

April 15, 2019

EU Foreign Direct Investment Regime Enters into Force

New EU Regulation Focuses on Cooperation Between Member States and the EU Commission

SUMMARY

On 10 April 2019, Regulation (EU) 2019/452 (the “**Regulation**”) entered into force, establishing a European Union framework for the screening of foreign direct investments (“**FDI**”).¹

The Regulation does not require EU member states to implement national FDI screening mechanisms or transfer decision-making power with regard to FDI from member state authorities to the European Commission. However, it imposes certain basic requirements on those member states that have domestic FDI regimes and establishes cooperation obligations among the relevant national authorities and the European Commission. In particular, it creates a framework for the exchange of information and opinion between EU member states and the European Commission.

In practice, the cooperation obligations set out in the Regulation could impact transaction timelines and risk allocation considerations, in particular because authorities could intervene up to 15 months after the closing of transactions that have not been subject to a national FDI screening regime.

BACKGROUND

Historically, FDI has been regulated solely at a national level in the EU. Member states exercised this prerogative with differing levels of vigour: for example, the United Kingdom does not require mandatory prior approval of foreign investments but retains the right to investigate them in certain circumstances. This contrasts with France, where foreign investment in protected sectors must be pre-cleared with the Ministry of the Economy, which has discretion to reject transactions harming unspecified “national interests”. Moreover, some member states do not regulate foreign investment at all.²

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Against this backdrop of divergent national approaches, and considering that many of the EU's significant trading partners regulate foreign investment (e.g., CFIUS in the United States), it was felt that the EU needed a unified and coherent approach. EU Commission President Juncker proposed the creation of an EU-wide foreign investment regime in his 2017 State of the European Union address, starting a process that culminated in the adoption of the Regulation on March 19, 2019.

The Regulation entered into force on April 10, 2019, and applies from October 11, 2020 onwards. In the case of investments completed between these two dates, retroactive intervention by member states or the European Commission may be possible for investments that completed after July 11, 2019 and were not subject to FDI screening. The Regulation defines FDI as investments by non-EU investors that aim to establish "lasting and direct links" between an EU business and a foreign natural person or entity, including the acquisition of control or management participation rights.

The most concrete aspect of the Regulation is the cooperation framework it introduces:

- Member states screening a proposed investment are obliged to notify the European Commission and other member states. The notification must contain certain minimum information, such as the size of the transaction and the sector affected.
- Where another member state is concerned that an investment may affect its security or public order, it can request information from, and provide comments to, the member state in which the investment is located. The Regulation sets maximum time limits: member states have 15 days to request information and 35 days to comment once notified of a proposed investment.
- This is possible even if the member state in which the investment is located is not screening it. In such a case, member states and the European Commission are able to provide comments on the transaction up to 15 months after the investment has been completed.
- The European Commission can issue opinions on FDI that affect security or public order in more than one member state, or affect an EU-wide project (such as Horizon 2020 (an EU research and innovation programme), the European GNSS programmes (Galileo & EGNOS), the Trans-European Networks for Transport (TEN-T), the Trans-European Networks for Energy (TEN-E), or the European Defence Industrial Development Programme).

While member states are required by the Regulation to give due consideration to the opinion of the European Commission and the comments of other member states, approving the investment is within the sole discretion of each member state. The obligation to consider the comments of the European Commission is stronger where the FDI may affect a programme of Union interest: the member state must "*take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed.*"

The Regulation does not require member states to implement an FDI screening regime, but sets limited parameters within which any screening procedure must operate. It provides that the protocols for screening must set out the relevant timeframes, be transparent, and identify events that trigger screening. Discrimination between different third countries is not permitted, and member states must allow appeals against screening decisions.

COMMENTARY

While the Regulation is significant because it is the first EU legal instrument governing foreign investment generally, the regime it establishes is quite modest. It does not require any substantive harmonisation of FDI laws, or even that member states must have a national FDI screening regime. National divergences in the EU in openness to foreign investment are therefore likely to continue

However, the cooperation obligations set out in the Regulation may accelerate the crystallisation of a harmonised EU policy on FDI. The Regulation may even herald the move towards more centralised decision-making, with the European Commission playing an increasing role in regulating FDI impacting multiple member states. This is underlined by the European Commission's view that FDI screening forms a key part of trade policy and free trade agreement negotiations with third countries.³

The broad spectrum of sectors identified in the Regulation as potentially sensitive chimes with a global trend towards more expansive interpretations of the risks of foreign investment, as exemplified by recent CFIUS activity in the semiconductor and communications industries. Critical infrastructure (whether physical or virtual), technologies, raw materials and inputs, sensitive information (including personal data), and the freedom of the media are all identified in the Regulation as meriting possible intervention.

The Regulation will apply to the UK prior to the time the UK ceases to be an EU member state.

The practical impact of the Regulation on individual investment decisions will depend on how member states and the European Commission engage under the cooperation provisions. As member states are required to build sufficient time into their screening procedures to consider comments from other member states and the European Commission, this may add delay to the investment approval process and ultimately impact deal certainty and risk allocation considerations, even in member states traditionally regarded as open and pro-business. Deal makers should closely monitor FDI screening developments and national precedents across the EU in order to assess the risk of intervention in sectors of interest, including post-closing interventions by the authorities.

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ENDNOTES

¹ Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the European Union [2019] OJ L79/1.

² Nearly half of EU Member States have in place mechanisms for screening foreign direct investments. This is the case for Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom. Source: Commission, 'Welcoming Foreign Direct Investment while Protecting Essential Interests' COM(2017) 494 final, 13 September 2017

³ Commission, 'Welcoming Foreign Direct Investment while Protecting Essential Interests' COM(2017) 494 final, 13 September 2017

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