

The European Commission publishes results of FDI screening stakeholder consultations and hints at upcoming changes

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The EU Commission (*Commission*) consulted stakeholders during the summer to evaluate the Regulation (EU) No 2019/452 (*EU-Screening Regulation*) and recently published the survey's results. The consultation is part of the EU's ongoing evaluation of the current FDI screening framework and follows the recent release of its third "Annual Report on the screening of foreign investments into the Union", as we noted in an earlier briefing. As the Commission is expected to formally propose revisions to the EU Screening Regulation by the end of 2023, the survey's results highlight the various stakeholders' views on the framework, which are likely to inform the upcoming changes. Key findings include the following:

Continued relevance and added value of the EU-Screening-Regulation

The overwhelming majority of consulted stakeholders, in particular Member State public authorities, considered that the EU-Screening Regulation's main objective of protecting security and public order from risks posed by certain FDI transactions remains highly relevant, notably in the face of increasing political influence exerted by foreign investments in critical infrastructure and technologies as well as the defence sector. Moreover, the respondents also generally agreed that the current EU framework had increased the effective protection from said risks beyond what single Member States would have achieved on their own.

However, most respondents signalled that while the EU-Screening Regulation's cooperation mechanism had promoted the adoption or modernisation of national screening frameworks, its direct impact on individual screening decisions by Member States was limited. Similarly, opinions on the issue if the mechanism had increased convergence between national rules were diverging, whereby most respondents notably shared the view that there had been little increase in convergence regarding the procedural aspects of national screening mechanisms, in particular with a view to different timelines in the Member States.

Effectiveness of the current framework

Most respondents agreed that the EU-Screening Regulation had significantly helped both the Member States and the Commission to identify problematic FDI transactions while neither national nor the EU framework were perceived to be deterring FDI into the

EU. Remarkably, there was general agreement on maintaining the Member States' prerogatives to evaluate and decide on FDI transactions on their territory on grounds of national security while ensuring close cooperation with the Commission and other Member States. Despite the current EU framework generally being perceived as effective, some major problems of the cooperation mechanism were highlighted by the consultation, including:

- Member States not being required to set up an FDI screening mechanism and thus being able to choose to not screen FDI transactions on the grounds of their potential impact for security and public order at all thereby leaving an open door for circumvention within the EU single market.
- The fact that there is no general requirement for Member States to screen FDI transactions prior to closing, which seems unreasonable both regarding national security concerns and regarding coherence of the national screening frameworks.
- Member States not being required to report to other Member States and the Commission the outcomes of their security or public order risk assessments of FDI transactions.

Disputed efficiency of the EU-Screening Regulation

The consulted stakeholders generally agreed that the administrative burden imposed on the parties to the transactions was reasonable but private sector respondents showed an increased tendency to deem the burden excessive. Meanwhile, public authority stakeholders overall agreed that the cooperation mechanism implied a reasonable administrative burden for the Member States regarding FDI transactions posing serious risks. However, there was disagreement among the responding public authorities when it came to evaluate the overall administrative burden arising from the cooperation mechanism when considering screening FDI transactions of all risk levels. Parts of the administrative burden are also seen as directly hampering the cooperation mechanism's efficiency, for instance procedural aspects such as the timelines for screening FDI transactions not being harmonised across the Member States.

(In-)coherence with other areas of EU regulation

The consultation also highlighted that the screening processes required by the EU-Screening Regulation are not wholly deemed to be in alignment with other scrutiny and authorisation procedures such as for instance EU merger control. Divergences are thus said to be particularly present in terms of substance and consistency of assessments, for instance regarding key concepts such as security and public order or "control". However, one might question the need for such coherence between these areas, given their naturally diverging objectives.

Possible changes

In addition to the regime's flagged issues, the consulted stakeholders made several additional suggestions to improve the current EU-Screening Regulation. In order to increase the regime's effectiveness, respondents argued for the extension of the EU-Screening Regulation's scope to cover transactions where the direct investor is established in the EU but is ultimately owned by a natural person or an undertaking from a non-EU country. Such a change could be introduced by the Commission as a direct reaction to the EU FDI screening mechanism's limitations laid bare by the recent ECJ decision in the Xella case, in which the court held that in the absence of elements indicating a circumvention of the FDI screening rules, the EU-Screening Regulation would not be applicable to EU investors. Nonetheless, some national screening frameworks, such as the German FDI screening regime, already allow for FDI transactions involving ultimately foreign-owned or controlled EU investors to be scrutinized (find our detailed case briefing [here](#)).

Moreover, it was suggested to lay down a minimum set of sectors in which all Member States are required to screen proposed transactions. As for improving the cooperation's efficiency, most respondents called for restricting the current notification requirement of national screening authorities exclusively to FDIs meeting certain criteria as opposed to the current requirement to notify all FDIs under screening. In addition, general support was expressed for more transparency and information from Member States and the Commission in their annual FDI screening reports, notably through the introduction of common minimum requirements for content and reporting methodology.

Concrete proposals for changes to the EU-Screening Regulation by the Commission are expected before the end of year as stated in a recent parliamentary [hearing](#) by the Commission's Chief Trade Enforcement Officer Denis Redonnet. The Commission generally intends to follow a "less is more" approach, aiming to have less non-problematic FDI transactions undergo screening to reduce the burden weighing on stakeholders while ensuring that high-risk FDIs don't fall through the framework's cracks. Redonnet's statements further signalled that the Commission was likely to directly address the flagged issues and build upon the improvement suggestions made by the consultation. This could likely result in efforts to promote further coherence among the national screening mechanisms, both in substance regarding which sectors are deemed sensitive as well as regarding procedural aspects such as the diverging screening timelines.

Finally, further developments regarding an EU outbound-investment screening initiative could also see the light in the near future, see our previous briefing on the matter [here](#).

Conclusion

Accordingly, further tightening of foreign direct investment regulations is to be expected on the EU level and subsequently on the national level if the amended EU framework eventually promotes greater coherence among Member States. 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.