

The EU's Proposed Framework for FDI Screening Mechanism – Status and Prospects for Adoption

On September 13, 2017, the European Commission (“Commission”) presented a proposal for a regulation establishing a framework for screening foreign direct investments (“FDI”) into the European Union (“proposed Regulation” or “the Proposal”).¹ Mayer Brown published a Legal Update on the proposed Regulation on September 15, 2017.² The proposed Regulation came at a time of increased attention on (the negative aspects of) foreign investment in several jurisdictions. That attention has certainly not disappeared in the last 12 months, as evidenced by CFIUS (“Committee on Foreign Investment in the United States”) and FIRRMA (“Foreign Investment Risk Review Modernization Act”) reform in the United States, the activation of the FDI screening process in Germany, a proposed screening mechanism in France and the proposed national security review process for inward investment into the United Kingdom.³

In this Legal Update, we take stock of the status of the discussions on the Proposal between the European Parliament (“EP”) and the European Council (“Council”), as well as the positions expressed by the member states of the European Union individually.

Recall that the proposed Regulation does not require EU member states to implement an FDI screening mechanism.⁴ However, where such a mechanism exists or is to be adopted at the member state level, the Proposal aims to ensure that it meets certain basic screening

requirements, such as judicial review of decisions, non-discrimination between different third countries and transparency.⁵ In addition, the proposed Regulation foresees a comprehensive cooperation mechanism requiring member states to, *inter alia*, inform the Commission and member states of ongoing investment screenings. Finally, in cases “where a foreign direct investment is likely to affect projects or programmes of Union interest,” the Commission may carry out its own review on grounds of security and public order.⁶

After its publication, the proposed Regulation was sent to the EP and the Council as per ordinary legislative procedure rules. The EP adopted its “first reading” position on June 5, 2018, on the basis of a report prepared for the Committee on International Trade (“INTA”) by rapporteur Franck Proust.⁷ The report contains dozens of proposed amendments to the proposed Regulation, which are aimed at giving it more specificity yet do not go as far as proposing a centralized screening mechanism. The amendments focus, *inter alia*, on the extension of the scope of the proposed Regulation to investments in the Exclusive Economic Zone (“EEZ”) of Member States, the provision of a definition for the term “foreign government-controlled” investment, a more detailed explanation of the terms “critical infrastructure” (to also include data storage and financial infrastructure) and “technologies with potential dual use applications” (such as, *inter*

alia, quantum technology; nano-, bio- and medical technologies; electronic chips; energy storage; and cybertechnologies) and a clearer description of the circumstances under which an investment is made.⁸

Much less is known about the Council's negotiating position that was adopted on June 13, 2018. The accompanying press release merely indicates the context for the proposal by referring to the facts that "in recent years there has been a surge in investments relating to critical EU assets which are not the result of normal market forces" and that "opaque state-owned enterprises or private firms with close government links are buying EU firms using cutting-edge or dual use technologies [...] or strategic infrastructure assets which could have a potential impact on the EU's security or public order." In addition, press reports suggest that the Council seeks to introduce a new clause, "absent from the original proposal," that would mean that already completed investments would face 15 months of uncertainty, during which the Commission could still issue an opinion.⁹ Further, as part of the Council's negotiating position, member states reportedly seek to delay the application of the proposed Regulation, suggesting that it should not enter into force until 18 months after its adoption.¹⁰

In the meantime, member states are not passively standing by. Germany has already initiated its FDI screening mechanism, and France and the United Kingdom have proposed a more robust mechanism for reviewing transactions that would result in the acquisition of influence or control over certain assets. These developments, which are taking place against the backdrop of the negotiations for the EU's proposed Regulation, have not gone unnoticed by the Commission, which has declared to be "following regulatory developments related to national screening mechanisms, including in France, with the view to verify compliance with EC law."¹¹

In March 2018, the Council assigned legislative priority status to the proposed Regulation, which suggests a joint intention of the EU and member states to reach swift agreement. Indeed, the EP and the Council are currently discussing the amendments proposed by the EP, and the institutions reportedly aim to reach an agreement within the current legislative period or even before the end of 2018.¹²

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Endnotes

- ¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union. Available at <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF>.
- ² <https://www.mayerbrown.com/european-commission-proposes-framework-for-fdi-screening-mechanism-09-15-2017/>
- ³ See <https://www.mayerbrown.com/uk-government-proposes-expanded-national-security-review-process-for-inbound-investment-08-14-2018/>, <https://www.mayerbrown.com/de/German-Ministry-activates-the-Foreign-Investment-Regime-08-21-2018/> and <https://www.mayerbrown.com/Congress-Enacts-New-Legislation-Reforming-CFIUS-and-US-Review-of-Foreign-Investment-08-02-2018/>.
- ⁴ Page 3 of the Explanatory Memorandum to the proposed Regulation. Currently, 12 member states apply a form of investment screening: Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom.
- ⁵ See Article 6 of the proposed Regulation.
- ⁶ Article 3(2) of the proposed Regulation.
- ⁷ See <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2018-0198&language=EN>.
- ⁸ See, *inter alia*, amendments 27, 31, 39, 40, and 45.
- ⁹ MLex, Foreign investments could face EU vetting 15 months after completion, under new proposal, 15 June 2018.
- ¹⁰ MLex, EU leaders to insist new foreign-investment vetting mechanism be made law by year end, 21 June 2018.

- ¹¹ European Parliament, Answer given by Vice-President Dombrovskis on behalf of the Commission, 12 July 2018. See <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2018-002312&language=EN>
- ¹² MLex, French foreign-investment screening plans come under EU review, 16 July 2018.

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