# *Don't be a stranger*: EU adopts foreign investment screening regulation

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**On 14 February 2019 the European Parliament approved the adoption of a regulation establishing a framework for screening of foreign direct investments into the European Union on the grounds of security or public order (the FDI Regulation).**

## Cooperation - but not harmonisation

Following increased calls for the EU to take a more active role in this area, including from MEPs, President Juncker unveiled the proposal for the FDI Regulation during his 2017 State of the Union speech. In parallel, the European Commission started a detailed analysis of foreign direct investment flows into the EU.

The most significant change brought by the FDI Regulation is to introduce a mechanism for cooperation and information-sharing between the Commission and EU Member States in respect of national-level screening of foreign direct investments. These are defined very broadly as investments of any kind by a foreign investor to create or maintain "*lasting and direct links*" with the subject of the investment, including those enabling de facto participation in the management or control of a company - and greater clarity would be welcomed from the Commission on the scope of investments that may be caught.

The FDI Regulation stops short of introducing a veto right or decision-making powers for the Commission. However, the Commission can issue a non-binding opinion, and other Member States can provide comments, to a Member State in which a foreign investment is planned or has already completed, where, for example, the investment may affect the security or public order of other Member States or of an EU-wide project.

They may do so irrespective of whether that Member State is conducting a review of the investment or not – and irrespective of whether it even has its own national foreign investment review regime. "Invested in" Member States can also request a Commission opinion or comments from other Member States proactively.

The "invested in" Member State must give the Commission's opinion and any Member State comments received "*due consideration*" - although for Member States without a foreign investment review regime, it is not clear what immediate enforcement action they could take to address any objection, short of adopting a legislative measure.

The final say on approval of the foreign investment remains the sole preserve of the reviewing Member State. What the FDI Regulation does not do, therefore, is seek to create an overarching EU-wide screening regime – unlike the EU Merger Regulation, for example, which produced a "one-stop shop" for merger control reviews in the EU.

Nor does the FDI Regulation attempt to harmonise regimes across Member States – indeed, there is no requirement for Member States to have a foreign investment review regime at all (only 14 of the 28 do), and there are no prescriptions around a Member State's decision whether to screen an investment within the framework of any regime that it does have.

## Implications for investors

Although approved by the European Parliament, the FDI Regulation will not apply until sometime in 2020.

For investors contemplating foreign direct investment in the EU, the most important practical impact is on timing. Where an investment is subject to a national review process, other Member States can provide comments within 35 calendar days of being notified of the review (extendable if they request additional information), and the Commission has a further five calendar days beyond that to issue an opinion. Making space for the prescribed cooperation process is therefore likely to extend materially a Member State's review of an investment.

Where an investment is not subject to a review (either because it does not surpass the thresholds for review in the relevant Member State, or because that Member State does not have a review regime in place at all), the Commission and other Member States can provide comments to the relevant Member State for up to 15 months after completion of the deal – although the FDI Regulation does not provide for any right to unwind a completed transaction or impose any other remedies. Save for the relevant Member State giving "*due consideration*" to the comments, it is not clear what the implications of such an intervention would be.

One of the FDI Regulation's stated aims is to improve transparency of Member States' review processes for investors. It may be, however, that the result is *decreased* transparency. It is not clear, for example, if a Commission opinion or Member State comments will be made available publicly or to the merging parties.

### A first step, or already a step too far?

It remains to be seen if the FDI Regulation will be a first step towards EU-wide harmonisation. However, the current climate of dissatisfaction in some quarters at the Commission's application of the EU merger rules (most vocally from the French and German governments in *Siemens / Alstom*, recently blocked by the Commission) may mean that an agreement on foreign investment harmonisation is slow in coming.

When assessing deal risk, prospective foreign investors into the EU will therefore need to add to their list of considerations the likely reaction of other EU Member States and any EU-wide effects of a potential deal – and ensure that any foreign investment filings they are required to make are consistent across the EU.

## A global trend towards politicisation

The adoption of the FDI Regulation in the EU marks another step in a wider global trend towards expansion of foreign investment controls. The UK Government, for example, is in the process of considering a new regime for reviewing deals on national security grounds (its response is awaited to the consultation on the white paper proposals, which closed in October 2018), while in August 2018 the US passed legislation to expand CFIUS' jurisdiction to review transactions involving foreign persons. As political scrutiny increases of possible national security implications arising from international buyers acquiring local businesses, investors may expect an increasingly interventionist stance towards foreign direct investment to become the 'new normal'.