

The new EU framework for screening foreign investment is now in force

The EU framework for screening foreign direct investment (FDI) came into force this April. The new mechanism is intended to coordinate the review conducted by Member States of FDI coming from outside the EU with respect to possible security and public order risks. It can be expected that a number of Member States will introduce their own domestic screening systems for FDI before 2020 when the new screening mechanism will become operational.

Current status of FDI control in the EU

Currently, 14 Member States have national screening mechanisms in place. They are Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. However, individual national mechanisms differ in their design and scope.

Therefore, the new EU mechanism intends to converge national policies, establish coordination and communication means and also make sure that the relevant threats are taken seriously. Indeed, there have been a number of cases in recent years where foreign investors, mostly from China, pursued very aggressive purchasing policies in relation to advanced technological companies in

Europe, such as semiconductor firms and the producers of industrial robots. Some of these transactions were blocked by the national screening mechanisms in Europe as well as, due to connections to the US defence industry, by the US mechanism called CFIUS, which has been screening FDI since the 1970s. In general, FDI control has been becoming stricter in a number of jurisdictions in recent years, for example in Germany, Australia and the US.

The new EU screening mechanism

Under the new framework, which takes the form of an EU Regulation, Member States are allowed (though not obliged) to introduce domestic mechanisms for reviewing FDI, most importantly to establish whether the investment by the foreign entity threatens security or public order, especially regarding key infrastructure and technologies and EU projects. At the same time, the Regulation set certain requirements for Member States in this area, such as transparency, security of confidential information, non-discrimination, and availability of legal remedies for foreign investors. Member States are also required to provide relevant information to the Commission and to other Member States on screened investments.

On the other hand, the Commission and Member States will be allowed to request additional information and provide comments, while the reviewing Member

State must give “due consideration” to those comments, although it will have the final word. Moreover, the Commission will be allowed to issue opinions when an investment could pose a threat to European infrastructure, programmes or an EU project, such as Galileo or Horizon 2020.

With respect to the details, the new Regulation will surely be analysed and commented on in detail in the coming months. One of the key terms is “foreign direct investment”, which is defined as covering cases of an investment aiming to “establish or to maintain lasting and direct links” between the foreign investor and the entrepreneur. This will inevitably be subject to intense scrutiny. When compared to the test of “control” under the EU Merger Regulation, it seems to imply a lower threshold.

Further, the key issue will be the criteria under which the investment and the investor will be evaluated. The factors that may be taken into consideration in determining whether FDI is a threat are very broad. The Regulation mentions, for example, the possible influence of the investment on “critical technologies”, “access to sensitive information”, and “the freedom and pluralism of the media”. Furthermore, consideration will also be given to whether the investors are, for example, “directly or indirectly controlled by the government of a third country” and “whether there is a serious risk that the foreign investor engages in illegal or

criminal activities”. These broad criteria are likely to give rise to intense debate over the next few years.

Next steps and challenges

The new EU legislation establishing the screening framework has now entered into force. Member States and the Commission will have 18 months to put in place the necessary arrangements for the application of this new mechanism. Work has already started on establishing a group of experts within the Commission.

However, the challenges related to the new mechanism lie ahead. Experience with the US system CFIUS shows that national security issues are highly political and it might prove virtually impossible for Member States to abide by the principles set by the Regulation, such as transparency, non-discrimination, and availability of legal remedies. For example, is it possible to share relevant information gained by the national intelligence services in a transparent way? Is it possible to treat every investor without discrimination? For example, in the case of investors from China and the US. Also, is it possible to allow transparent procedures at courts in certain cases of sensitive investments?

Conclusion

The new framework is not an independent, fully-fledged FDI regime, but establishes a cooperation and information sharing mechanism to ensure coordination among EU Member States. It

A stylized map of Europe with various countries and cities labeled. The map is in shades of grey and white, with some countries highlighted in a darker shade. The text 'CHSHCEE NEWSLETTER Czech Republic' is overlaid on the right side of the map.

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can be expected that several Member States will establish their own domestic screening mechanism in the next two years (as is already intended for example in the Czech Republic) and the whole EU-wide system will become operational in 2020.

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