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European Commission's proposal for a new FDI Screening Regulation

In the midst of geopolitical and economic challenges, the European Commission has proposed five new initiatives to advance its "European Economic Security Strategy", including a proposal for a new FDI Screening Regulation ("**Draft FDI Regulation**").

The Draft FDI Regulation aims to strengthen the efficiency and effectiveness of the current FDI Screening Regulation by addressing its shortcomings and ensuring a higher degree of harmonisation across the EU. The proposed **key developments** include the following:

Harmonizing national FDI screening mechanisms

The European Commission is pushing for a higher degree of harmonization across national FDI regimes. This is to be achieved, *inter alia*, by introducing a mandatory standstill obligation if a target company participates in projects or programmes of interest to the EU (such as Horizon Europe, the European Space Programme, etc.) or is active in an area of particular importance for the security of the EU or that is in keeping with the public order interests of the EU, as listed in Annex II (e.g. defence, semiconductors, dual-use, AI, etc.).

Furthermore, the Draft FDI Regulation stipulates that for at least 15 months post-closing, national FDI authorities must have the power to screen investments ex officio; this relates to investments that are not subject to a FDI notification requirement. This plan to give each national authority the

power to screen investments post-closing could lead to significant deal uncertainty.

In addition, to ensure greater convergence between the FDI screening laws of the Member States, the European Commission intends to clarify in Annex II what constitutes critical infrastructure and critical technologies. This would appear to be beneficial for investors, in terms of predictability and deal certainty.

Extending the scope

The Draft FDI Regulation intends to extend the scope of the FDI Screening Regulation. On the one hand, following the ECJ ruling in *Xella* (C-106/22), the Draft FDI Regulation foresees that acquisitions by EU entities will be reviewable if the EU acquirer is controlled by a foreign investor. While this expands the current FDI Screening Regulation, it should be noted that the FDI regimes of several Member States already cover investments by EU companies with minority shareholders from outside the EU or those that do not require any element of foreign ownership at all.

Another proposed extension of the scope concerns greenfield investments, implying that the mere establishment of a new company by a foreign investor active in certain sectors could be subject to FDI screening in the near future.

Improving the EU cooperation mechanism

Acknowledging the importance of the EU cooperation mechanism, the Draft FDI Regulation requires Member States to notify the EU cooperation mechanism if certain thresholds are exceeded, i.e. if (i) a Phase II procedure is initiated, (ii) if the target company participates in a project or programme of interest to the EU, (iii) if the target is active in critical infrastructure or those critical



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technologies listed in Annex II and (a) the foreign investor is either controlled by a foreign government or (b) is subject to economic sanctions, or (iv) if a Member State exceptionally intends to impose mitigating measures or prohibit a transaction in Phase I.

In addition, another aim is to strengthen the exchange of information between Member States within the EU cooperation mechanism. Comments and opinions of Member States are now to be given "utmost consideration" and Member States have to provide justification for not following the recommendations of other Member States or the European Commission.

Most notably, Member States and the European Commission will be able to start the cooperation mechanism on their own initiative, including cases which were not notified to the EU cooperation mechanism. Essentially, comments and recommendations can even be given unsolicited and also in cases where a mandatory notification is not triggered. Thus, Member States could recommend the commencement of post-closing proceedings.

Mandatory FDI Screening for Europe

The Draft FDI Regulation requires all Member States to establish an FDI screening mechanism within 15 months of its entry into force. To date, only Bulgaria, Croatia, Cyprus, Greece and Ireland have yet to implement an FDI screening framework.

Special rules for multi-jurisdictional filings

Ultimately, the Draft FDI Regulation foresees special rules for transactions that require multi-jurisdictional FDI clearances. These provisions affect both the parties and the Member States.

On the one hand, the Parties are obliged to file their FDI notifications with all relevant Member States on the same day. This will have to be considered in the planning of the deal timeline.

On the other hand, Member States should notify the transaction to the EU cooperation mechanism on the same day as well and have to coordinate on the final decision (though the final decision still rests with the national FDI authority).

By ensuring simultaneous filing and prompt notification, the proposed process aims to synchronize the assessment timeline across jurisdictions, thereby streamlining the overall assessment and decision-making process.

Conclusion

The Draft FDI Regulation foresees significant changes in the FDI landscape. While the Draft FDI Regulation will likely undergo some changes prior to entering into force 15 months after it is published in the Official Journal of the European Union, companies and individuals are advised to carefully assess FDI screening requirements in the context of M&A transactions and continuously monitor the legal landscape.

Authors

Dr. Anna Wolf-Posch, LL.M.
Partner
anna.wolf-posch@cerhahempel.com
+43 1 514 35 581

Mag. Philipp Schaubach, LL.M.
Senior Associate
philipp.schaubach@cerhahempel.com
+43 1 514 35 581