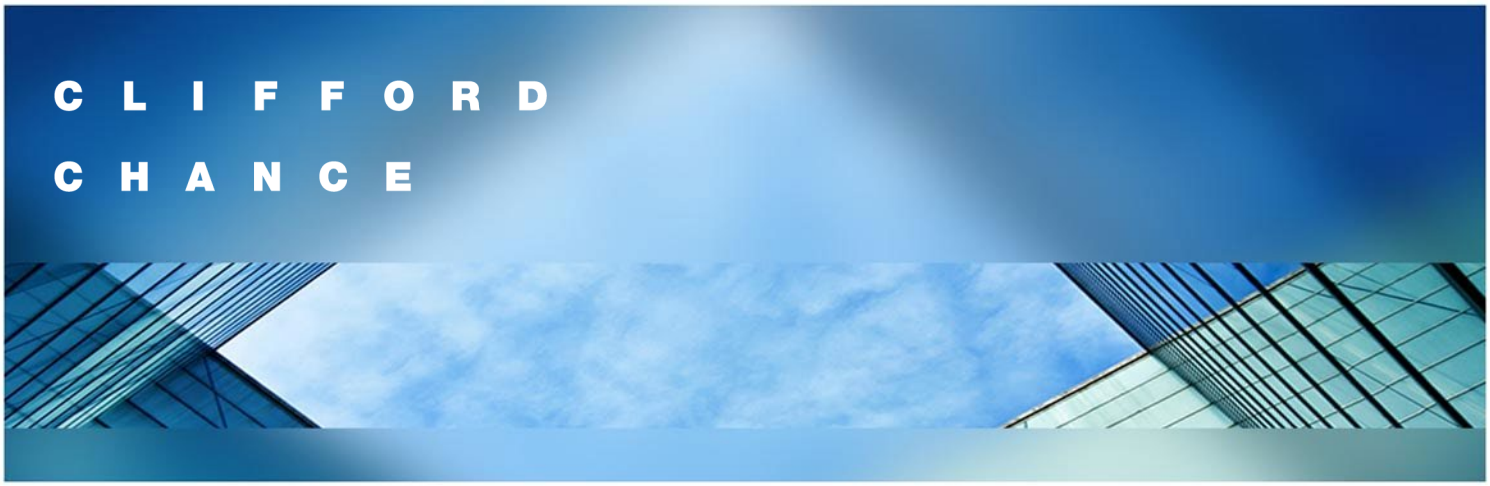

EUROPEAN COMMISSION PROPOSES BROADER FDI SCREENING REQUIREMENTS FOR M&A

The European Commission has published draft EU legislation that would require all EU member states to impose mandatory filing requirements for investments by foreign (*i.e.*, non-EU) investors in certain sectors. It would also strengthen and, for many deals, lengthen the "cooperation mechanism" that requires clearance to be delayed until other member states and the Commission have had the opportunity to comment on screened transactions, while substantially reducing the number of deals that would be subject to the mechanism.

Separately, the decision as to whether to introduce screening of outbound investments by EU businesses into other jurisdictions has been delayed to 2025.

Key issues

- What changes would be made by the Commission's proposed reforms of the EU FDI Screening Regulation?
- How would they impact foreign investors and FDI clearance timetables?
- When is the Commission proposing to decide on whether to introduce outbound investment screening, and what is its process for assessing this?

THE EU FDI SCREENING REGULATION

The current EU FDI Screening Regulation (the Regulation) became applicable in October 2020. Its main innovation was to create a cooperation mechanism whereby the European Commission (EC) and EU Member States (MS) would be informed of, and have the right to comment on, certain investments by non-EU investors in EU targets, irrespective of where in the EU those investments took place. Any MS that reviews such an FDI investment under its national screening regime for national security or public order issues is required to give "due consideration" to such comments (or "utmost" consideration for certain EC opinions).

The EC has proposed, on 24 January 2024, a new draft Regulation. As justifications for its proposed reform, it cites problems that are currently caused by the fragmented nature of MS' differing FDI screening regimes and the increased risks to security and public order that have been caused by the Covid pandemic and the Russian invasion of Ukraine. The revised legislation would introduce various changes, as detailed in the table below.

	Current Regulation	Proposed Regulation
MS required to have a mandatory filing regime, with standstill obligations?	No.	Yes, but this will not make much difference. All MS already have a screening regime or are in the process of implementing one. And almost all of those already impose mandatory filing and standstill obligations.
MS required to have powers to call-in deals that are not notifiable for review?	No.	Yes, MS would have to be able to call-in non-notifiable deals on public order/security grounds for at least 15 months after closing, including cases where concerns are raised by another MS. MS would also be required to have powers to impose remedies or to prohibit deals that have not closed. They would not be required to have powers to unwind closed deals (unless a mandatory filing obligation was infringed) but could choose to take such powers.
Requirements regarding filing criteria?	No.	Yes, MS would have to impose mandatory filing for (at least) covered deals involving foreign investments in targets with actual or intended activities in certain sectors, in particular (i) defence/ dual use items; (ii) technologies relating to: AI; semiconductors; quantum; biotech; space and propulsion; advanced connectivity/navigation; robotics; advanced sensing; and advanced materials, manufacturing and recycling; (iii) critical medicines; and (iv) critical activities for the EU's financial system.
Investments by an EU subsidiary of a non-EU parent caught?	No, not covered by the Regulation unless structured to circumvent a screening regime.	Yes, the scope of the draft legislation would be extended to cover investments by EU subsidiaries of non-EU parents.
Transactions subject to the "cooperation mechanism"	All covered investments that are "formally" screened by an MS must be notified to all other MS and the EC for their comments and cannot (usually) be cleared until after the commenting period.	The cooperation mechanism would be limited to: (i) notifiable deals involving an investor controlled by a non-EU government or an investor that is or has links to any person/entity subject to sanctions under EU law; (ii) deals involving targets that participate in a certain projects or programmes of EU interest; and (iii) deals that an MS considers to be of interest to another MS from a security or public order perspective. However, the mechanism would also be expanded to greenfield investments, if MS include them in their screening regime (which is encouraged).
Timing of the cooperation mechanism	Fixed periods within which MS must comment, once provided with information by the MS in which a deal is notified.	Minimal changes to the deadlines for the various stages of the commenting procedure. However, the overall procedure would become longer for many deals due to new requirements: (i) that all FDI filings in the EU for a deal be made on the same day (so the one that takes longest to file will hold up all the others); (ii) that MS should endeavour to launch any Phase 2 investigations on the same day (so that the slowest authority holds up all the others); and (iii) that new information provided by another MS resets or extends the commenting period.
Mandatory criteria for assessment?	No, but various factors are set out that MS can take into account, such as impacts on critical infrastructure, technologies or inputs.	MS would be required to consider the relevant factors.
Weight to be given to views of other MS/EC	"Due consideration" to other MS comments and most EC opinions.	MS would be required to give "utmost consideration" to all MS and EC comments and opinions, with procedures for discussing disagreements and obligations to seek alternative solutions.

Next steps

The proposal will now proceed through the EU's legislative process. Legislative timetables vary considerably but, for comparison, the current FDI Regulation took 18 months from the Commission's initial proposal to be passed. If enacted, the Regulation (as drafted) would not become applicable until 15 months and 20 days after it is published in the EU's Official Journal.

Outbound investment screening

Separately, the EC has also been considering whether to introduce a screening regime for certain "outbound" investments (*i.e.*, investments by EU businesses in other jurisdictions) that may create risks of technology and know-how "leakage" that could enhance military and intelligence capacities of actors who may use these capabilities to threaten international peace and security. Following the United States' decision to introduce such a regime (aimed at investments in certain sectors in China – see our briefing here for details), the EU has come under pressure to follow suit.

The EC has now published a White Paper setting out its initial thinking on this issue. Its current position is that it needs to think some more, with a "gradual step-by-step approach". It has commenced this process with a public consultation running to April 2024 on the proposed monitoring and review of certain existing outbound investments and related activities. This will be followed by a recommendation to carry out a 12-month process (until Summer 2025) of monitoring and reviewing outbound investments by EU investors, to gather information on the technology and know-how that may be transferred in the context of such transactions and the security risks that may arise. The EC then envisages finalising its assessment of the need and possible content of an outbound investment screening regime in Autumn 2025.

Comment

The Commission touts the proposed reform of the EU FDI Screening Regulation as benefitting foreign investors, by reducing the costs and legal uncertainty caused by having to deal with the current patchwork of different national FDI screening regimes with different requirements. However, if passed in its current form, it would in fact be a mixed bag for foreign investors.

The main benefit would arise not from harmonisation of MS' screening regimes but from the much reduced scope of deals that have to be subject to the "cooperation mechanism", which at present creates delays in clearances for many unproblematic deals: around half of all notified deals were put through the cooperation mechanism in 2022, because many MS do so for all covered transactions that are notified to them. Foreign investors would, however, be less likely to welcome the increased number of filings caused by requirements for all MS to have mandatory filing for acquisitions of control by foreign investors of targets in certain sectors, or the longer timetables for many deals that are subject to the cooperation mechanism.

That said, there is a significant chance that the draft Regulation could be passed in a very different form, if at all. The current Regulation was subject to significant political disagreements between MS, some of which did not want to give the EC or other MS rights to impinge on their screening decisions, or their discretion not to screen foreign investments at all. While some of those differences have subsided in recent years, there may yet be opposition to the stronger obligations to take into account comments and opinions of other MS and the EC.

Moreover, it remains uncertain whether EU businesses will face outbound investment restrictions, that can having been kicked firmly down the road.

FDI SCREENING CONTACTS

Richard Blewett
Partner, Brussels
T +32 2 533 5023
E richard.blewett
@cliffordchance.com

Luciano Di Via
Partner, Rome
T +39 064229 1265
E luciano.divia
@cliffordchance.com

Sue Hinchliffe
Partner, London
T +44 207006 1378
E Sue.Hinchliffe
@cliffordchance.com

Stanislav Holec
Senior Associate,
Prague
T +420 222 55 5251
E stanislav.holec
@cliffordchance.com

Renee Latour
Partner, Washington
D.C.
T +1 202 912 5509
E Renee.Latour
@cliffordchance.com

Carme Briera
Senior Counsel, Madrid
T +34 93 344 2210
E carme.briera
@cliffordchance.com

Katrin Schallenberg
Partner, Paris
T +33 1 4405 2457
E katrin.schallenberg
@cliffordchance.com

Dimitri Slobodenjuk
Partner, Düsseldorf
T +49 211 4355 5315
E dimitri.slobodenjuk
@cliffordchance.com

Iwona Terlecka
Counsel, Warsaw
T +48 22429 9410
E iwona.terlecka
@cliffordchance.com

Eleonora Udroiu
Of Counsel, Bucharest
T +40 216666 127
E eleonora.udroiu
@cliffordchance.com

Bai Yong
Partner, Beijing
T +86 10 6535 2286
E yong.bai
@cliffordchance.com

Dunja Pralong - Damjanovic
Counsel, Luxembourg
T +352 48 50 50 222
E dunja.pralong-damjanovic
@cliffordchance.com