

## EU ENDORSES NEW FOREIGN INVESTMENT SCREENING MECHANISM

EU member states have been increasingly focusing on the development of mechanisms for the investigation and assessment of foreign investments to the purpose of preventing foreign influence on certain strategic sectors such as energy, transport, water, healthcare, communications, media, AI, aviation, defence, nano- and biotechnology and others. This approach is also being observed beyond the old continent, especially in the USA, Canada and Australia where such mechanisms have been implemented for a while now. It is in the last 5-10 years that some EU members have started to independently introduce such regulations without coordination on a Community level.

Some sources indicate that foreign direct investments (FDI) from Russia to just three EU countries - Italy, Austria and The Netherlands - were approximately EUR 160 billion as at the end of 2017. In 2018 Chinese FDIs in the EU are estimated at EUR 17, 3 billion, the majority of which are directed to the UK (EUR 4,2 billion), Germany (EUR 2,1 billion) and France (EUR 1,6 billion). The reinforcement of FDIs (especially those originating from China) in significant infrastructure projects (for ex. the Toulouse airport) and the emergence of new cutting-edge technologies on the market urged EU members to insist on a more coordinated approach towards such investments.

Germany, France and Italy are the main driving forces behind this initiative, which resulted in Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments (“FDI”) into the EU (“the FDI Screening Regulation”) - published in the Official Journal of the EU on 21 March 2019. The Regulation entered into force on 10 April 2019 and will be applied as of 11 October 2019.

Under the Regulation ‘screening’ means a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments realised by subjects from non-EU countries.

The new Regulation is aimed at enhancing cooperation and information exchange among EU members by defining basic standards for national regulators. Although the Regulation underlines the sole responsibility of member states to monitor FDI based on national security measures, it is expected that the new regime will have actual influence on the control over these investments in the EU.

### **Mechanism for cooperation and additional screening**

As opposed to the EU merger control system, aimed at guaranteeing effective competition on the internal market, the FDI screening mechanism does not provide for the establishment of an independent national regulator that adopts decisions of obligatory nature. At this point there is also no requirement for member states to harmonise existing national regimes besides the minimal procedural requirements of the Regulation. The latter shall be treated as an open legal framework for cooperation at the unitary level. It creates a mechanism for cooperation between the Commission and the member states for facilitating the coordination of screening actions and gives an opportunity to members to express their opinions on specific investments.

The main steps in this sense are:

- notification for the FDI – member states notify the Commission and the other member states for every FDI on their territory that has been subjected to screening and provide information on the foreign direct investor, the capital structure and the shareholders, the estimated value of the investment, the products, services and the industry within which the investment is being realised

- comments of the other member states – when a member state considers that a planned or already implemented FDI in another member state may affect the former's national security or public order, or disposes of information that relates to this FDI, it can provide comments, which are simultaneously send to the Commission
- Commission statement – if the Commission considers that a planned or already implemented FDI in a member state, which has not been subjected to screening in that member state, may affect a) the security and public order in more than one member state or b) projects or programmes of security and public order interest to the EU, the Commission may issue a statement to the member state. The Commission may also issue a statement following the comments of other member states, when they are justified and when at least one third of them consider that an FDI may affect their security and public order
- 15-month term for the preparation of comments and statement – when a member state considers that a planned or already implemented FDI in another member state, which has not been subjected to screening in that member state, may affect the former's security and public order, it should provide a comment no later than 15 months after the implementation of the FDI, respectively, the Commission shall issue a statement.

The Regulation seeks to increase transparency and to unify the screening mechanisms of member states. The member states, which already apply such mechanisms, need to notify the Commission of the existing mechanisms and the changes therewith.

All member states are required to present reports on FDIs on their territories, whereas the member states that maintain screening mechanisms need to also present information on their application. Based on the annual reports, the Commission prepares a public report on FDI in the EU.

In case the Commission or a member state request information from a given member state with regard to a specific FDI, the investors are expected to provide national regulators with additional

information on the ownership structure and the controlling shareholders, the value of the investment, the products, services and industry, the participating member states, the date of completion of the transaction and the financing sources. Each lack of information shall be justified by the respective member state.

### **National legal framework**

In Bulgaria, the Minister of Economy, supported by the InvestBulgaria Agency, assures the national policy in the field of investments, as well as represents the state in international organisations in this field.

InvestBulgaria Agency has the main role in the investigation and assessment of foreign investments. The Agency prepares annual reports on investments in the country and the conditions for their encouragement. The reports are presented by the Minister of Economy before the Council of Ministers.

The Bulgarian National Bank (BNB) may have a supportive function and in accordance with Ordinance No. 27 of the BNB on the Balance of Payment Statistics, International Investment Position and Securities Statistics, it monitors transactions between local and foreign subjects and receives information from the business regarding the foreign capitals on the territory of the country. More specifically, within a 15-day period from the conclusion of the transaction, each legal person is required to declare before the BNB if it has received financial resources of BGN 50 000 or more.

In accordance with the Regulation, member states can maintain, modify or adopt FDI screening mechanisms based on security or public order reasons. The screening rules and procedures shall comply with the basic requirements set out in the Regulation: a) to be transparent and non-discriminatory towards third countries, b) to establish limits and terms in accordance with the Regulation, c) to allow for a decision making process that takes into consideration the opinions of

the other member states and those of the Commission, d) to guarantee the protection of confidential information, including commercial information of sensitive nature provided by a member state, e) to provide the opportunity of court defence to affected foreign investors and enterprises against screening decisions of national bodies.

### **Consequences for the business and subsequent steps**

It is without doubt that the new Regulation will have an impact on the existing legislation, respectively, on FDI transactions. For instance, in addition to the merger control system, the Commission may review and issue statements regarding the consequences of FDIs. On the other hand, member states will be able to review FDIs even when they are excluded from merger control. The introduction of minimal procedural requirements and the non-exhaustive list of factors to be considered in FDI screening, allows member states to plan and provide for specific requirements for notification and cooperation, thus achieving more transparency and security in transactions.

Businesses will have to carefully analyse the impact of the new European legislation. The deeper investigation of FDI transactions will subject these to another level of scrutiny on behalf of any of the 28 member states together with the Commission. The envisaged cooperation mechanism between member states and the Commission also presumes longer terms for the conclusion of transactions.

The EU has one of the most open investment regimes in the world and is a leading FDI destination. According to Commission data, shares in the EU, held by investors from non-EU countries, are estimated at EUR 6,3 billion at the end of 2017. At the same time, only half of member states have FDI screening mechanisms in place (Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Hungary, Italy, Poland, Portugal, Spain, UK).

However, the new legal framework adopted by the EU Parliament and the Council provides the Commission with more influence over decisions for the investigation and assessment of FDIs,

whereas the legislation envisages the review of potential or completed investments that involve significant EU funding (so called projects or programmes of interest to the EU). This includes projects related to critical infrastructure, critical technologies and critical raw materials, which are of significant importance to the security and public order.

In conclusion, although the new FDI screening rules are not referred to as direct regulation of transactions, the envisaged mechanisms will in fact impact the negotiation, structuring and completion of transactions. In this sense, Bulgaria has to put in place a clear legal framework of FDI screening rules, compatible with those of other EU member states. On the other hand, the increased transparency will lead to a better understanding of the investment climate in the country and will send a positive signal to foreign investors.

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