

EU FDI Screening Regulation

PricewaterhouseCoopers Legal AG
Hao Chu, LL.M.



EU Foreign Direct Investment Screening Regulation

Time of Effectiveness

The “EU Foreign Direct Investment Screening Regulation” sets up a framework for the review of foreign direct investment in the EU will enter into force on October 11, 2020

Information Exchange Mechanism

- The Regulation would allow the European Commission ("EC") to review (but not veto) specific investments "affecting the interests of the EU" and issue a non-binding opinion to the Member State to which the investment relates
- Member States may apply their own review systems and establishes mechanisms for law enforcement cooperation and information exchange between Member States and the EC.

Expanding Scope of Existing Systems in Member States

The Regulations make it clear that member countries can legally block foreign acquisitions involving critical infrastructure, technology, raw materials and sensitive information, this may lead some member countries to introduce new foreign investment review regimes or expand the scope of existing regimes and with the increased information exchange, some transactions that are currently outside the scope of review may be subject to review in the future for reasons of public interest and national security.

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Member States' Review Framework

- The Regulation does not require member States to establish a mechanism to review FDI
- The Regulations only confirm that member States may review FDI that meets certain criteria
- The Regulations also provide a non-exhaustive list of areas for the Member States to consider, including:
 - Critical infrastructure, including energy, transportation, water, medical, communications, media, aerospace, defense, electoral or financial infrastructure;
 - Key technologies and dual-use items, such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnology and biotechnology;
 - Supply of key raw materials, including energy or raw materials, and food security;
 - Access to sensitive information, including personal data, or the ability to control such information; or
 - Freedom of the media

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Cooperation and Information Sharing

The Regulation requires the Member States to:

- Notify the EC of any foreign investment that is being examined under its domestic review system and, where such foreign investment may affect the security or public order of any other Member State, to other Member States at the same time
- Respond within a reasonable time frame to reasonable requests for information from other Member States and/or the EC relating to foreign investments planned or completed in their territory, whether or not such investments are under review

Member States may issue opinions on foreign investments in other countries that they consider raise public order or security concerns and the EC is also entitled to give an opinion on cases outside the scope of the above-mentioned review system “affecting the interests of the EU”

- In both cases, the Member State, in which the FDI is taking place, is required to “take proper consideration” of these views/opinions; but
- The Member States have the final decision power on whether to allow specific investment activities in their territory

Recent Changes in Germany

What's New

In light of the Covid-19 Pandemic, the German government intends to better protect security-relevant businesses in the health branch from take-overs from outside the European Union. For this purpose, on May 20, 2020 the German authority adopted the 15th amendment of the Germany Foreign Trade Regulation (*Außenwirtschaftsverordnung*).

The amendment broadens the business qualified as “critical infrastructure” which is subject to the government’s examination in case of acquisition of a stake of 10% or more in companies of this sort. Specifically, the companies in question

- develop or manufacture specific personal protective equipment (PPE)
- develop, manufacture or place on the market essential medicines including their starting and active substances, or hold a corresponding license under medicines law
- develop, manufacture or distribute certain medical devices for the diagnosis, prevention, monitoring, forecasting, prognosis, treatment or mitigation of life-threatening and highly contagious infectious diseases and
- supply, develop, manufacture or distribute specific in vitro diagnostic devices related to life-threatening and highly contagious infectious diseases

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Which Changes Are Expected

The 15th Amendment of the Foreign Trade Regulation was enacted urgently in the in light of the current pandemic. The planned amendment of the German Foreign Trade and Payments Act, which is the basis for the German Foreign Trade and Payments Regulation, is still pending and expect to include some bigger changes, including the EU Screening Regulation in the upcoming months.

The planed 16th Amendment Regulation will adapt the EU Screening Regulation and is therefore expected to introduce the “information exchange mechanism” and change the duration of the examination proceedings. Additionally, in a draft introduced earlier in 2020, is it also planned that

- Reduction of the required level of risk for investment restrictions – from “actual threat to public security or public order” to **“likelihood of impairment”**
- Further expansion of „critical infrastructure“, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nano- and biotechnologies
- If reporting requirements are imposed, closing of the transactions will temporarily be blocked

Thank you.

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