LEGAL UPDATE

ANTITRUST AND REGULATORY

The Commission proposal to screen foreign investment: keep calm and carry on

Contents

1. Introduction

"We are not naïve free traders", said President Juncker in September 2017 while unveiling the new instrument to screen foreign investment[1]. Yet, the concerns underpinning the proposal – vetting transactions by investors who have strong ties to their home governments and that target companies which develop key technology and/or maintain critical infrastructure – are not new.

When the EU encouraged the liberalisation of energy and telecoms in the late 1990s, a wave of intra EU investments followed. This in turn lead to the adoption of legislation to protect national interests, even if the suitors were EU companies.

The Commission brought many of these 'old' investment screening measures before the Court of Justice for compliance with what is now Article 63 TFEU. The result has been a court-driven process of harmonisation, with well-defined grounds for Member States to limit investors' rights, in a balanced way.

Importantly, the rules protect EU and non-EU investors alike, thus making the EU one of the most open investment regimes in the world.

Despite much fanfare, the proposed new rules are solidly grounded in this tradition. The only new innovation is an obligation on Member States to cooperate between themselves and with the Commission when applying national investment screening proposals. But even this limited change might improve legal certainty for investors.

2. Existing investment screening mechanisms will remain unaltered

In 2012, Italy passed new investment screening legislation, replacing a "golden shares" system that had been struck down by the Court of Justice for being arbitrary[2].

Under the legislation, the acquirer needs to obtain prior authorisation from the President of the Council of Ministers when the acquisition of an Italian company could pose a serious threat to defence, public security, security or the proper functioning of energy supply, transport and communications. The Administrative Tribunal of Rome can review any veto issued by the President of the Council of Ministers. These rules apply to EU and non-EU companies and is referred to as the 'golden power'.

Italy recently triggered this golden power when French company Vivendi took control of Telecom Italia. However, if the acquirer had been a non-EU company "controlled by the government of a third country, including through significant funding", the proceedings would have followed the same set of rules.

Under the new proposed regulation, the only difference to the current position would have been that Italy would have had to inform the Commission and the other Member States about the decision to screen the investment ("*within 5 working days from the start of the screening*", according to Article 8 of Proposed Regulation).

1 Proposal for a Regulation of the European parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, n. 2017/0224 (https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF).

2 See Decree Law No. 21 of 2012, and Law No. 56 of 2012. The Court of Justice ruled on Italy's golden shares system in Judgment of 23 May 2000, Commission v. Italy, C-58/99, ECLI:EU:C:2000:280.

This document is delivered for informative purposes only.

It does not constitute a reference for agreements and/or commitments of any nature.

For any further clarification or research please contact:

Brussels

Francesco Maria Salerno
Tel. +32 2 340 1550
fsalerno@gop.it

Milan

Alessia Pastori
Tel. +39 02 763741
apastori@gop.it

3. Increased legal certainty for investors?

The proposed regulation sets out minimum standards for national screening mechanisms. These are based on the Court case law and include;

i. transparency and non-discrimination,

ii. predictable timeframes,

iii. protection of confidential information, and

iv. a guarantee of judicial redress.

Investors will also benefit from knowing at the outset that, according to the proposed regulation, in screening a transaction, Member States and the Commission may consider the potential effects on a number of sectors and activities, including, for example, potential effects on "critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity".

Member States will have to provide their investment screening legislation to the Commission and report on their decision. This should enhance the Commission's ability to monitor national systems' compliance with EU law, which, as mentioned, requires an equal level of protection for both EU and non-EU investors.

Finally, the proposed regulation gives the Commission screening powers when foreign investments are likely to affect projects of interest to the EU such as EU funded projects.

4. Conclusion

The proposed regulation tries to strike a balance between the EU's tradition of being an open regime (which is firmly rooted in the EU Treaty) and recent concerns about foreign state-owned or otherwise state-sponsored companies acquiring European companies in strategic areas, with potential detrimental effects on the EU's technological edge, but also on security and/or public order.

It is not clear when the proposal will become law, as some Member States oppose it and have called for an impact assessment, which was not prepared at the time of the proposal.

Moreover, in December 2017 several Member States have reportedly sent a formal letter to the Commission requesting further assessment. The issue will be discussed in January 2018, when the rotating presidency of the EU falls on Bulgaria.

In any event, the proposed regulation does not make any substantial change, and the most significant outcome, in fact, may well be that foreign investors end up with more consistency across the EU and therefore more predictability in their investments.

As for Member States, they will continue to be able to rely on their screening mechanisms, regardless of the fate of the proposal. In December 2017, Italy passed some amendments to the existing rules[3]. These amendments, in essence, already import into Italian law some of the points of the proposal such as the designation of sectors with high technological intensity as areas which are likely to be screened. At the same time, Italy is continuing to implement measures to attract foreign investment, for instance by simplifying and speeding up the procedures for granting visas to foreign investors.

3 Law No. 172 of 2017, converting into Law the Decree Law No. 148 of 2017.