
THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL

Editor's Note: Antimicrobial Resistance

Victoria Prussen Spears

Addressing Antimicrobial Resistance: A Review of Global Public Policy and Legislative Approaches

Lincoln Tsang, Greg Levine, Katherine Wang, Julie Kvedar, Ling Xu, and Helen Ryan

Electric Vehicles and Data Collection: A Tour of Several Jurisdictions

Barbara Li, Steve Tam, Elle Todd, Sarah L. Bruno, Michael J. Rubayo, Bryan Tan, and Eng Han Goh

A New European Commission Proposal on Foreign Direct Investment Screening: Toward Greater Harmonization?

Karl Stas, Cyriel Danneels, and Jean-Baptiste Blancardi

China Issues Rules to Clarify and Relax Cross-Border Data Transfer Controls

Jenny "Jia" Sheng, Chunbin Xu, and Wenjun Cai

The EU and UK Introduce New Security Standards for Internet of Things

Steven Farmer, Scott Morton, and Mark Booth

Three Points for Employers About Collective Bargaining in Mexico Under the New U.S.-Mexico-Canada Agreement Rules and the Labor Reform

Germán de la Garza De Vecchi

More Countries Join the Digital Nomad Visa Club: A Four-Step Employer's Guide to International Remote Work Requests

Nazanin Afshar, Jack O'Connor, and Nan Sato

UK Government Unveils Remote Work Rules for Short-Term Visitors

Paige Edwards, Claire D Nilson, and Abilio Jaribu

Monitoring Workers in the United Kingdom

Claude-Étienne Armingaud and Sophie F. Levitt

The Global Regulatory Developments Journal

Volume 1, No. 4

July–August 2024

- 225 Editor’s Note: Antimicrobial Resistance**
Victoria Prussen Spears
- 229 Addressing Antimicrobial Resistance: A Review of Global Public Policy and Legislative Approaches**
Lincoln Tsang, Greg Levine, Katherine Wang, Julie Kvedar, Ling Xu, and Helen Ryan
- 253 Electric Vehicles and Data Collection: A Tour of Several Jurisdictions**
Barbara Li, Steve Tam, Elle Todd, Sarah L. Bruno, Michael J. Rubayo, Bryan Tan, and Eng Han Goh
- 267 A New European Commission Proposal on Foreign Direct Investment Screening: Toward Greater Harmonization?**
Karl Stas, Cyriel Danneels, and Jean-Baptiste Blancardi
- 275 China Issues Rules to Clarify and Relax Cross-Border Data Transfer Controls**
Jenny “Jia” Sheng, Chunbin Xu, and Wenjun Cai
- 281 The EU and UK Introduce New Security Standards for Internet of Things**
Steven Farmer, Scott Morton, and Mark Booth
- 287 Three Points for Employers About Collective Bargaining in Mexico Under the New U.S.-Mexico-Canada Agreement Rules and the Labor Reform**
Germán de la Garza De Vecchi
- 291 More Countries Join the Digital Nomad Visa Club: A Four-Step Employer’s Guide to International Remote Work Requests**
Nazanin Afshar, Jack O’Connor, and Nan Sato
- 297 UK Government Unveils Remote Work Rules for Short-Term Visitors**
Paige Edwards, Claire D Nilson, and Abilio Jaribu
- 303 Monitoring Workers in the United Kingdom**
Claude-Étienne Armingaud and Sophie F. Levitt

EDITOR-IN-CHIEF

Steven A. Meyerowitz

President, Meyerowitz Communications Inc.

EDITOR

Victoria Prussen Spears

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Tyler Bridegan

Attorney

Wiley Rein LLP

Paulo Fernando Campana Filho

Partner

Campana Pacca

Hei Zuqing

Distinguished Researcher

International Business School, Zhejiang University

Justin Herring

Partner

Mayer Brown LLP

Lisa Peets

Partner

Covington & Burling LLP

William D. Wright

Partner

Fisher Phillips

THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL (ISSN 2995-7486) at \$495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2024 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff

Publisher: Leanne Battle

Production Editor: Sharon D. Ray

Cover Art Design: Morgan Morrisette Wright and Sharon D. Ray

The photo on this journal's cover is by Gaël Gaborel—A Picture of the Earth on a Wall—on Unsplash

Cite this publication as:

The Global Regulatory Developments Journal (Fastcase)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2024 Full Court Press, an imprint of Fastcase, Inc.

All Rights Reserved.

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE GLOBAL REGULATORY DEVELOPMENTS JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to international attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and others interested in global regulatory developments.

This publication is designed to be accurate and authoritative, but the publisher, the editors and the authors are not rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Leanne Battle, Publisher, Full Court Press at leanne.battle@vlex.com or at
866.773.2782

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2995-7486

A New European Commission Proposal on Foreign Direct Investment Screening: Toward Greater Harmonization?

Karl Stas, Cyriel Danneels, and Jean-Baptiste Blancardi*

In this article, the authors examine a recent proposal by the European Commission regarding the screening of inbound investments.

On June 20, 2023, the European Commission (EC) and the High Representative for Foreign Affairs and Security Policy published a Joint Communication on the European Economic Security Strategy.¹ The Strategy was adopted to reduce risks to the EU's economic security amid rising geopolitical tensions and rapid technological changes. The Strategy is structured according to a three-pillar approach: promoting competitiveness, protecting against risks, and partnering with like-minded countries.

It is in this context that the EC recently announced five new initiatives:

1. A legislative proposal for the revision of the Foreign Direct Investment (FDI) Screening Regulation (inbound investments),²
2. A white paper on potential security risks linked to EU investment in non-EU countries (outbound investment),³
3. A white paper on how to make export controls more effective for export of goods with both civilian and military use (dual-use goods),⁴
4. A white paper on enhancing support for research and development involving technologies with dual-use potential,⁵ and
5. A proposal for a Council of the European Union recommendation on enhancing research security.⁶

This article focuses on the first initiative—concerning the screening of inbound investments. It is interesting to note that the

EC is also looking at ways to reinforce the screening of outbound investments, to prevent leakage of EU technology and know-how that could be used by third countries to enhance their intelligence and military capabilities.

Current Situation

The current FDI Screening Regulation⁷ has been applicable since October 11, 2020. One of its main objectives is to ensure that any effects of FDI on security and public order outside the borders of the member state in which the investment takes place can be addressed. To that end, the Regulation introduced a cooperation mechanism allowing member states and the EC to comment on FDI in other member states. Member states must notify the EC and the other member states of any FDI in their territory that is undergoing screening under their national screening regime. In addition, the Regulation makes it possible for member states to comment on FDI in another member state that is not undergoing screening there.

The current FDI Screening Regulation falls short of requiring member states to introduce an FDI screening mechanism, but it does set out some minimum requirements that all national mechanisms must respect, such as nondiscrimination between third countries, transparency, protection of confidential information, anticircumvention provisions, and the availability of recourse against screening decisions. In addition, the Regulation lists some factors that member states may take into consideration in determining whether an FDI is likely to affect security or public order, such as whether the FDI concerns a sensitive sector (e.g., critical energy, communications or transport infrastructures; critical technologies such as artificial intelligence, robotics, and semiconductors; critical inputs, including raw materials and energy; access to sensitive information, including personal data; press and media) or the identity of the foreign investor involved (e.g., whether the investor is directly or indirectly controlled by a foreign government).

Currently, 24 out of 27 EU member states have enacted FDI screening legislation, including, most recently, Bulgaria and Ireland. In Bulgaria, the mechanism entered into force on March 12, 2024; in Ireland, it is expected to come into force during Q2 2024. Other relatively late joiners of the FDI screening club include Belgium

(July 1, 2023) and Luxembourg (September 1, 2023). Croatia, Cyprus, and Greece are still at various stages in the process of adopting a screening mechanism.

Rationale of the New Proposal

The EC carried out an evaluation of the current FDI Regulation.⁸ Overall, the evaluation report highlighted a lack of harmonization as the biggest issue of the current FDI Regulation. In particular, the following shortcomings were identified:

- There is no obligation for member states to have an adequate screening mechanism.
- There are no clear guidelines as to the scope of member states' screening mechanisms. If the scope is defined too narrowly, some investments may not be covered.
- Member states define key concepts differently, which results in confusion and uncertainty.
- There are no minimum common criteria to determine which investments should be assessed.
- The deadlines to respond are the same for the EC and the member states, potentially leaving the EC insufficient time to consider any comments made by member states.
- The timetable for submitting comments in the framework of the cooperation mechanism is determined by the start of a formal screening procedure, and this is in the hands of the member state concerned.

What's New

The new proposal aims to address these concerns by strengthening harmonization and enhancing cooperation and information exchange between member states. The main proposed changes are as follows:

- The proposal would for the first time introduce an obligation on all member states to adopt a screening mechanism and to notify those mechanisms (or any changes to existing mechanisms) to the EC. Existing mechanisms would have

to be aligned with the requirements of the new Regulation if necessary.

- The proposal would cover not only investments in existing EU-based targets but also in newly established targets (greenfield investments), if they are reportable at the member state level. However, passive, hands-off investments (such as portfolio investments) are excluded.
- In response to the judgment of the Court of Justice in *Xella Magyarország*,⁹ where the Court essentially decided that an EU company with a foreign ultimate beneficiary owner should be regarded as an EU company under the current FDI framework, the definition of foreign investment would be updated to include investments by a non-EU investor through a subsidiary in the European Union. However, most of the existing FDI screening regimes in the European Union already cover investments by EU entities directly or indirectly controlled by non-EU investors.
- The proposal introduces a minimum sectoral scope, which would require that member states' screening mechanisms impose an authorization requirement for foreign investments where the target participates either (1) in one of the 20 EU-wide projects and programs listed in Annex I of the proposal (Annex I investments, including, e.g., the Space Program, Horizon 2020, the European Defense Fund, etc.), or (2) is active in one of the areas listed in Annex II of the Proposal (Annex II investments, including, e.g., dual-use items, artificial intelligence, internet of things, virtual reality, critical medicines, etc.).
- The proposal would improve the transparency of national screening mechanisms, inter alia, by requiring member states to publish an annual report with aggregated and anonymized data on screened investments. It would also grant investors certain due process rights: notably, before taking a prohibition or conditional clearance decision, screening authorities would have to inform foreign investors of the reasons for taking such a decision, and give them an opportunity to make their views known.
- The proposal aims to streamline the EU-level cooperation mechanism, by requiring investors who have to notify their investments in several member states, to submit their filings to all of them simultaneously (referencing the other

filings) and by requiring reviewing authorities to coordinate with each other and send notifications to the cooperation mechanism on the same day. The EC would be involved if the investment is likely to affect security and/or public order in more than one member state, if it affects EU projects/programs, or if it has relevant information about the investment.

- At the same time, the proposal attempts to limit review under the cooperation mechanism to the most critical cases. While Annex I investments would always have to be notified, notification of Annex II investments would only be required if:
 - The foreign investor (or the foreign investor's subsidiary in the European Union) is directly or indirectly controlled by a foreign government,
 - The foreign investor is subject to EU sanctions, or
 - The foreign investor (or any of its subsidiaries) has had a previous investment blocked or subjected to conditions by a member state.
- The proposal tightens up the procedures and deadlines of the cooperation mechanism, while giving the EC more time to take into account comments from the member states. Member states would have 15 calendar days, and the EC 20 calendar days, to inform the screening member state(s) that they intend to submit comments or issue an opinion on an investment. Member states would then have 35 days from receipt of a complete notification to submit their comments, and the EC would have 45 days in which to issue its opinion. The screening authority would have to give "utmost consideration" to the comments of the member states and the opinion of the EC.
- The proposal also harmonizes the information that member states should collect in notifications. The EC would be empowered to adopt a standard form to collect such information. In addition, the proposal tightens up the exchange of information between the member states in the context of the cooperation mechanism: each member state would have to designate a contact point and the EC would set up a system to enable encrypted communications with the contact points. The proposal also includes provisions on the protection of confidential and classified information.

- The proposal would also introduce an “own-initiative procedure,” allowing a member state or the EC to initiate a review of a foreign investment in another member state if the investment has not been notified under the cooperation mechanism. A member state would be entitled to do this if it considers that the investment is likely to negatively affect its security or public order; the EC would be able to do this if it considers that the investment is likely to negatively affect the security or public order of more than one member state. According to the proposal, member states and the EC would be granted “at least” 15 months after the foreign investment has been completed to initiate an own-initiative procedure. This lack of a firm deadline could create legal uncertainty.

Likely Impact

The new proposal addresses some key issues, such as the diverging scope of screening mechanisms and the difference in key concept definitions across member states. Furthermore, filing in multiple member states is at present a complex exercise because the deadlines and screening procedures do not line up. This proposal contains certain provisions that aim to fix that.

If the draft FDI Regulation were to be adopted as proposed, most EU member states would have to significantly amend their national screening regimes to achieve the proposed level of harmonization. However, in our opinion, member states may resist moves toward far-reaching harmonization. After all, measures to protect national security and public order touch the core of national sovereignty and are, for that reason, the preserve of the member states under the EU Treaties. The revised FDI Regulation is therefore unlikely to usher in a common EU-wide screening regime, and the changes it brings will probably be limited to tweaks to the existing cooperation mechanism.

The proposed revisions to the FDI Regulation are without prejudice to the implementation of other instruments recently adopted as part of the EU’s economic security strategy.

In particular, the proposed Regulation would not prevent the application of countermeasures under the EU’s Anti-Coercion Instrument¹⁰ that affect foreign investors’ access to the European Union.

Similarly, the proposal would not affect the EC's assessment, under the Foreign Subsidies Regulation, of whether an investment is fueled by market-distorting foreign subsidies.¹¹

Next Steps and Estimated Timing

The proposal still needs to go through the legislative process and will not be final until both co-legislators (the European Parliament and the Council) have adopted it—likely a project for the next legislature. Furthermore, the proposal provides for a transitional period of 15 months. Therefore, a new Regulation is not likely to become fully applicable before 2027.

However, we expect this proposal to spur the few remaining laggards among the EU member states into action, pushing them to finally adopt an FDI screening mechanism on a voluntary basis. Member states may also preemptively adapt their regimes before the new Regulation enters into effect.

In Summary

- Building on its experience with the current FDI Screening Regulation over the past three years, the EC is proposing that all member states be required to adopt an FDI screening system and that those systems be made more uniform.
- Under the proposal, national screening mechanisms would have to cover greenfield investments and investments by foreign investors through an EU-based subsidiary.
- The proposal also defines a minimum sectoral scope within which all member states would be required to screen transactions.

Notes

* The authors, attorneys with Crowell & Moring LLP, may be contacted at kstas@crowell.com, cdanneels@crowell.com, and jblancardi@crowell.com, respectively.

1. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0020&qid=1687525961309>.

2. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024PC0023&qid=1712049852393>.

3. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024DC0024&qid=1716387356285>.
4. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14144-White-Paper-on-Export-Controls_en.
5. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14060-RD-on-dual-use-technologies-options-for-support_en.
6. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024DC0026&qid=1716387659947>.
7. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02019R0452-20211223>.
8. [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2024\)23&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2024)23&lang=en).
9. <https://curia.europa.eu/juris/document/document.jsf?jsessionid=B91DFCBEC6B5968C1707FFFCEC813A?text=&docid=275390&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=910106>.
10. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202302675.
11. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2560>.