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National competition authorities and FDI screening: the case of Poland

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EU FDI Screening Regulation: separating security and competition concerns

Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union (EU FDI Screening Regulation) was adopted on 19 March 2019 and will enter into force on 11 October 2020. Its adoption was prompted by the concerns of various stakeholders alleging the existence of the regulatory gap in the current EU merger control regime under the Regulation 139/2004 (EUMR), which does not include public interest considerations such as the competitiveness of the EU companies on the global markets, the creation of "European champions" or taking into account state subsidies received by the foreign acquirers. Unwilling to expose the EU merger control to "politicization" and non-competition considerations, the EU Commission tabled a legislative proposal for the EU FDI Screening Regulation, which suggested the Member States to use FDI screening legislation for filtering foreign investments on the grounds of security and public order. In its subsequent Guidance to the Member States, the EU Commission recommended the adoption of the extensive national FDI screening legislation.

While the newly adopted EU FDI Screening Regulation was to be applied in parallel with the EUMR, several Member States have engaged their national competition authorities (NCAs) in the process of FDI screening along with their existing competences in the field of merger control. For example, in Romania, the proposed amendments to the current FDI screening regime attribute an important role to the NCA – the Romanian Competition Council (RCC), which was designated a point of contact under Article 11 of the EU FDI Screening Regulation. The newly established Commission for the Screening of the Foreign Direct Investments (CSFDI) will include representatives from various state authorities, including the RCC. will serve as a secretariat of the CSFDI without having a right to vote at the SCFDI meetings. It will forward to the SCFDI all notifications concerning FDI in certain sectors provided the value of the FDI reached EUR 2 million. Thus, while the RCC will be involved in all stages of the FDI screening process, formally it will have no influence on the decision of SCFDI concerning the clearance/prohibition of the FDI on public security grounds.

A more peculiar institutional arrangement was chosen by the Polish legislators when expanding the scope of the FDI screening regime adjusting it to the procedural

cooperation requirements under the EU FDI Regulation.

Two hats of one head: merger control and FDI screening

In Poland, the implementation of the EU FDI Screening Regulation has led to substantial amendments to the existing FDI screening regime, which required the Government's approval of foreign investment into certain Polish companies, which were included in the periodically updated list. The 2020 amendments have expanded the scope of the "protected entities" subjected to FDI screening to the whole economic sectors provided that the Polish company that is targeted by the FDI realizes a turnover of EUR 10 million in any of the two financial years preceding the notification. The expected increase of the workload related to the handling of the FDI notifications has been addressed by the Polish legislator through the designation of the Polish NCA – the Office of Competition and Consumer Protection (UOKiK) – as a "competent authority" for FDI screening. However, unlike the other Member States, Poland decided to accord its NCA with the decision-making powers in relation to the FDI screening on the grounds of public security, public order, and public health. It should be noted that the UOKiK has been already authorized by the Competition Act to consider "public interest" in its merger control assessments. The legislative amendments have thus extended the UOKiK's public interest assessment into the sphere of FDI screening, which besides concentrations covered by the national merger control regime also includes any shareholder acquisitions in the specified sectors reaching 20% of the capital of the "protected entities". As a result, the non-EEA and non-OECD acquirers may have to pass their transactions through a set of parallel proceedings run by the UOKiK: merger control and FDI screening. While the merger control regulations allow the Polish NCA to clear the notified concentrations subject to conditions, the FDI screening regime provides only for clearance and objection outcomes. As a result, the UOKiK may be tempted to employ the FDI leverage when negotiating remedies under the merger control regime. This concern is further strengthened by the fact that the decision-making powers under merger control and FDI screening regimes are vested with the President of UOKiK and the notifications under the two procedures will be administered by the same case handlers.

Outlook

Currently, the example of Poland concerning the NCA's involvement in the procedural even decision-making phases of the FDI screening on the basis of public security remains a sole example as only half of the Member States have notified their national FDI screening regimes under the EU FDI Screening Regulation. Nevertheless, it could be expected that certain Member States will choose to delegate FDI screening investigations to their NCAs, which are already involved in the process of receiving merger notifications. This engagement of the NCAs in the process of the FDI screening could have unintended consequences, especially if no adequate procedural safeguards are in place to ensure clear separation between merger control and FDI screening functions exercised by the NCAs. While the FDI screening could be used as

a legitimate regulatory framework for the protection of public security and other public interests, these considerations should be institutionally and procedurally separated from the competitive assessment under the merger control regime in order to avoid the unintended "politicization" of the merger control, one of the objectives that the EU Commission attempted to achieve with the adoption of the EU FDI Screening Regulation.

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