

6 June 2018

Screening of FDI into the EU – BusinessEurope’s views

KEY MESSAGES



- 1** BusinessEurope supports a calibrated, risk-based approach that respects the balance between achieving legitimate security and public order objectives while maintaining an open and welcoming environment for much needed FDI in the EU.
- 2** Therefore, the scope of the framework for the screening of FDI should be well defined and limited to what is necessary to achieve this objective. The door to protectionism should remain closed.
- 3** A well-functioning cooperation mechanism between the Member States of the EU and the European Commission is essential. In this regard, the confidentiality of commercially sensitive information should be effectively protected and a permanent dialogue with business needs to be established.

WHAT DOES BUSINESSEUROPE AIM FOR?



- *This position paper assesses the European Commission’s proposal for a Regulation “establishing a framework for the screening of foreign direct investments into the European Union”. The assessment takes place under a set of principles considered essential from a European business perspective.*
- *We find that a number of those principles are taken into consideration. For instance, the proposed Regulation recognises the importance of FDIs and provides more legal certainty, putting conditions on how national screening mechanisms should be operating.*
- *However, we also identify elements that should be improved, in order to ensure a harmonised and well-targeted implementation of the Regulation. These involve: definitions, including those of security and public order; timelines; information sharing; questions on the screening of projects and programmes of Union interest.*



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SCREENING OF FDI INTO THE EU – BUSINESSEUROPE’S VIEWS

1. Background

The discussion on setting up a mechanism on the screening of foreign direct investment (FDI) at EU level is not new, as concerns related to certain acquisitions of European firms by companies originating in third markets have also been raised in the past. In the current context, the debate circles very much, but not exclusively, around the significant increase of Chinese investments in the EU¹ in recent years and, more specifically, the number of acquisitions by Chinese companies (private or State-Owned) of European companies in sectors deemed strategic, such as IT².

FDI screening mechanisms exist in many of the EU’s main trading partners, including Australia, Canada, China, India, Japan and the US. Within the EU, 13 Member States³ already have in place FDI screening mechanisms, more or less strict, based on the grounds of defense and security, with some differences on the procedure, the application of thresholds or the timeline set until a final decision is reached.

In February 2017, 3 EU Member States – namely Germany, France and Italy – addressed a clear request to the European Commission to work on a European instrument to *“prevent any damage to the economy through one-sided, strategic direct investment made by foreign buyers in areas sensitive to security or industrial policy, and to ensure reciprocity”*.

A lively debate has sparked with many stakeholders supporting the need to look at the possibility to create such a mechanism at EU level. For instance, in March 2017, the European Peoples’ Party (EPP) at the European Parliament made a proposal for a Union Act on the screening of foreign investment in strategic sectors.

¹ According to a [Merics](#) report, in 2016, Chinese FDI in the EU reached €35 billion, which translates into an increase of 77% in comparison to 2015. The bulk of Chinese FDI concentrated (around 59%) in France, Germany and the UK. In terms of sectors, between 2008 and 2016, industrial machinery and equipment, ICT, utilities, transport and infrastructure increasingly attract investments.

² A prominent case has been the takeover of the German robot manufacturer Kuka by the Chinese private and listed company manufacturing white goods Midea.

³ The 13 EU Member States that have FDI screening mechanisms in place are: Austria, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Spain and the United Kingdom.



As a consequence, in September 2017, the European Commission published a proposal for a Regulation “*establishing a framework for screening of foreign direct investments into the European Union*”.

2. The Commission proposal

The purpose of the proposed Regulation is to set up a common framework for the screening of FDI into the EU, on the grounds of security and public order. Furthermore, the Regulation seeks to establish a closer cooperation among Member States and between Member States and the Commission in this area.

More specifically, the Regulation, as originally presented by the Commission:

- Allows Member States to maintain, amend or adopt FDI screening mechanisms under the condition that these mechanisms are: transparent and non-discriminatory, follow rules set on the triggering and actual process of screening, establish specific timelines within which screening can take place, protect confidential information and offer foreign investors the possibility of judicial redress against screening decisions.
- Describes factors that may be taken into account in the process of screening, including the sectors in which FDI takes place (critical infrastructure, critical technologies) as well as the security of supply of critical inputs, access to sensitive information as well as whether the foreign investor is controlled by a government of a third country.
- Instructs Member States that have screening mechanisms in place to report annually to the Commission of the FDI that took place in their territory as well as on the application of the screening mechanisms. Member States without screening mechanisms in place will also report on an annual basis on the FDI that took place in their territory.
- Gives the possibility to the European Commission to screen FDI itself, in cases where certain projects or programmes of Union interest are likely to affect the security and public order of one or more Member States. An indicative, non-exhaustive list of projects and programmes may be found in Annex I of the proposed Regulation. The list includes European GNSS programmes (Galileo and EGNOS), Copernicus, Horizon 2020, Tran-European Networks for Transport (TEN-T), for Energy (TEN-E) and for Telecommunications.
- Establishes a cooperation mechanism at EU level, in order to improve information gathering and sharing. Member States shall inform the Commission and other Member States of FDI undergoing screening under national mechanisms. Member States may also provide comments to another Member State if they consider that a planned or completed FDI in that Member State is likely to affect their security or public order. The Commission may also issue an Opinion if they consider that a planned or completed FDI is likely to affect security and public



order in one or more Member States. The Member States should give due consideration to the comments or Opinions⁴ they receive but the final decision on the FDI remains in their hands.

3. BusinessEurope's views

In the period before the publication of the Commission's proposal, BusinessEurope discussed and agreed on a number of principles that a possible FDI screening mechanism established at EU level should include and take into account.

Namely, BusinessEurope:

- would like to ensure the openness of the EU market to FDI, as investments are an important source of jobs and growth in the EU;
- supports the clear identification of the problem and further analysis to ensure the development of the right solution;
- believes that a potential mechanism at EU level will have to be proportional, non-discriminatory and in line with the EU's international obligations and the rules of the Single Market;
- in terms of structure, such a mechanism should be transparent, with clearly defined criteria, while its scope should be limited;
- finally, would like to promote a global and coordinated EU strategy on investment, increasing the complementarity between different policies and instruments available in the EU.

The proposal of the Commission will be, therefore, examined in light of these principles. The key question is whether this proposal for a Regulation manages to balance current concerns in the area of security with the need to maintain an open environment for FDI in the EU in an effective and appropriate manner.

In this regard, we also need to take into account that the legislative process with the involvement of the Member States and the European Parliament is currently on-going and the text will likely be amended.

Assessment of the proposed Regulation

a. General appreciation

The lack of a clear identification of the problem and possible solutions (different options examined) through an impact assessment creates a difficulty, as a number of important

⁴ In case a Member State receives an Opinion by the European Commission and decides not to follow it, it is obliged to provide an explanation to the Commission.



questions that stakeholders discuss in the context of the Commission's proposal would have been addressed through this process. For example, these would include: the need for a framework at EU level, the nature of such a framework as well as the role of the Commission and the Member States.

We have to note the significant lack of data on inward FDI into the EU per Member State and per sector, investor ownership structures, the behavior of investors before and after the investment, the support of investors by third governments, as well as on the use of the screening mechanisms currently existing in different Member States. In this regard, we welcome the launch of an in-depth study run by the Commission and look forward to its presentation. The study, which is expected to be finalised and published by the end of 2018, will look at trends in inward FDI, including on sectors and geography. It will also analyse the impact on FDI in those Member States that have screening mechanisms in comparison to those where such instruments do not exist.

This information is important in order to understand how national screening mechanisms work in practice and what is the actual impact on FDI. Looking at the limited available data⁵, screening processes are launched for a small number of FDIs, while an even smaller number of screening decisions is negative (against the FDI) and a certain amount of cases is discontinued.

b. Positive elements

The Commission's proposal, as originally presented, indicates that a number of the principles agreed by BusinessEurope have been taken into consideration:

- It is clearly stated that the EU maintains an open investment environment and welcomes FDI. This point is crucial, as FDI is a major contributor to the creation of jobs and growth in the EU⁶.
- The proposed Regulation provides more legal certainty for existing investment screening mechanisms at national level, while at the same time, it does not oblige

⁵ Example 1 – US: In 2016, CFIUS received a total of 172 notices and investigated 79 cases. One Presidential decision was published. 27 notices were withdrawn, while 15 notices were withdrawn and refiled. There were 5 cases of notices withdrawn and transactions abandoned in light of CFIUS-related national security concerns, while 7 notices were withdrawn for any other reason. (source: https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS_Stats_2014-2016.pdf)

Example 2 – Canada: In fiscal year 2016-2017, a total of 737 investment filings were processed under the Investment Canada Act. 22 applications for net benefit review were approved and 715 notifications were certified. A total of 5 reviews were conducted. In 3 cases the investor was ordered to divest control of the Canadian business, while in 2 cases the investment was permitted to proceed with the imposition of conditions. (source: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k81126.html)

⁶ "... Inward investment is responsible for employing 7.3 million people in the EU." (source: Trade for all – Towards a more responsible trade and investment policy, European Commission, October 2015)



Member States that do not have such a mechanism in place to adopt one. It also ensures that national screening mechanisms (existing and future ones) should satisfy a number of basic parameters (such as non-discrimination, transparency, judicial redress), in order to avoid arbitrary decisions that could also jeopardise the internal market.

- Furthermore, the ultimate decision to allow, condition or block FDI lies with the Member States. This is important to ensure the sovereignty of the Member States. This prerogative of the Member States should not be altered or weakened during the legislative process.
- Overall, there is also an effort to contain the scope of the proposed Regulation within the grounds of security and public order, to ensure compliance with multilateral regimes (such as the WTO rules) and the EU's international obligations in general. It explicitly refers to the OECD Guidelines for Recipient Country Investment Policies Relating to National Security.
- We note that the Commission excludes references to reciprocity as grounds for the proposed Regulation. The lack of reciprocity in terms of access to third markets in the area of trade and investment is a major issue for European companies. However, as the objective of screening mechanisms is to ensure that FDI entails no negative impact in the security and public order of a country, we agree that reciprocity should be achieved through other instruments, namely under multilateral, plurilateral and bilateral agreements.

c. Elements of concern that should be further clarified and improved

A number of issues reflected in the principles agreed by BusinessEurope are not adequately addressed by the proposed Regulation:

- Ensuring a well-targeted proposal

Although the effort to limit the scope of the proposed Regulation on the grounds of security and public order is recognised, definitions need to be further clarified to avoid different interpretations between Member States, therefore ensuring a harmonious implementation within the EU.

Moreover, it is important to avoid that a broader interpretation of the scope of the Regulation results in opening the door to arbitrariness and protectionism. The proposed framework for the screening of FDI into the EU should be fully in line with the EU law. This not only includes the rules of the Single Market, such as the free movement of capital, but also the Judgements of the Court of Justice of the EU, in which the scope of security and public order have been interpreted⁷.

⁷ For instance, in case C-503/99, Commission of the European Communities vs Kingdom of Belgium, § 47, the CJEU judged that: *“However, the Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State*



In addition, according to the OECD Guidelines for Recipient Country Investment Policies Relating to National Security, each country has the right to determine what is necessary to protect its national security. The Guidelines define that this determination should be made through rigorous risk assessment and that the relationship between the investment restrictions and the national security risk identified should be clear⁸.

In the proposed Regulation, the Commission lists an illustrative number of factors that Member States may take into account when they conduct screening processes on the grounds of security and public order. These factors, which include among others the effect of particular FDIs on critical infrastructure, transport, communications, data storage, space and sensitive facilities. Unless strictly defined, they may be misused as economic criteria and create discrepancies between different policies at EU and/or national level. For instance:

- In the area of energy, where EU law already requires energy companies controlled by third-country entities to go through a certification process in order to be able to operate in the EU.
- In the area of mergers and acquisitions, where the Regulation on the control of concentrations between undertakings (the EU Merger Regulation) already looks at issues such as fiduciary responsibility. Furthermore, it clarifies the issue of competence between EU Member States and the Commission in the area of mergers.

Particular attention should be paid to definitions such as ‘critical technology’ and ‘critical input’, in order to limit screenings of FDI to what is necessary to protect security and public order. This is important in order to avoid unintended consequences to the EU’s capability to innovate and grow, for instance by hampering companies’ research and development activities and by disrupting European and Global Value Chains.

Additional comments

a. Cooperation mechanism

BusinessEurope welcomes the efforts to increase cooperation among Member States and the Commission on FDI and screening of FDI into the EU. The cooperation mechanism is a central element of the proposed Regulation. It will operate on the basis of annual reports as well as on *ad hoc* basis, when Member States or the Commission request information to other Member States in cases where they consider that an FDI may pose a threat to their security of public order, or to this of the EU.

without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficient serious threat to a fundamental interest of society”

⁸ OECD, OECD Guidelines for Recipient Country Investment Policies Relating to National Security (source: <https://www.oecd.org/investment/investment-policy/43384486.pdf>).



Nevertheless, the Regulation raises a number of questions on the practical implementation of the cooperation mechanism, which will be, hopefully, addressed during the legislative process:

- Differences among Member States

There is a differentiation between Member States that have a screening mechanism in place and those that do not have. Gaps both in the availability as well as in the quality of information should be expected. Setting up contact points may help address these differences, however, the Commission should provide further guidance and technical guidance to all Member States.

- Timelines

Different locations are competing to attract foreign investments and the EU must remain an attractive destination. Although we recognise that the timelines proposed under the draft Regulation are relatively short, they should be further streamlined with those under national screening mechanisms. Furthermore, it is important to ensure that the possibility to prolong them is not abused in order to avoid additional delays in the screening process that will negatively affect investors.

- Justification of requests for information

It is not clearly stated in the proposed Regulation that the Member States interested in requesting information under the cooperation mechanism will have to duly justify this request. This is an important point to ensure that the Regulation is not abused.

- Protecting sensitive information

It is understood that it is not in the Commission's intention to disrupt the market or jeopardise the competitiveness of EU business. However, assurances on the confidentiality of information offered under the proposed Regulation should be further clarified and reinforced. Ensuring that commercially sensitive information does not fall into the hands of competitors is essential. For instance, disclosure of information in sectors such as defense, may put national security at risk. These risks must be kept to a minimum and the Regulation should ensure that governments cannot be forced to disclose sensitive information about companies to other Member States or to the European Commission.

- Political pressure

The proposed Regulation does not oblige a Member State that is a recipient of comments by other Member States to follow them, but to give due consideration to them. This may on occasions lead to political pressure against Member States – especially those that do not maintain a screening mechanism – jeopardising their right to take a sovereign decision on a FDI.

In a similar manner, according to the Commission's proposal, a Member State may not follow an Opinion provided by the Commission, although in this case an explanation is required. Nevertheless, it is not clear what the consequences will be – if any – in cases where the Commission does not consider the explanation provided by the Member State



adequate. The implications of the Member States' observations and the Opinion of the Commission should be therefore clarified in the Regulation.

- Predictability

Finally, business need more clarity on the amount and type of information expected of them under the proposed Regulation. Creating additional burden and costs should be avoided, for instance by not duplicating processes already established under other policies and instruments.

b. EU financed projects and programmes

The indicative and non-exhaustive list of projects and programmes of interest to the EU, as provided in the Annex that accompanies the proposal for a Regulation, should be carefully designed to make sure that the effects on the European economy as a whole are duly taken into account. Furthermore, the types of projects that could potentially be affected should be clarified. Additionally, there is a possibility that this list will also be enlarged during the legislative process, to include more projects and programmes.

It is essential that terms such as “substantial amount or significant share of EU funding” and “which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs” are further clarified.

We understand that thresholds may not be introduced in the context of the proposed Regulation, as the legal basis is security and public order. Nevertheless, more clarity is required with regards to the treatment of smaller projects, for instance in the framework of Horizon 2020, especially when SMEs are involved.

More generally, the projects and programmes listed by the Commission in the Annex of the draft Regulation entail that financing usually takes place over a number of years, in the form of different settlements. More clarity is needed with regards to how on-going projects may be impacted in case there is a concern raised under the scope of the draft Regulation.

c. Defining the timing of screening

Under the proposed Regulation, screening can take place on planned or completed FDI. It is a common practice that screening takes place on planned FDI – ex-ante, instead of ex-post. In this regard, the question is on the treatment of completed FDI. We recognise that there should be the possibility to monitor a FDI, when there is reason to believe that the particular FDI was completed on the basis of erroneous information or maladministration, following specific criteria. This differentiation should be further clarified.

d. Dialogue with trading partners

Although not part of the proposed Regulation, an expert group comprised by Member States' representatives and the Commission is set up. The objective of the expert group will be to analyse current trends in FDI in the EU as well as practices in investment screening policy. In this framework, the expert group will also seek to establish contacts



with trading partners of the EU and exchange views and best practices on screening of FDI. BusinessEurope welcomes this initiative.

e. Dialogue with business

The proposed Regulation is silent on the need to have an open dialogue with business, on issues pertaining to the implementation of the Regulation. The voice of business is valuable in this context, as they will be directly affected by the Regulation. We, therefore, invite the legislators to consider ways to engage further with business.