New Rules on Foreign Direct Investment: A Balanced Approach or a Step towards the Halt of the Foreign Investments?

Further to long discussions amongst the EU officials to address the concerns that third (non EU) countries are taking advantage of the openness of the European Union field to promote their industrial policy interests, the European Parliament and the Council have adopted the Regulation no 2019/452 on March 21, 2019 with the aim to establish a legal framework to curb foreign investments in sensitive areas. Although, the screening measures shall apply uniformly to all foreign investments, it is common knowledge that the main target of the measures is to halt the prominent position of the Chinese investments in the European Union, which has stand out in terms of number of recent acquisitions over the last year, as highlighted by the Commission Staff Working Paper that has been prepared on September 13, 2018.

The Regulation aims to strike a balance between the openness of the European Union to inbound foreign investments, while ensuring that the essential interests of security and public order are not emasculated. In addition, the Regulation seeks to harmonize the existing screening mechanisms on foreign direct investments already in place by certain Member States and to set general criteria for those Member States that wish to adopt such mechanisms.

The measures introduced by the Regulation are three fold:

(i) Screening Measures at the option of the Member States

Member States may opt for the adoption and/or maintenance of mechanisms to screen foreign direct investments (FDI) in their territory on the grounds of ***security or public order.*** The further application of the above substantive criteria is left at the discretion of the Member States. In this context, the

Regulation provides for certain non-binding factors that Member States may take into account in determining whether the FDI is likely to affect the security and public order in their territory.

The first type of such factors relate to the type of the target asset or infrastructure. The Regulation includes the following indicative list:

(a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure; or
(b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies; or
(c) supply of critical inputs, including energy or raw materials, as well as food security;
(d) access to sensitive information, including personal data, or the ability to control such information; or
(e) the freedom and pluralism of the media.

The second type of factors relates to the person of the foreign investor. In determining whether the FD investment may threaten the security or public order, the Member States may take into account whether (i) the foreign investor is controlled by a foreign state or is significantly funded by the foreign state (for example through subsidies or otherwise), (ii) the relevant foreign investor is already involved in activities affecting security or public order or (iii) whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

(ii) Notification Requirements & Reporting

The Regulation introduces a requirement for the Member State, which carries a screening on a FDI, to notify respectively the Commission and the other Member States, by providing a minimum list of information set in the Regulation in respect of the details of FDI. The same notification may include also a list of other Member States, whose security or public order is likely to be affected from the consummation of the FDI.

On an annual basis, all Member States – even those that have not opted to put in place a FDI screening mechanism- are required to submit to the Commission a report on the FDIs consummated in their territory during the preceding year as well as any requests for cooperation received from the other Member States.

(iii) Cooperation Mechanism between the European Commission and the Member States

The Regulation further introduces a two level cooperation mechanism in relation to the FDIs, which applies to all Member States irrespective of whether such have in place a screening mechanism or not. Namely:

- A Member State that considers that a FDI planned or completed in another Member State – even if such is undergoing screening or not in the host Member State- is likely to

affect its own security or public order may either (i) provide comments to such Member State (in which case the latter should forward the comments to the Commission) or (ii) request the Commission to issue an opinion or other Member States to provide comments.

- The Commission:
  - ✓ is required to issue an opinion, if at least 1/3 of the Member States considers that the FDI is likely to affect their own security or public order.
  - ✓ The Commission may issue an opinion: (i) if it considers that a FDI undergoing screening in a Member Stake is likely to affect security and public order in more than one Member States and/or (ii) if other Member States have provided comments and/or if a FDI planned or completed is likely to affect specific projects or programs of Union Interest on grounds of security or public, which are exclusively listed in the Regulation (e.g. trans-European infrastructure for energy and transport, Galileo & Egnos).

The comments and opinions issued by the Member States and the Commission respectively are not binding upon the Member States. Namely, the Member State which carries the screening (or respectively to whose territory the FD investment is consummated) shall give due consideration of the comments and opinion, while the final decision on whether the FD investment is cleared lies with the Member State itself carrying the screening. Exceptionally, the level of consideration that the Member State should give to the opinions issued by the Commission in the context of the exclusively listed projects of a Union interest, is higher; the Regulation says "*utmost account*", while the Member State is further required to explain to the Commission the reasons why the Commission's opinion was not followed.

The Regulation is not clear on whether all the above communications or their contents shall be shared with the foreign investors.

The new EU framework introduces an additional layer of procedure in the screening mechanisms in place by the Member States as well as a new procedure to those Member States, which have opted not to adopt a relevant screening mechanism. In addition to the procedural complexities, although the opinions and comments issued in the context of the Regulation qualify as soft law, it is expected that the Regulation shall affect overall the reviewing approaches of the Member States over FDIs in considering a wide range of security or public order concerns.

Greece, like other southern countries, has so far strongly encouraged foreign direct investments. It remains to be seen whether the new EU rules on the screening of the FDIs shall lead Greece to tighten its openness towards the foreign direct investments.

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