

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The EU Commission proposes an updated list of projects and programs of EU interest annexed to the FDI Screening Regulation

REGULATORY, ALL BUSINESS SECTORS, EUROPEAN UNION, REFORM, FOREIGN INVESTMENT, COMPETITION POLICY

EU Commission, *Commission delegated regulation (EU) of 29.9.2021 amending the Annex to Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union*, Draft Regulation, 29 September 2021

Laura Lehoczky-Deckers | Van Bael & Bellis (Brussels)

Rebecca Halbach | Van Bael & Bellis (Brussels)

Edoardo Canali | Van Bael & Bellis (Brussels)

Giovanni Pregno | Van Bael & Bellis (Brussels)

Dilja Helgadottir | Van Bael & Bellis (Brussels)

Floris-Willem Dierickx | Van Bael & Bellis (Brussels)

e-Competitions News Issue Preview

On 29 September 2021, the European Commission (“Commission”) adopted a draft delegated regulation updating, for the second time, the list of projects and programmes of Union interest annexed to the EU Regulation establishing a framework for the screening of foreign direct investments into the Union (the “FDI Screening Regulation”, Regulation (EU) 2019/452 of 19 March 2019).

The Commission proposes to add seven new projects and programs of European Union (“EU”) interest to the list in the Annex to the FDI Screening Regulation, namely: (i) the Union Space Programme and the European Union Agency for the Space Programme; (ii) Horizon Europe; (iii) the Research and Training Programme of the European Atomic Energy Community for the period 2021-2025 complementing Horizon Europe; (iv) the Connecting Europe Facility; (v) the Digital Europe Programme; (vi) the European Defence Fund; and (vii) the Programme for the Union’s action in the field of health (‘EU4Health Programme’) for the period 2021-2027. These additions will bring the list of projects and programmes of EU interest to a total of 18.

When a Member State receives comments from other Member States or an opinion from the Commission within the cooperation mechanism, it must give such comments or opinions “due consideration”. Where the Commission considers that a foreign direct investment is likely to affect projects or programs of Union interest on grounds of security or public order, the Commission may issue an opinion addressed to the Member State where the foreign direct investment is planned or has been completed. In that case, the Member State must “take the utmost account” of opinions issued by the Commission on investments likely to affect one of the projects or programs listed. The final decision on whether a foreign investment undergoing screening is authorized lies with the Member State where the investment takes place within the scope of a national screening mechanism.

The European Parliament and the Council of the EU now have two months to examine the text proposed by the Commission. If they do not oppose it (or extend their time to scrutinise it) by the end of November 2021, the delegated regulation will enter into force.

Furthermore, the Commission published an updated version of its FAQ document on the FDI Screening Regulation on 22 June 2021. The updated version elaborates on the scope of the Regulation, particularly regarding indirect changes of control or ownership and relevant factors in determining whether an investment is considered as “foreign”. It also expands on the anti-circumvention clause and public procurement.

Austria and Germany update their FDI screening mechanisms

Austria

Following the entry into force of the Austrian Cartel and Competition Law Amendment Act 2021, the Federal Competition Authority (“FCA”) is required to transmit merger filings submitted from 10 September 2021 to the Federal Minister for Digital and Economic Affairs which is responsible for the screening of foreign direct investments under the Federal Investment Control Act (“ICA”) immediately upon filing.

Investors established outside the EU, EEA and Switzerland will need to carefully consider whether they are under an obligation to seek authorisation under the ICA in addition to a merger filing. Any failure to comply with the notification requirement under the ICA is more likely to be detected by the Austrian authorities now that the FCA is sharing information with the Federal Minister for Digital and Economic Affairs. The failure to comply with the authorisation requirement under the ICA may result in the transaction being considered null and void, in custodial sentences and fines.

As a result, it is likely that more acquisitions by foreign investors will be subjected to scrutiny under the ICA. According to a statement by the Austrian Federal Minister for Digital and Economic Affairs, the number of screening procedures carried out has already increased very significantly with around 70 transactions being screened in the year following the introduction of the new legislation, compared to 25 investigations conducted within eight years under the old mechanism. Notably, around three-quarters of investigations under the new ICA regime concerned transactions with a link to the United States, according to the statement. The Minister also confirmed that Austria has issued comments on foreign direct investments carried out in other Member States, through the EU cooperation mechanism.

Germany

On 1 May 2021, the amendment of the German Foreign Trade Ordinance entered into force. The amendment transposes the EU FDI Screening Regulation (Regulation (EU) 2019/452 of 19 March 2019) and further tightens

German FDI screening rules. It focuses on defining critical technologies which will be subject to cross-sector screening for investments above a 20% stake. The number of sectors for screening was previously expanded from 11 to 27, with a focus on future and key technologies such as artificial intelligence, autonomous driving, quantum technology, aerospace technology, robotics and cyber-security.

The 16 new sectors are: (i) satellite systems; (ii) artificial intelligence; (iii) motor vehicles and unmanned aerial vehicles with automated driving/flight; (iv) industrial robots, software or technology; (v) microelectronic or nano electronic optical or non-optical circuits or discrete semiconductors; (vi) IT security products; (vii) aerospace sector; (viii) nuclear technology; (ix) quantum technology; (x) 3D printers; (xi) network technology; (xii) smart meter gateways; (xiii) Federal information and communication technology services; (xiv) critical raw materials; (xv) goods based on a secret patent or utility model; and (xvi) ownership or lease of an agricultural area of more than 10,000 hectares.

In practice, broadening the scope of FDI screening to the above sectors may appear to be a hurdle for many investors, although most transactions may not present any safety concerns.

The Czech Republic, Denmark and Malta introduce new FDI screening mechanisms

Czech Republic

On 1 May 2021, the Foreign Direct Investments Screening Act (the “Czech FDI Act”) came into force. The Czech FDI Act introduces the possibility to screen potentially high-risk foreign transactions by investors from countries outside of the EU. The competent authority for screening such investments is the Czech Ministry of Industry and Trade (the “Czech Ministry”).

The Czech FDI Act provides for a fully-fledged ex ante screening mechanism for investments carried out by non-EU entities. It introduces a notification requirement for foreign investments in key sectors (military equipment, critical infrastructures, cyber-security, dual-use goods) or any other sector if the investment could compromise the security of the Czech Republic or its internal public order. Foreign investors may also submit voluntary requests for consultation and the Czech Ministry can review foreign investments ex officio within 5 years of their completion. A transaction subject to the authorisation requirement is null and void if it is carried out without authorisation. Failure to comply with the relevant provisions can expose investors to fines up to 2% of the investor’s annual turnover in the preceding accounting period.

Denmark

On 1 July 2021, the Danish Investment Screening Act (“ISA”) entered into force. The ISA introduces screening mechanisms for foreign direct investments and financial agreements which may pose a threat to national security or public order. The Danish Business Authority is responsible for granting approvals. The ISA provides for two distinct screening mechanisms: (1) a mandatory screening process for investments in particularly sensitive sectors; and (2) a voluntary cross-sectoral screening process. The ISA fully applies to investments and agreements implemented after 1 September 2021. The mandatory screening process applies to foreign investors who intend to invest by acquiring, directly or indirectly, at least 10% of the shares, voting rights or similar control in a Danish company deemed to be particularly sensitive in relation to national security or public order. Particularly sensitive sectors and activities include: (1) companies in the defence sector; (2) companies in the field of IT

security functions or treatment of classified information; (3) undertakings producing dual-use items; (4) companies in critical technology; and (5) critical infrastructure companies. The voluntary screening process applies to foreign investors from outside the EU and EFTA who acquire, directly or indirectly, at least 25% of the shares of or voting rights in a Danish company, regardless of the sector's sensitivity in relation to national security or public order. Malta On 27 September 2021, Malta officially inaugurated the National Foreign Direct Investment Screening Office ("NFDIS"). In Malta, FDI screening is required in the following sectors: (i) critical infrastructures such as energy, transport and health; (ii) critical technologies such as artificial intelligence, infrastructure, and cybersecurity, as well as dual-use items; (iii) supply of critical inputs; (iv) access to sensitive information; and (v) media. The NFDIS has the power to impose administrative penalties for failure to notify, refusal to provide information, or providing incorrect, inaccurate or incomplete information. Italian government uses "golden power" to block transactions and impose conditions. The Italian FDI screening mechanism provides for the so-called "golden power" of the Italian government which allows it to review investments in certain sectors considered to be of strategic importance. For instance, in the 5G technology sector, the scope of the golden power includes foreign entities entering into agreements for the acquisition of goods or services relating to the design, implementation, maintenance and operation of networks for broadband electronic communications services based on 5G technology; or the acquisition of technology-intensive components necessary for such implementation, maintenance or operation with entities outside the EU. Moreover, the FDI screening mechanism also covers sectors such as artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies, biotechnologies and non-military aerospace technologies. Recently, the Italian government has made use of its "golden power" on several occasions to block FDI transactions or impose conditions. In particular, the Italian government acted in cases related to the acquisitions of: (a) goods and services in the field of 5G technology; (b) shares of a company making semiconductor components; and (c) robotic technology. For instance, on 9 September 2021, the Italian government imposed conditions on a framework contract negotiated between Linkem and the Taiwanese Gemtek Technology for the supply of 3GPP standard user terminals (CPE), with dual mode 4G/5G functionality. The Italian government, furthermore, imposed conditions on contracts for the supply of 5G technology from Chinese companies, ZTE and Huawei, to Italian companies: TIM on 5 September 2021, Fastweb on 30 June, 8 July and 5 August 2021, Linkem on 15 March 2021 and Vodafone Italia on 20 May 2021. Although official publicly available information is limited due to the confidentiality of screening decisions, the main conditions that have been imposed on 5G deals appear to concern the obligations: (a) to implement a monitoring committee and the introduction of a security officer within the company; (b) to diversify suppliers; and (c) not to disclose information related to the contract, as well as to limit remote access to such information. The Italian government also used its veto power to block one transaction involving Fastweb on 23 October 2020 related to the purchase of supply of equipment for its 5G core network. According to press reports, the rationale behind this prohibition lies in the government's will to diversify Fastweb's suppliers. In March 2021, the Italian government also vetoed the acquisition of 70% of the shares in LPE (a manufacturer of components for semiconductors) by Schenzhen Inveland Holdings. Finally, in September 2021, the financial police reportedly completed a dawn raid to ascertain a violation of the notification obligation in relation to the acquisition of Alpi Aviation (a drone manufacturer, inter alia, for the Italian army) by companies linked to the Chinese government. In this case, according to the national FDI law, the Italian government can impose a fine for gun jumping and order the restoration of the status quo.

In conclusion, the recent Italian practice on the application of the FDI rules indicates that the Italian government is willing to use its "golden powers" to safeguard strategic public interests, as well as to generally protect the national industrial security system and technological know-how. Italy thus seems to be very keen on protecting its industry concerning new technologies (5G, chips or drones). New FDI screening regime to enter into force in the United Kingdom In July and September 2021, the UK government provided further updates on the new National Security and Investment Act 2021 (the "NSI Act"), publishing a series of draft statutory instruments and guidance notes in order to help businesses prepare for the new regime (available here). The NSI Act will come into force on 4 January 2022. It will establish a standalone UK investment screening mechanism, combining mandatory and

voluntary notifications for certain acquisitions which may pose a risk to the UK's national security. Notifications under the new regime will be reviewed by the recently established Investment Security Unit within the Department for Business, Energy and Industrial Strategy. The regime provides the UK government with wide powers to scrutinise transactions in 17 key sectors of the UK economy. The rules are very broad and also include a "call-in" power to review any deal which has closed since 12 November 2020 and may give rise to national security concerns. With that in mind, companies and investors, even those with limited UK presence, will need to be aware of the new rules and factor them into their acquisition strategies.