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EU Adopted Regulation on Screening of Foreign Investments

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In April 2019, the EU adopted the Regulation on the Screening of Foreign Direct Investments ("Regulation"), which will apply as of 11 October 2020 in all Member States.

Currently, 14 out of 28 EU Member States, including the economically most important jurisdictions (in particular Germany, U.K., France, Austria, Spain, and Italy) have implemented national screening mechanisms for foreign investments. The Regulation is the first EU-wide investment screening legislation. Whilst it does not introduce an independent regulatory body with the capacity of issuing binding decisions, the new Regulation does create a legal framework of information sharing and cooperation between Member States and the European Commission ("EC").

It is fair to expect that the Regulation will have a real impact on foreign investment contracts, both from a timing, as well as from a substantive point of view.

Key Takeaways

- Member States are not obliged to translate the Regulation into national law;
- If a Member State decides to implement a screening mechanism, it must comply with certain minimum standards in accordance with the Regulation (e.g., transparency and non-discrimination between third-party countries);
- Member States, which already have screening mechanisms in place, may adjust them in accordance with the Regulation. However, this is not obligatory; and
- The European framework will maintain the national competences. Each Member State keeps the last word in any investment screening undertaken by such Member State.

The Regulation groups areas for concern into the following (non-exhaustive) categories:

- Critical infrastructure (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 (artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies);
- Critical inputs (energy, raw materials, and food security);

- Access to sensitive information (personal data, or the ability to control such information); and
- Freedom and pluralism of the media.

Cooperation Mechanism

Member States screening an investment based on their domestic rules have to inform the EC and the other Member States about the initiation of a screening and shall provide information on, inter alia, the ownership structure and business activities of the buyer and the target, as well as the funding.

Other Member States and/or the EC have up to 35 calendar days to provide an opinion to the screening Member State. They have to determine whether or not the intended investment is likely to affect their own, or in the EC's case at least two Member States', security or public order, especially in case of investments in critical technologies, artificial intelligence and robotics, sensitive information and media.

The screening Member State has to give due consideration to the statements received but has no further obligations towards the other Member States or the EC.

15 Months Post-Closing Comments/Opinion

In case a screening has not been initiated by a Member State, other Member States may nevertheless provide comments and the EC is entitled to issue an opinion within a period of up to 15 months after the completion of the investment, if they consider the transaction is likely to affect the security and public order in their own territory or in more than one Member State.

Although the Regulation will only apply as of 11 October 2020, it is already relevant to investments completed on or after 11 July 2019.

Mechanism for Investments likely to affect EU Interests

Furthermore, the Regulation provides the EC with the competence to provide opinions if an investment may affect legitimate interests of the EU (e.g., European GNSS programmes, Trans-European Networks for Telecommunications, European Defence Industrial Development Programme).

The Member State where the investment is located has to take utmost account of the EC's statement and has to provide an explanation in case of deviations.

Strategic Considerations

The Member States maintain the sole responsibility for the foreign investment screening. However, it is to be expected that Member States without a screening mechanism in place will implement national screening legislation, as, for example, Hungary did in January 2019 and that statements provided will have de facto a major impact on the decision of the respective national screening authority notwithstanding their non-binding effect.

Obligations under the Regulation will add to the bureaucratic burden for the authorities (e.g., transmission of information, translations, due consideration of statements) and have the potential to prolong the screening procedure. Investors and sellers need to take into account increased costs and a potential delay.

If no screening process has been conducted by a Member State, there is a risk that it could be initiated up to 15 months after the completion of the transaction, based on statements provided by

other Member States or the EC. In order to maintain legal certainty, investors should apply for a screening/clearance certificate if this is possible under the law of the respective Member State.

As of today, non-EU investors not only have to consider the national regulation of the Member State in which the target is located, but also whether the transaction possibly affects the security interests or public order of other Member States or the EU.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Frankfurt lawyers:

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