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Third Commission FDI Report Reflects Consolidation of EU Framework

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The European Commission's third annual report (the Report) on experience with Regulation 2019/452 (as amended, the FDI Regulation) reflects the growing importance of foreign direct investment (FDI) screening in the European Union (EU). Together with a staff working document, the Report provides valuable insights into the FDI Regulation's practical impact and the Commission's role in FDI screening in the EU. According to the Report, all 27 Member States now have active FDI screening mechanisms or are in the process of adopting one, compared to 11 when the FDI Regulation was adopted.

FDI trends

In 2022, global FDI decreased -14.3% compared to 2021, but EU inward FDI decreased much more dramatically, -199%, primarily driven by decreases of inward FDI in Luxembourg. Despite the downward trend in inward EU FDI by value, the number of FDI transactions increased in 2022. Ultimate investors originated from 52 different countries, up from 43 in 2021. The share of the US, UK and China decreased somewhat in 2022 compared to 2021, while the share of Japanese investors increased. The US remained the top foreign investor (32.2% of foreign acquisitions and 46.5% of greenfield investments), followed by the UK and offshore financial centres (OFCs). Germany remained the first destination for foreign acquisitions (17.2%), followed by Spain (13.5%), Italy (10.6%), France (10.2%) and the Netherlands (10%). As regards greenfield investments, Spain was the number one destination (17.2%), followed by France (14%) and Germany (11%).

The five main sectors for inward FDI in the EU saw a decrease in the number of acquisitions, while greenfield investments saw increases in all but one (manufacturing) sector. The ICT sector received the highest share of investments (28%), although acquisitions in this sector declined by 18.6%. ICT accounted for 19.4% of new greenfield investments, ranking second after retail: Manufacturing was the second most important sector in 2022 in terms of acquisitions (24.7%), but only fifth in terms of the share of greenfield investments (10.4%).

FDI screening

Based on data submitted to the Commission, Member States handled 1,444 requests for authorisations of acquisition and ex officio cases, of which 55% were screened and 45% were considered ineligible or did not require formal screening. Four Member States accounted for 66% of all applications, compared to 70% in 2021 and 87% in 2020, reflecting the expansion of FDI screening across the EU.17 Member States submitted a total of 423 notifications, compared to 13 Member States in 2021. Six Member States, namely Austria, Denmark, France, Germany, Italy and Spain, were responsible for more than 90% of those notifications. 20% of cases notified in 2022 were notified by two or more Member States 20% (compared to 28% in 2021). The Commission also made use of Article 7 of the Regulation, which allows the Commission to screen proposed investments and issue opinions ex officio, but the Report provides no information on how many cases the Commission reviewed on this basis or what action it recommended.

The notified transactions varied greatly in terms of sectors of the target company, value of the transaction and origin of the ultimate investors. The four sectors with the highest number of transactions in 2022 were manufacturing (including critical infrastructures and/or technologies), ICT, professional activities, wholesale and retail. Within the manufacturing sector, the share represented by energy and aerospace, defence and semiconductor sub-sectors decreased from 2021, but there were more sectors above 5%: data processing and storage, communications, transport, health and cybersecurity.

Under the FDI Regulation, the Commission may adopt opinions on FDI transactions, for example, to recommend possible conditions for approval or sharing information with Member States. The Commission issued such opinions in less than 3% of notified cases. Member States participated actively in the EU cooperation mechanism by sending comments to the notifying Member States: nine Member States sent comments concerning around 7% of the notified cases.

86% of cases formally screened in 2022 were authorised without conditions. National authorities blocked transactions in 1% of all decided cases, while 4% were withdrawn by the parties. Of the 423 notified cases reviewed by the Commission in 2022, 81% were closed by the Commission in Phase 1, while 11% proceeded to Phase 2 (8% were still ongoing on the cut-off date). In Phase 2, the Commission requests additional information, such as data on products and/or services of the target company; possible dual-use classification of any products involved; customers, alternative suppliers and market shares; the influence of the investor on the target company after the transaction; IP portfolio and R&D activities of the target company; additional defining characteristics of the investor and its strategy. The average period of time for Member States to provide the requested information was 24 calendar days, but this period ranged from 1 to 126 days.

Next steps

As contemplated in the FDI Regulation, the Commission will propose a revision of the FDI Screening Regulation before the end of 2023. The proposed revisions will likely reflect the conclusions of an October 2023 study (the OECD study) on the FDI cooperation mechanism. Despite generally favourable views of the FDI Regulation, the OECD study noted a number of shortcomings.

Apart from the absence of screening mechanisms in some Member States during the study period (likely to be eliminated soon), the OECD study noted the following points:

- Limitations in the scope of transactions that undergo screening in some Member States;
- A perceived decline of the political priority of investment screening in some Member States;
- Lack of tools in some Member States to effectively gather and provide information on transactions that are not undergoing screening;
- Limited ability to detect and screen reviewable transactions that are not notified owing to institutional rules and limited resources;
- Inability in some Member States to incorporate input from the cooperation mechanism into their screening decisions;
- Lack of accountability mechanisms, specifically in the context of input from other Member States and the Commission, leads to uncertainty and may lead Member States to undervalue input from the cooperation mechanism; and
- Ambitious timelines dent the possibility of Member States to use the input from the cooperation mechanism.

Conclusion

The Report documents the growing importance of FDI screening in the EU and the institutionalization of cooperation among the Member States under the FDI Regulation's cooperation mechanism. The Report expresses overall satisfaction with this regard, and the OECD study reflects a generally favourable view of the FDI Regulation.

However, the OECD study also pointed to a number of shortcomings that may be targeted in the Commission's forthcoming proposals for review of the FDI Regulation. These include the uneven implementation of the FDI Regulation in certain Member States and design features of the FDI Regulation that may lead Member States to underweight the input they receive from other Member States and the Commission.

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