The EU Regulation on Foreign Direct Investments Is Now On!

On 10 April 2019, the Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments ("FDI") into the EU ("The Regulation") has entered into force.

This new control of FDIs based on security and public order, adds an extra regulatory layer that may affect the timing and, possibly, the completion of FDIs into the EU.[1]

The system merely creates an EU-wide cooperation mechanism where the Member State concerned keeps the final say.

The need for EU protection of strategic assets may clash with national interests. Italy's endorsement of China's Belt and Road Initiative, or the Portugal's vindicated openness towards Chinese investments show that not all in the EU share a common view about FDIs.

Non-EU investors should anticipate possible criticisms through a timely information and dialogue with the EU Commission in Brussels and other capitals of the Member States potentially affected by the FDI.

What FDI may be controlled?

FDIs may be subjected to the Regulation when they may affect security or public order.

Yet, these two legal concepts are not defined in the Regulation. The Regulation only establishes a non-exhaustive list of criteria to assess whether a FDI may affect security and public order.

These criteria concern the **investment** itself (Art. 4(1) of the Regulation), and the **investor** (Art. 4(2) of the Regulation).

Does the investment relate to:

- Critical infrastructures?
- Critical technologies?
- Supply of critical inputs?
- Access to sensitive information? or
- The freedom and pluralism of the media?

Who is the non-EU investor?

- Is the foreign investor directly or indirectly controlled by the government of a third country?
- Has the foreign investor already been involved in activities affecting security or public order in a Member State? or

[1] This article follows an earlier post "Foreign Direct Investments: A Future Regulation That Matters", that analyses the context in which the Draft Regulation was voted and its potential practical consequences on the legal practice and EU policies.

- Is there a serious risk that the foreign investor engages in illegal or criminal activities?

Non-EU investors should be careful when one or some of these criteria are hit, even if a FDI may be screened if it does not fall within one of those categories.

Co-operation mechanism

The Regulation does not create a centralized EU system. Each Member State keeps the final say on a FDI taking place on its territory. The Regulation does not impose on Member States to adopt a FDI screening mechanism if they do not have one already. [2]

The Regulation establishes a co-operation mechanism between the Member States and the Commission.

In a nutshell, a Member State that **is screening** a FDI on its territory, will notify it to the Commission and the other Member States. The Commission and the other Member States have the opportunity to provide respectively an opinion and comments based on security and public order concerns. Although not binding, the Member State must take due account of these opinion and comments.

Conversely, if a Member State **is not screening** a FDI on its territory, the Commission and the other Member States can take the initiative to provide an opinion and comments to this Member State until 15 months after completion. This situation may thus give rise to ***ex-post* screening** of a FDI.

Where the Commission considers that a FDI is likely to affect programs or projects of EU interests, the Commission may also take the initiative to issue an opinion to the Member State where a FDI is taking place.[3]

The investors and the companies concerned must be authorized to appeal screening decisions.

Impact on unscreened FDIs completed from 10 April 2019 onwards

The Regulation has entered into force on 10 April 2019.

Member States have a period of 18 months to adopt the measures necessary to the Regulation's application on 11 October 2020.

Interestingly enough, the Regulation points that the co-operation mechanism for unscreened FDI does not apply to FDIs completed before 10 April 2019.

A contrario, it suggests that FDIs completed after that date which have not been screened in a Member State, may be subject to the cooperation mechanism for unscreened FDI, and, in particular, to its *ex post control* provisions, as of 11 October 2020.[4]

[2] As of today, 14 Members States have screening rules: Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Spain and the UK.

[3] These projects and programs are listed in the Annex to the Regulation.

[4] See Article 7 (10) of the Regulation.
This provision remains unclear since the ex-post control is limited to 15 months after completion of the FDI.

EU v. national interest?

If the Member State where the FDI takes place has the final say on the FDI, the co-operation mechanism leaves unanswered several questions, including:

- To what extent the Regulation may lead a Member State to give up its national economic interest against the security or public order?
- What is the test to decide against the opinion of the Commission or the comments of the other Member States?
- May a Member State expose its liability under EU law when it goes against these comments and opinion?
- How much weight will have these opinions and comments in case a screening decision is challenged?

Legal uncertainty

The Regulation leaves also a number of loopholes. For example, could several Member States consider that a same FDI takes place in their respective territory? If so, will the co-operation mechanism be sufficient to prevent inconsistent decisions?

Also, the right of Member States and the Commission to question an unscreened FDI, 15 months post completion causes legal uncertainty. For instance, how to factor this ex-post period in a sale purchase agreement?

Moreover, some investments may be genuinely intertwined with merger control concerns. For example, could so-called "killer acquisitions" be blocked on the basis of the Regulation, rather than merger control review at the EU or national level?

Moreover, what is the interplay between the Regulation and bilateral treaties, such as the recent FTAs with Japan, Canada South Korea and Singapore, or such as the bilateral investment treaty that the EU is negotiating with China?

Practice will help to resolve these issues and possible other concerns. Hopefully, this Regulation will contribute to cement Member States on EU-wide matters and not cause tensions or competition between Member States. More than ever, the EU needs one common voice in a global economy increasingly piloted by geo-political interests.

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