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EU Screening of Foreign Investments

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Screening of Foreign Investments at the Raise

The European Union negotiators reached a political agreement on an EU framework for screening foreign direct investment and introduced an alert mechanism enabling the regulators to act on short deadlines and with the utmost confidentiality. Germany lowered the threshold for initiation of the screening procedure to 10%.

The New Trend

While the EU emphasises its desire to remain open for foreign investments, it highlights the need to protect certain strategic fields of business where the attainment of control or influence over European assets could become critical for the security and public order in the EU and its Member States. The goal is to limit threats to "critical infrastructure," including energy, transport, communication, data, financial industries, and food supplies, and to "critical technologies," such as semiconductors, robotics, and AI.

The core element of the agreement is to establish a "cooperation mechanism" for foreign direct investments through a combination of data collection and information exchange. While the ultimate power of approving deals remains with the individual Member State, the other Member States and the Commission will be allowed to provide comments/opinions and therefore introduce peer pressure.

The main features of the new European framework for screening of foreign direct investment are the following:

- Creating a cooperation mechanism where Member States and the Commission will be able to exchange information and raise specific concerns.
- Allowing the Commission to issue opinions in such cases that a particular envisaged investment concerns several Member States, or an investment that could affect a project or programme of interest to the whole EU.
- The individual Member States keep the last word whether or not a specific investment should be allowed in their territory.

Next Steps

The two co-legislators have now to confirm this agreement and give the final green light to the proposal so that it can enter into force.

In parallel, the Commission is completing a detailed analysis of the foreign direct investment flows into the EU and has set up a coordination group to help identify joint strategic concerns and solutions in the area of foreign direct investment.

The EU framework contains essential elements of a procedural framework for screening mechanisms in the Member States. This includes transparency of the screening mechanisms, no discrimination between third countries, the establishment of timeframes for issuing screening decisions, the protection of confidential information, and the possibility to seek judicial redress against screening decisions of national authorities. However, each Member State will maintain its ability to adopt new review mechanisms or to amend its existing ones. Currently 14 Member States have such mechanisms in place and it is expected there will be more to come. On December 19, 2018, Germany decided to lower the thresholds for the Ministry of Economy to review foreign investments from 25% to 10% relating to investments in security-sensitive areas, such as critical infrastructure. Taking into account the recent changes and the political climate it is recommended to apply for the issuance of a clearance certificate from the regulators to obtain transaction security.

Recommendation

The direction is clear—foreign direct investments are on the spot of the regulators, and political intervention is increasing. Therefore, any investment from a non-EU member into an EU business requires careful consideration and investigation, in particular from a legal perspective.

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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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