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The Proposed Revision of the EU's FDI Screening Regulation: Is it Sufficient to Protect EU Strategic Assets, Security and Public Order?

John Gaffney (Beauchamps) · Tuesday, November 5th, 2024

Introduction

Earlier this year, the European Commission published a [legislative proposal for a new FDI Screening Regulation](#). The legislative proposal builds, as noted in the [Commission's 4th Annual Report on the screening of foreign direct investments \(FDI\)](#), on the experience gained by the Commission and EU Member States over the previous three years under the existing FDI Screening Regulation.

While the Commission's evaluation found that the Regulation has had a positive impact on protecting security and public order from risky FDI in the EU, [several shortcomings have been identified that result in blind spots in the system](#):

- There are still Member States without a screening mechanism and investments by foreign-controlled subsidiaries or businesses within the EU fall outside the cooperation mechanism.
- Implementation of cooperation between all national authorities and the Commission has presented several challenges, such as the management of multi-jurisdiction notifications.
- Existing differences in national laws result in regulatory fragmentation with national screening mechanisms differing in respect to their scope, procedural deadlines and requirements, and the criteria applied for assessing security and public order risks.

These shortcomings are viewed as undermining the ability of the Commission and Member States to identify and address a potentially wide scope of risky transactions. The legislative proposal for the revision of the Regulation aims to address these shortcomings and improve the efficiency of the system by, *inter alia*, obliging all Member States to have a screening mechanism in place, establishing minimum procedural requirements, and introducing an own initiative procedure for ex-post reviews.

The Commission's [4th Annual Report on the screening of foreign direct investments \(FDI\)](#) posits that, while these changes would significantly improve the screening of foreign investments in the EU, the key principles of investment screening in the EU would remain unchanged:

- Investment screening will remain a limited and targeted tool for exceptional cases where a foreign investment poses risks to EU security or public order. It does not change nor undermine the EU's openness to foreign investments.
- The current division of responsibilities – whereby the Member State where the transaction takes place investigates and decides on the transaction, and the Commission and the other Member States can flag concerns – would remain unchanged.
- The main purposes of the cooperation mechanism between Member States and the Commission would remain the protection of EU strategic assets and the identification of security or public order risks likely to negatively affect more than one Member State.

I disagree. Maintaining the *status quo* risks prejudicing EU strategic assets, security and public order.

Protecting EU strategic assets and EU security or public order

The legislative proposal for the revision of the Regulation includes as one of its objectives the identification of a minimum sectoral scope where all Member States must screen foreign investments. This includes EU strategic assets, which are listed in Annex I to the proposed regulation and certain critical goods, technologies and entities where a foreign investment may harm EU security or public order, which are listed in Annex II to the proposal.

Annex I lists “projects and programmes of Union interest”. These are projects or programmes covered by EU law which provide for the development, maintenance or acquisition of critical infrastructure, critical technologies or critical inputs which are essential for security or public order. Where the EU target is part of or participates in a project or programme of Union interest, Member States will be required under the proposed Regulation to screen and notify the foreign investment concerned to the Commission and other Member States.

Annex II lists the technologies, assets, facilities, equipment, networks, systems, services and economic activities of particular importance for the security or public order interests of the Union. Where the EU target is economically active in an area listed in Annex II, Member States are required to screen the foreign investment. The notification of this foreign investment to the cooperation mechanism is required if the foreign investor or the EU target meets one of the risk-based conditions set out in the regulation.

The Commission will be allowed to issue an opinion to the Member State where the foreign investment takes place if it considers that such a foreign investment is likely to negatively affect the security or public order of more than one Member State, or projects or programmes of Union interest on grounds of security or public order. The Commission may also issue an opinion if it has information relevant to the screening of the foreign investment or if several foreign investments present similar risks to security or public order.

However, is all this sufficient to protect EU strategic assets, security and public order?

An enhanced Commission role in protecting EU strategic assets, security and public order

According to the principle of subsidiarity ([Article 5\(3\) TEU](#)), action at EU level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects, be better achieved by the EU. It is submitted that one of the overriding objectives of the proposal, that is, the protection of EU strategic assets and EU security and public order, cannot be achieved by Member States acting alone – a foreign investment that is likely to negatively affect the security or public order of more than one Member State, or projects or programmes of EU interest, have an EU dimension, affecting several Member States.

This is not dissimilar to the position under the [Foreign Subsidies Regulation](#), which like the legislative proposal for a new FDI Screening Regulation, has its legal basis in [Article 207](#) and [Article 114 TFEU](#). The legislative proposal for the [Foreign Subsidies Regulation](#) notes that:

“[...] foreign subsidies cause distortions on the internal market, including in the context of acquisitions of EU targets and of public procurement. The situation is comparable to State aid granted by EU Member States, which by nature has effects on more than one Member State. Likewise, distortions caused by foreign subsidies may have a Union dimension, affecting several Member States.”

Notably, therefore, the Commission is responsible for enforcing that regulation by way of, *inter alia*, ex-ante notification systems on potentially subsidised concentrations and public procurement bids.

The role of the Commission under the [Foreign Subsidies Regulation](#) provides a useful model for enforcing a new and improved FDI Screening Regulation and protecting EU strategic assets, security and public order which lies at the heart of the proposal. Hence, I suggest that -in addition to the proposed arrangements for information-sharing and consultation – the legislative proposal for a new FDI Screening Regulation should be revised to provide that where a foreign investment that is likely to negatively affect projects or programmes of EU interest and/or EU security or public order, as listed in Annexes I and II, respectively, the Commission should have the power to examine and issue a screening decision – rather than simply issuing an Opinion – on the relevant foreign investment on behalf of the relevant Member State or States either at its own behest and/or at the request of a Member State or States.

While this proposal would necessitate substantial changes to the existing legislative proposal, the burden on the Commission of implementing this proposal would be reasonable in the light of the potential benefits for, and reduced risk of prejudice to, the protection of EU strategic assets, security and public order, benefits which could not be achieved at Member State level. At the same time, this proposal is not intended to enforce all components at EU level and to supplant the role of Member States in examining foreign investments whose potential negative effects are likely to be confined to one Member State.

Conclusion

The proposal set out in this post for an enhanced enforcement Commission role under a new FDI Screening Regulation to examine and issue a screening decisions on foreign investments with an EU dimension is intended to address the risk, as Member States begin to roll out national screening mechanisms, of foreign investment that is likely to negatively affect projects or programmes of EU

interest and/or EU security or public order failing to be prevented with the concomitant damage to essential EU interests. While it is appreciated that the legislative process for a new FDI Screening Regulation is well-advanced at the time of writing, a reconsideration of the Commission's enforcement role thereunder, even if posing a challenge to the status quo which the Commission has sought to achieve with its proposal, merits serious consideration if the proposal truly is to ensure the effective protection of EU strategic assets, security and public order.

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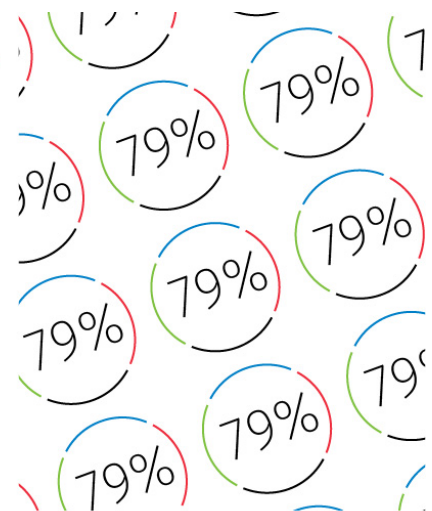
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