# Client Update
# European Commission Calls for Common Scrutiny of Foreign Direct Investments

## BACKGROUND

The European Commission has outlined a proposed common framework for screening foreign takeovers and investment into the EU. The proposal is designed to standardise and coordinate the existing foreign investment review mechanisms across the 28 Member States. It would also create a new oversight role for the Commission over foreign direct investment, allowing it to assess the effects of transactions outside of the antitrust area.

Currently, the Commission only has the ability to review transactions subject to merger control review under the EU Merger Regulation. That process limits the Commission to consideration of the impact on competition, although with some limited scope for any affected Member State to protect national interests in the context of acquisitions of businesses operating in the defence, media, and financial services sectors.

## CONSISTENT FRAMEWORK FOR SCREENING

The Commission's proposal would not oblige the Member States to adopt their own national screening mechanisms, but Member States that do have such mechanisms in place would be required to meet certain minimum standards. These include judicial review of decisions, non-discrimination between different third countries, and transparency. At the moment there is no consistent approach among the different Member States, so cross-border transactions are subject to a patchwork of different procedures.

The proposal also sets out a non-exhaustive list of factors to be taken into account, such as the effect on critical infrastructure (e.g., energy, transport, communications, data storage), critical technologies (e.g., artificial intelligence, robotics, cybersecurity), inputs essential for the security or the maintenance of public order, and access to sensitive information. One of the underlying concerns prompting the Commission's action is evident from the statement that, when assessing these effects, Member States and the Commission should be able to take into account

*"whether a foreign investor is controlled directly or indirectly by the government of a third country, including through significant funding"*.

Member States that do not maintain a screening mechanism will still be expected to provide the Commission with an annual report covering foreign direct investments that took place in their territory.

## COOPERATION AND COORDINATION

If the proposal is implemented, it would also create a system for the individual Member States to raise concerns with each other about potential investments and to reach a coordinated outcome. The Commission would oversee information exchanged between the Member States and be able to issue a non-binding opinion on investments under review. The final decision in such cases would be taken by the Member State(s) in which the investment is planned, and they would not be bound by the Commission's opinion; however, they will be required to give "due consideration" to it.

## FRAMEWORK FOR COMMISSION SCREENING IN SECTORS OF UNION INTEREST

The Commission would also have the right to intervene directly in deals it believes are "of Union interest" on grounds of security or public order, such as those involving EU funds, or projects relating to critical infrastructure, technologies, or inputs that are covered by EU legislation. This includes projects and programmes in the areas of research (e.g., beneficiaries of Horizon 2020 scientific or industrial funding), space (Galileo), transport (Trans-European Networks for Transport, TEN-T), energy (TEN-E), and telecommunications. The Commission itself would not, however, have the power to block a transaction. Importantly, merging parties would also not be expected to notify transactions to the Commission, or suspend transactions whilst awaiting a decision. However, national governments must take "utmost account" of any opinion issued by the Commission, and provide an explanation if that opinion is not followed.

## SCOPE

The proposed regulation would apply broadly to any investment by a non-EU investor in order to carry on economic activity within a Member State, whether through control or management of the business or otherwise. As such it would also – at least as proposed – seem to cover acquisitions of a non-EU parent with an EU subsidiary.

## COMPARATIVE IMPACT

Government review of foreign investment is not new. The Committee on Foreign Investment in the U.S. and the Investment Canada Act are two of the most well-established processes. Other countries take such concerns into account as part of their merger control approval process. For example, under the Chinese merger control system, the broader impact on the development of the national economy is a relevant consideration. In South Africa, the

competition authorities routinely evaluate whether a merger may be justified on public interest grounds. Similarly, 12 of the 28 EU Member States already have some form of approval over foreign investment. Recently, for example, the German government broadened its ability to intervene in acquisitions of German companies by foreign investors (for more detail, please see here). Indeed, Germany – along with France and Italy – has been one of the key Member States asking for greater oversight of foreign investment under an EU-wide regime.

The novelty here from an EU perspective is the harmonisation and coordination of the current decentralised system, and the additional oversight role that will be played by the Commission. The proposed system would give the parties involved greater legal certainty, although in exchange for a heightened level of scrutiny. However, it is not clear whether, or in what form, the proposal will become law as opposition may come from other EU countries keen not to take steps that may deter foreign investment. Any final version is unlikely to be in effect before 2019.

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Please do not hesitate to contact us with any questions.

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