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EU Commission proposes new EU investment screening framework

Jay Modrall (Norton Rose Fulbright, Belgium) · Friday, September 15th, 2017

On September 13, the European Commission (Commission) proposed a [regulation](#) creating a new framework for screening foreign direct investments into the European Union (EU). The proposal would address the potential for divergence among existing Member State screening mechanisms and create a new oversight role for the Commission itself. The framework could affect acquisitions in a broad range of industries, including communications, data storage, energy and transport infrastructure, artificial intelligence and robotics.

Several Member States have national mechanisms in place enabling them to intervene in transactions that they believe endanger their national interest, but there is currently no EU regime for reviewing foreign investment into the EU other than the EU Merger Regulation (EUMR), which restricts Member States' ability to review transactions subject to the EUMR on any ground other than public security, media plurality and prudential rules. The proposal would not require Member States to adopt or maintain screening mechanisms, but would create minimum requirements for such mechanisms, including judicial review of decisions, non-discrimination, and transparency, as well as setting out a list of factors to be considered when screening investments (e.g., effect on critical infrastructure, technologies, inputs essential for the security or the maintenance of public order, and access to sensitive information).

Under the proposal, Member States would be required to notify the Commission of existing screening mechanisms and provide annual reports on their application. Member States that do not maintain a screening mechanism would be required to collect information and report on foreign direct investments taking place in their territory and create a contact point that could be contacted on issues relating to the implementation of the proposed regulation. The regulation would also create a system for national governments to raise concerns with each other about problematic investments. A Member State conducting a screening would be required to inform other Member States within five working days, and other Member States would then have 25 working days to provide comments.

If an investment concerns projects or programmes of Union interest, such as projects involving EU funds, the Commission would be able to carry out its own assessment of the investment's impact on security and public order. In such cases, the Commission's

opinion would be addressed to the Member State in which the investment is planned or completed. The addressed Member State would be required to “take utmost account of the Commission’s opinion” and provide an explanation if the opinion is not followed. The proposal contains an indicative list of such projects, including networks for transport, energy, telecommunications, and the European GNSS programme.

In addition, the Commission would oversee information exchanges between Member States and be able to issue a non-binding opinion on investments under review, taking account comments made by Member States, within an additional period of 25 working days.

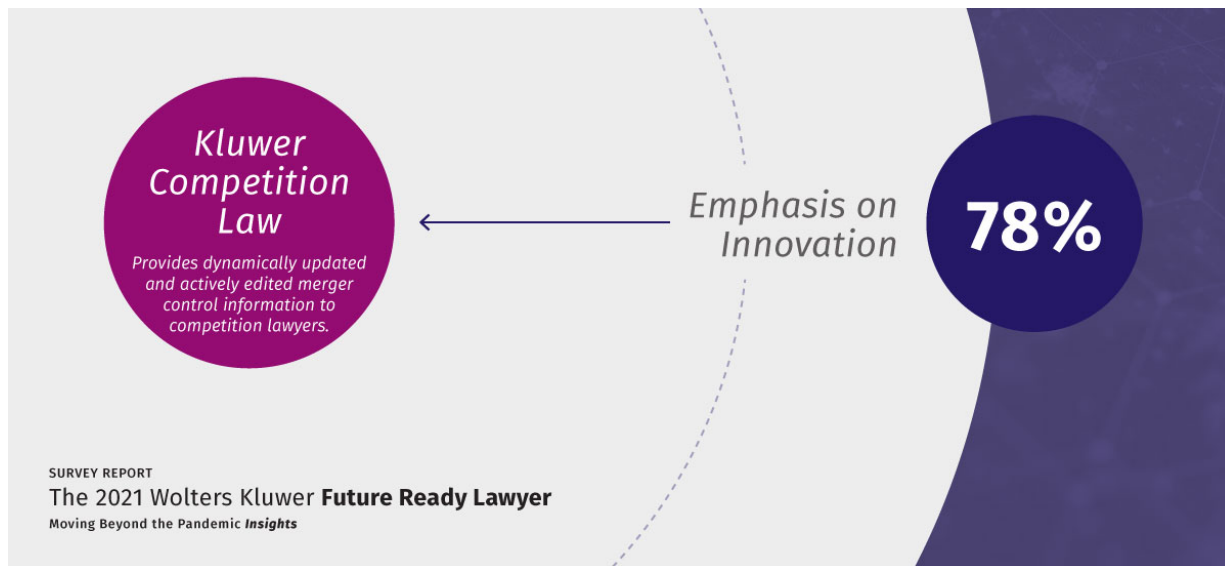
The Commission’s proposal will now be considered by the European Parliament and the European Council. If adopted into law, the new framework would create a new role for the Commission in the assessment of major global transactions outside the antitrust area. Any proposal by the Commission to expand its role in the assessment of strategically important transactions is likely to be politically sensitive, and the prospects for adoption of the new regulation are unclear. The Commission’s ability to thread the needle between providing an efficient review while respecting national sovereignty and encouraging investment will be key to the proposal’s success.

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