

European Union Introduces FDI Screening Mechanism on Security and Public Order Grounds

EU Regulation on FDI will enhance Member State cooperation in screening investments by non-EU investors.

Key Points:

- The Regulation will establish a cooperation and coordination framework amongst Member States and the European Commission (Commission) with regard to foreign direct investments (FDI) that affect security or public order.
- Member States must cooperate and exchange information on FDI; the Commission may deliver non-binding opinions.

European framework for investment screening

The “Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union” (the Regulation) strives to ensure EU-wide coordination and cooperation on the screening of FDI likely to affect security or public order. The Regulation will come into effect 18 months after its publication in the Official Journal, which is expected within the next few weeks.

The Regulation establishes a common framework for Member States to undertake FDI reviews of certain investments by foreign investors, such as state-controlled or state-financed entities, in sensitive areas in the EU. These sensitive areas include:

- **Critical infrastructure** in the areas of energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate, crucial for the use of such infrastructure
- **Critical technologies and dual use items** including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, nuclear technologies, nanotechnologies and biotechnologies
- **Supply of critical inputs** including energy or raw materials, as well as food security
- **Access to sensitive information**, including personal data or the ability to control such information
- **Freedom and pluralism of the media**

No independent review by the EU Commission and no harmonization of national FDI regimes

The Regulation does not allow the Commission to scrutinize and potentially block FDI. Rather, FDI review remains the sole responsibility of the Member State in which the investment takes place. Member States are not obliged to introduce a screening mechanism if such mechanism does not currently exist. Nor does the Regulation harmonize existing national FDI rules. Member States must ensure, however, that existing screening mechanisms are transparent, non-discriminatory, and must provide for timeframes for completing a potential review.

Cooperation in case of national FDI screening

Member States are obliged to notify the Commission as well as other Member States when initiating review proceedings. The notification must include information about the foreign investor's ownership structure and the financing of the investment, including third-country funding and subsidies. In order to guarantee confidentiality, the exchange of information between the Commission and Member States will take place through official contact points and via an encrypted communication system.

Upon receiving a Member State's notification that a transaction is under review, other Member States may submit comments and the Commission may issue a non-binding opinion on the notified transaction within certain deadlines. The Commission shall issue a non-binding opinion if requested by one third of the Member States.

The reviewing Member State is obliged to give "due consideration" to the Commission's opinion and to comments from other Member States. The reviewing Member State must "take utmost account" of the Commission's opinion if the investment affects a project or a program of Union interest. Moreover, the reviewing Member State must provide the Commission with an explanation if it does not follow the Commission's opinion. This concerns programs and projects with substantial EU funding or those established by EU legislation as listed in the annex to the Regulation. Listed programs include Copernicus, Galileo, Horizon 2020, as well as Trans-European Networks for transport, energy or telecommunications. The Commission will update the annex regularly.

Cooperation absent a national FDI screening

If a Member State believes that a foreign investment that is completed after entry into force of the Regulation and that is not subject to a national FDI screening in another Member State could affect its security or public order, the Member State may request relevant information and provide comments to the other Member State within 35 calendar days of the receipt of the information. The Commission may likewise issue an opinion in such cases, if the transaction affects the security or public order of more than one Member State. The Commission must issue a non-binding opinion if one third of the Member States consider that an investment likely affects their security or public order. The Member State in which the FDI takes place will give due consideration to the comments and the opinion. The Regulation, however, does not compel a Member State to review a transaction if no FDI control regime exists or the existing regime does not apply. It remains to be seen in such cases whether the Member States concerned will resort to other regulatory means of restricting or blocking the transaction in question.

Background

FDI control in Europe has been subject to a rapidly evolving legal landscape in the past few years. Germany extended its FDI control regime in 2017 and 2018, introducing lower review thresholds and expanding the definition of critical infrastructure subject to a mandatory FDI notification. The UK broadened the scope of its national law on FDI in 2017 and published a White Paper in 2018 proposing

an overhaul of the current screening mechanism. France recently extended its national rules on FDI control to certain sectors, including artificial intelligence and robotics. Hungary introduced legislation on FDI review on January 1, 2019. Beyond Europe, in particular the US expanded FDI review by the Committee on Foreign Investment in the United States (CFIUS) in 2018. Against this background, the new EU framework constitutes another step towards an increasing interdependence of national FDI control regimes.

Outlook

While the new European screening framework does not restrict FDI, it will lead to increased coordination between Member States and the Commission. Even foreign investment in a Member State without a formal FDI control regime may be subject to non-binding comments from Member States and opinions of the Commission. Member States that would normally not open a review proceeding could be peer-pressured into restricting or even blocking an FDI by other regulatory means. Investors from outside the EU must be mindful of the changes and should develop a coherent strategy early in the deal process in order to navigate the increasingly complex and rapidly evolving FDI control landscape in Europe.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Jana K. Dammann de Chpto

jana.dammann@lw.com
+49.40.4140.30
Hamburg

Niklas Brüggemann

niklas.brueggemann@lw.com
+49.40.4140.3306
Hamburg

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