BLOMSTEIN

# Reform of EU Screening Regulation

25 January 2024

As part of the European Economic Security Strategy, the EU proposes a revision of the Regulation (EU) 2019/452 (***Proposed Regulation***). The reform is motivated by the need to enhance the protection of security and public order in the face of growing geopolitical challenges and the recognition that certain investments, which are not adequately screened under the current system, could pose risks to EU interests. Here are the key points of the reform.

## Establishment of Screening Mechanisms in all Member States

First, the Proposed Regulation requires all Member States to set up and maintain a screening mechanism that complies with the requirements of the Proposed Regulation. In contrast, the current regulation only encouraged Member States to adopt a screening mechanism. As the EU is a single market, "leaving the door open" for strategic investments in countries without a screening mechanism poses a risk to public order and security. 22.7% of the foreign acquisitions and 20% of the greenfield projects were located in Member States that did not have a fully applicable investment screening mechanism. It addresses the need for a standardized approach across the EU to manage the risks associated with foreign investments, particularly in sensitive or strategic sectors.

## Extension of scope of applicability to certain investments within the EU

The Proposed Regulation also extends the scope of the current regulation to capture certain **investments within the EU involving entities controlled by non-EU investors**. This must be seen as a reaction to the judgment of the CJEU in the Xella case, in which the EU Screening Regulation was not applicable to intra-EU situations. According to the Proposed Regulation, investments carried out by an EU entity shall be screened when this entity is controlled by a non-EU investor and the decision-making power on the investment remains with the non-EU investor. Entities which have no third-country participation, or which only have a non-controlling participation by a foreign investor (***portfolio investments***), are not covered. In contrast, the current law on FDI screening in Germany is stricter and also covers portfolio investments. Regarding **greenfield investments**, the Proposed Regulation encourages Member States to include these in the scope of transactions covered by their screening mechanisms, in particular when such investments occur in sectors relevant to their security or public order or when they present characteristics such as size or essential nature to be relevant to their security or public order.

## Harmonisation of core elements of national screening mechanisms

The core elements of national screening mechanisms are going to be harmonised. That minimum harmonisation includes the scope of investments to be screened, the screening procedure's essential features, and the interaction between the national mechanisms and the Union cooperation mechanism.

Regarding **procedural aspects**, the Proposed Regulation foresees a two-phased procedure, whereby phase I allows the screening authority to determine whether it has jurisdiction and to carry out an initial review. In contrast, phase II allows for an in-depth review. Screening shall be done before the transaction is closed in areas where an authorisation requirement referred to in Article 4 (4) of the Proposed Regulation exists. Before any measures are taken by a national screening authority, the applicant has the right to be heard. *Ex officio* reviews shall be possible for at least 15 months after the completion of a foreign investment where the screening authority has grounds to consider that the foreign investment may affect security or public order. Furthermore, a screening mechanism should foresee the possibility of seeking recourse against decisions.

The Proposed Regulation lays down sectors in which investments must be screened and authorised by national authorities. These include if the target participates in one of the projects or programmes of Union interest or is active in one of the areas listed in Annex II of the Proposed Regulation. While the current framework was rather broad in designating sensitive sectors, the proposed reform takes a much more detailed approach while also referring to the common EU lists of dual-use items and of military equipment as well as the list of critical technology areas.

## Cooperation mechanism

To enable the cooperation mechanism to function efficiently and effectively, the Proposed Regulation defines a minimum common scope for foreign investments that all Member States should notify to the cooperation mechanism. In the past there was a divergence regarding the cases the national authorities notified to the cooperation mechanism. Some Member States notified every transaction, some only phase II cases (including Germany). The Proposed Regulation now distinguishes: Phase I proceedings must only be notified if the target participates in a project or programme of Union interest or if it is active in an area where an authorisation requirement exists and if the investor is either controlled by a government or is subject to sanctions. Additionally, all phase II proceedings must be notified to the cooperation mechanism.

Member States remain free to notify to the cooperation mechanism foreign investments outside the scope of the Proposed Regulation.

Lastly, Member States are now able to provide comments to a Member State in which a foreign investment is planned or has been completed even if that Member State is not

screening that foreign investment or if the foreign investment is screened but not notified to the cooperation mechanism.

### More Commission opinions

The Commission will have more possibilities to issue opinions in a greater number of situations, covering the planning stages of an investment or when it has been completed, even if that foreign investment is not undergoing screening or if the foreign investment is screened but not notified to the cooperation mechanism. The same applies if the Union target provides for the development, maintenance or acquisition of infrastructure, technologies or inputs. Furthermore, it should be possible for the Commission to adopt an opinion addressed to all Member States if it identifies several foreign investments that, taken together, are likely to impact the security or public order of the Union.

### Multi-country transactions

In the past, investors needing authorisation in several Member States often times ran into complications. Now, the deadlines and procedures within the cooperation mechanism will be aligned.

The applicant should file the different requests for authorisation in the Member States concerned simultaneously. In addition, those Member States should notify the requests simultaneously to the cooperation mechanism. To ensure an efficient handling of these multi-country transactions, the Member States concerned should coordinate and agree on whether the foreign investments are notifiable and when they should be notified. Furthermore, the Member States concerned should also coordinate on the final decision. If the Member States concerned intend to authorise the foreign investment with conditions, they should ensure that these conditions are compatible with one another and address cross-border risks adequately.

### Standards for the material assessment

To ensure a consistent approach to the screening of investments the Proposed Regulation sets out the standards and criteria used to assess likely risks to security and public order. Those include the impact on the security, integrity and functioning of critical infrastructure, the availability of critical technologies (including key enabling technologies) and the continued supply of critical inputs for security or public order, the disruption, failure, loss or destruction of which would have a significant impact on security and public order in one or more Member States or on the Union as a whole.

In that regard, Member States and the Commission should also take into account the context and circumstances of the foreign investment. This should include, in particular, whether an investor is controlled directly or indirectly, for example through significant funding, by the government of a third country or is involved in pursuing policy objectives

of third countries to facilitate their military capabilities. In this context, if applicable, Member States and the Commission should also consider why the foreign investor, is subject to any type of sanctions.

**Summary**

This reform appears to be a proactive step towards safeguarding the EU's strategic interests while managing potential security risks. By standardising the screening process, it could lead to a more unified and efficient approach in dealing with FDIs, which is increasingly important in a globalised economic environment marked by complex geopolitical dynamics. Moreover, the Proposed Regulation's explanatory memorandum highlights how the Commission was keen on further improving the harmonisation between its FDI screening set-up and other related EU instruments, such as the recent Foreign Subsidies Regulation. However, the success of this reform will largely depend on its implementation and the cooperation among Member States. In addition, the Proposed Regulation's formal adoption is likely to be impacted by the fast-approaching EU elections in Summer. Potentially (substantial) modifications to the Commission's reform proposals are thus to be expected.

We will continue to monitor any developments and are at your disposal to assist you with any questions you might have in this respect. Please do not hesitate to contact Roland Stein or Leonard von Rummel.