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# ANALYSIS

EU law

## New EU regulation on the screening of foreign investments

This paper analyses Regulation (EU) 2026/1386 of the European Parliament and of the Council of 17 June 2026 on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452. We look at the main changes introduced by the new regulatory framework — the mandatory nature of national screening mechanisms, the broadening of the scope of application to intra-Union investments, and the strengthening of cooperation between Member States and the European Commission — as well as its impact on the Spanish legal system and the adjustments Spain must make by 17 January 2028.

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## 1. Introduction

On 26 June 2026, Regulation (EU) 2026/1386 of the European Parliament and of the Council of 17 June 2026 on the screening of foreign investments in the Union was adopted and published in the *Official Journal of the European Union*.

This regulation repeals previous Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, which had been in force since October 2020.

The adoption of the new regulation is one of the measures provided for in the European Economic Security Strategy, published in June 2023, and responds to several factors: on the one hand, from a geopolitical perspective, the COVID-19 pandemic, Russia's war of aggression against Ukraine, and rising geopolitical tensions have highlighted the need to protect the Union's critical assets more effectively. On the other hand, the previous regulation revealed significant shortcomings in its practical application, and the judgment of the Court of Justice of the European Union (CJEU) in Case C-106/22 *(Xella Magyarország)* highlighted the existing loophole regarding foreign investments channelled through European subsidiaries controlled by third-country investors[1].

Therefore, the new regulation essentially introduces three fundamental changes: it strengthens the system for screening foreign investments in the Union; it harmonises screening criteria, deadlines and procedures across all Member States; and it improves cooperation between Member States and the European Commission in assessing risks to security and public order.

## 2. Key Changes

The general principle governing the regime for foreign investments in the European Union is that of openness and freedom of investment, enshrined in Articles 49 and 63 of the Treaty on the Functioning of the European Union (TFEU) and in the Union's international commitments, notably those undertaken within the World Trade Organization. This principle is set aside only when there is a risk to security or public order, and only to the extent that it is appropriate and necessary to address a genuine and sufficiently serious threat.

The new regulation upholds this principle of openness but introduces a harmonised and mandatory framework for screening that significantly strengthens the capacity of Member States and the Commission to identify and address the risks that certain foreign investments may pose to security or public order.

[1] Regulation (EU) 2026/1386 of the European Parliament and of the Council of 17 June 2026 on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (OJ L, 2026/1386, June 26), recitals 5 through 8. See also the Joint Communication on 'European Economic Security Strategy', JOIN/2023/20 final, dated 20 June 2023.

Consequently, the following are the main new features:

### 2.1. *Mandatory national screening mechanisms*

The most significant change introduced by the regulation is that it requires all Member States to ensure that foreign investments targeting entities operating in a specific set of sensitive areas are screened.

The repealed regulation merely allowed Member States to maintain, amend or adopt mechanisms to screen foreign direct investments, without imposing this obligation on them[2]. As a result, a significant portion of foreign investment in the Union was directed toward Member States that lacked screening mechanisms, creating a degree of systemic vulnerability that the new framework aims to eliminate. Specifically, Special Report No. 27/2023 of the European Court of Auditors estimated that approximately 42% of the volume of foreign direct investment (FDI) in the Union was directed to Member States without a fully applicable screening mechanism[3].

In addition to being mandatory, national screening mechanisms must meet a series of harmonised minimum requirements[4], including the following:

- They must cover investments in companies active in the sectors listed in Article 4(15) of the regulation.
- They must require prior authorisation before an investment is made in those sectors; it must not be possible to complete the transaction and obtain authorisation afterward.
- They must establish adequate procedures to identify and prevent circumvention of the screening mechanisms.
- They must publish an annual activity report including aggregate and anonymised data on the transactions screened.

### 2.2. *Broadening of the scope of application: intra-Union investments subject to foreign screening*

The previous regulation covered only foreign direct investments from third countries, leaving those made by European subsidiaries of foreign companies outside its scope. This loophole allowed for the circumvention of screening mechanisms by using an entity established in the Union but controlled by a third-country investor, a circumstance highlighted by the

[2] Article 3(1) of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.

[3] Special Report No. 27/2023 of the European Court of Auditors, cited in recital 8 of Regulation (EU) 2026/1386. According to that report, approximately 42% of the volume of foreign direct investment in the Union originated from Member States without a fully applicable screening mechanism.

[4] Article 4 of Regulation (EU) 2026/1386.

CJEU judgment in Case C-106/22 (Xella Magyarország)[5].

The regulation corrects this situation by expressly including within its scope so-called intra-*Union investments* - that is, those made by European subsidiaries of foreign investors when such subsidiaries are directly or indirectly controlled by a third-country person or entity and the transaction is aims to establish or maintain a lasting link between the foreign investor and the Union target. To provide a legal basis for this broadening, the regulation incorporates Article 114 TFEU (internal market) alongside Article 207 of the same treaty (common commercial policy)[6].

The regulation also specifies the transactions that are excluded from its scope of application:

*a*) portfolio investments, that is, the acquisition of securities without the intention of influencing the management or control of the company;

*b*) acquisitions resulting from bank resolution procedures or those involving insurers and central counterparties, given that the urgency inherent in such processes is incompatible with screening deadlines;

*c*) internal reorganisations within a corporate group without resulting in any changes in the beneficial ownership;

*d*) greenfield investments, which, although falling within the scope of the regulation, are not subject to the prior authorisation requirement, leaving it to the discretion of each Member State to include them in their screening mechanisms.

### 2.3. *Sectors subject to mandatory screening: common minimum scope*

The regulation establishes a common minimum scope of sectors in which all Member States must require prior authorisation. This scope includes, among others, companies that develop, produce or commercialise dual-use items or military goods; those that produce, conduct research in or develop semiconductor or quantum technologies, or conduct research in or develop certain artificial intelligence technologies; those exercising certain activities related to strategic raw materials; certain financial market infrastructure; companies that own, develop or operate voter registration databases, voting systems and other relevant information systems; and companies that are active in the transport, energy or digital infrastructure

[5] Judgment of the Court of Justice of the European Union, Case C-106/22, Xella Magyarország. The reference to this case appears in recital 7 of Regulation (EU) 2026/1386.

[6] Article 2(1) and (7) of Regulation (EU) 2026/1386. The dual legal basis (Articles 114 and 207 TFEU) is set out in the beginning of the regulation itself.

sectors but only to the extent that they are considered critical following a risk-based, targeted assessment[7].

The technology areas relevant to risk assessments are listed in Annex III to the regulation, which includes, among others, biotechnologies, advanced connectivity technologies, submarine fibre-optic cables, space technologies, robotics and autonomous systems, and advanced materials technologies. The annexes may be amended by the Commission through delegated acts, in order to adapt them to changes in circumstances relevant to the security or public order of the Union.

> *The regulation introduces a two-stage procedural framework for the national screening of foreign investments*

### 2.4. *National screening procedure: the two-stage structure*

The regulation introduces a two-stage procedural framework for the national screening of foreign investments.

The first stage consists of an initial review lasting forty-five calendar days, during which the screening authority determines whether the investment raises concerns from the perspective of security or public order. If it does not, the investment is authorised without further action.

The second stage is triggered when, following the initial review, concerns remain regarding the likely effect of the investment. During this stage, a comprehensive investigation is conducted to determine whether the investment should be authorised unconditionally, authorised subject to mitigating measures, or prohibited. Prohibition is exceptional in nature and applies only when the available mitigating measures are not sufficient to resolve the foreign investment's likely negative effect on security or public order.

As a procedural safeguard, before adopting a decision to authorise a foreign investment subject to mitigating measures or to prohibit or unwind a foreign investment, the screening authority shall give the parties subject to the intended screening decision the opportunity to make their views known effectively.

### 2.5. *The European cooperation mechanism: notification, deadlines, and risk screening*

The regulation keeps and strengthens the cooperation mechanism between Member States and the Commission by introducing a risk screening system that focuses European cooperation on truly sensitive transactions.

[7] Annex II to Regulation (EU) 2026/1386 (projects or programmes of Union interest).

Notification through the mechanism is mandatory when the investment involves companies falling within the common minimum scope and any of the following conditions apply: the foreign investor or the foreign investor's subsidiary in the Union is directly or indirectly controlled by the government; the investor or its subsidiaries are subject to Union restrictive measures; or the investor was involved in a foreign investment which was previously screened by a Member State and was not authorised or was authorised subject to mitigating measures, which were significantly or repeatedly not complied with. Likewise, notification is mandatory when a Member State initiates an in-depth investigation and the is active in a project or programme of Union interest or has one or more subsidiaries in at least one other Member State. In all other cases, notification is voluntary[8].

The deadlines under the mechanism are as follows: the notification must be sent within 15 calendar days of the filing for foreign investments subject to ordinary mandatory notification, and within 45 calendar days for investments under an in-depth investigation.

Once the notification is received, the other Member States have 15 calendar days to reserve the right to provide comments, and the Commission has 20 calendar days to reserve the right to issue an opinion. Comments must be provided no later than 20 calendar days after notification (or 15 calendar days after receipt of additional information), and the Commission's opinions within 30 calendar days (or 25 calendar days after receipt of additional information). The receiving Member State may not adopt its screening decision while these deadlines are still in effect.

As a significant new development, the Commission may now issue an opinion addressed to all Member States where it identifies two or more foreign investments that, taken together, are likely to negatively affect security or public order.

### 2.6. *The strengthened "comply or explain" principle*

The regulation significantly strengthens the principle of Member States' accountability regarding the comments and opinions received under the cooperation mechanism.

Where a notifying Member State receives a comment from another Member State or an opinion from the Commission, it shall give due consideration to that comment or opinion and shall notify to the Member States concerned and to the Commission, no later than seven calendar days from the date of entry into force of the screening decision, the operative part of its screening decision as well as a summary of the main reasons thereof in view of the provided comments or issued opinion,

[8] Articles 5, 6, 7, 8, and 11 of Regulation (EU) 2026/1386.

including the extent to which it gave the Member States' comments or the Commission opinion due consideration and, where applicable, the reason for its disagreement with the Member States' comments or the Commission opinion. If a Member State that provided comments so requests, the host Member State shall organise a meeting with the Member States that provided comments and with the Commission or, if the Commission so requests, a meeting with the Commission alone where only the Commission issued an opinion to discuss how best to address the risks identified. This mechanism is considerably more stringent than that provided for in the repealed regulation, where the obligation to provide an explanation existed but without specific deadlines or a formalised follow-up mechanism.

## 2.7. *The own-initiative procedure and multi-country transactions*

The regulation sets out in greater detail the own-initiative procedure, which allows Member States and the Commission to review investments that have not been notified through the cooperation mechanism within a period of fifteen months and up to a maximum of five years from the completion of the foreign investments. This mechanism has significant practical importance, as it means that even transactions that have already been closed may be subject to review during that period, a fact that must be taken into account when structuring transactions.

When the same investment requires simultaneous authorisation in several Member States, the regulation lays down specific rules for multi-country transactions: the investor must submit separate in the Member States concerned on the same day, and the Member States concerned shall coordinate closely throughout the process and, in particular, endeavour to align the timing of their respective screening procedures, including as regards the adoption of their respective screening decisions, and, where appropriate, shall discuss whether their respective screening decisions are compatible with each other and adequately address the identified risks to security or public order.

## 2.8. *Risk assessment criteria*

The regulation establishes a harmonised set of criteria that Member States and the Commission must apply when assessing whether a foreign investment is likely to negatively affect security or public order. These criteria take into account both the characteristics of the investment target — whether the transaction could affect critical infrastructure, critical technologies, the supply of critical inputs, the protection of sensitive information, media freedom, or the protection of electoral processes — and those of the investor itself — whether it is controlled by the government of a third country, whether it has engaged in illegal or criminal activities, whether it is likely to pursue a third country's policy objectives, whether it is subject to Union restrictive measures, or whether it has an opaque ownership structure —.

### 2.9. *Mitigating measures and investment prohibitions*

Where the host Member State that the foreign investment is likely to negatively affect security or public order, it shall adopt a screening decision that may consist of *a*) authorising the foreign investment subject to mitigating measures or *b*) prohibiting or ordering the unwinding of the foreign investment. A prohibition is exceptional and applies only when there are no other adequate measures to address the risk.

Mitigating measures that may be imposed include, but are not limited to, the following: changes to the proposed governance structure of the Union target, modifications to the voting rights conferred on the foreign investor, conditions on access to sensitive technologies or information, commitments to ensure a specific supply and/or supply to a specific client, measures to ensure the continuation of business activities, requirements to source critical components from secure and reliable suppliers, implementation of cybersecurity protocols to protect against potential threats, and an obligation to store and process specific data within the Union.

### 2.10. *Penalty regime and compliance obligations*

The regulation requires Member States to ensure that their screening authorities are empowered to impose effective, proportionate and dissuasive penalties on foreign investors that fail to comply with the requirements of the screening mechanism.

In particular, failure to file the foreign investment where required and failure to comply with mitigating measures imposed in a screening decision will constitute punishable violations.

Furthermore, screening authorities must be provided with sufficient resources to monitor compliance with screening decisions and identify their circumvention. Where mitigating measures in a screening decision require compliance by undertakings established in other Member States, the Member State that adopted that screening decision and other relevant Member States shall endeavour to cooperate with each other in the monitoring and enforcement of the screening decision.

### 2.11. *Digital infrastructure: online EU portal and secure database*

The regulation provides for the creation of two digital tools of great practical importance:

— First, a secure and encrypted system to facilitate the exchange of information between the contact points and the Commission, which must be operational no later than 17 July 2027.

— Second, at the request of at least nine Member States, an online EU portal for the electronic filing of foreign investments with screening authorities and whose use will be mandatory in the Member States that request it.

In addition, the Commission shall set up a secure database available to all Member States with information on the foreign investments notified through the cooperation mechanism and the outcome of the assessments of those foreign investments under screening mechanisms. This database will enable the sharing of relevant information, including cases where mitigating measures were significantly or repeatedly not complied with, thereby strengthening the ability to identify high-risk investors.

### 2.12. *Transitory provisions and application timeline*

The regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union, but its general application is deferred until 17 January 2028, granting Member States an eighteen-month adaptation period.

However, certain provisions will apply in advance as of 16 July 2026, including those relating to the obligation to notify through national mechanisms, the requirement to establish a secure and encrypted system and a secure database, and the provisions on delegated acts and committee procedures.

The previous regulation will continue to apply to investments subject to screening until the date of application of the new regulation (17 January 2028) or that were made prior to that date.

The regulation will not apply retroactively to investments made before its date of application, and the Commission shall evaluate the functioning of the regulation no later than 17 January 2031, and every five years thereafter.

## 3. Impact on Spain

In Spain, the screening of foreign direct investment is regulated by the Movement of Capital and Financial Transactions with Foreign Countries (Legal Regime) Act 19/2003 of 4 July, the provisions of which were strengthened by the introduction of Article 7 *bis* through Royal Decree-law 8/2020 of 17 March[9]. This provision establishes the suspension of the liberalization of foreign direct investments that exceed 10% of the share capital of a Spanish company or that result in effective participation in its management or control when made in strategic sectors or under certain circumstances relating to the investor.

Spain has had a strengthened screening mechanism in place since 2020, which means that the adaptation to the new European framework will not be as extensive as in Member States that lack such a mechanism. However, significant changes

[9] Final Provision 4(1) of Royal Decree-law 8/2020 of 17 March (Official Journal of Spain no. 73, of 18 March), which inserted Article 7 *bis* into the Movement of Capital and Financial Transactions with Foreign Countries (Legal Regime) Act 19/2003 of 4 July.

will need to be made in the following areas by 17 January 2028, the date of application of the regulation:

— *Procedural structure:* the two-stage structure must be formally introduced, with a first stage of initial review lasting 45 calendar days and a second stage of comprehensive investigation for higher-risk transactions.

— *Review of closed transactions:* the possibility of reviewing transactions that have already been closed must be expressly incorporated for a period of 15 months up to five years after their completion.

— *Sectoral expansion:* the sectors subject to screening are expected to be expanded to align with the regulation, particularly those that trigger mandatory notification through the European cooperation mechanism.

— *Accountability requirements:* the national framework must be adapted to comply with the requirements of the strengthened "comply or explain" principle, in accordance with the deadlines and monitoring procedures established by the new regulation.

— *Penalty regime:* Spanish legislation must ensure that effective, proportionate, and dissuasive penalties are established for cases of noncompliance with the screening mechanism, particularly the failure to file the foreign investment where required or failure to comply with mitigating measures.

— *Intra-Union investments:* the national mechanism must be adapted to expressly include investments made by European subsidiaries of third-country investors, in line with the broadened scope of the regulation.

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