



Episode 8: Screening of Asian investment in Europe – The EU Regulation on the screening of foreign direct investment

In this episode, Joel Rheuben, a competition and regulatory specialist based in the HSF Tokyo office, and Kyriakos Fountoukakos, who is the Head of Competition for the EMEA region and the Managing Partner of our Brussels office, discuss the European Union's Regulation on the Screening of Foreign Direct Investment (**Regulation**), which became fully operational in late October this year.

Unlike competition-related merger control, which is reviewed at EU level by the European Commission (**EC**) under the EU Merger Regulation, foreign direct investment (**FDI**) screening has traditionally been seen as an area for EU Member States to determine in line with their own interests (although not all EU Member States currently have a national FDI screening regime). For several years there has been a view that the EC should also have a role in screening FDI into the EU, particularly where it is linked to trade issues like reciprocity.

The approach taken under the Regulation is to establish a collaborative network to link together the various national FDI screening regimes, rather than to introduce a new screening regime at EU level. The Regulation requires a Member State to inform the EC and other Member States of when it reviews a transaction under national laws, allowing them to provide comments and opinions. Although the Member State is not bound by these comments and opinions, it will be required to pay them "due consideration", and where an investment touches upon a so-called "Union interest" (one impacting the EU as a whole), to pay "utmost account".

While the Regulation does not require Member States to implement FDI screening regimes, the EC has strongly encouraged all Member States to do so, particularly in light of the impact of COVID-19. The Regulation similarly does not require harmonisation of existing FDI

regimes across the EU; however, it imposes a set of minimum requirements for existing or future regimes, including in relation to the assessment of security and order, and transparency.

The impact of the Regulation on Asian businesses may be evident in a few ways.

- Several Member States are looking to introduce new FDI regimes or tighten existing FDI regimes, so there are likely to be more filings than ever before.
- Rules in relation to what levels of shareholding or what types of transaction may trigger a filing, or what sectors are regarded as sensitive, differ from Member State to Member State. Businesses should therefore assess carefully whether a transaction needs to be notified on a case by case basis.
- Failure to make a mandatory FDI filing may also imply severe consequences, including criminal sanctions in some Member States.
- Since the review process must now build in time for consultation with the EC and other Member States, review times are likely to be longer.

All of these factors should be considered in deal planning when investing in the EU, and reflected in transaction agreements accordingly.

