artificial intelligence, cloud, robotics and Internet of Things), including where these technologies are not part of the target company's core business. The mere use of a listed critical technology by a Union target should not be sufficient to trigger mandatory authorisation requirements for foreign investments. The proposed amendments seek to clarify this point and narrow the scope of the mandatory authorisation requirements to investments involving Union targets that engage in more substantive activities related to the listed critical technologies. The language on 'core business lines' is consistent with Directive 2014/59/EU, and the reference to 'design, development or production' is derived from Regulation (EU) 2021/821 (Dual-Use Regulation).

Article 4 (Minimum Requirements)	
Article 4(2)	
Commission text	**Proposed amendments**
2. Member States shall ensure that their screening mechanisms comply with the following requirements: (a) adequate procedures shall be provided for the screening authority to determine whether it has jurisdiction over a foreign investment filed for authorisation and to carry out an initial review followed by, where necessary, an in-depth investigation to determine whether that foreign investment is likely to negatively affect security or public order. The purpose of the in-depth investigation shall be, in particular, to determine whether a screening decision as referred to in Article 14(1) is appropriate and to determine its content; […] (c) the screening authority shall be empowered to start screening foreign investments by its own initiative for at least 15 months after the completion of a foreign investment that is not subject to an authorisation	2. Member States shall ensure that their screening mechanisms comply with the following requirements: **Alternative 1:** (a) Member States shall require mandatory notification of foreign investments which enable the possibility for the investor to exercise decisive influence on a Union target pursuant to Article 3(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Article 20(5) of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. Screening mechanisms shall not allow Member States to require mandatory notification of minority or short-term investments, or restructuring operations within a group of companies or a merger of more than one legal entities into a single legal entity; **Alternative 2:** (a) Member States shall require mandatory notification of foreign investments where this enables effective participation in the management or control of a Union target. Screening mechanisms shall not

requirement where the screening authority has grounds to consider that the foreign investment may affect security or public order; […] (d) confidential information, including commercially sensitive information, made available to the Member State carrying out the screening shall be protected; […] (e) foreign investors, foreign investors' subsidiaries in the Union through which the foreign investment is carried out and undertakings concerned by a screening decision shall have the possibility to seek judicial recourse against that screening decision; […] (f) an annual report shall be made public, and shall include information on relevant legislative developments in the Member State and aggregate and anonymised data on the investments screened, including the outcome of screening decisions, nationalities, or country of establishment as the case may be, of parties to the investments notified to the screening authority, and the economic sectors in which those transactions took place; […] (g) foreign investments subject to an authorisation requirement as referred to in paragraph 4 shall be filed by the applicant requesting authorisation	allow Member States to require mandatory notification of minority or short-term investments, or restructuring operations within a group of companies or a merger of more than one legal entities into a single legal entity; (~~a~~ b) adequate procedures, resources, legal and administrative means shall be provided for the screening authority to efficiently and effectively determine whether it has jurisdiction over a foreign investment filed for authorisation and to carry out an initial review followed by, where necessary, an in-depth investigation to determine whether that foreign investment is likely to negatively affect security or public order. The purpose of the in-depth investigation shall be, in particular, to determine whether a screening decision as referred to in Article 14(1) is appropriate and to determine its content; […] (~~c~~ d) the screening authority shall be empowered to start screening foreign investments by its own initiative under Article 9 for ~~at least~~ no later than ~~15~~ 6 months after the completion of a foreign investment that is not subject to an authorisation requirement where the screening authority has reasonable grounds to consider that the foreign investment ~~may affect~~ is likely to pose a genuine and sufficiently serious threat to security or public order; […] (~~d~~ e) confidential information, including commercially sensitive information, made available to the Member State carrying out the screening shall be protected. The Member State carrying out the screening

with the screening authority and shall be screened before the foreign investment is completed;	shall give undertakings concerned the opportunity to indicate which information made available they consider to be confidential; […] (~~e~~ f) foreign investors, foreign investors' subsidiaries in the Union through which the foreign investment is carried out and undertakings concerned by a screening decision shall have the possibility to seek effective and timely judicial recourse against that screening decision; […] (~~f~~ g) an annual report shall be made public, and shall include information on relevant legislative developments in the Member State, criteria used to assess whether an investment is likely to negatively affect security or public order, and aggregate and anonymised data on the investments screened, including the outcome of screening decisions, nationalities, or country of establishment as the case may be, of parties to the investments notified to the screening authority, and the economic sectors in which those transactions took place; […] (~~g~~ h) foreign investments subject to an authorisation requirement as referred to in paragraph 4 shall be filed by the applicant requesting authorisation with the screening authority and shall be screened before the foreign investment is completed. The screening authority shall limit administrative burdens and undue delays for the applicant requesting authorisation. In the absence of a decision from the screening authority

	within the applicable deadline, the authorisation shall be deemed to be granted upon expiry of that deadline; […] (~~i~~ j) […]
Justification	
Proposed paragraph (a): See justification for article 2(1). Existing paragraph (a): Article 11(1) in the proposal would require Member States to provide the necessary 'resources, legal and administrative means' to ensure their 'efficient and effective' participation in the cooperation mechanism. This should help expedite the conclusion of the small percentage of overall cases notified to the cooperation mechanism. However, given that the majority of cases will not be notified to the cooperation mechanism, the current text risks concentrating resources around a small number of notified cases while failing to address resource issues that currently complicate the assessment of the majority of cases. These proposed amendments would require Member States to provide their screening authorities with the resources needed to ensure expeditious clearance of the cases not notified to the cooperation mechanism. Going beyond the language suggested, encouraging Member States to adopt review timelines consistent with article 24 and article 25 of the Foreign Subsidies Regulation would align timelines for the three main transaction screening regimes in the EU: merger control, foreign subsidies screening and foreign investment clearance. This would create certainty for notifiable investments that lack national security investments while allowing flexibility for further investigations. Direct reference could be made to the timelines indicated in article 24 and 25 of the Foreign Subsidies Regulation. Existing paragraph (c): To ensure stability for not only Union targets that secure foreign investments but also for their employees, creditors and the economic activities surrounding the Union target, screening authorities should open procedures within a reasonable timeframe after an investment has been completed. In addition, any decision to screen an investment that has been completed should meet the threshold of reasonability, and should be based on a genuine and sufficiently serious threat to security or public order. The current FDI Regulation (Regulation (EU) 2019/452) allows Member States and the Commission to make comments or 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. AmCham EU believes that this period should not be extended, and in fact should be removed entirely or considerably reduced.	

A 15-month call-in window creates significant uncertainty for investors as a large volume of economic activity can already be underway 15 months after an investment is cleared. We recommend adopting as an absolute maximum a 6-month window. By way of comparison, under the UK National Security Investment Act of 2021, the UK Secretary of State has a maximum of six months from becoming aware of a non-notified transaction to call it in for *ex post* review. Similarly, the Commission considers that a referral under article 22 EUMR is generally not appropriate where more than six months have passed after the implementation of a concentration. 6 months provide sufficient time for a national screening authority to identify non-reported transactions using their own market intelligence tools, but a short enough window to not create undue uncertainty for investors. Existing paragraph (d): The proposed amendment is consistent with obligations under Regulation (EU) 2022/2560 (Foreign Subsidies Regulation) and would create stronger safeguards for investors' confidential information. Existing paragraph (e): Member States should apply to foreign investment screening the same principles of due process and good governance applicable in other areas of judicial recourse. Existing paragraph (f): Investors would benefit from guidance on how Member States interpret and apply key provisions of the regulation. The requirement set out under article 4(2)(f) for Member States to publish annual reports is a welcome proposal in that regard. As currently drafted, however, Member States would only be required to publish high-level information on legislative developments and aggregate transactional statistics, which is unlikely to provide actionable guidance on the interpretation of jurisdictional concepts, approach to substantive assessments or underlying reasons for remedial enforcement and prohibitions. The proposed amendment would help provide greater clarity to investors on Member States' substantive assessments and is in line with Member States' reporting obligations under article 16(1)(f). Existing paragraph (g): In line with good governance principles, national screening authorities should be required to ensure that their procedures are efficient and accessible to investors. The proposed language on administrative burdens and undue delays is consistent with the Foreign Subsidies Regulation and Regulation (EU) 2019/941. Similarly, Member States have diverging rules about deemed approvals and denials. Several Member States' FDI regimes (including Austria, Belgium, Ireland, Italy, the Netherlands and the Slovak Republic) already comprise deemed approval rules. Setting an EU-wide standard for deemed approval would allow investors to obtain closure and certainty. This would be without prejudice to Member States' abilities to suspend statutory timelines in the context of in-depth investigations.

Article 4(3)	
Commission text	**Proposed amendments**

3. Before taking a decision to authorise a foreign investment subject to mitigating measures or to prohibit a foreign investment, Member States shall inform the applicant requesting an authorisation and state the reasons on which they intend to take their decision, subject to the protection of information the disclosure of which would be contrary to the security or public order interests of the EU or one or more of the Member States and without prejudice to Union and national law concerning the protection of confidential information. Member States shall give the foreign investor the opportunity to make their views known before taking such decision.	3. Before taking a decision to authorise a foreign investment subject to mitigating measures or to prohibit a foreign investment, Member States shall inform the applicant requesting an authorisation and state the reasons on which they intend to take their decision, subject to the protection of information the disclosure of which would be contrary to the security or public order interests of the EU or one or more of the Member States and without prejudice to Union and national law concerning the protection of confidential information. Member States shall give the foreign investor ~~the opportunity~~ at least 10 calendar days to make their views known and shall take these views into account before taking such decision.
Justification	
A key element of transparency is the duty for Member States to provide reasons for decisions taken. To that end, article 4(3) in the proposal would require Member States to provide applicants with advanced notice of forthcoming decisions, along with adequate reasoning. However, the provision does not contain the specificity necessary to encourage Member States to make meaningful improvements to their processes. An important clarification would be to require Member States to afford meaningful time for investors to make their views known. In accordance with due process principles, Member States should at least consider investors' views before issuing a decision to authorise an investment subject to mitigating measures or to prohibit an investment.	

Article 4(4) and Annex II	
Commission text	**Proposed amendments**
4. Member States shall ensure that their screening mechanisms impose an authorisation requirement for foreign investments where the Union target established in their territory: (a) is part of or participates in one of the projects or programmes of Union interest listed in Annex I, including as a recipient of funds as defined in Article 2 paragraph 53 of Regulation 2018/1046 of the European Parliament and of the Council, or (b) is economically active in one of the areas listed in Annex II.	4. Member States shall ensure that their screening mechanisms impose an authorisation requirement for foreign investments where the Union target established in their territory: (a) ~~is part of or~~ participates in one of the projects or programmes of Union interest listed in Annex I~~, including~~ as a recipient of funds, as defined in Article 2 paragraph 53 of Regulation 2018/1046 of the European Parliament and of the Council, except where it is a recipient of a low-value grant as defined in Article 2 paragraph 41 of Regulation 2018/1046~~, or~~;

	(b) ~~economically active in one of the areas~~ designs, develops or produces items or operates an entity of a type listed in Annex II~~.~~; 5. Paragraph 4 shall not apply where the Union target is a subsidiary of the foreign investor.
ANNEX II	
Commission text	**Proposed amendments**
List of technologies, assets, facilities, equipment, networks, systems, services and economic activities of particular importance for the security or public order interests of the Union 1. Items listed in Annex I to Regulation (EU) 2021/821 of the European Parliament and of the Council (common list of dual-use items subject to export controls) 2. Equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (Common Military List of the European Union) 3. The following critical technology areas for the EU's economic security annexed to Commission Recommendation (EU) 2023/2113 of 3 October 2023 on critical technology areas for the EU's economic security for further risk assessment with Member States: […] 5. The following critical entities and activities in the Union's financial system: central counterparties, payment systems and payment institutions, electronic money institutions6 , market operators and investment firms that operate a multilateral trading facility or an organised trading facility, central securities depositories, significant issuers of asset-referenced tokens or e-money tokens and crypto asset	**List of ~~technologies, assets, facilities, equipment, networks, systems, services and economic activities~~ items and entities of particular importance for the security or public order interests of the Union** 1. Items listed in Annex I to Regulation (EU) 2021/821 of the European Parliament and of the Council (common list of dual-use items subject to export controls), except where the investor and its global ultimate owner are established or otherwise organised in a third country authorised for the export of those items by a Union General Export Authorisation under Annex II of Regulation (EU) 2021/821 2. Equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (Common Military List of the European Union) ~~3. The following critical technology areas for the EU's economic security annexed to Commission Recommendation (EU) 2023/2113 of 3 October 2023 on critical technology areas for the EU's economic security for further risk assessment with Member States:~~ […] 5. The following critical entities and activities in the Union's financial system: central counterparties, payment systems and payment institutions, electronic money

service providers operating trading platforms for crypto-assets, large institutions, global providers of specialised financial messaging services and designated critical ICT third-party service providers.	institutions, market operators and investment firms that operate a multilateral trading facility or an organised trading facility, central securities depositories, significant issuers of asset-referenced tokens or e-money tokens and crypto asset service providers operating trading platforms for crypto-assets, large institutions, and global providers of specialised financial messaging services ~~and designated critical ICT third-party service providers.~~
Justification	
Article 4(4)(a): The proposal's language is unclear regarding what level of participation in an annex I project would place a Union target in scope of the Regulation's authorization requirements. The projects listed in annex I (eg Horizon Europe) often involve multiple layers of subcontractors with increasingly tenuous connections to the core activity of the project. article 4(4)(a) should therefore only apply to beneficiaries of an annex I project with concrete connections to the project's core activity and should not apply to beneficiaries of insignificant grants. **Article 4(5):** As understood in the Consolidated Jurisdictional Notice, greenfield foreign investments occur when a foreign investor creates a subsidiary in a new country. These types of investments do not lead to a change in the effective participation of a foreign investor in the management or control of a Union target and do not involve Union entities carrying out critical economic activities. Therefore, they do not present an immediate risk of intellectual property leakage or supply chain disruptions, and should not be subject to an authorisation requirement. This would not prevent Member States from screening greenfield investments if they eventually pose a risk to security or public order. **Annex II:** The proposed list of affected sectors is at once unduly broad and internally duplicative, and that would benefit from considerable further refinement. There is extensive overlap between annex II paragraph 1 (Regulation 2021/821 – common list of dual-use items) and annex II paragraph 3 (Recommendation 2023/2113 - critical technology areas for the EU's economic security), which is liable to cause legal uncertainty around the exact scope of annex II. Recommendation 2023/2113 in particular covers an excessively large array of technologies – including widely available technologies – and lacks the risk-based elements required to develop effective investment screening rules. It does not provide Member States with a clear framework to align the scope of their investment screening regimes and risks creating additional national divergences. In practice, by requiring foreign investors to request an authorisation for all investments in Union targets operating in such broadly defined technology areas, the proposal would compel national authorities to over-screen foreign investments, unnecessarily delaying low-risk transactions that are vital to the EU's competitiveness and creating significant administrative burdens for investors.	

Annex I of Regulation (EU) 2021/821 (Dual-Use Regulation) in contrast is very detailed, identifying specific technologies that are liable to raise national security concerns. As such, it is a preferable frame of reference to Recommendation 2023/2113. Nevertheless, even annex I of Regulation 2021/821 encompasses some technologies that are fairly innocuous and globally available – for example, several standard encryption technologies. Therefore, further refinements to the proposal's export control reference would be welcome. AmCham EU's proposed Union General Export Authorisation exemption seeks to address this point. For example, Union General Export Authorisation EU001 authorises the export of all Annex I dual use items to the U.S.; therefore, an investor established in the U.S. would be exempt from screening based on the Annex I criteria if it met the conditions of UGEA EU001.

In light of the detailed approach of Regulation 2021/821, as well as its superior legislative status, it is sufficient to rely on annex II paragraph 1 (as amended) for the purposes of the FDI Regulation, and to delete annex II paragraph 3.

The proposed amendments would help ensure that the regulation's authorisation requirements focus on higher-risk investments – namely investments targeting export-controlled companies (companies developing the most sensitive technologies are in most cases subject to export controls) and companies providing certain previously defined critical services.

If the legislators nevertheless choose to maintain a longer annex II list, they should endeavour to follow the same approach outlined in our recommendations, where definitions are tied wherever possible to existing detailed legislation. AmCham EU would be willing to engage in further discussion on legislative cross-references.

Annex II paragraph 5: Critical ICT third-party providers are already subject to specific requirements through the European Supervisory Authorities.

CHAPTER 3: THE UNION COOPERATION MECHANISM ON FOREIGN INVESTMENT LIKELY TO NEGATIVELY AFFECT SECURITY OR PUBLIC ORDER	
Article 5 (Notification of foreign investments)	
Commission text	**Proposed amendments**
1. Member States shall notify the Commission and the other Member States through the cooperation mechanism of any foreign investment in a Union target established in their territory that: […]	1. Member States shall notify the Commission and the other Member States through the cooperation mechanism of any foreign investment in a Union target established in their territory that: […]

(b) meets the conditions set out in Article 4(4) point (b) and any of the following conditions: […] (iii) the foreign investor or any of its subsidiaries was involved in a foreign investment previously screened by a Member State and was not authorised or only authorised with conditions; to determine this, the notifying Member State shall rely on information available to them, including the information contained in the secure database set up pursuant to Article 7(10) and information provided by the foreign investor on this matter.	(b) meets the conditions set out in Article 4(4) point (b) and any of the following conditions: […] (iii) the foreign investor or any of its subsidiaries was involved in the year prior to the request for authorisation in a foreign investment ~~previously~~ screened by a Member State and was not authorised ~~or only authorised with conditions~~; to determine this, the notifying Member State shall rely on information available to them, including the information contained in the secure database set up pursuant to Article 7(10) and information provided by the foreign investor on this matter.
Justification	
Under Article 5(1)(b)(iii) of the proposal, Member States must refer to the cooperation mechanism any investment that meets two criteria: (i) the Union target is active in an annex II sector; and (ii) the foreign investor has previously received a prohibition decision or a conditional authorisation. This would mean that any foreign investor who has received a conditional authorisation or a prohibition decision would always see their investments in annex II targets undergo additional scrutiny, without any clear limitation in time. As a result, historical prohibitions or conditional approvals would continue to impair investors' activities long after the conditions that prevailed when such decisions were handed down have materially changed. This could perpetually prejudice the activities of investors who have previously received prohibitions or conditional authorisations on political grounds or where political, security or other conditions have significantly changed. By placing additional scrutiny on all investors previously subject to conditional authorisations, the proposal also ignores that these conditional authorisations may take many forms. While some conditions may be very minor- – requiring, for example, some pro forma disclosures that do not imply risks to security or public order – others may be quite expansive. Under the 2019 FDI Screening Regulation, some Member States will subject investors to remedies simply by virtue of involving a Union target engaged in a standard supply contract to the government. These proposed amendments would avoid prejudicing investors who have received minor or pro forma conditions in the past and would set a statute of limitations to prevent prohibitions from inhibiting investors in perpetuity, building on the precedent established in Regulation (EU) 2022/2560 (Foreign Subsidies Regulation).	

Article 6 (Content and procedures for notification of foreign investments)	
Commission text	**Proposed amendments**

2. The following procedures shall apply to multi-country transactions: (a) applicants requesting an authorisation shall file their requests for authorisation in all relevant Member States on the same day, and each request for authorisation shall make reference to the other requests;	2. The following procedures shall apply to multi-country transactions: (a) applicants requesting an authorisation shall file their requests for authorisation in all relevant Member States ~~on the same day~~ within 15 calendar days of the first request for authorisation, and each request for authorisation shall make reference to the other requests;
Justification	
The proposal would require investors to file their authorisation requests in all relevant Member States on the same day. Member States would then have to notify the cooperation mechanism on the same day, and there would be common timelines for other Member States and the Commission to issue comments/opinions. Greater procedural alignment is a welcome objective. However, the proposed system could place an undue burden on investors. Because of national screening mechanisms with divergent and unclear jurisdictional concepts, thresholds and information requirements, notifying transactions across several jurisdictions on the same day would not only require a sizeable effort of coordination amongst transacting parties but could delay transactions. This would be an inefficient outcome. The co-legislators should consider removing this obligation or in the alternative providing a reasonable window for investors to notify multi-country investments. The proposed window of 15 calendar days aligns with the notification window in article 6(1)(a); this window should be regarded as an absolute minimum. See also the proposed amendments to recital 18(a) and article 4(2).	

Article 9 (Own initiative procedure)	
Commission text	**Proposed amendments**
2. Member States shall be granted at least 15 months, after the foreign investment has been completed, the right to open the procedure set out in paragraph 1, provided the respective foreign investment has not been notified to the cooperation mechanism in the meantime. […] 4. The Commission shall be granted at least 15 months, after the foreign investment has been completed, to open the procedure set out in paragraph 3, provided the	2. Member States shall be granted ~~at least~~ no more than ~~15~~ 6 months, after the foreign investment has been completed, the right to open the procedure set out in paragraph 1, provided the respective foreign investment has not been notified to the cooperation mechanism in the meantime. […] 4. The Commission shall be granted ~~at least~~ no more than ~~15~~ 6 months, after the foreign investment has been completed, the right to open the procedure set out in

respective foreign investment has not been notified to the cooperation mechanism in the meantime.	paragraph 3, provided the respective foreign investment has not been notified to the cooperation mechanism in the meantime.
Justification	
See proposed amendment to article 4(2)(c).	

Article 10 (Information requirements)	
Commission text	**Proposed amendments**
4. Where necessary, the Member State where the foreign investment is planned or has been completed may request the applicant requesting an authorisation or any other relevant undertaking to provide the information referred to in paragraphs 1 and 3. The request for information may concern information necessary for the Member State to determine if any of the conditions set out in Article 5(1) are met. The undertaking concerned shall provide the requested information to the Member State where the foreign investment is planned or has been completed within 15 calendar days of the request.	4. Where necessary, the Member State where the foreign investment is planned or has been completed may request the applicant requesting an authorisation or any other relevant undertaking to provide the information referred to in paragraphs 1 and 3. ~~The request for information may concern information necessary for the Member State to determine if any of the conditions set out in Article 5(1) are met.~~ The undertaking concerned shall provide the requested information to the Member State where the foreign investment is planned or has been completed within 15 calendar days of the request. Any request for information pursuant to this paragraph shall be duly justified, limited to the information necessary for the Member State where the foreign investment is planned or has been completed to determine whether that foreign investment is likely to negatively affect security or public order, proportionate to the purpose of the request and not unduly burdensome for the undertaking concerned. Where relevant, Member States shall endeavour to rely on information already available to them, including information made available under Article 29 of Regulation (EU) 2022/2560.
Justification	
The proportionality standard for government-to-government information requests in article 9(5) should also be applied to investors.	

CHAPTER 4: FOREIGN INVESTMENTS LIKELY TO NEGATIVELY AFFECT SECURITY OR PUBLIC ORDER

Article 13 (Determination of likely negative impact on security and public order)	
Commission text	**Proposed amendments**
4. When determining whether an investment is likely to negatively affect security or public order, the Member States or the Commission shall also take into account information related to the foreign investor, including: (a) whether the foreign investor, a natural person or entity controlling the foreign investor, the beneficial owner of the foreign investor, any of the subsidiaries of the foreign investor, or any other party owned or controlled by, or acting on behalf or at the direction of the foreign investor was involved in a foreign investment previously screened by a Member State and that was not authorised or was only authorised with conditions; to determine this, Member States and the Commission shall rely on information available to them, including the information contained in the secure database set up pursuant to Article 7(10); […] (e) whether the foreign investor, a natural person or entity controlling the foreign investor, the beneficial owner of the foreign investor, any of the subsidiaries of the foreign investor, or any other party owned or controlled by, or acting on behalf or at the direction of the foreign investor is likely to pursue a third country's policy objectives, or facilitate the development of a third country's military capabilities.	4. When determining whether an investment is likely to negatively affect security or public order, the Member States or the Commission shall also take into account information related to the foreign investor, including: (a) whether the foreign investor, a natural person or entity controlling the foreign investor, the beneficial owner of the foreign investor, any of the subsidiaries of the foreign investor, or any other party owned or controlled by, or acting on behalf or at the direction of the foreign investor was involved in a foreign investment previously screened by a Member State and that was not authorised ~~or was only authorised with conditions~~; to determine this, Member States and the Commission shall rely on information available to them, including the information contained in the secure database set up pursuant to Article 7(10); […] (e) whether the foreign investor, a natural person or entity controlling the foreign investor, the beneficial owner of the foreign investor, any of the subsidiaries of the foreign investor, or any other party owned or controlled by, or acting on behalf or at the direction of the foreign investor is likely to ~~pursue a third country's policy objectives, or~~ facilitate the development of a third country's military capabilities.
Justification	
Paragraph (a): See justification for proposed amendment to article 5(1)(b)(iii). Paragraph (e): Recital (35), which highlights the standards and criteria used to assess likely risks to security and public order, describes investors that pursue the 'policy objectives of third countries to facilitate their military capabilities'. However, paragraph (e) currently splits the Recital's wording into two – highlighting both the pursuit	

of military capabilities and a more general pursuit of policy objectives. To avoid doubt and uncertainty, the language should be aligned with the clearer formulation in the Recital.

Article 14 (Screening decisions on foreign investments likely to negatively affect security or public order)	
Commission text	**Proposed amendments**
1. Where, taking into account the criteria laid down in Article 13 and, where applicable, in the light of comments provided by other Member States pursuant to Article 7(1) or Article 9(7), or an opinion provided by the Commission pursuant to Article 7(2) or (3) or Article 9(7), the Member State in which the foreign investment is planned or completed concludes that the foreign investment is likely to negatively affect security or public order in one or more Member States, including where a project or programme of Union interest is concerned, it shall issue a screening decision to: (a) authorise the foreign investment subject to mitigating measures, or (b) prohibit the foreign investment. The screening decision shall comply with the principle of proportionality and take into consideration all circumstances of the foreign investment.	1. Where, taking into account the criteria laid down in Article 13 and, where applicable, in the light of comments provided by other Member States pursuant to Article 7(1) or Article 9(7), ~~or~~ an opinion provided by the Commission pursuant to Article 7(2) or (3) or Article 9(7), or the views provided by the foreign investor pursuant to Article 4(3), the Member State in which the foreign investment is planned or completed concludes that the foreign investment is likely to negatively affect security or public order in one or more Member States, including where a project or programme of Union interest is concerned, it shall issue a screening decision to: (a) authorise the foreign investment subject to mitigating measures, or (b) prohibit the foreign investment. ~~The~~ Such a screening decision shall comply with the principle of proportionality, be based on a genuine and sufficiently serious threat to security or public order, and take into consideration all circumstances of the foreign investment.
Justification	
To ensure that the operation of screening mechanisms is predictable and grounded in law and not politics, the Regulation should specify that any prohibitions or conditional authorisations should be based on genuine and sufficiently serious threats to security or public order, as required by European Court of Justice case law. As summarised in the ECJ's ruling in Case C-171/08, 'requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital', be based on 'a genuine and sufficiently serious threat to a fundamental interest of society'.	

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