EU Foreign Investment Law In Force from April

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Key Points

- The new EU FDI Regulation provides a framework for screening foreign direct investments and will enter into force in mid-April. While China, Russia and other currently high-profile "foreign" countries are not expressly mentioned, the EC will be particularly interested in investors from these jurisdictions.
- Unlike the CFIUS regime, the EC will not be able to veto or condition a proposed foreign investment. Instead, the EC will only be able issue non-binding opinions on investments that are likely to affect projects or programs of European Union interest on security or public order grounds, or which are likely to impact public order and security in other Member States. Investments in various critical sectors are covered, including energy, transport, health, media and data.
- Member States will remain the ultimate decision-makers on such investments, having taken into account the EC's opinion. In most cases, the EC will have 35 calendar days to issue its opinion before Member States can decide whether or not to follow it.
- In certain circumstances, Member States and the EC will be able to issue comments and opinions on completed investments for a period of 15 months after completion.
- Member States will also be subject to notification requirements in relation to any FDI that they choose to review under their own national mechanisms, and may be requested to provide certain information even in respect of FDI that they do not review themselves.
- The FDI Regulation will impose certain minimum procedural requirements on all existing and any new national review mechanisms.

The European Commission (EC), the European Parliament (Parliament) and the European Council (Council) agreed on a Regulation establishing a framework for screening of foreign direct investments into the European Union (EU) ("FDI Regulation") on March 5, 2019, following the conclusion of trilogue discussions in November 2018. The FDI Regulation originates from a September 2017 EC proposal for a Union-wide response to foreign direct investment (FDI) screening – please see

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our previous client alert dated September 18, 2017 (available here) for our initial read-out.

Legislative progress

The FDI Regulation was approved by Parliament on February 14, 2019 and by the Council on March 5, 2019. On the same day, the EC announced its intention to proceed with the adoption of the FDI Regulation, which is expected to be published in the EU Official Journal on March 21, 2019, and which will enter into force 20 days later in mid-April. Member States will be given an 18-month grace period in which to adapt their domestic legislation to the FDI Regulation, meaning it will only begin to apply in October 2020.

Scope of the FDI Regulation

The scope of the FDI Regulation is limited to the screening of FDI into the EU that is likely to affect security or public order in one or more Member States. "Likely to affect" could be interpreted as "on a balance of probabilities," or "more than 50 percent."

Importantly, the FDI Regulation has no suspensory effect on investments. It also spells out in robust terms that the Investee Member State (as defined below) will retain sole responsibility and final say over any foreign investment decisions. This is an important distinction between the FDI Regulation regime and decisions of the Committee on Foreign Investment in the United States (CFIUS), which are binding. Likewise, the decisions whether or not to put in place or retain national FDI screening procedures, and whether or not to screen a specific investment, remain solely with the Member States. The FDI Regulation also clarifies that it does not apply to portfolio investments.

The FDI Regulation includes three key developments, discussed in turn below. These developments remain largely intact from the initial EC proposal: (i) the power for the EC to issue opinions and for EU member states ("Member States") to comment in respect of FDI into a Member State (the "Investee Member State"), where these investments are likely to affect public order and security outside the Investee Member State; (ii) an EU cooperation mechanism involving information exchange and annual reporting obligations for Member States and (iii) a set of minimum procedural protections to be provided by any national FDI screening mechanisms operated or introduced by Member States.

The FDI Regulation therefore does not to seek harmonization of FDI screening across the EU, or to ensure that every inbound investment is reviewed from an FDI perspective—it will not result in a "one stop shop" for FDI screening. Instead, the stated aim of the FDI Regulation is to put in place a framework to coordinate screening between the EC and Member States so as to increase legal certainty and transparency. Nevertheless, investors should focus on the inevitable uncertainty and associated transaction risks that are introduced or increased as a result of the FDI Regulation.

EU screening of FDI under the FDI Regulation

The FDI Regulation will enable both the EC and other Member States to interfere with FDI into an Investee Member State under separate mechanisms (collectively, "EU Screening"). The FDI Regulation imposes two "compliance levels" with respect to EU Screening:

- Under the first, lower compliance level, Investee Member States must give "due consideration" to EC opinions and comments from other Member States. The list of factors that may raise security or public order concerns in respect of FDI is non-exhaustive.[1] In addition, Member States should be able to take into account the context of the investment[2]
- Under the second compliance level, Investee Member States must take "utmost account"—being a higher threshold than "due consideration"—of, and justify derogation from, EC opinions issued in respect of FDI that is likely to affect projects or programmes of EU interest ("EU Interest FDI"). An exhaustive list of projects and programmes of EU interest is set out in an Annex to the FDI Regulation,[3] which may be updated by the EC subject to consultation and the consent of both Parliament and the Council. We note that even a limited list can result in a broad power to review, if the items listed are interpreted as including, for example, the entire supply chain for the project or program.

EU screening of foreign direct investments, other than EU Interest FDI

Other Member States may choose to provide comments, or may choose to request that the EC provide an opinion to the Investee Member State in respect of the relevant investment. The EC may also issue an opinion where the investment is likely to affect security or public order in more than one Member State, irrespective of whether comments have or will be provided by other Member States. Moreover, the EC shall issue an opinion in respect of an investment if at least one third of Member States consider that the investment is likely to affect their security or public order. All Member State comments and requests shall be duly justified and proportionate.

The FDI Regulation sets different procedural paths for (i) investments that are undergoing screening by the Investee Member States and (ii) investments that are not undergoing screening by the Investee Member State (whether because the Investee Member State lacks a national screening mechanism, or has a national screening mechanism but has chosen not to screen the investment).

(i) Investments undergoing national screening

Investee Member States that screen FDI should provide information to other Member States on certain aspects of the investment including the ownership structure of the foreign investor and funding sources (the "Article 9(2) Information"). The EC or the relevant Member State(s) shall notify the Investee Member State of their intention to provide an opinion or comments no later than 15 calendar days following receipt of the Article 9(2) Information. The notice may include a request for the Investee Member State to provide further information ("Additional Information"). Comments and opinions shall be addressed to the Investee Member State within 35 calendar days following receipt of the Article 9(2) Information (with an additional five calendar days granted for opinions in case the EC received comments from other Member States), or within 20 calendar days following receipt of the Additional Information (if such information was requested).

(ii) Investments not undergoing national screening

The EC and other Member States may request the Investee Member State to provide the Article 9(2) Information in respect of the investment, even though the Investee Member State has not reviewed, is not reviewing or does not intend to review the

investment. Comments and opinions shall be addressed to the Investee Member State within 35 calendar days following receipt of the Article 9(2) Information (with an additional 15 calendar days granted for opinions in case the EC received comments from other Member States). In any case, the comment or opinion must be addressed to the Investee Member State no later than 15 months after the investment has been completed. The 15-month retrospective period is controversial, and the FDI Regulation offers no clear tools for the EC to challenge completed transactions. Investments completed before the entry into force of the FDI Regulation will not be subject to EU Screening.

EU screening of EU Interest FDI

The same procedures apply to the screening of EU Interest FDI as in respect of other FDI, as set out above. The key difference is that the Investee Member State shall take "utmost account" of (as opposed to giving "due consideration" to), and must justify any decision that is contrary to, the EC opinion addressed to it in respect EU Interest FDI.

Whilst EU Screening remains non-suspensory, the potential for the EC and other Member States to intervene up to 15 months following the completion of investments that were not screened by the Investee Member State will increase transaction risk through increased uncertainty and knock-on effects for deal timing, even in cases that never end up subject to EU Screening, as Investee Member States factor in their information sharing obligations in discussions with the parties.

Reporting obligations for Member States

Under the FDI Regulation, Member States would be required to notify the EC of any existing screening mechanisms (within 30 days after entry into force of the FDI Regulation), amendments thereto, or any new screening mechanisms within 30 days of such amendments or mechanism entering into force. The EC will publish and keep an up-to-date list of all Member State FDI screening mechanisms.

In addition, Member States will be obliged to report annually to the EC on the application of their domestic screening tools, and even Member States with no screening mechanism in place must report annually to the EC on FDI that has taken place within their territory. However, unlike in the initial EC proposal, under the FDI Regulation the Member States' annual report need only include aggregate as opposed to transaction-specific data.

Minimum procedural requirements

The FDI Regulation lays down certain minimum requirements that must be met by all existing and future Member State national screening procedures, including in relation to transparency, non-discrimination, the possibility for redress and timelines for screening decisions. The FDI Regulation thus includes a certain minimum level of harmonization on EU FDI screening.

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[1] The list expressly includes (a) critical infrastructure, whether physical or virtual (including energy, transport, water, health, communication, media, data processing or storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities as well as land and real estate crucial for the use of such infrastructure); (b) critical technologies and dual-use items (including AI, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nano- and bio-technologies); (c) supply of critical inputs (including energy, raw materials and food supply); (d) access to sensitive information, including personal data and (e) freedom and pluralism of the media.

[2] Including whether the foreign investor is a non-EU state-owned entity or has already been involved in activities affecting security or public order in the EU, or where there is a risk that the investor engages in illegal or criminal activities.

[3] The projects and programs of EU interest are the European GNSS programs, Copernicus, Horizon 2020, Trans-European Networks for Transport, Trans-European Networks for Energy, Trans-European Networks for Telecommunications, projects under the European Defence Industrial Development Programme and projects to be developed under Permanent structured cooperation.