

September 18, 2017

EU Merger Control

New EU Framework for Screening of Foreign Direct Investments

SUMMARY

In his State of the Union speech on September 13, 2017, Jean-Claude Juncker, President of the European Commission (“Commission”), announced a proposed Regulation establishing a framework for the screening of foreign direct investments into the European Union. The measure, which stops short of creating a formal EU mechanism for screening foreign takeovers, would allow the Commission to review and issue non-binding opinions on certain foreign investments of “Union interest.” While highlighting the Union’s “open investment environment,” the Commission’s proposal attempts to establish a framework to promote closer cooperation among EU Member States reviewing foreign investments on a national level – without prejudice to the Member States’ exclusive competence for the maintenance of national security.

THE POLICY CONTEXT

The draft Regulation comes in response to the mounting pressure from certain Member States, in particular Germany, France and Italy, to intensify the screening of foreign takeovers in order to match the level of review seen in other jurisdictions such as the US, China or Japan. The Commission has already noted the concerns relating to acquisitions of European companies with key technologies by foreign investors, notably state-owned enterprises, in its Reflection Paper on Harnessing Globalization from May 2017.

THE PROPOSED REGULATION

The proposed measure does not attempt to create an EU-level regime for reviewing foreign takeovers. Instead, it is fostering convergence between the different standards of screening of foreign investments in individual Member States and on improving cooperation between Member States through information sharing and notification requirements. It also grants the Commission the opportunity to review and comment, through non-binding opinions issued to Member States, on foreign investments of “Union interest.”

A. EUROPEAN COMMISSION'S REVIEW

The Commission review would be limited to foreign investments of "Union interest," namely those:

- involving a substantial amount or significant share of EU funding; or
- covered by EU legislation and relating to critical infrastructure, critical technologies or critical inputs.

The Commission would lack the ability to block or impose remedies on the reviewed transactions and instead would issue non-binding opinions, which the recipient Member States would have to take "utmost account" of, or provide reasons for not following the opinions in the alternative.

B. MEMBER STATES' REVIEW

The proposed Regulation sets out minimum requirements for national screening mechanisms, which seek to ensure transparency, timeliness and lawfulness of the Member States' review of foreign investments. Furthermore, the Regulation would impose obligations on Member States to notify and share information regarding their national screening processes among each other and with the Commission. Member States would be also allowed to provide comments on foreign investments in other Member States which are deemed by them to raise concerns for public order or security.

IMPACT ON BUSINESSES

If adopted into law (which is far from certain given the political sensitivities in this area), the proposed Regulation would give the Commission a new role in the assessment of certain transactions outside the merger control arena. The Commission's action may also lead to the strengthening of national screening mechanisms, and foster the creation of new ones. The proposed regulatory review would run in parallel with standard merger control proceedings, resulting in delays, additional costs and even greater legal uncertainty for merging businesses.

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