

March 5, 2019

EU REGULATION ON ESTABLISHING A FRAMEWORK FOR SCREENING OF FOREIGN DIRECT INVESTMENTS INTO THE EUROPEAN UNION HAS BEEN ADOPTED

To Our Clients and Friends:

The regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments (“**FDI**”) into the European Union (“**EU**”) was adopted on March 5, 2019. This new regulation (“**FDI Regulation**”) is based on a proposal by the European Commission (“**Commission**”) presented in September 2017 following an initiative for investment reviews at the EU level by the French, German and Italian governments from February 2017. The FDI Regulation will come into force on the 20th day following its publication in the Official Journal of the EU, hence, presumably sometime in April. It will, however, only apply 18 months after entry into force, thereby giving the EU member states (“**Member States**”) enough time to take necessary measures for its implementation.

The FDI Regulation establishes an EU-coordinated cooperation among Member States and is the result of the EU’s efforts to strike a balance between the opportunities globalization offers and the potential cross-border impact of FDI inflows on security or public order of the Member States and the EU as a whole.

By establishing a common framework for screening by Member States and for a mechanism for cooperation on EU level concerning FDI, the FDI Regulation seeks to provide legal certainty for Member States’ screening mechanisms on the grounds of security and public order (by, *e.g.*, expressly determining critical infrastructure, critical technologies, supply of critical inputs, access to sensitive information, and freedom and pluralism of the media as factors that may be taken into consideration in national screening decisions) and to ensure EU-wide coordination and cooperation on the screening of FDI likely to affect security or public order.^[1] The creation of designated contact points and the regulated exchange of information at an EU level is aimed to increase transparency and awareness on FDI likely to affect security or public order. The FDI Regulation also provides the Member States and the Commission with the means to address such risks to security or public order. The Commission may issue an opinion and the other Member States may provide comments which are both non-binding but shall be given due consideration by the Member State where the FDI is planned or has been completed. Where an FDI is likely to affect projects and programs of EU interest (regarding areas such as research, space, transport and energy), the Member State concerned will even have to take utmost account of the Commission’s opinion and provide an explanation to the Commission if its opinion is not followed. The FDI Regulation neither aims to harmonize national screening mechanisms (which currently exist in 14 out of 28 Member States), nor does it replace national screening mechanisms with a single EU screening mechanism, *i.e.*, it does not create a European one-stop shop solution. The FDI

Regulation also does not oblige Member States without screening mechanisms in place to establish one. The decision whether to set up a screening mechanism, or to screen a particular FDI, remains the sole responsibility of the Member State concerned.[2] Any maintenance, amendment or adoption of a screening mechanism, however, needs to be in line with the provisions of the FDI Regulation.[3]

Even though the FDI Regulation stresses that Member States without screening mechanisms are not required to create one, the mere existence of a screening framework at the EU level may nonetheless increase the likelihood of more Member States establishing a national screening mechanism – examples being Hungary, which has introduced a national screening mechanism in January 2019, as well as Sweden and the Czech Republic which may follow suit in the near future. The establishment of a screening framework will also have an impact on currently existing screening mechanisms, most of which will have to be adjusted to allow for the integration of the new EU cooperation process. It is likely that besides extending time frames, national screening rules may be tightened (further), as it is for instance expected in the case of Germany. The developments in Europe can be seen as part of a global trend towards more awareness and scrutiny of foreign investments.

Background

Prior to the FDI Regulation, there was no comprehensive framework at EU level for the screening of FDI on the grounds of security or public order. No formal coordination was in place, neither between the Commission and the Member States nor amongst the Member States themselves. When the Commission presented its draft proposal for the FDI Regulation in September 2017, only 12 out of 28 Member States had a national mechanism for screening of FDI in place; meanwhile 14 Member States screen FDI, namely Austria, Denmark, Germany, Hungary, Finland, France, the Netherlands, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom. These national FDI screening mechanisms are not aligned and may differ widely in their scope and design.

Key Aspects of the FDI Regulation

Enhanced Cooperation

A key aspect of the FDI Regulation is the establishment of a formal mechanism for cooperation between the Member States, and between Member States and the Commission, which takes on an active role. The cooperation mechanism is enabled through the following instruments:

- **Designated Contact Points.** All Member States (regardless of a national screening mechanism being in place or not) and the Commission have to establish a contact point for the implementation of the FDI Regulation.[4] Such contact points should be appropriately placed within the respective administration, and have the qualified staff and the powers necessary to perform their functions under the coordination mechanism and to ensure a proper handling of confidential information.[5] Direct cooperation and exchange of information between the contact points shall be supported through a secure and encrypted system provided by the Commission. The Member States (and the Commission alike) need to ensure the protection of confidential information acquired in application of the FDI Regulation in accordance with EU law and their national law. It also needs to be ensured that classified information shared under

the FDI Regulation is not downgraded or declassified without the prior written consent of the originator.[6] The foregoing confidentiality obligations are particularly important to protect and avoid misuse of commercially sensitive information. The FDI Regulation further stipulates that personal data has to be processed in accordance with EU data protection laws and only to the extent necessary for screening of FDI by the Member States and for ensuring the effectiveness of the cooperation provided for in the FDI Regulation, and may only be kept for the time necessary to achieve the purposes for which it was collected.[7]

- **Group of Experts.** A group of experts on the screening of FDI into the EU was set up by Commission decision of November 29, 2017.[8] The group of experts consists of representatives of the Member States and is chaired by a representative of the Commission's Directorate General for trade. It functions as a second institutional coordination body – next to the envisaged FDI screening contact points – and provides advice and expertise to the Commission on matters relating to FDI into the EU.[9] The group of experts provides a forum to discuss issues relating to the screening of FDI, share best practices and lessons learned, and exchange views on trends and issues of common concern relating to FDI.[10]
- **International Cooperation.** The FDI Regulation encourages international cooperation by expressly stating that the Member States and the Commission may also cooperate with the responsible authorities of (like-minded) third countries on issues related to the screening of FDI on grounds of security and public order.[11]
- **Other Stakeholders and Interest Groups.** Albeit not directly invited to share their viewpoint (and somewhat hidden in the recital), economic operators, civil society organizations, and social partners such as trade unions may convey relevant information in relation to FDI likely to affect security or public order to the Member States and the Commission, which might consider such information.[12]
- **Active Role of the Commission.** The Commission is now equipped with the competence to request information and share its opinion on FDI that are likely to affect (i) projects and programs of EU interest on grounds of security or public order, or (ii) security and public order in more than one Member State which allows it to play an active role in the cooperation mechanism. The Member State where the FDI is planned or has been completed needs to give due consideration to the Commission's opinion, or, in case of projects and programs of EU interest likely being affected, is even required to take utmost account of it and provide an explanation if it does not follow the Commission's opinion.

Increased Transparency on FDI

The FDI Regulation introduces certain notification, reporting and information requirements related to FDI inflows and screening mechanisms, which shall increase the level of transparency and information exchange. The Member States are required to initially notify the Commission of their existing screening mechanisms no later than 30 days after the entry into force of the FDI Regulation. No later than three months after having received such notifications, the Commission will make publicly available (and keep

up to date) a list of the Member States' existing screening mechanisms. Any newly adopted screening mechanism or any amendment to an existing screening mechanism needs to be notified to the Commission within 30 days of the entry into force of the newly adopted screening mechanism or of any amendment to an existing mechanism. By March 31 of each year, the Member States are required to submit to the Commission an annual report which shall include aggregated information on (i) FDI that took place in their territory, on the basis of information available to them, (ii) the requests received from other Member States, and (iii) the application of their screening mechanisms (including the decisions allowing, prohibiting or subjecting FDI to conditions or mitigating measures and the decisions regarding FDI likely to affect projects and programs of EU interest), if any.^[13] The Commission is expected to provide standardized forms in order to improve the quality and comparability of information provided by the Member States and to facilitate compliance with the notification and reporting obligations.^[14] The Commission in turn will provide an annual report to the European Parliament and the Council on the implementation of the FDI Regulation, which will be made public for greater transparency. The FDI Regulation further provides for a notification requirement regarding FDI undergoing screening in a Member State with screening mechanism as well as a minimum level of information with regard to all FDI falling under the scope of the FDI Regulation, to be shared either mandatorily (for FDI undergoing screening) or upon request (for FDI not undergoing screening for lack of a national screening mechanism), unless such information is not available in exceptional circumstances despite best efforts. Minimum information to provide includes aspects such as the ownership structure and the business operations of the foreign investor and the target company, as well as the financing of the planned or completed investment and its source.

Legal Certainty

By creating a framework for screening mechanisms of Member States, the FDI Regulation aims to provide legal certainty for Member States and investors. Screening mechanisms of Member States need to be based on the grounds of security and public order, thereby being compliant with the requirements for imposing restrictive measures under GATS,^[15] OECD,^[16] or Free Trade Agreements (FTAs), and sending a signal against protectionism.^[17] Member States shall apply time frames under their screening mechanisms and allow for the consideration of comments of other Member States and the opinion of the Commission. Rules and procedures relating to screening mechanisms shall provide for the protection of confidential information made available to the Member State conducting the screening, not discriminate between third countries and be transparent by way of setting out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules. National screening mechanisms shall also be equipped with measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions, and provide foreign investors and target companies concerned with the possibility to seek recourse against the screening decisions of the national authorities.

Scope of Application

A foreign direct investment, pursuant to the FDI Regulation, is an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the target company to which the capital is made available in order to carry on

an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity. Not covered by the FDI Regulation are portfolio investments, *i.e.* investments without any intention to influence the management and control of a company. Foreign investor is defined as a natural person of a third country or a company of a third (*i.e.*, non-EU) country, intending to make or having made an FDI.

How does the new EU cooperation mechanism work?

There are three different scenarios to distinguish: (a) FDI undergoing screening by a Member State, (b) FDI not undergoing screening for lack of a national screening mechanism, and (c) FDI likely to affect projects or programs of EU interest.

(a) FDI undergoing screening in a Member State with screening mechanism

Step 1: The Member State conducting the screening notifies the Commission and the other Member States of the FDI and provides information.

The Member States shall, as soon as possible, notify the Commission and the other Member States of any FDI in their territory that is undergoing screening. The notification may include a list of Member States whose security or public orders is deemed likely to be affected and shall indicate whether the FDI is likely to fall within the scope of the EC Merger Regulation. Information to be provided in the notification of an FDI includes:

- the ownership structure of the foreign investor and of the target company in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;
- the approximate value of the FDI;
- the products, services and business operations of the foreign investor and of the target company in which the FDI is planned or has been completed;
- the Member States in which the foreign investor and the target company in which the FDI is planned or has been completed, conduct relevant business operations;
- the funding of the investment and its source, on the basis of the best information available to the Member State; and
- the date when the FDI is planned to be completed or has been completed.

The Member State conducting screening may request the foreign investor or the target company in which the FDI is planned or has been completed to provide the above information.[18]

Step 2: The other Member States and the Commission notify the Member State conducting the screening of their intention to provide comments or an opinion and may request additional information.

After being notified of the FDI, other Member States and the Commission have 15 calendar days to notify the Member State conducting the screening of their intent to provide comments or an opinion, and to request additional information. Any request for additional information, however, has to be duly justified, limited to information necessary to provide comments or issue an opinion, proportionate to the purpose of the request and not unduly burdensome for the Member State conducting the screening. The Member State conducting the screening shall endeavor to provide such additional information, if available, to the requesting Member States and/or the Commission without undue delay.

Step 3: Determining whether the FDI is likely to affect security or public order (screening factors).

The FDI Regulation provides for a non-exhaustive list of factors that the Member States and the Commission may take into consideration when determining whether an FDI is likely to affect security or public order.

Firstly, the Member States and the Commission may consider the FDI's potential effects on, *inter alia*:

- critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities as well as land and real estate crucial for the use of such infrastructure;
- critical technologies and dual-use items as defined in point 1 of Article 2 of Council Regulation (EC) no. 428/2009[19], including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- supply of critical inputs, including energy and raw materials, as well as food security;
- access to sensitive information, including personal data, or the ability to control such information;
or
- the freedom and pluralism of the media.

Secondly, the Member States and the Commission may also take into account, in particular:

- whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;
- whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or
- whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

Step 4: The other Member States and the Commission may provide comments or an opinion.

Other Member States may provide comments to the Member State conducting the screening if they consider that the FDI is likely to affect their security or public order, or if they have information relevant for such screening. The Commission may issue an opinion addressed to the Member State conducting the screening if it considers that the FDI is likely to affect security or public order in more than one Member State, or if it has relevant information in relation to that FDI. The Commission may issue an opinion irrespective of whether other Member States have provided comments. The Commission shall, however, issue an opinion where justified following comments from at least one-third of Member States considering that the FDI is likely to affect their security or public order. Other Member States' comments and the Commission's opinion have to be duly justified. The Member State conducting the screening may also itself request that the Commission issues an opinion, or other Member States provide comments if it considers that the FDI in its territory is likely to affect its security or public order.

Comments and opinions are to be addressed and sent to the Member State conducting the screening no later than 35 calendar days following the receipt of the information conveyed with the notification of the FDI (see above). If additional information was requested, such comments or opinions are to be issued no later than 20 calendar days following receipt of the additional information or the notification that such additional information cannot be obtained. Moreover, the Commission – irrespective of having notified its intention to issue an opinion (pursuant to Step 2 above) – may issue an opinion following comments from other Member States where possible within the aforementioned deadline(s), but not later than 5 calendar days after those deadline have expired.

Should the Member State conducting the screening consider that its security or public order requires immediate action, it may issue a screening decision before the time frames above have lapsed. The Member State conducting the screening will need to notify the other Member States and the Commission of said intention and duly justify the need for immediate action. The other Member States and the Commission shall hence endeavor to provide its comments or opinion expeditiously.

The Commission will notify the other Member States that comments were provided or that an opinion was issued.

Step 5: The Member State conducting the screening makes final screening decision after having given due consideration to the comments of the other Member States and to the opinion of the Commission.

The Member State conducting the screening needs to give due consideration to the comments of the other Member States and to the opinion of the Commission. Recital 17 of the FDI Regulation elaborates in this regard that a Member State should give due consideration through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of “sincere cooperation” laid down in Article 4 para. 3 Treaty on European Union (“TEU”). The final screening decision in relation to any FDI, however, remains the sole responsibility of the Member State conducting the screening. For the sake of clarity, the Commission and the other Member States do not have the power to overrule the screening decision made by the competent national authority of the Member State conducting the screening.

(b) FDI not undergoing screening (for lack of a national screening mechanism)

Step 1: The other Member States and the Commission may request information from the Member State where the FDI is planned or has been completed without undergoing screening.

Where the Commission or a Member State considers that an FDI planned or completed in another Member State, where it is not undergoing screening for lack of a national screening mechanism, is likely to affect security or public order, it may request information from the Member State where the FDI is planned or has been completed. Such information may include:

- the ownership structure of the foreign investor and of the target company in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;
- the approximate value of the FDI;
- the products, services and business operations of the foreign investor and of the target company in which the FDI is planned or has been completed;
- the Member States in which the foreign investor and the target company in which the FDI is planned or has been completed, conduct relevant business operations;
- the funding of the investment and its source, on the basis of the best information available to the Member State; and
- the date when the FDI is planned to be completed or has been completed.

Additional information to the above may be requested. Please note that the Member State where an FDI is planned or has been completed may request the foreign investor or the target company in which the FDI is planned or has been completed to provide the above information.[20]

Any request for information, however, has to be duly justified, limited to information necessary to provide comments or to issue an opinion, proportionate to the purpose of the request and not unduly burdensome for the Member State where the FDI is planned or has been completed which, in turn, shall ensure that the requested information is made available to the Commission and the requesting Member States without undue delay.

Step 2: Determining whether the FDI is likely to affect security or public order (screening factors).

See above Step 3 for FDI undergoing screening in a Member State with screening mechanism.

Step 3: The other Member States and the Commission may provide comments or an opinion.

Other Member States may provide comments to the Member State where an FDI is planned or has been completed which is not undergoing screening in that Member State if they consider that the FDI is likely to affect their security or public order, or if they have relevant information in relation to that FDI. The

Commission may issue an opinion addressed to the Member State in which the FDI is planned or has been completed if it considers that the FDI is likely to affect security or public order in more than one Member State, or if it has relevant information in relation to that FDI. The Commission may issue an opinion irrespective of whether other Member States have provided comments. The Commission shall, however, issue an opinion where justified following comments from at least one-third of Member States considering that the FDI is likely to affect their security or public order. Other Member States' comments and the Commission's opinion have to be duly justified. The Member State which duly considers that an FDI in its territory is likely to affect its security or public order may also itself request the Commission to issue an opinion, or other Member States to provide comments.

Comments and opinions are to be addressed and sent to the Member State where the FDI is planned or has been completed no later than 35 calendar days following the receipt of the requested information or the notification that such information cannot be obtained. Should the Commission issue an opinion following comments from other Member States, it has 15 additional calendar days for issuing that opinion. In order to provide greater certainty for investors, Member States and the Commissions may only issue comments and an opinion in relation to completed FDI not undergoing screening for lack of a national screening mechanism for a limited period of 15 months after the FDI has been completed.^[21] This time frame, however, does not apply to FDI completed before the entry into force of the FDI Regulation.

The Commission will notify other Member States that comments were provided or that an opinion was issued.

Step 4: The Member State where the FDI is planned or has been completed shall give due consideration to the comments of the other Member States and to the opinion of the Commission.

The Member State where the FDI is planned or has been completed needs to give due consideration to the comments of the other Member States and to the opinion of the Commission. Recital 17 of the FDI Regulation elaborates in this regard that a Member State should give due consideration through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of "sincere cooperation" under Article 4 para. 3 TEU. The decision to screen an FDI or to establish a screening mechanism for that matter, however, remains the sole responsibility of the Member State in question.

(c) FDI likely to affect projects or programs of EU interest

If an FDI potentially affects "projects or programs of EU interest" on grounds of security and public order, the Commission's opinion carries more weight in the sense that the Member State in which the FDI is planned or has been completed (*i.e.*, regardless of whether the FDI is undergoing screening or not) needs not only to give due consideration to, but needs to take utmost account of, the Commission's opinion and, additionally, provide an explanation to the Commission in case its opinion is not followed. Recital 19 of the FDI Regulation elaborates in this regard that a Member State should take utmost account of the opinion received from the Commission through, where appropriate, measures available under its national law, or in its broader policy-making, and provide an explanation to the

Commission if it does not follow its opinion, in line with their duty of “sincere cooperation” under Article 4 para. 3 TEU.

The underlying objective is to give the Commission a tool to protect projects and programs, which serve the EU as a whole and represent an important contribution to its economic growth, jobs and competitiveness.[22]

“Projects or programs of EU interest” shall include projects and programs which involve a substantial amount or a significant share of EU funding, or which are covered by EU law regarding critical infrastructure, critical technologies or critical inputs, which are essential for security or public order. In its annex, the FDI Regulation sets out a list of eight projects and programs of EU interest, namely the European GNSS programs (Galileo & EGNOS), Copernicus, Horizon 2020, Trans-European Networks for Transport (TEN-T), Trans-European Networks for Energy (TEN-E), Trans-European Networks for Telecommunications, European Defense Industrial Development Program, and the Permanent structured cooperation (PESCO). The Commission is authorized to amend this list by way of adopting a delegated act.

As for the cooperation mechanism, the above outlined procedures for FDI undergoing screening / not undergoing screening apply accordingly except for three modifications: (i) the Member State conducting the screening may indicate in the FDI notification whether it considers that the FDI is likely to affect projects and programs of EU interest; (ii) the Commission’s opinion shall be sent to the other Member States (instead of the Commission only notifying the other Member States of the fact that an opinion was issued); and (iii) the Member State where the FDI is planned or has been completed needs to take utmost account of the Commission’s opinion and provide an explanation to the Commission in case its opinion is not followed.

Interplay with German Foreign Investment Control

Current German Investment Control Regime

Germany has had an FDI screening mechanism in place since 2004, which is based on the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* or “AWG”) and codified in more detail in the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* or “AWV”). The German Federal Ministry of Economic Affairs and Energy (the “**German Ministry**”) has the competence to review and potentially prohibit or restrict investments in domestic companies (direct or indirect acquisition of 25% – if in a security-sensitive sector or a critical infrastructure now already of 10% – or more of the voting rights) by a foreign investor on the grounds of public order or security, or to ensure the protection of essential security interests of the Federal Republic of Germany. The rules for German investment control distinguish between so-called “sector-specific reviews” (defense and certain parts of IT security industry) and “cross-sector reviews” (all other industry sectors).

In case of sector-specific reviews (defense and certain parts of IT security industry), the foreign investor – EU and non-EU investor – is obliged to report the transaction to the German Ministry which then has three months to initiate formal review proceedings or otherwise clearance is deemed granted. Should the German Ministry decide to enter into formal review proceedings, it has a further period of three

months of receipt of certain information on the transaction to render a screening decision. Any such decision by the German Ministry, that is any clearance, restriction or prohibition of a transaction, is consensually agreed with the Foreign Office (*Auswärtiges Amt*), the Federal Ministry of Defense (*Bundesministerium der Verteidigung*), and the Federal Ministry of the Interior (*Bundesministerium des Inneren*).

In case of cross-sector reviews (all industry sectors but defense and certain parts of IT security), German Ministry has the competence to review the transaction independently despite the foreign investor – non-EU/non-EFTA – being obliged to report the transaction to the German Ministry, that is if the target company operates a critical infrastructure as listed in sec. 55 para. 1 sentence 2 AWV. The German Ministry then has three months to initiate formal review proceedings; otherwise it foregoes its right to review the transaction. Foreign investors also have the option to apply – even prior to the signing of the acquisition agreement – for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*), which shall be deemed granted if the German Ministry does not initiate formal review proceedings within two months of receipt of the application. For the sake of transaction security and time, investors will often make use of this option and apply for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*). Either way, should the German Ministry decide to enter into formal review proceedings, it has a further period of four months of receipt of certain information on the transaction to render a screening decision. Any decision to restrict or prohibit the transaction requires the consent of the German government.

Hence, both types of review proceedings, the sector-specific as well as the cross-sector review, may take up to six (or even seven) months. It is noteworthy, however, that, regardless of the industry sector concerned, the ultimate duration of a formal review proceeding is likely to stretch even longer in the individual case as the review period is suspended if and so long as negotiations on contractual arrangements ensuring the protection of public order and security are taking place between the German Ministry and the parties involved in the transaction.

In December 2018, the German government further tightened its rules for German foreign investment control. The amended rules provide for greater scrutiny of FDI by lowering the threshold for review of investments in German companies by foreign investors from the acquisition of 25% of the voting rights down to 10% in circumstances where the target operates in security-sensitive sectors (defense and certain parts of IT security industry) or a critical infrastructure. In addition, the amendment also expands the scope of the German screening mechanism to include certain media companies that contribute to influencing the public opinion by way of broadcasting, teleservices or printed materials and stand out due to their special relevance and broad impact. While the lowering of the review threshold as such has the purpose to increase the number of reported, and ultimately, reviewed investments, the broader scope is aimed at preventing German mass media from being manipulated with disinformation by foreign investors or governments.

Interplay and Potential Friction between German Investment Control and the FDI Regulation

As said above, the newly established framework for screening of FDI into the EU does not supersede German investment control but rather adds a layer of overall transparency and awareness among the

Member States and, arguably even more importantly, provides the German Ministry with additional screening factors it may consider when reviewing an FDI under German investment control rules. In the case of the German robot manufacturer Kuka for instance, this would have allowed the German Ministry to actually prohibit the takeover of Kuka by Chinese investors. While, in 2016, robotics itself was not deemed to affect the public order or security of the Federal Republic of Germany – even under the current, more tightened regime, it still is not – it *is* considered a critical technology pursuant to the FDI Regulation and, as such, may be taken into account by the German Ministry in its screening decision.

The EU-wide cooperation process under the FDI Regulation will take place between the respective contact points appointed for the implementation of the FDI Regulation by the Commission and the Member States. The German contact point will almost certainly be the department of the German Ministry in charge of investment control. The German Ministry, therefore, continues to be the sole point of contact for investors. It will need to inform the Commission and other Member States of FDI which undergo German review.

The time frame for cooperation activities under the FDI Regulation is generally set to 55 calendar days (60 calendar days in case the Commission decides to issue an opinion *following* comments from other Member States) but may be longer depending on the individual circumstances that go with the obligation of the Member State concerned to make available additional information requested “without undue delay”.

At first glance, the time frames under the FDI Regulation do not seem to conflict with the German screening procedure given that the German Ministry has, depending on the sector concerned, two or three months, to decide on entering into formal screening proceedings while the Commission/other Member States have 15 calendar days to notify their intent to provide an opinion/comments and no longer than 35 calendar days to actually do so. The time frame to issue an opinion or comments, however, may easily stretch longer than 35 calendar days in the event that the Commission or other Member States include a request for additional information in their notification of intent because an opinion or comments only need to be issued (no later than) 20 calendar days following receipt of the additional information. Even though the Member State concerned – in our example the German Ministry – is to ensure that the information requested is made available without undue delay, it is highly unlikely that the Member State concerned will be in a position to provide the information the same day. Therefore, the Commission/other Member States may actually have (much) longer than 35 calendar days to provide an opinion/comments in the individual case which in turn may collide with current time frames under German investment control rendering it impossible for the German Ministry to effectively consider such opinion/comments. This will be true especially in case of applications for certificates of non-objection (*Unbedenklichkeitsbescheinigung*) which need to be processed within two months. Therefore, it is certain that the German rules will be amended to ensure that both time frames are reconciled. Instead of simply extending the time frames to allow for the inclusion of the new EU cooperation mechanism, it is also conceivable that the German screening process will not start or be suspended until the EU cooperation procedure is completed.

There will also be a need to reconcile information requirements. The information to be provided under the EU cooperation mechanism goes beyond what is required under the German screening mechanism. It

is to be expected that the information to be submitted under the German screening procedure will be extended to comply with information requirements under the FDI Regulation. Alongside of extended information requirements, foreign investors should also prepare for an increased need for translations, as the German Ministry requires information to be submitted in German – and will continue to do so – whereas information to be shared with the Commission and other Member State will most likely (and at least) need to be provided in English.

The German Ministry anticipates that the implementation of the FDI Regulation will take at least until end of 2019 and that the German investment control regime most likely will be tightened even further in the process.

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- [1] See FDI Regulation, recital no. 7.
- [2] See FDI Regulation, recital no. 8 and article 1 para. 3.
- [3] See FDI Regulation, article 3 para. 1.
- [4] See FDI Regulation, recital no. 26 and 27.
- [5] See FDI Regulation, recital no. 27.
- [6] See FDI Regulation, article 10 para. 3.
- [7] See FDI Regulation, article 14.
- [8] Commission Decision of November 29, 2017 setting up the group of experts on the screening of foreign direct investments into the European Union (not published in the Official Journal), C(2017) 7866 final.
- [9] See article 2 and article 5 of the Commission Decision of November 29, 2017 setting up the group of experts on the screening of foreign direct investments into the European Union (not published in the Official Journal), C(2017) 7866 final.
- [10] See FDI Regulation, recital no. 28.
- [11] See FDI Regulation, recital no. 29 and article 13.
- [12] See FDI Regulation, recital no. 14.
- [13] See FDI Regulation, recital no. 22 and article 5.
- [14] See FDI Regulation, recital no. 22.

[15] The General Agreement on Trade in Services (GATS) is a treaty of the World Trade Organization (WTO) which establishes a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner and do not constitute unnecessary barriers to trade.

[16] The Organisation for Economic Co-operation and Development (OECD) is an international organization with currently 36 member countries committed to promote policies that will improve the economic and social well-being of people around the world by providing a forum in which governments can work together to share experiences and seek solutions to common problems.

[17] Statement made by Commission member Dr. Sylvia Baule during her presentation at the panel discussion “M&A – The evolving landscape of foreign direct investment – Just another thing to deal with or the new ice age for cross-border M&A?” at the German & American Lawyers Association (*Deutsch-Amerikanische Juristen-Vereinigung* or “DAJV”) Working Group Day 2018.

[18] See FDI Regulation, article 9 para. 4.

[19] Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134 29.5.2009, p. 1) (whereby ‘dual-use items’ shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices).

[20] See FDI Regulation, article 9 para. 4.

[21] See FDI Regulation, recital no. 21.

[22] See FDI Regulation, recital no. 19.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following:

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