AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Consultation response

# Targeted consultation on the evaluation and review of the EU's FDI Screening Regulation (Reg. (EU) 2019/452)

Supplement to Questionnaire

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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# Executive Summary

As of 2023, merger and acquisition (M&A) transactions will be subject to three separate clearance regimes in the EU (merger control, foreign subsidies, and foreign direct investments [FDI]). Amendments to the EU FDI screening framework should seek to minimise burdens for transactions subject to multiple clearances by aligning FDI and merger control timelines, authorities and procedures. Likewise, they must drive the maturity of FDI screening in the EU by aligning and coordinating national FDI screening processes with stronger due process rules, stricter defence of fundamental freedoms amidst national security concerns and clearer jurisdictional tests and notification requirements.

# Introduction

Members of the American Chamber of Commerce to the European Union are active in M&A and frequently act both as sellers and buyers of businesses and assets in Europe. Therefore, we increasingly interact with European FDI screening regimes for investments and transactions in a variety of sectors and countries. Accordingly, our experiences reflect the increasingly complex set of requirements which now apply to M&A activities in Europe, where companies (as of 2023) will be required to subject transactions to potential review and clearance under: (i) merger control, (ii) FDI screening, and (iii) foreign subsidy clearance.

This paper complements AmCham EU's response to the Directorate-General for Trade of the European Union's (DG TRADE) questionnaire by providing supplementary information and views better suited for a free text format.

# The case of mergers and acquisitions

FDI generates significant societal benefits by creating economic growth, enhancing competitiveness, creating jobs and economies of scale and bringing in capital, technologies, innovation and expertise. FDI principally takes two different forms: greenfield investments or mergers and acquisitions (M&A). With respect to M&A, the Commission and the EU Member States have well-established systems for reviewing M&A transactions under their respective **merger control systems**.

In addition to merger control, M&A activity is now subject to **FDI screening** in EU Member States as well as the newly established EU **Foreign Subsidies Regulation (FSR)**, which will be fully enforced as of 12 October 2023. M&A transactions can thus be subject to **three separate clearance regimes** within the EU, creating significant challenges for business and their advisors going forward and a clear need for a coherent and administratively efficient approach. FDI screening and FSR are at an early stage of implementation. Conversely, merger control procedures have been developed and refined over decades of experience, and thus, helpful parallels can be drawn from that example.

At the Member State level, the EU's Merger Regulation subjects merger controls to extensive case cooperation mechanisms within the European Competition Network (ECN). Increasingly, best

practices, studies and policy cooperation are done also at an international level through the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD). For instance, the ICN has, *inter alia,* developed Recommended Practices for (i) merger notification and review procedures and (ii) merger analysis, as well as Guiding Principles for procedural fairness. The OECD has issued Recommendations on, *inter alia,* (i) merger review and (ii) transparency and procedural fairness, as well as Guiding Principles for regulatory quality and performance.

Overall, efforts are being made to ensure that global M&A activity is subject to a framework where jurisdictional triggers, procedures and substantive reviews are more closely coordinated and aligned. This provides clarity and certainty to the relevant competition agencies and to business.

In the area of competition law, through the adoption in 2018 of the so-called ECN+ Directive, the Commission has put in place important principles with which national competition authorities should comply. This includes impartiality and independence from political influence, human and financial resources needed to perform their tasks, effective investigative and decision-making tools as well as a requirement to conclude investigations within a reasonable timeframe. These principles should also be adhered to in the work undertaken for investment screening.

More generally, the Commission has increasingly focused on rule of law issues as these guarantee fundamental rights and values, allow the effective application of EU law and support an investment-friendly business environment. Fairness of procedures and due process considerations play a vital role in this regard.

## Recommendations for the FDI screening regime

Many of the above referenced procedures and processes currently governing M&A reviews under EU competition laws could serve as inspiration for how to further evolve the EU's FDI screening regime.

In sum, aligning FDI screening regimes is crucial to enhance security and public order. Such alignment not only strengthens the European Union's pursuit of strategic sovereignty but also fosters mutual benefits and prosperity through close coordination with international partners and across the Atlantic.

Greater alignment would also provide legal certainty, enabling companies to reduce administrative costs and risks. This would, in turn, enhance the attractiveness of the EU's single market as a preferred destination for foreign investments, thereby promoting economic growth and job creation. Simultaneously, a centralised FDI screening mechanism would enable the EU to effectively address common concerns regarding economic security and vulnerabilities.

To achieve this, the establishment of a clear framework and set of principles, supported by a robust central mechanism, would greatly benefit both the EU and investors. By striving for alignment and cooperation, we can establish an environment that safeguards both the EU's interests and the interests of investors. Together, we can foster economic resilience, prosperity and a stronger single market.

The key issues for the Commission to consider include:

- **Adhering to due process in screening procedures.** Investigations should be conducted in a manner that promotes effective, efficient, transparent and predictable reviews that are subject to the appropriate protection of confidential information. This would include, *inter alia,* non-discrimination, the right to good administration (including appropriately resourced agencies, access to files, the duty to provide reasons, and an obligation to make public decisions), the right to be heard and the right of effective remedies. Importantly, timely review by a separate adjudicative body of an agency's final adverse decision on the merits of a transaction must be provided for. We recognise that national security and public order are of utmost importance to EU Member States. However, national authorities must in all circumstances - also when protecting legitimate and important interests - comply with due process. FDI screening must adhere to due process is furthermore vital to ensure that it is not used to conceal protectionism unless there is legitimate need to protect public security or public policy.

- **Ensuring that the decisions adopted under FDI screening comply with fundamental freedoms.** Derogations to the these Treaty-based freedoms must comply with the Treaty and the jurisprudence of the Court of Justice of the European Union (CJEU). As held by the CJEU in its judgment of 13 July 2023 (Case C-106/22 - Xella Magyarország Építőanyagipari Kft.) "**However, it is clear from the Court's case-law that, while, in essence, the Member States remain free to determine, in accordance with their national needs, the requirements of public policy and public security, the fact remains that, in the context of the Union, and in particular as a derogation from a fundamental freedom guaranteed by the TFEU, those grounds must be understood strictly, so that their scope cannot be determined unilaterally by each of the Member States without control by the Union institutions. Thus, public policy and public security can only be invoked where there is a genuine and sufficiently serious threat affecting a fundamental interest of society. Moreover, these grounds cannot be diverted from their proper function in order to serve, in fact, purely economic ends**". Notably, as Member States pursue legitimate interests of protecting public security or public policy, measures must be proportionate and be adopted to address threats that can be demonstrated as genuine, present and sufficiently serious in accordance with the case law of the CJEU.

- **Enforcing stronger jurisdictional tests.** The Commission should prescribe or encourage Member States to adopt clear and aligned definitions of transactions and triggering events that fall within the scope of their screening regimes, including sectorial coverage and investor nationality. At least outside the defence industry, the Commission should promote further alignment where FDI screening regimes include the screening of investments made by EU companies. Furthermore, jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction. Notification thresholds should be clear, understandable and – to the extent possible – based on an aligned set of objectively quantifiable criteria throughout the EU.

- **Fomenting cooperation among agencies tasked with merger control review and FDI screening**. Agencies should seek to cooperate in order to avoid conflicting or incompatible outcomes which can have negative effects on business, the attractiveness of Europe and the agencies themselves. The Commission should therefore explore closer coordination between authorities tasked with merger control review and FDI screening to avoid divergent outcomes or conflicting commitments in proceedings, including in subsequent proceedings (eg where a divestment remedy negotiated and agreed with a competition authority would become subject to a potential prohibition or the imposition of conditions under FDI screening).

- **Specifying clear and workable review periods**. M&A transactions are typically time sensitive and the completion of reviews by regulatory authorities is often a condition to closing. Consistent with the principles of good administration, review periods should therefore be completed within a reasonable – and specified – period of time, and any extended review periods should also expire within a determinable time frame. Increased cross-border alignment of review timetables would also be welcome for those cases in which the same transaction is notified to several Member States.

- **Adopting aligned notification requirements for initial filings**. To the greatest extent possible, the Commission should prescribe or encourage Member States to adopt aligned notification forms or similar/identical information requirements for initial filings. Common or centralised submission platforms could even be envisioned. The scope of the information should be set out in a clear and precise manner and initial requirements should be limited to the information needed to determine whether the transaction raises issues meriting further investigation. This would not prevent authorities from making requests for additional information, if considered necessary. This is again particularly important when the same transaction is notified to several Member States as it eases the burden on business and allows for closer coordination and cooperation between the national authorities and the Commission.

# Conclusion

It is vital that Europe's regulatory systems promote FDI but also have effective control systems for the limited number of transactions that merit closer scrutiny. Rules should be designed in ways that do not unduly hamper business or regulators and with due regard to the Commission's express wish to simplify and reduce reporting requirements for companies by 25% per cent[1].

At the EU level, the Commission's merger control statistics indicate that less than 6% of its decisions include commitments and less than half a per cent of decisions lead to transaction bans. Further, FDI screening data from Germany (the top destination for acquisitions involving foreign investors as per the most recent EU data) can be used as a useful indicator for FDI screening purposes - only approximately 2% of notifications in Germany in 2022 led to decisions with restrictive measures. According to EU data (the Second Annual Report on the screening of foreign direct investments into the Union), out of the cases formally screened in 2021, and for which Member States have reported a decision, the vast majority (close to 75%) were authorised without conditions.

For this reason, further alignment of both procedural and substantive principles is vital, and due process considerations must be given priority. Thus, any amendments to the EU FDI screening framework should aim to harmonise FDI and merger control timelines, authorities and procedures. Likewise, these amendments should seek to align and coordinate national FDI procedures across the EU.

[1] Von der Leyen, Ursula. (2023, March 15) *Speech by President von der Leyen at the European Parliament Plenary on the preparation of the European Council meeting of 23-24 March 2023*. European Commission. https://ec.europa.eu/commission/presscorner/detail/en/speech_23_1672