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Foreign Investment Review Becomes Communitywide

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Following up on the Foreign Investment Risk Review Modernization Act (FIRRMA), the United States' amendment to the Committee on Foreign Investment in the United States (CFIUS), the European Union (EU) has now enacted a new framework for screening foreign direct investment into EU states. The authority to screen foreign direct investment in the EU lies with each nation state. But in the spirit of formalizing a harmonized approach to screening, the EU has enacted the Regulation on Foreign Direct Investment Screening (FDI Regulation). The European Parliament approved this measure, and it will become effective on October 11, 2020.

Foreign direct investment review legislation is currently in place in 12 of the 27 members of the EU. The FDI Regulation is aimed at investments that are made directly by non-EU persons or entities into EU businesses. It is not intended to include portfolio investments.

The FDI Regulation sets out a list of factors to be considered in foreign investment reviews. As with many regulations, the FDI Regulation is intended to encourage uniformity in investment review. Among other things to be considered by governments, critical infrastructure and technology as well as sensitive information will be considered in investment reviews.

The intent of the FDI Regulation is to require EU state governments to report on their reviews of foreign direct investment transactions. The FDI Regulation requires a government to inform the EU and the member states of any investment that is undergoing screening. If at least one-third of member states consider the investment to be likely to affect security or public order, the European Commission may issue a non-binding official opinion regarding whether the investment is likely to affect EU nations' security or public order. While the opinion is not binding, it is an official pronouncement of the Commission. And if a government decides not to follow the opinion, the FDI Regulation requires it to provide an explanation of why it did not follow the opinion.

The effect of the FDI Regulation inside the community is to: (1) promote cooperation among EU nations; (2) allow member states to possibly influence the direction of foreign direct investment into the EU; (3) potentially harmonize investment review legislation in member states; and (4) establish an oversight mechanism that will attempt to promote security and avoid investment that will contravene established norms (ordre publique). Will this become, as some people view the GDPR, an anti-competitive obstacle to foreign investment in EU businesses?

What it definitively means for investors is unknown. But our guess would be that it means a number of things for investors, none of them extremely good. First, as in the United States under FIRRMA, more investments will come under scrutiny. Second, more information will be sought by government review bodies, causing expense, delay, and possible confidentiality issues. Third, potentially sensitive investments will need to consider an extended review timetable and, possibly, interference by national review bodies as well as EU member states. Finally, if there is a possibility of intervention by one-third of the member states and a non-binding opinion by the European Commission, will investors shy away from making an investment in the first place or will the absence of such intervention become a standard condition to the closing of non-EU investments into the EU.

Apparently, as the United States goes, so goes the world. This new FDI Regulation seems to underlie a movement toward sovereignty in all aspects of the regulation of investment. It is also a recognition of the changing environment in which we live and another step toward what Jean Monnet and Robert Schuman envisioned as the ultimate goal of the European integration movement — political as well as economic integration.

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