

REVISION OF THE EU FDI SCREENING REGULATION: THE NEGOTIATING POSITIONS COMPARED

Following the recent publication of the negotiating position of the EU Council, which represents governments of the EU Member States (**MSs**), we now have a complete picture of the positions of the two EU institutions that will now negotiate and agree on a final text of the revised EU FDI Screening Regulation: the EU Council and the European Parliament (**EP**). This briefing compares these positions, as well as the text initially proposed by the European Commission (**EC**) and summarises their implications for investors.

On balance, the position of the MSs is likely to be better for investors, as the minimum scope of MSs' mandatory filing regimes would be smaller (although most MS will continue to implement broader regimes) and it minimises the risks of delays due to disagreements between a "host" MS that is reviewing a transaction and other MSs and the EC. However, the EP proposals would impose shorter deadlines in MSs' phase 1 screening decisions.

THE BARGAINING BEGINS

The revised EU FDI Screening Regulation aims to further harmonise the operation of the various screening regimes operated by MS.

The table below summarises the key differences between the negotiating positions of the EP and the MSs and the text initially proposed by the EC and assesses which position would be better for investors. These positions will now form the basis of negotiations between the EU Council and the EP, with the EC acting as mediator. Under its proposed legal basis, the new Regulation does not require unanimous approval of EU member state governments. It can be passed by a simple majority of votes in the EU Parliament and 15 out of 27 MS in the EU Council, representing at least 65% of the EU's population.

See our separate briefings on the [text proposed by the EC](#) and the [position of the EP](#) for more details.

Key issues

- Will the EC have powers to override MS clearance decisions and block or impose remedies on investments?
- Will the minimum scope of MS' mandatory filing regimes include greenfield investments and the long "Annex II" list of sectoral activities?
- What new factors will MSs be required to consider in their screening decisions?
- What are the implications for clearance timetables under the respective positions of the EP and MSs?
- To what extent will the revised Regulation reduce the number of transactions that are delayed because they are put through the "cooperation procedure", which allows the EC and other MSs to give comments?

POTENTIAL AREAS OF NEGOTIATION BETWEEN THE EU PARLIAMENT AND MEMBER STATES (VIA THE COUNCIL)

Issue	Commission (EC) position	EU Parliament (EP) position	Member states' (MS) position	Implications for investors
Minimum scope of MSs' mandatory filing regimes	Any involvement in a project of common EU interest and any activity listed in Annex II, which includes a significant number of sensitive sectors, defined broadly.	Large number of new sectors proposed for Annex II, albeit some refinements to wider EC sectors.	Annex II deleted from minimum scope (but still in the draft for other reasons), as well as reference to projects of common EU interest. Minimum scope of mandatory filing regimes limited to military and dual use products.	MS position is by far the best for investors, as minimum scope of mandatory filing regimes is much smaller and better defined. However, most MSs will continue to have screening regimes that are broader in scope than these minimum requirements.
Greenfield investments	MSs have discretion to decide whether to screen.	Mandatory screening if over €250 million in value, in a sensitive sector or a project of EU interest, where such investments are made by a foreign investor that: (i) has links to a foreign government; (ii) is subject to sanctions; or (iii) has previously been subject to an adverse FDI screening decision by a MS FDI screening authority.	Same as EC position (and drafted more clearly).	MSs position better for investors. Most screening regimes do not cover greenfield investments at present, so EP position would significantly expand filing obligations for certain investors.
Right of applicants to respond to concerns raised	Right for applicant to understand and respond to the reasons behind provisional decision to block a transaction or impose remedies.	Same as EC. In addition, obligation on MS to take applicant's views into account in their eventual decision.	MSs' obligation limited to giving parties the "opportunity to make their views known effectively".	Investors will prefer the EP's position, as lack of opportunity to respond to potential concerns is a key cause of investment uncertainty at present.

Issue	Commission (EC) position	EU Parliament (EP) position	Member states' (MS) position	Implications for investors
Timelines for MS screening reviews	No deadlines imposed for Phase I/II decisions or for acknowledging completeness of filings.	5 working day deadline to acknowledge completeness of a filing, 35 day ¹ deadline for phase I decisions. No Phase II deadline.	Same as EP position, except for 45 day deadline for Phase I decisions and no deadline for acknowledging completeness of filings.	EP position would impose shortest deadlines for Phase I decisions and would minimise scope for MSs to extend reviews by delaying acceptance of filings.
Timing of filings	FDI filings in multiple MSs must be made on the same day.	Same as EC position but relaxed to "within 3 calendar days".	Same as EC position (albeit applicants need only to " <i>endeavour to make their filings</i> " on the same day).	This requirement means that the filing form that takes the longest to complete (e.g. due to onerous information requirements) delays all the others. EP's position marginally mitigates this.
Factors relating to target activities to be taken into account by MSs in their screening decisions	Impacts on: (i) critical infrastructure; (ii) cyber security; (iii) availability of critical technologies; (iv) supply of critical inputs; (v) protection of sensitive information; and (vi) media plurality/freedom.	Same as EC position, plus impacts on (i) security of military/sensitive public facilities proximate to target; (ii) the internal market; (iii) protection of intellectual property (v) likelihood of economic coercion by a non-EU country (vi) food security; strategic dependencies; (vii) financial and economic stability of the EU; and (viii) services of general economic interest.	Same as EC position, except: (i) critical technologies defined by reference to a list; (ii) impacts on cybersecurity removed; (iii) impacts on projects of EU interest, public health, critical transport infrastructure and food security added.	The EP's position would be worse for investors, as it contains a number of vague factors that can be interpreted broadly by MSs in their screening decisions, such as "financial and economic stability".

¹ References to days are calendar days unless otherwise stated

Issue	Commission (EC) position	EU Parliament (EP) position	Member states' (MS) position	Implications for investors
Factors relating to foreign investor to be taken into account by MSs in their screening decisions	Investor (i) has been previously subject to an adverse screening decision in the EU; (ii) is subject to sanctions under EU law; (iii) is engaged in illegal activities; or (iv) has links to a foreign state or its military capabilities.	Same as EC position, plus investors that: (i) have been subject of an adverse screening decision in a non-EU country with which the EU cooperates; (iii) support risks of violations of international law by a non-EU country; or (iii) are established in a country that (a) has deficient money-laundering/counter-terrorism regimes, (b) has rules allowing arbitrary access to company operations or data; or (c) pursues an "aggressive civil-military fusion strategy".	Broadly the same as the EC position (and, for (i) where the adverse decision imposed only conditions, the risk factor only arises where the conditions were not complied with).	MSs positions better for investors. EP position would substantially increase the scope of investors that are considered to give rise to potential security risks.
Scope of cooperation procedure (host MS notifying transaction to other MSs and the EC, and allowing them to comment)	Applies to: (i) all transactions involving a target participating in a project of common EU interest; (ii) other notifiable transactions where investor has links to foreign governments or parties subject to EU sanctions; (iii) transactions subject to a Phase II review or remedies/prohibition in Phase I; and (iv) any other transactions that an MS thinks may be of interest to other MSs. This would significantly reduce the scope of transactions that go through the cooperation procedure under the current FDI Screening Regulation.	Same as EC position, plus all greenfield investments that are notifiable under EP proposals (see above) as well as transactions with "opaque ownership structures".	Same as points (ii) and (iv) of the EC position. Point (i) of EC limited to military and dual use items. For (iii), scope reduced so that the cooperation procedure is only triggered where the previous transaction was prohibited or where remedies were imposed and not complied with.	Transactions subject to the cooperation procedure face additional delays to clearance. MSs position is preferable as it would subject fewer transactions to the cooperation procedure.

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Timing of cooperation procedure	Largely preserves timing in the existing regulation for deadlines for the various stages of the commenting procedure. Also requires MSs to coordinate and notify any decisions to open a Phase II investigation on the same day.	Same as EC position, except: (i) MSs required to notify Phase II decisions within 3 days of each other; and (ii) adds additional period to the procedure in the event that EC exercises proposed decision making powers (see below).	Same as EC position but reduces timing of some stages of the cooperation procedure by 5-15 days.	MSs position would mean quicker clearances for transactions subject to the cooperation procedure.
EC decision-making powers	No proposal for EC to have the power to make its own decisions.	EC to have the right to over-ride host MS' decision and issue its own decision to prohibit the transaction or impose remedies, if the EC or another MS objects to the host MS' proposed clearance decision. EC to have investigative powers for this purpose.	Same as EC position.	EP position would lead to the potential for unpredictable outcomes and significant delays where there is disagreement between the host MS and other MSs or EC. However, it would also mark a large shift in approach to EU FDI screening and is likely to be strongly resisted by MSs.
Level of deference host MSs have to give to EC	Host MS must give "utmost consideration" to comments/opinion of other MSs and the EC.	Same as EC position. In addition, where EC issues an opinion, host MS must provide EC and commenting MSs with draft decision and explain how it has taken utmost consideration and where and why they disagree, if applicable.	Limited to a requirement to take "due consideration" of comments/opinions of other MSs and the EC.	MSs position is preferable for investors, as stronger obligations to take views of other MSs and the EC into account (and the EP proposal that a draft decision should be circulated before a final decision is taken) would add a further layer to the screening process and delay reviews.

Issue	Commission (EC) position	EU Parliament (EP) position	Member states' (MS) position	Implications for investors
Guidance and annual reports	MSs and EC to provide annual reports including data on outcome of screening decisions, nationalities of investors and economic sectors of investments.	Also proposing annual reports, with additional detail required compared to EC's proposal. Moreover, requirement for MSs to "publish and regularly update detailed guidance" on their regimes and for the EC to publish guidelines on various issues, such as concept of control under the Regulation, criteria for substantive assessment of risks, and criteria for determining whether a target has Annex II activities that would (under EP proposals – see above) require mandatory filing.	Annual reports only required to include "aggregate and anonymised data on the investments screened". No requirement for MSs or the EC to issue guidance.	Detailed guidance and annual reports are likely to be very helpful for investors and will likely lead to fewer filings that are declared out of scope, so EP position is preferable.
Timing / entry into force	New Regulation would become applicable 15 months and 20 days after publication in the EU Official Journal. All MSs required to have compliant screening regimes by that time.	Same as EC position, except 12 months instead of 15.	Same as EC position, except 24 months instead of 15.	Whether a longer implementation period favours investors will depend on what is agreed. Some aspects of the new Regulation (such as a reduced scope of transactions subject to the cooperation mechanism) will reduce burdens for investors, irrespective of which institution's position prevails. But some of the proposals, in particular those of the EP, have the potential to outweigh those benefits.

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