NEW EU FOREIGN DIRECT INVESTMENT SCREENING LEGISLATION COMING TO LIFE

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On 21 March 2019, the Regulation establishing a new framework for the screening of foreign direct investments ("FDI") into the European Union ("EU") on grounds of security or public order was published and enters into force on 10 April 2019.

EU Member States are entitled to request information from foreign investors planning or accomplishing FDI in their territory. Although the decision on whether to establish such a mechanism lies with EU Member States (currently, only fourteen of them have a FDI review mechanism in place), the new Regulation expands the European Commission's ("Commission") involvement in reviewing foreign investments.

In particular, the Commission:

Encourages all EU Member States to assess risks to security or public order that may arise from significant changes to the ownership structure or key features of a foreign investor, also taking into account inputs from economic operators and civil society organizations.
Among the factors determining whether FDI is likely to affect security or public order and should, therefore, be restrained, EU Member States and the Commission will have to take into consideration whether the foreign investor is controlled directly or indirectly by a government of a third country or is pursuing state-led external projects or programs.

Will issue a non-binding opinion when FDI is likely to affect projects and programs of EU interest or when at least one third of EU Member States considers that a FDI case, which does not undergo screening, is likely to affect their security or public order. However, the final decision whether a specific operation should be permitted or not lies solely with the EU Member State in whose territory the FDI is directed.

Requires those EU Member States not following its opinion to provide an explanation in accordance with the duty of sincere cooperation set by Article 4(3) of the Treaty on the Functioning of the EU ("TFEU"). EU Member States will, on an annual basis, have to report on the application of their review mechanisms, including the decisions allowing, prohibiting or subjecting FDI to conditions or mitigating measures. Existing mechanisms or amendments to them must be notified to the Commission, which has to keep up to date a public list of screening EU Member States.

On 13 March 2019, the Commission for the first time published an analytical overview of the current state of FDI in the EU that provides the basis for the Regulation and the increased scrutiny of FDI. The report demonstrates a continuous rise in foreign company ownership in EU key sectors (such as oil refining, pharmaceuticals,

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electronic/optical products and electrical equipment) as well as an increase in investments from emerging economies. The report reveals that investment by state-owned enterprises has grown rapidly over the last years, with companies from China, Russia and the United Arab Emirates performing three times more acquisitions in the EU in 2017 than in 2007. In addition, the presence of offshore investors is growing and they appear to currently control 11% of foreign-owned EU companies and 4% of all foreign-owned assets in the EU. The report further provides an outline of the origin of FDI, sectoral and geographical distribution and characteristics of foreign-owned companies in the EU. The Commission will continue monitoring EU-wide investment trends, thereby contributing to the implementation of the new framework.

Companies contemplating FDI in the EU will have to pay greater attention to the political climate and expect enhanced political reviews.

The K&L Gates Brussels Policy and Antitrust team is available to assist.

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