

EC Proposal to enhance EU economic security set to further harmonise FDI Screening throughout the EU

A material revision of the current foreign direct investment screening regulation is under way

09 April 2024

1 Background: Material revision is one of the newly proposed economic security initiatives

As mentioned in our previous Client Alert ([here](#)), the European Commission (EC) proposed new initiatives to strengthen EU economic security in late January 2024. The EC intends to take action with 5 initiatives:

- **Initiative 1:** Further strengthening of foreign investment screening leading to EU-wide FDI screenings and – *inter alia* – harmonising core elements of national screening mechanisms with certain minimum standards.
- **Initiative 2:** Exploring implementation of a legal procedure with regard to outbound investment risks.
- **Initiative 3:** More effective EU control of dual-use goods exports.
- **Initiative 4:** Review and assessment of existing research and development support in technologies with dual-use potential.
- **Initiative 5:** The EC's plan to take action by providing guidance and enhancing resilience across Europe with the aim of bolstering research security across the EU.

This Client Alert focuses on Initiative 1.

2 Key insights into the current EC proposal

The ramifications of the EC proposal ([here](#)) for FDI control mechanisms on member-state level are far-reaching, which is why we would like to highlight the following key insights:

- EU wide mandatory FDI screening:** Mandatory screening mechanisms must be implemented within 15 months after entry into force. Existing FDI screening mechanisms must be updated in accordance with the new proposed framework. As a consequence, a corresponding amendment to the Austrian FDI mechanism in the Investment Control Act (*Investitionskontrollgesetz*) can be expected in 2025.
- Mandatory review due to certain activities of a target:** National FDI screening is mandatory and must impose an authorisation requirement for investments where the target (a) is part of or participates in one of the projects or programmes that are of Union interest (review due to project of Union interest; "Annex I- authorisation"), or (b) is economically active in one of certain listed areas (review due to sectoral activities; "Annex II- authorisation") (Art 4 para 4) (for details, see both [Annexes to EC Proposal](#)).

Wolf Theiss

- (iii) **Enhanced legal basis:** Not only the foreign trade competence (Article 207 TFEU) but also Article 114 TFEU shall be used, which provides for the adoption of measures to ensure the establishment and functioning of the internal market (see the implication described more closely below).
- (iv) **'Internal market' legal basis broadens the scope for FDI screening:** On the legal basis of Article 114 TFEU, Member States shall be required to screen certain investments within the internal market (or be encouraged to do so – for example concerning **Greenfield investments**; see recital 17 of the EC proposal). Furthermore, differences between Member States' screening mechanisms shall be addressed on this legal basis, which may affect the respective scope of applicable fundamental freedoms and have a direct effect on the functioning of the internal market. Under Article 114 TFEU, a review extension would encompass those investments within the EU which (i) are made by a foreign investor's subsidiary in the Union, where the subsidiary is directly or indirectly controlled by a foreign investor (in contrast, entities which have no third-country participation, or which only have a non-controlling participation by a foreign investor - portfolio investments - are not covered), and (ii) have the aim of establishing a lasting link between the foreign investor and the EU target. In short, the extension is, thus, aimed at capturing a specific set of foreign investments made through EU subsidiaries controlled by non-EU investors.
- (v) **Further objectives of the amended regulation** aimed at (i) creating a level playing field among Member States, (ii) reduce existing compliance costs for foreign investors and (iii) preventing the emergence of additional obstacles in the internal market for investments.
- (vi) **More harmonised standards:** There shall be more homogenous standards and timelines in order to facilitate a higher degree of harmonisation at Union level. For example, rules and procedures related to screening mechanisms, as well as measures taken pursuant to such rules and procedures, shall comply with Union law, be transparent and shall not discriminate between third countries or between the Member States in which the foreign investor's subsidiary in the Union is established (Art 4 para 1 FDI Screening Regulation).
- (vii) **Broadening of *ex officio* review in case of no FDI authorisation requirement being triggered:** Another important element is that the national FDI authority shall be empowered to start screening FDI by its own initiative. It shall be able to do so for at least 15 months following the completion of a foreign investment that is not subject to authorisation requirements where the screening authority has grounds to consider that said investment may affect security or public order (Art 4 para 2 lit c).

3 Roadmap towards the Regulation

Status of proceedings as of April 2024

Intended Timeline (based on the EC proposal):

- The proposal went into the ordinary legislative procedure.
 - Status in EP see [here](#)
- The proposed amendment to the regulation shall enter into force on the twentieth day following the date of its publication in the official journal.
- The proposed regulation shall apply 15 months after its' entry into force.
- Legislative action at the national level is to be expected and effective procedures must be in place within 15 months after the regulation entered in force.

4 Conclusion

Over the past years, Austria has proven to be particularly challenging in terms of FDI control. The EC proposal to enhance EU economic security will further tighten relevant national review mechanisms and, therefore, further increases regulatory risks for investors. As such, it is advisable to seek profound regulatory expertise at the early stages of a transaction subject to FDI control, in order to successfully avoid lengthy Phase II audits and infringements of the law which can even trigger criminal investigations.

Since 2011, when Austria introduced its first FDI control regime, our **Regulatory Team** has accumulated broad experience in advising investors and targets on matters of FDI control, related regulatory issues and investigations in Austria and other EU-jurisdictions. Specifically, it can provide clients with well-established contacts with relevant authorities and stakeholders and a long-standing and highly specialised economic & national security expert group comprised of Kurt Retter, Dominik Engel, Georg Knafel from the Vienna Office, who have also authored numerous publications on key legal issues at stake or worked in-house with relevant federal Ministries.

About Wolf Theiss

Wolf Theiss is one of the leading European law firms in Central, Eastern and South-Eastern Europe with a focus on international business law. With more than 400 lawyers in 13 countries, over 80% of the firm's work involves cross-border representation of international clients. Combining expertise in law and business, Wolf Theiss develops innovative solutions that integrate legal, financial and business know-how.

For more information, please contact WT's FDI control experts:



Kurt Retter
Partner

E kurt.retter@wolftheiss.com

T +43 1 51510 5240



Dominik Engel
Senior Associate

E dominik.engel@wolftheiss.com

T +43 1 51510 5248



Georg Knafel
Senior Associate

E georg.knafel@wolftheiss.com

T +43 1 51510 5249



Sign up

to receive our
latest updates
and insights