AmCham EU

SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

Proposal for a new regulation on the screening of foreign investments

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Executive Summary

The Proposal for a new Regulation on the screening of foreign investments is a welcome step towards greater harmonisation of foreign investment screening rules in the EU. However, to safeguard Europe's attractiveness as an investment destination while protecting sensitive technology areas, national regimes must be better aligned and investors must be provided with a clear legal framework, strong due process rules and effective reviews.

Introduction

On 24 January 2024, the European Commission (Commission) published a Proposal for a new Regulation on the screening of foreign investments (Proposal). Based on the Explanatory Memorandum, the Proposal sets out to better harmonise Member States' investment screening mechanisms and create a clearer system for cross-border investment screening coordination across the EU.

AmCham EU welcomes the ambition to reduce the existing divergences between national rules, which, as outlined in the Proposal's Explanatory Memorandum, have resulted in "the creation of obstacles to investments made within the EU". The US is the EU's largest source of foreign investment, accounting for approximately a third of foreign acquisitions and nearly half of all greenfield investments[1], and the introduction of more consistent screening rules would bring much-needed certainty to US-based investors and their EU partners.

However, the current draft of the Regulation does not adequately codify many of the ambitions articulated in the Explanatory Memorandum, and could result in increased scrutiny of low-risk transactions, inadvertently raising barriers to positive investment in the EU by US-based, EU-based and third country-based investors alike.

Therefore, while we appreciate the Commission's efforts to improve investment screening procedures in the EU, we believe the Proposal needs further changes to meet its stated ambitions. We encourage the co-legislators to go further in providing more alignment and focused enforcement. We have outlined in this paper our key concerns and recommendations on how to bring improvements forward.

Concerns

The current Proposal brings into scope an excessively broad and loosely-defined range of sectors that does not consider the actual risks associated with specific transactions. Therefore, the proposed framework would implicate significantly **more low-risk transactions** at the Member State and Cooperation Mechanism level than are currently scrutinised. Likewise, by **expanding the screening scope to intra-EU transactions**, and without providing a detailed and specific definition of a 'Union

[1] See Commission's 2023 'Third Annual Report on the screening of foreign direct investments into the Union'.

target', the system risks expanding disproportionately into transactions involving only non-EU companies with EU subsidiaries or branches.

Similarly, while there is a recognised need for a coordinated investigation system for cross-border cases, the Proposal fails to **streamline the notification and investigation** of the vast majority of low-risk investments. The revised scope of the Cooperation Mechanism may have the potential to encourage better administration and some degree of coordination between authorities, but it puts **too much of the onus on notifying parties**, and too little on national authorities. As a result, it will unfortunately not limit the significant administrative burden faced by the majority of transactions. In some instances – notably the plan to require investors to notify multi-country transactions simultaneously in all relevant Member States – the Proposal in fact risks creating unfeasible requirements.

In addition, though we agree that setting minimum screening standards is a positive idea, the Proposal lacks the specificity needed to bring about **legal clarity, due process and convergence between national rules.**

Recommendations

Set clearer requirements for Member States' national screening procedures

In its evaluation of Regulation 2019/452 ('FDI Screening Regulation'), the European Court of Auditors noted that 'there are significant differences in scope and approach between screening systems in the Member States', and that these divergences pose a risk to the coherence of the Single Market[2]. In order to address these divergences, the Commission's Proposal seeks to introduce a set of minimum standards for Member States' national investment screening regimes, following a 'minimum harmonisation' approach to aligning key substantive and procedural requirements. For example, the Proposal would require Member States to screen all foreign investments targeting a common list of economic areas, while also giving Member States the liberty to extend the list and screen additional transactions.

This approach is a welcome step towards achieving the level of clarity and alignment necessary for businesses, and would eliminate some disproportionate obstacles to investment within the EU. An EU-wide list of foreign investments subject to screening can indeed potentially lead to increased legal certainty for investors and drive down compliance costs.

However, 'minimum harmonisation' based on vague definitions and loose procedural requirements still leaves space for significant divergences on the scope of minimum requirements across Member States. In order to fully meet the objective of 'minimum harmonisation', the **co-legislators should agree upon more explicit language on substantive, jurisdictional and procedural features of national screening mechanisms.**

Definitions of key jurisdictional concepts (article 2)

[2] See 2023 European Court of Auditors Special Report on 'Screening foreign direct investments in the EU'.

Current definitions of key jurisdictional concepts in the Proposal leave space for divergent interpretations at the Member State level. For example, some Member States may continue to interpret the notion of 'foreign investment' as covering acquisitions of at least 10% of voting rights in Union targets, whilst others might set a higher threshold based on the acquisition of shares. While the Proposal could result in a levelling-up of transaction thresholds, it is perhaps more likely to trigger a 'race to the bottom', whereby all Member States decrease their thresholds to ensure their domestic system is compliant with the Regulation. In this regard, we recommend setting clearer transaction thresholds to **avoid screening minority investments where the investor is unable to exercise control** over the target company – for example, investments without meaningful governance rights (eg board seats, veto rights over certain types of transactions), investments without or with limited voting rights, or investments for less than a 25% equity stake and otherwise having no actual elements of control. In addition, investments in a non-EU-based company (eg a US-based company that may have operating subsidiaries in the EU or elsewhere) should be expressly excluded from scope.

Without greater definitional clarity, similar jurisdictional issues may also arise in relation to determining what is a 'foreign investor', when a Union target is deemed 'economically active' in one of the listed economic areas, and what is covered by certain broadly termed sectors (eg 'new fuels').

It should also be clarified that two important areas of low-risk investment should in principle fall **outside the scope** of Member States' screening mechanisms – namely (i) **internal corporate restructurings** where there is no ultimate change of control of an entity, and (ii) **greenfield investments.**

As a general rule, jurisdictional concepts which are hard to apply in practice may prompt many investors to submit full form notifications out of precaution. The Proposal could therefore result in increased red tape for transactions that do not raise substantive concerns, with associated administrative burdens for national authorities. In order to preserve legal certainty, the co-legislators should set out criteria for jurisdictional tests to minimise divergences, and consider developing more specific definitions of annex II sectors (see below) and raising thresholds overall in order to target mandatory notification requirements towards transactions that display genuine sensitivities from a security and public order perspective.

Another avenue which may be explored would be to require Member States to adopt consultation procedures allowing investors to test the reportability of a given transaction under national screening mechanisms. Several Member States do not currently maintain such procedures. This inefficiency could be addressed by detailing what 'adequate procedures' Member States would be required to adopt under article 4(2)(a) to determine whether they have jurisdiction over a foreign investment.

Features of 'adequate' review procedures (article 4)

The current EU FDI Screening Regulation allows for national screening regimes with significantly diverging procedural features. For instance, some Member States allow information requests to suspend review timelines, and, across the EU, the expiration of statutory timelines does not always result in the automatic approval of notified transactions. In France and Spain, for example, if a decision is not handed down within statutory timelines, a transaction is deemed rejected. Similarly, there is no principle of deemed approval under Luxembourgish and Romanian FDI screening rules, and businesses must therefore delay implementation until approval is received, even if statutory timelines have expired. Such procedural mechanisms place a disproportionate burden on investors. For example, to secure a timely authorisation, investors may have to accept remedial action which is disproportionate to the security and/or public order interest intended to be safeguarded.

Such significant procedural divergences, and the resulting obstacles to investments made within the EU, are not addressed by the current Proposal. In fact, the Proposal's stated objective of aligning the essential features of national screening procedures is not achieved by article 4(2)(a). Indeed, article 4(2) does not detail the requisite features of an 'adequate' review procedure. The co-legislators should include additional detailed and specific common requirements for national screening mechanisms, guided by the principles of due process, proportionality and transparency. Appropriate guidance to Member States on how to approach the substantive elements of investment reviews would also be welcome.

Transparency (article 4)

Transparency is vital to ensuring that the operation of screening mechanisms is predictable and based in law and not politics – always having due regard for legitimate claims of confidentiality, national security and classified information. Article 4(1) of the Proposal would require Member States to provide some transparency regarding their screening rules, procedures and measures, but does not illustrate what would constitute an appropriate level of transparency.

Inspiration could be taken from the field of merger control, where a relevant transparency tool is soft-law guidance on jurisdictional, procedural and substantive concepts. Transacting parties would benefit from EU- and Member State-level guidance setting out how key notions are interpreted and applied in the field of investment screening. The requirement set out under article 4(2)(f) for Member States to publish annual reports is a welcome proposal in that regard. As currently drafted, however, Member States would only be required to publish high-level information in an aggregated and anonymised format, which is unlikely to provide actionable guidance on the interpretation of jurisdictional concepts, approach to substantive assessments, or underlying reasons for remedial enforcement and prohibitions. We believe that the Proposal should be revised to include specific details on the format of Member State reports, covering matters such as scope, content and frequency.

Another key element of transparency is the duty for Member States to provide reasons for decisions taken. In this regard, we welcome article 4(3) in the Commission's Proposal, which would require Member States to provide applicants with advanced notice of forthcoming decisions, along with some reasoning. However, the provision does not contain the specificity necessary to encourage Member States to make meaningful improvements to their processes, including by requiring Member States to address all arguments brought forward by investors (article 14(1) only requires Member States to 'take into consideration all circumstances of the foreign investment'). Another important clarification would be to require Member States to afford meaningful time for investors to make their views known.

The co-legislators should expand the language used in article 4 to require Member States to clarify jurisdictional, procedural and substantive concepts and how they are concretely applied. In addition, the co-legislators should consider expanding this provision to establish a minimum timeline for investors to formulate a response and to specify the obligations of a Member State upon receiving this response. This language should be drafted in consideration of multi-country investments, which might require several responses at one time.

Adequate resourcing (article 11(1))

Article 11(1) would require Member States to provide the necessary resources to ensure their 'efficient and effective' participation in the Cooperation Mechanism. This is welcome and should make a contribution to the success of the mechanism, expediting the conclusion of the small percentage of overall cases submitted to it.

However, given that the majority of cases will not be escalated to the Cooperation Mechanism, this language risks concentrating resources around only a few high-risk cases while failing to address resource issues that complicate the assessment of the majority of low-risk cases.

The co-legislators should revise the language to ensure that Member States provide their FDI screening teams with the resources needed to ensure both the expeditious clearance of low-risk cases and effective participation in the Cooperation Mechanism.

Critical technologies (annex II)

In order to promote a degree of substantive harmonisation in national investment screening procedures, the Proposal would require Member States to introduce mandatory and suspensory filing requirements for investments in EU companies that (i) participate in an EU project or programme listed in annex I, or (ii) are 'economically active' in one of the areas/sectors listed in annex II. However, some of the areas/sectors listed in annex II lack the definitional clarity required to facilitate this substantive harmonisation.

As outlined in a recent OECD report, investment screening procedures should be 'based on a set of objective criteria clearly articulated in legislation or guidance'[3]. While some of the areas/sectors in annex II have been clearly defined in EU law and/or by the EU's supervisory authorities – for example, the critical medicines and financial services referenced in paragraphs 4 and 5 – this is not the case with many of the 'critical technology areas' listed in paragraph 3. Therefore, the Commission's list of critical technology areas does not provide Member States with a clear framework to align the scope of their investment screening regimes.

Moreover, the Commission's list covers a large array of technologies – including **widely-available technologies** – thus lacking the risk-based elements required to develop effective investment screening rules. In practice, by requiring Member States to pre-clear all foreign investments in domestic target companies operating in such broadly-defined technology areas, the Proposal would compel national authorities to over-enforce their screening rules, unnecessarily delaying low-risk investments that are vital to the EU's competitiveness.

This could prove particularly challenging for Europe's nascent technology industries. As outlined in a recent AmCham EU paper[4], some of the 'critical technology' areas identified by the Commission (eg quantum) have not had sufficient time to mature and specialise, and their value chains are comprised primarily of general-purpose components that are widely available globally. By requiring Member States to pre-clear any foreign investments in these critical technology areas, the Commission's Proposal could delay investments in companies that are developing widely-available, low-risk technologies. For many EU start-ups and SMEs that require rapid access to capital, any delays in the investment clearance process could have a significant impact on innovation. The EU has other mechanisms for protecting the outbound proliferation of these technologies without placing further inbound restrictions on investment that could stifle the EU's technological development.

In addition, it is also unclear whether annex II would apply to any activities related to the critical technology areas listed (eg packaging, distribution), or whether this is meant to be limited to more substantive activities such as R&D and production. The term "**economically active"** in article 4(4)(b) of the Proposal has **not been adequately defined**. As a result, the Regulation could potentially impact all companies using technologies that have become ubiquitous (eg AI, robotics, Internet of Things),

[3] See 2022 OECD report on 'The Relationship between FDI Screening and Merger Control Reviews'.

[4] See 2024 AmCham EU position paper on the 'White Paper on Export Controls'

including where these technologies are **not part of the company's core business**. The mere use of a listed critical technology by a company should not be sufficient to trigger mandatory screening for foreign investments.

As outlined in a 2022 study published by Sweden's National Board of Trade, 'to minimise uncertainty and the potential FDI dampening effects of an investment screening regulation, the range of affected sectors should be narrowly defined, accompanied by a swift and transparent review process that provides predictability to the transaction parties'[5]. The study goes on to recommend against 'broad sector-based lists that require investment screening', noting that, 'if sector-based lists are used, such lists should be drawn as narrowly as possible and tailored to those transactions that are at the core of a government's national security interests'.

In addition to unnecessarily burdening investors, the broad scope of the technologies listed in annex II would also increase the enforcement costs incurred by national authorities. A recent report published by the UN Conference on Trade and Development found that 'the expansion of strategic sectors and transactions that fall under the scrutiny of FDI screening mechanism[s] can create significant administrative burden for the implementing authorities'[6].

In order to allow Member States and the Commission to focus their limited resources on high-risk transactions, the co-legislators should **narrow and clearly delineate the range of transactions** subject to mandatory screening and authorisation under article 4(4)(b). For example, under the US's investment screening regime – the Committee on Foreign Investment in the US (CFIUS) – transactions are only subject to mandatory screening if they **target critical technology providers that produce goods/services whose use by foreign nationals would require a regulatory authorisation** (ie companies subject to dual-use export controls).

While annex II of the Commission's Proposal makes a reference to Regulation 2021/821 – the EU's Regulation on dual-use export controls – this is listed only as an additional criterion for mandatory screening. In other words, while screening criteria in the US are cumulative – ie foreign investments are only subject to mandatory screening if the target companies are active in a critical technology sector **and** produce goods/services subject to dual-use export controls – the screening criteria in annex II of the Commission's Proposal are complementary (ie only one of the criterions has to be met in order to trigger mandatory screening).

Co-legislators **should remove the list of critical technology areas from paragraph 3 of annex II**, while maintaining a reference to the Regulation on dual-use export controls in paragraph 1 (or, alternatively, bundle paragraphs 1 and 3 as cumulative criteria). By closely aligning national investment screening regimes with existing export control rules, the co-legislators would help ensure that screening procedures focus on high-risk transactions involving genuinely sensitive technologies. This would be without prejudice to the ability of Member States to screen additional transactions that they believe present risks to security or public order. We also note that, with the removal of paragraph 3 from annex II, transactions involving critical technologies would still be captured under the export control criterion.

Alternatively, if the co-legislators wish to maintain a 'criticality' criterion for target companies in annex II, we recommend that this is tied to existing legislative and regulatory instruments – for instance, the national lists of 'essential entities' designated under Directive 2022/2555 (NIS2 Directive).

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[5] See 2022 National Board of Trade Sweden study on the 'Economic Effects of FDI and Investment Screening'.

[6] See 2023 UNCTAD report on 'The evolution of FDI screening mechanisms'.

With regards to the existing export control criterion in annex II, we note that several ubiquitous and non-sensitive technologies are listed in the Dual-Use Regulation, meaning that many low-risk investments could be captured under the Proposal. In line with the Dual-Use Regulation, the co-legislators could **exempt investors from countries eligible for EU General Export Authorisations from the mandatory screening and authorisation** requirements in article 4(4)(b). AmCham EU would welcome the opportunity to engage further with the Commission and the co-legislators on how to make annex II workable for investors and regulators.

Seek greater alignment between the Cooperation Mechanism and business processes

Balancing proper due diligence with security concerns (article 5(1)(b)(iii))

Under article 5(1)(b)(iii) of the Proposal, foreign investments in an annex II activity made by a company that has previously received a prohibition decision or a conditional authorisation would have to be notified under the Cooperation Mechanism. This would mean that any foreign investor who has received a conditional authorisation or a prohibition decision would always see their investments in annex II activities undergo additional scrutiny, without any clear limitation in time. As a result, historical prohibitions or conditional approvals will continue to impair investors' activities long after the conditions that prevailed when such decisions were handed down have materially changed.

Without proper due diligence systems in place in national foreign investment screening regimes, this could prejudice the activities of legitimate investors who have previously received prohibition decisions on political grounds, or where political, security or other conditions have significantly changed since the time of that prohibition.

By placing additional scrutiny on all investors previously subject to conditional authorisations, the Proposal also ignores that conditional authorisations may take many forms. While some conditions may be very minor, requiring, for example, some pro forma disclosures that do not imply risks to security or public order, others may be quite expansive. Under the present FDI Screening Regulation, some countries like Germany will subject cases to Phase 2 assessment simply by virtue of a standard supply contract to the government. The co-legislators should revise the language in article 5(1)(b)(iii) to specify which types of conditional authorisation qualify, avoiding permanently prejudicing investors who have received minor or pro forma conditions in the past. A sunset provision or statute of limitations could also be foreseen to prevent certain prohibitions or conditional authorisations from inhibiting investors in perpetuity.

A less burdensome Cooperation Mechanism for businesses

Although the proposal does not attempt to align national review timelines, it aims to align the timeline for review under the Cooperation Mechanism. To achieve this aim, the Proposal would require investors to file their authorisation requests in all relevant Member States on the same day (article 6(2)(a)). Member States would then have to notify the Cooperation Mechanism on the same day, and there would be common timelines for other Member States and the Commission to issue comments/opinions.

Greater procedural alignment is a welcome objective. However, we are concerned that the proposed system places an undue burden on investors without improving the overall functioning of the regime. In the context of national screening mechanisms with divergent and unclear jurisdictional concepts, thresholds and information requirements, notifying transactions across several jurisdictions on the

same day will not only require an incredible effort of coordination amongst transaction parties, but may prompt investors to preventively file in virtually all Member States with a nexus to a given transaction. This would be an inefficient outcome. Moreover, the proposed system would also likely create, at best, a 2-3 month screening process for transactions escalated to the Cooperation Mechanism, potentially extending the current duration of national review procedures. This could result in a chilling effect on transactions that are beneficial to the EU.

The co-legislators should consider providing a reasonable window for investors to notify multi-country investments. Likewise, co-legislators should review the types of cases which may be subject to the Cooperation Mechanism to ensure that truly low-risk transactions may continue to benefit from streamlined national review procedures.

It is our view that, rather than placing the timing obligation on notifying parties, review periods could be more effectively harmonised by placing timing obligations (or more informal timing objectives) on national authorities. The functioning of the European Competition Network under the EU Merger Regulation regime could serve as a useful template here.

Increase transparency around divergent national rules

The Cooperation Mechanism could play a role in increasing predictability for investors by maintaining a database of national rules and filing requirements. The Cooperation Mechanism already requires Member States to notify changes to their national FDI rules.

Common filing forms or a one-stop-shop (within the confines of EU competences) would be welcome, greatly facilitating compliance and cooperation between authorities, while also simplifying and reducing notification burdens for investors. We strongly encourage the Commission to include detailed filing requirements (or, by proxy, a more detailed list of the information requirements for exchange under the Cooperation Mechanism currently envisaged in article 10 of the Proposal) in the Regulation itself or in its Implementing Acts.

Foster investment screening cooperation among trusted partners

In May 2023, in the G7 Hiroshima Leaders' Communiqué, the EU and its closest partners outlined their shared commitment to protecting their economic security 'without unduly limiting trade and investment' or creating 'unnecessary barriers to […] partners' industries'. As cross-border research, development and innovation initiatives become the global norm, it is essential that the EU and its trusted partners focus on developing interoperable investment screening rules and minimising trade barriers. While we welcome the reference to international investment screening cooperation made in article 15 of the Proposal, more work is needed to operationalise this commitment – including through existing institutional fora such as the OECD, the G7, NATO and the EU-U.S. Trade and Technology Council. As an organisation representing some of the EU's largest foreign investors, we look forward to playing a role in facilitating this dialogue.

Conclusion

The Proposal represents a significant stride toward creating a more harmonised system for investment screening in the EU. However, to ensure its effectiveness in balancing security concerns with facilitating investment, lawmakers should go further in aligning national regimes, and ensuring the

framework effectively defines and targets investments in critical assets while streamlining the clearance of low-risk cases.

Addressing these concerns would lower uncertainty and administrative costs and make a significant contribution to Europe's attractiveness as an investment location. As a representative of US investors and advisers engaged in foreign investments across various sectors and jurisdictions, AmCham EU is committed to applying its expertise to ensure that FDI screening facilitates, not complicates, beneficial investments in the EU.

Moving forward, further dialogue and refinement are necessary to address these concerns and ensure the regulation's effectiveness in fostering investment while safeguarding economic security in the EU. Collaboration with stakeholders like AmCham EU will be essential in achieving these objectives and maintaining a conducive environment for transatlantic investment and cooperation.