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ABSTRACT

The authors provide a comparative perspective on foreign direct investment ("FDI") screening in Europe in light of the EU's new regulation, Regulation (EU) 2019/452. They explain the key drivers behind FDI screening and offer an analysis of what it implies at a European level. The article further delineates the impact that FDI screening has on transactional practice areas and provides a comparative overview of the concept of "foreign direct investment." In this regard, the article gives practical guidance for clients and their advisers as to how to deal with an area of law in flux with several ambiguities.

Les auteurs fournissent une perspective comparative sur l'examen des investissements directs étrangers ("IDE") en Europe à la lumière du nouveau règlement de l'UE, le règlement (UE) 2019/452. Ils expliquent les principaux critères d'examen des IDE et analysent leurs implications au niveau européen. L'article délimite en outre l'impact de l'examen analytique des IDE dans le domaine des pratiques de transaction et fournit un aperçu comparatif du concept d'"investissement direct étranger". À cet égard, l'article donne des conseils pratiques aux clients et à leurs conseillers sur la manière de traiter un pan du droit en mutation qui présente plusieurs ambiguïtés.

I. Background: Foreign direct investment screening in Europe*

1. The Covid-19 pandemic has raised systemic concerns in Europe about the "sell-off" of strategic industries. As such, it has acted as an accelerant for the development of many new foreign direct investment ("FDI") laws, including the tightening of pre-existing FDI laws; albeit it builds on protectionist sentiments that have been emerging over the past years.[1] Indeed, a number of EU Member States have long had laws in place to enable FDI screening. However, what has traditionally been a national matter has now also gathered pace at an EU level. On 11 October 2020, Regulation (EU) 2019/452 (the "EU FDI Regulation")[2] has entered into full effect. It is worth noting that the issuance of the EU FDI Regulation predates the pandemic; but by the time it has entered into force, the European landscape has thoroughly changed, including vis-à-vis the issuance of

*The views and opinions expressed herein are only those of the authors and do not reflect the views of Covington & Burling or its clients.

1 For this—political—discussion, FDI rules are only one piece of a much broader puzzle. Merger control (where the creation of national/European champions has been discussed), State aid, anti-dumping, or new regulatory instruments (as proposed in the Commission White Paper on levelling the playing field as regards foreign subsidies COM(2020) 253 of 17 June 2020) may offer complementary instruments.

2 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I/1.

emergency regulations and the like, casting into laws and measures geared towards protecting key sectors—e.g., large swathes of the health sector—that have traditionally resided outside the paradigms of FDI-orientated concerns. Undoubtedly, this will result in an even wider level of disparity between the miscellaneous FDI regimes across the Member States.

2. While the powers to screen FDI remain firmly national, the EU FDI Regulation establishes a framework for the screening of foreign direct investments by EU Member States. Moreover, it introduces a framework for cooperation between Member States and between Member States and the European Commission ("Commission"), and includes the possibility for the Commission to issue non-binding opinions on investments into the EU.

3. Within its Guidance Paper[3] the Commission has called upon Member States to apply existing FDI regimes vigorously, and to set up appropriate FDI mechanisms, where such mechanisms have not yet been implemented.[4] Despite this clear request from the Commission, the decision on whether to set up a screening mechanism, or to screen a particular investment, remains the sole responsibility of the Member State concerned. It is for the Member States to safeguard their national security interests.[5] The list of EU Member States without FDI screening is decreasing rapidly. At the time of writing, fourteen Member States and the UK have notified a national FDI screening mechanism to the European Commission.[6] Further regimes will enter into force soon[7] and it is anticipated that others are to be amended.[8]

4. Notwithstanding the European efforts of the Commission, a review of the existing FDI laws reveals that FDI screening regimes differ significantly between Member States, in terms of scope, procedure and their potential impacts on a transaction. Rather than dissecting the myriad differences between the various regimes, this article provides a comparative perspective on the key drivers of FDI screening across Europe and aims to offer an overview of what FDI screening implies at a European level. It explains why FDI screening matters and provides a comparative overview of the concept of "foreign direct investment." Finally, the article illustrates common questions and options clients and their advisers should bear in mind.

3 Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of application of Regulation (EU) 2019/452 (FDI Screening Regulation), C(2020) 1981, 25 March 2020, OJ C 99 I/1 ("Commission FDI Guidance Paper").

4 Ibid., p. 2.

5 As provided for in Article 4(2) TEU and Article 346 TFEU and acknowledged in Article 1(2) EU FDI Regulation.

6 The list of Member States is being permanently updated; the current version still does not list the Slovenian regime which entered into force on 31 May 2020; the list can be found on DG Trade's website under https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.

7 In Sweden and Slovakia new FDI regimes are proposed to enter into force in 2021.

8 The German government will most likely adopt the 16th amendment to the Foreign Trade and Payments Ordinance ("AWV") shortly. The Dutch government announced that it intends to introduce a legislative proposal for FDI screening in the near future. However, the timing thereof is still uncertain. In Finland, the FDI screening regime is under amendment and the changes are expected to come into force in October 2020.

II. Why FDI screening matters

5. Whilst in the past, FDI screening had rather limited implications on transactional practice areas and only concerned investments in the defense sector or in critical infrastructures (i.e., energy, water, food, information technology and telecommunication, health, finance and insurance, and transport), it has developed into a must-consider item for investments within the EU for a broad range of sectors. Under the existing regimes, Member States have powers to ban certain investments, or ask for mitigating measures, if it is established that an investment is likely to affect security or public order. Irrespective of such findings, the procedural rules on FDI screening determine both the timing and the closure of a transaction. Where an obligation to notify the transaction to the FDI regulator exists, standstill obligations may apply that render closure of transaction null and void until FDI clearance is received.[9] The breach of a standstill obligation can result in significant fines[10] of up to the transaction value or even higher and can, in some countries,[11] be punished with criminal sanctions. The scope of those standstill obligations does not only cover the closure of transaction, but may also prohibit pre-closing information exchanges.[12]

III. The notion of foreign direct investments from a comparative perspective

6. In light of these material implications on a transaction, it is of paramount importance to assess potential FDI filing requirements early on in the process; for example, together with the merger control filing analysis. Akin to merger control, the FDI filing analysis often requires a multi-jurisdictional in-depth assessment that can have very different outcomes with respect to the Member States and other countries concerned.

7. There is no universal definition of the notion of FDI. The EU FDI Regulation serves as a useful starting point by providing a definition in Article 2, inter alia, for "foreign

9 Such suspensory regimes exist for example in Austria, France, Germany, Hungary, Italy, Poland, and Spain.

10 Austria, France, Germany, Hungary, Italy, Poland, and Spain.

11 For instance, in Austria, Germany, Hungary, and Poland.

12 Like in Germany.

direct investment"[13] and their "screening". Tracing key commonalities using Article 2 as a starting point, all FDI screening regimes include a review of a transaction on security or public order grounds and provide powers to national governments to "*assess, investigate, authorise, condition, prohibit or unwind*"[14] foreign direct investments. Further, all FDI regimes within the EU are subject to the free movement of capital, as guaranteed within any EU Member State, and also with third countries under Article 63 TFEU. Therefore, national measures which restrict the free movement of capital must be justified under the EU treaty provisions by overriding reasons in the general interest.[15] Such justifications may be provided by grounds of public policy, public security and public health as stated in Article 65(1) lit. (b) TFEU. As to the case law of the European Court of Justice, this requires a genuine and sufficiently serious threat to a fundamental interest of society.[16] When implementing the EU FDI Regulation, apart from the free movement of capital, Member States shall comply with their respective commitments under international law, as imposed by the WTO and other trade and investment agreements.[17]

8. Within these legal boundaries, Member States are at liberty to decide whether to set up a screening mechanism and how to shape it. Inevitably, this creates discrepancies between Member States, resulting in very different understandings of what FDI screening actually means within national law. The following sections will explore the differences and commonalities in relation to the sectors concerned (1.), and the notion of foreign (2.) direct (3.) investment (4.)., and will close with an interim finding (5.).

1. Sectors concerned

9. FDI screening has traditionally focused on the defense sector and on critical infrastructures. The EU FDI Regulation, however, is not limited in its scope, and applies to all sectors. Article 4 of the EU FDI Regulation includes a non-exhaustive list of factors that Member States and the Commission may take into account when assessing whether an FDI is likely to affect security or public order. Thereby, Article 4(1) provides a list of sensitive sectors and activities that may pose particular vulnerability to a state, thus mandating thorough FDI screening. This list is not yet fully incorporated into national law; in many Member States, the scope of activities or assets which may fall under broad headlines, such as critical infrastructure, critical technologies, or supply of critical inputs, is not yet further defined. The EU FDI Regulation provides numerous examples, but Member States are free to add further infrastructures, technologies, or inputs to the list, or to limit their screening mechanisms only to some or none of the examples that are mentioned. It is beyond the remit of this paper to provide a comprehensive overview of how the list of sectors provided in Article 4(1) of the EU FDI Regulation is implemented into national law. For present purposes, it is sufficient to note that the respective list serves as a good indicator for sensitive target activities that require thorough FDI scrutiny by investors and their advisers. Equally, it will come as no surprise that the national differences between Member States show through the specific focus sectors included.[18]

2. Foreign

10. The interpretation of when an investor is seen as "foreign" depends on the sectors concerned by the investment, and on each Member State's approach. Investments into companies active in the area of defense can trigger a screening even for EU investors. In contrast to that, the EU FDI Regulation refers to "third countries" and indicates a focus on investments from non-EU/non-EEA countries for investments listed in the sectors noted in Article 4(1) of the Regulation.[19] This is mirrored by many national FDI regimes which consider non-EU or non-EEA investors as foreign.[20] The Polish regime takes a broader approach and only considers non-OECD investors as foreign. In Italy and Slovenia certain investments by EU investors are also subject to the FDI provisions.[21]

3. (In-)Direct

11. The notion of "direct" investment suggests that FDI screening may only impact investments, where a foreign investor directly invests in an EU target. The reality goes much further though and also covers indirect investments. First, in most European FDI regimes, "indirect" acquisitions are covered expressly by law with the consequence that, even where a "foreign" (for example a US-based) parent company does not directly acquire shares in an EU target, but rather uses its long-existing EU subsidiary to conduct the investment, most regimes would "look through" the directly acquiring EU subsidiary and consider the indirect acquisition by the foreign parent company as a trigger for a filing requirement. In some EU jurisdictions, this principle is pushed even further, because they do not require the directly acquiring EU subsidiary to be a majority-owned

13 As to Article 2(1) EU FDI Regulation, "*'foreign direct investment' means an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.*"

14 Article 2(3) EU FDI Regulation.

15 As noted in the Commission FDI Guidance paper (p. 4) though, the analysis of justification and proportionality of restrictions on the movement of capital to and from third countries takes place in a different legal context compared to restrictions to intra-EU movements.

16 *See* Cases C-54/99, *Église de scientologie*, para. 17; C-503/99, *Commission v. Belgium*, para. 47; C-463/00, *Commission v. Spain*, para. 72.

17 *See* Recital 35 of the EU FDI Regulation.

18 E.g., France: agricultural produce; Poland: gasoline and diesel.

19 Even though Article 4(1) also includes defense as a critical infrastructure and critical technology.

20 Austria, Germany, Hungary, and Spain.

21 With the exception that under the temporary regime in Italy, currently in force until 31 December 2020, "control" must be acquired.

subsidiary of the foreign parent. This is, for example, the case in Germany: if the foreign investor holds 10% or more of the voting rights in the directly acquiring (EU-based) company, the acquisition of a German target active in a critical sector will be attributed to the foreign investor.

12. In addition to the above, the EU FDI Regulation calls upon Member States for measures to prevent the circumvention of national screening regimes and to cover investments from within the Union, where such investments include "*artificial arrangements that do not reflect economic reality.*"[22] The German FDI regime may provide an example of what may amount to such an artificial arrangement by explicitly covering cases "*where the direct acquirer does not maintain any business operations of its own other than the acquisition or does not have any permanent establishment of its own including offices, staff and equipment within the EU.*"[23] Hence, an investment by a non-EU investor that acquires an EU target indirectly through a special purpose vehicle ("SPV") without own business activities does qualify as a foreign direct investment, despite the foreign investor's lack of direct involvement in the transaction between the two EU entities.

4. Investment

13. The term "investments" is generally interpreted broadly. Investments are commonly associated with two different forms, namely: (i) greenfield investments (i.e., the creation of a new company, establishment, or facilities)[24] and (ii) mergers and acquisitions ("M&As").[25] But they can also take broader forms, such as agreements concerning the joint exercise of voting rights, etc. Such investments can be made by both natural persons or undertakings.[26] Article 2(1) of the EU FDI Regulation explains that the notion of "foreign direct investment" includes investments "*of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available*."

14. The wording "any investment" already indicates that the EU FDI Regulation does not require any investment threshold to be met. As Recital 9 of the Regulation states, it shall cover a broad range of investments which establish or maintain lasting and direct links between investors from third countries including state entities and undertakings. It delineates, however, that the Regulation shall not cover portfolio investments. Such portfolio investments are not further defined, but are usually referred to as short-term investments which therefore do not establish, or maintain, lasting links.

15. By contrast, national laws commonly include investment thresholds. In the case of share acquisitions, the pertinent thresholds are usually calculated on the basis of equity and/or voting rights.[27] As regards asset acquisitions, almost all of the countries use qualitative thresholds by requiring the acquisition of a separable business unit, or all essential operating resources of a company.[28] Some countries also cover cases where effective participation in the management or control is acquired.[29] Such an interpretation is advocated in Recital 9 of the EU FDI Regulation; the Regulation shall also apply to "*investments which enable effective participation in the management or control of a company.*" Some (but certainly not all) Member States have introduced *de minimis* investment thresholds, with relatively low safe harbors (commonly set at a value of worth EUR 1 million).[30]

5. Interim finding

16. As explicated, different interpretations of the notion of FDI exist throughout the EU, with the potential to create legal discrepancies. This can make it difficult to keep abreast of the broader concept of FDI screening whilst making it harder to identify FDI-related risks for a transaction. However, with the analysis provided above and a general sense of caution, such risks can be managed early in advance of a transaction. The next section seeks to provide practical guidance in this regard.

IV. Check box: Common questions and options clients and their advisers should bear in mind

17. To address the various FDI-related risks accompanying a transaction, it is advisable to address the following points early in advance of a transaction:

- Identify local nexus: Analyze the potential nexus to a country by identifying the legal entities and assets involved.
- Analyze target activities: Does the target activity fall into a sensitive sector?[31]

22 Recital 10 of the EU FDI Regulation.

23 Section 55(2) sentence 2 AWV.

24 Greenfield investments are only covered in a limited number of jurisdictions, e.g., in Hungary.

25 *See* non-authoritative FAQ published by the Commission, p. 2, retrievable at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf.

26 Ibid.

27 E.g., Germany, Hungary, Italy, Spain, and Slovenia.

28 E.g., Germany, France.

29 E.g., in France, Italy, and Spain.

30 E.g., Spain, Italy, Hungary, and Austria.

31 Article 4(1) of the EU FDI screening Regulation may serve as a good starting point to identify such sectors. Bear in mind, however, that this list is not exhaustive and national FDI regimes may require an FDI filing for further sectors.

– Address FDI risks within deal negotiations: Consider condition precedents, risk allocation clauses, and long-stop dates or extensions for regulatory approval within purchase agreement clauses.

– Deal planning and strategy: Confirm filing requirements early in advance of a transaction and plan timing accordingly.[32]

18. The assessment described above can have different potential outcomes. The first is that a mandatory filing requirement exists. Such a filing commonly requires a description of the acquirer, the target with its sensitive activities, and the transaction structure. Otherwise, for example, where the target's activities triggering mandatory filing are not yet fully defined in a Member State, a precautionary filing may be advisable. Ultimately, where a filing is not mandatory, it may still be advisable to voluntarily file a transaction. This can be the case where the considerable likelihood exists that an authority could open an ex officio investigation.[33] Ultimately, the outcome can be that a filing is not required.

V. Conclusion

19. FDI screening in the EU is, and remains, an area of law in flux, consisting of a patchwork of national laws, with some common principles, albeit significantly differing implementations and interpretations. It would be a welcome step if the screening practices under the EU FDI Regulation were to lead to some harmonization of national screening mechanisms and procedures.

20. Further, FDI screening has its place within the framework of other regulatory procedures, adding closing conditionalities and similar hurdles to the existing rules under competition law and merger control. It should be emphasized that FDI developments are part of a wider political movement impacting on the ability to invest in Europe—the EU may have limited powers to engage in FDI; but it is actively flexing its muscle as regards curbing investments into European entities by overseas investors that receive state support (be it through state ownership or subsidies).[34] Companies and their advisers will be well-advised to watch this space of an evolving FDI puzzle. ■

32 Be aware that even though all FDI regimes provide for statutory timeframes, those can be and commonly are extended by information requests or upon consent with the notifying parties.

33 Such powers exist in Germany, Italy.

34 *See* European Commission White Paper on levelling the playing field as regards foreign subsidies COM(2020) 253 of 17 June 2020, p. 23 et seq. in this context.

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