

Mr. Valdis Dombrovskis
Executive Vice President of the
European Commission
Commissioner for Trade
European Commission
200, rue de la loi
BE – 1049 – Brussels

Brussels, 22 April 2024

Subject: ESF Comments on the Commission proposal for a new Regulation on the screening of foreign investments

Dear Executive Vice President Dombrovskis,

The European Services Forum (ESF) represents the interests of the European services sectors in international trade and investment activities. We are committed to actively promoting the liberalisation of international trade and investment in services.

You will find below our comments on the Commission proposal for a new Regulation on the screening of foreign investments.

As an introductory remark, we would like to highlight the importance of foreign direct investment for the EU economy, and in particular for the European services sectors. The EU is the world's biggest recipient (US\$ 11.1 trillion inward stocks – 25.2% of global FDI¹) of foreign direct investment. According to Eurostat, in 2021, 79.8% of total EU Inward FDI was invested in services sectors². It is considered that 16% of EU total jobs are working in foreign controlled businesses; i.e. 34 million jobs in the EU depend on Inward FDI, around 70% of those businesses are services companies, with a majority of SMEs. The EU economy is very much dependent on the free flow of capital, that nourishes growth and innovation, and allow the EU to remain competitive in an increasingly complex world. We would like you and your team to keep these figures in mind when formulating the EU policy on foreign direct investment.

The EU must remain an open and attractive destination for trade and investments. ESF agrees however that the risks related to security and public order stemming from certain types of investments need to be addressed effectively, in a targeted and proportionate manner. Therefore, ESF welcomes the Commission's proposal for a new Regulation on the screening of foreign investments in the Union, published on 24 January 2024. We consider

¹ <https://unctadstat.unctad.org/datacentre/dataviewer/US.FdiFlowsStock>

² See Eurostat - BOP FDI6 POS

that the proposal is in general well balanced but believe further work is needed to ensure that the revised screening mechanism will not reduce the EU's attractiveness or create protectionist barriers.

We take note of the fact that the first three years of functioning of the FDI screening Regulation bears positive results, but also note that it has generated a high number of notifications for a fortunately rather low number of transactions that have been blocked or authorised with conditions or mitigating measures. ESF calls on the Commission and the EU Member States to anticipate the need for significant additional human resources to be able to analyse expeditiously the new requests for authorisations and the new transactions to be screened.

In addition to the high number of notifications, the current Regulation has also generated large inconsistencies across Member States on substantive, procedural and jurisdictional issues (e.g., filing thresholds, review timelines, covered transactions, presumptions of approval/denial). A key benefit of the Commission's new proposal – which would set 'minimum standards for national investment screening procedures – could be to minimize procedural divergences and ensure robust due process safeguards across the EU, levelling the playing field for investors. However, some of the 'minimum standards' set in the proposal aren't sufficiently specific and targeted to achieve this harmonisation (see comments below regarding Annex II).

We call upon the Commission to reduce the administrative burden generated by the Regulation for the businesses impacted as far as possible. We are concerned that the number of notifications will likely increase significantly since 1) all EU Member States will now have to set up a national mechanism, and 2) the scope of the authorisation requirements has been considerably expanded to new fields. We are also concerned that the authorisation process for the investments in companies participating in projects or programmes of Union interest listed in Annex I, like Horizon, etc. – many of which pose no security risk – will generate significant administrative costs and delay investments that are vital for the EU's competitiveness. In order to minimize the economic costs of the EU's investment screening procedures, the screening criteria will need to be narrower, clearer and transparent.

The Commission's proposal would require Member States to screen all foreign investments where the target company is "economically active" in one of the areas listed in Annex II. Annex II of the Proposal lists the technologies, assets, facilities, equipment, networks, systems, services and economic activities which the Commission considers "of particular importance for the security or public order interests of the EU". Many of the "critical technologies areas" listed in this Annex II §3 and the "critical entities and activities in the Union's financial system" in §5 are of direct interest to services sectors. We have legitimate concerns that notifications from those areas will overload the system and increase the costs and timing of the transactions.

We have questions not only about the size and breadth of Annex II, but also on the fact that many of the listed 'critical technology areas' have not been defined in EU law (e.g.,

advanced semiconductors, quantum, edge computing, AI-enabled systems). This makes it difficult for Member States to align the scope of their investment screening procedures. In addition, many of these new technologies (42 “critical technologies are listed in Annex II) will progressively be integrated into a very large number of products and services. Does this mean that all FDI projects in all kinds of manufacturing and services sectors using these technologies will systematically need to be notified and screened? In order to avoid imposing new ex-ante authorisation requirements for investments in large swathes of the EU economy, ESF calls upon the Commission to consider narrowing down the scope of Annex II. When the EU negotiates trade and investment agreements with trading partners, one of the recurrent requests is to remove as far as possible ex-ante authorisation processes. Reaching such a target would be more complicated for EU negotiators if the scope of Annex II remains broad.

Other trading partners acting on the same matter, like the USA, follow a much clearer approach. Investments are only subject to mandatory filings if they target a critical technology provider subject to dual-use export controls. ESF considers that actions undertaken in the field of export controls offer a more robust framework to identify higher-risk transactions.

At a time where the EU is losing competitiveness in innovative technologies, the EU must avoid discouraging investors to come to the EU because of red tape and heavy and costly procedures. It will be extremely important to set up guidance for the members states to better coordinate their actions and avoid duplication, delays and different procedures.

We welcome the obligation for the member States to set up a legal recourse for businesses which would see their transactions not authorised or subject to conditions (Article 4§2.e). This is part of good governance and of EU international obligations notably through the WTO Disciplines on Services Domestic Regulation³ agreed on December 2021, and entered into force on 26 February 2024.

Furthermore, ESF would like to recall that the freedom of movement of capital is a fundamental freedom of the EU Single Market⁴. We take note that the Commission proposes to extend the EU screening “to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country”, i.e. to intra-EU investment by subsidiaries of foreign investors.

We are concerned that the system of mandatory notifications for certain types of investments, including intra-EU investments⁵ has the potential to increase the number of cases treated, and contributing to delays and uncertainty. In light of the increased volume of cases treated, it would also be important to require Member States to provide sufficient human resources to carry out their investment screening procedures. Article 11(1) in the proposal would require Member States to provide the necessary resources to ensure their

³ See Section II § 13 and Section III § 11 of the [Reference paper on Services Domestic Regulation](#), which requires “procedures for appeal or review of decisions concerning applications” if an authorization for the supply of a service is requested.

⁴ See [article 26](#) of the Treaty on the Functioning of the European Union, Title 1 on the Internal market.

⁵ As per the conditions set in Art. 5.1 and in particular Art. 5.1 (b) of the Proposal.

“efficient and effective” participation in the Cooperation Mechanism. However, the majority of cases will not be escalated to the Cooperation Mechanism. Therefore, while this provision could be helpful for a small number of high-risk cases, it would fail to address the resource constraints that have delayed the clearance of low-risk cases.

The notion of “ultimate control” remains unclear and hence subject to different interpretation among the member states. Similarly, the criteria of establishing a long-lasting link between the foreign investor and the EU company could lead to an increase of precautionary notifications made by EU companies that have a significant foreign shareholder base.

The proposal envisages as well to screen single foreign investment transaction that might imply multiple Member States across the EU, as it might negatively affect security or public order in more than one Member State. This will result in obliging filings in multi-jurisdictional on the same day (Article 5§3). Interesting to highlight that while the proposal would require investors to notify multi-country transactions on the same day, Member States are not required to reciprocate with a uniform review timeline. We take note that this is a best endeavour and require indulgence in that process as it could be burdensome in practice.

We call on the EU Commission, the EU Parliament and on the EU Member States to ensure that the review of the Regulation aims:

- at reducing the notification of non-essential cases at the national level,
- at bringing down the number of unnecessary reviews by the European Commission and other Member States under the cooperation mechanism,
- at limiting as far as possible the reporting requirements for EU companies and foreign investors, and
- at protecting confidential information in the notifications.

Furthermore, given that many of the EU’s like-minded countries (U.S., Japan, etc.) are also increasing the volume of screened transactions, it would be important to achieve a level of consistency between them. We call upon the EU to ensure an international cooperation on that matter.

ESF reserves the right to come back on additional issues at a later stage and remains at disposal for any further information on the above.

Yours sincerely,



Annette Meijer
ESF Chair

List of members supporting the above position

- Amazon
- Amfori
- Apple
- Architects' Council of Europe –ACE
- BDO
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- BSA The Software Alliance – BSA
- Danish Shipping
- Deutsche Post DHL
- Digital Europe
- EK - Confederation of Finnish Industries
- EuroCommerce
- European Banking Federation - EBF
- European Community Shipowners' Associations – ECSA
- European Express Association – EEA
- Fédération de l'Industrie Européenne de la Construction – FIEC
- FratiniVergano European Lawyers
- General Council of the Bar of England & Wales
- Google
- Huawei Europe
- IBM Europe, Middle East & Africa
- Institute of Chartered Accountants in England and Wales (ICAEW)
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- Le Groupe La Poste
- Microsoft Corporation Europe
- Mouvement des entreprises de France – MEDEF
- PostEurop
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- TechUK
- Telenor Group
- TheCityUK
- UPS
- Vodafone
- Zurich Insurance