

# EU framework for FDI screening

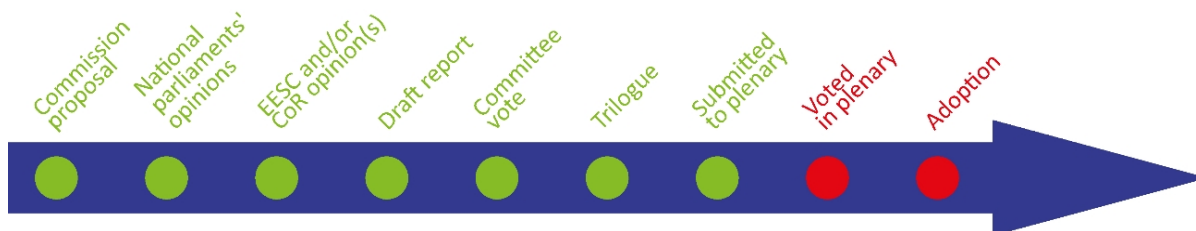
## OVERVIEW

On 13 September 2017, the European Commission adopted a proposal for a regulation establishing a framework for screening foreign direct investment (FDI) inflows into the EU on grounds of security or public order. The proposal is a response to a rapidly evolving and increasingly complex investment landscape. It aims to strike a balance between maintaining the EU's general openness to FDI inflows and ensuring that the EU's essential interests are not undermined. Recent FDI trends and policies of emerging FDI providers have cast doubt on the effectiveness of the current decentralised and fragmented formal system of FDI screening in place, and in use in only some EU Member States, to adequately address the potential (cross-border) impact of FDI inflows on security or public order without EU-coordinated cooperation among all EU Member States.

The proposal's objective is neither to harmonise the formal FDI screening mechanisms currently used by half of the Member States, nor to replace them with a single EU mechanism. Instead, it aims to enhance cooperation and information-sharing on FDI screening between the Commission and Member States, and to increase legal certainty and transparency.

The European Parliament's Committee on International Trade (INTA) and the Council adopted their positions in May and June 2018 respectively, and interinstitutional negotiations concluded in November 2018 with a provisional text. That was first endorsed by the Member States' Permanent Representatives (Coreper) and then by INTA in December 2018, and the text will be submitted for a vote in the European Parliament's plenary session of February 2019.

Regulation establishing a framework for screening of FDI into the EU		
<i>Committee responsible:</i>	International Trade (INTA)	COM(2017) 487 13.9.2017
<i>Rapporteur:</i>	Franck Proust (EPP, France)	2017/0224(COD)
<i>Shadow rapporteurs:</i>	Emmanuel Maurel (S&D, France) Joachim Starbatty (ECR, Germany) Dita Charanzová (ALDE, Czech Republic) Stelios Kouloglou (GUE/NGL, Greece) Yannick Jadot (Greens/EFA, France) Tiziana Beghin (EFDD, Italy)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	First-reading vote in plenary	



## Introduction

On 13 September 2017, the European Commission adopted a proposal for a regulation establishing a framework for screening of FDI into the EU on grounds of security or public order to protect the EU's essential interests.<sup>1</sup> The legislative proposal is part of a [package](#) of trade and investment proposals for an ambitious EU [trade agenda](#) to harness globalisation. They are intended to implement the 2015 Commission communication [Trade for all: towards a more responsible trade and investment policy](#), and build on its May 2017 [reflection paper](#) on harnessing globalisation.

Amid growing worldwide economic protectionism, the reflection paper reaffirms the EU's commitment to continued openness to FDI. The EU has one of the world's most open FDI regimes and has been a main source and destination of FDI.<sup>2</sup> Inward FDI is a significant source of innovation, growth and jobs in the EU. The reflection paper however recognises concerns about certain foreign investors, 'notably state-owned enterprises, taking over European companies with key technologies for strategic reasons', concerns which 'need careful analysis and appropriate action'.

## Context

The EU is faced with the (geo)political and economic implications of tectonic shifts in global power distribution which have resulted in the growing relevance of new FDI providers,<sup>3</sup> such as China,<sup>4</sup> and their rising global political and economic leverage. Some of these new FDI providers pursue state-led economic development models with restricted market access for foreign investors, and state-funded outward FDI policies for strategic industrial goals<sup>5</sup> which are fundamentally at odds with the EU's concepts of reciprocal openness to FDI, and internal market rules on fair and market-based competition.<sup>6</sup> Although EU competition law addresses unfair competition, and asymmetric market access between the EU and third countries may be tackled through investment provisions in international agreements,<sup>7</sup> security or public order issues fall largely [outside the scope](#) of these tools.<sup>8</sup>

The 2016 [surge](#) in takeovers of EU firms using cutting-edge or dual use technologies, and of strategic infrastructure assets, by non-EU investors – at times opaque state-owned enterprises (SOEs), conglomerates or private firms with close government links – [raised concerns](#) about the potential security or public order impact of these deals.<sup>9</sup> Within the EU single market not just one Member State, but several or all Member States may be [affected](#). The cross-border effects of acquisitions by non-EU investors in certain sectors may cast doubt on the effectiveness of the EU's decentralised and fragmented system of monitoring FDI inflows to respond adequately to new challenges. As a result, the Commission proposes a regulation that aims to strike a balance between maintaining the EU's general openness to FDI and ensuring that the EU's essential interests are not undermined by precisely this openness.

## Decentralised and fragmented FDI screening at Member State level

### Absence, and large diversity in scope and design, of FDI screening mechanisms

The EU has **no single centralised FDI screening mechanism** on grounds of security or public order. FDI screening is the exclusive responsibility of EU Member States under EU law, and national security exceptions under international law.<sup>10</sup> To date, **no formal coordination** among Member States and between Member States and the Commission exists in this field. FDI screening is conducted independently from merger control reviews under EU competition law at EU and Member State levels. Member States' screening mechanisms vary significantly in **scope** (review of intra- or extra-EU FDI; differing screening thresholds, breadth of sectors covered beyond defence) and in **design** (pre-authorisation vs. ex-post screening of FDI).<sup>11</sup> Since the European Commission issued its legislative proposal stating that 12 Member States have legislation on FDI screening in place, which allows them to review FDI on grounds of national security or public order, in line with international and EU law, Hungary adopted legislation which creates a new FDI screening mechanism.<sup>12</sup> As for the

Netherlands, originally not mentioned by the Commission, legislation on FDI screening concerning the energy sector has been in place since 2012.<sup>13</sup>

A 2018 study into Member States' national rules for the protection of infrastructure relevant for security of supply in the energy sector commissioned by the European Commission provides an insight into the diversity of sector-specific rules (Figure 1).

Figure 1 – Formal FDI screening mechanisms in the EU as applicable to the energy sector

Country	Screening law	Ownership restrictions			Golden shares	Other practices	
		Prohibition of foreign investment	Ownership limits for private investors	State ownership control by law		State ownership control de facto	Other
Austria	✓			✓		✓	
Belgium					✓	✓	
Bulgaria						✓	
Croatia						✓	
Cyprus		✓		✓			
Czech Republic				✓			✓
Denmark	*			✓			
Estonia						✓	
Finland	✓			✓		✓	✓
France	✓			✓	✓	✓	✓
Germany	✓					✓	
Greece		✓				✓	
Hungary	✓					✓	
Ireland			✓				
Italy	✓		✓				✓
Latvia	✓			✓		✓	
Lithuania	✓			✓			
Luxembourg						✓	
Malta						✓	
Netherlands	✓			✓			
Poland	✓			✓	✓		
Portugal	✓		✓				
Romania						✓	
Slovakia				✓			
Slovenia				✓	✓	✓	
Spain	✓		✓	✓			✓
Sweden				✓		✓	
UK	✓						✓

\* The investment screening procedure of Denmark applies only to the Defence sector

Source: European Commission, [Review of national rules for the protection of infrastructure relevant for security of supply](#), final report, February 2018.

Member States' legal bases applicable to the energy sector referenced in the report above do not provide a complete picture of the 14 current screening mechanisms in place. A recent [legal analysis](#) by Brussels-based Grayston & Co. law firm captures a range of the legal bases of the 14 Member States with an FDI screening mechanism (footnote 14), but is incomplete as regards the Netherlands among others.

### Recent action in some Member States on FDI screening mechanisms

In the **United Kingdom** (UK), a 2017 [green paper](#) sets out the broad lines of a [review](#) of the FDI screening regime with short-term objectives. The [review](#) has sought, inter alia, to make targeted

legislative changes to the 2002 Enterprise Act, to extend the scope of the existing reviews to smaller foreign acquisitions in the dual and military use sector and in parts of the advanced technology sector. In June 2018, the [expansion](#) of the UK [merger control regime](#) came into force. A 2018 [white paper](#) proposes long-term reforms.

In July and October 2017, [Germany](#) and [Italy](#) respectively completed a revision of their FDI screening mechanisms. In December 2018, **Germany** again [tightened](#) its rules by [lowering](#) (from 25 % to 10 %) the threshold of scrutiny for foreign acquisitions in certain sectors, and by adding media as a new sector given the high [relevance](#) of independent media for a well-functioning democracy. In **France**, the current FDI [screening rules](#) are in the [process](#) of being ratcheted up under proposed new legislation referred to as the '[Loi Pacte](#)' with a view among other things to bringing cutting-edge technologies such as artificial intelligence and robotics under scrutiny. The new rules are scheduled to be adopted in 2019.

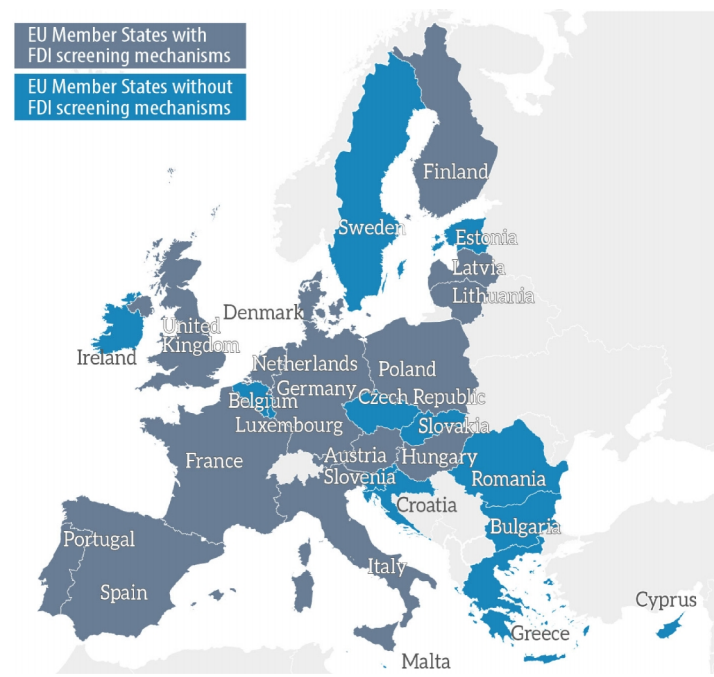
As for **Hungary**, in October 2018, its Parliament endorsed a [new law](#) which [requires](#) ministerial approval for FDI in specific sectors. It entered into force on 1 January 2019, raising the number of screening EU Member States to 14 (see Figure 2).

In **the Netherlands**, the Dutch government in 2017 considered a [telecommunications sector](#) draft bill to block undesirable takeovers. It would [vest](#) the respective minister with the right to order a shareholder to reduce his stake in a telecom firm to below 30% or refraining from making use of his voting rights. After [public consultation](#) and inter-ministerial discussions the bill is expected to be submitted to the Second Chamber of Dutch Parliament in the first quarter of 2019. More legislative initiatives may be taken in the future on FDI screening in other sectors. Paragraph 4.2 of the new [Dutch Defence Industry Strategy](#) for instance sets out how the Dutch government deals with FDI in the sensitive sector of the defence industry, and announces an analysis which may result in additional legislative measures.

## International approaches to FDI screening

The FDI screening mechanisms set up by countries such as [Australia](#), [Canada](#), [China](#), [New Zealand](#), [Japan](#), [South Korea](#), [Russia](#), and the [United States](#) vary significantly in scope or design.<sup>14</sup> In recent years most of these countries have tightened their FDI review schemes, rather than liberalising them. In 2017, Canada relaxed its rules by [increasing](#) its financial thresholds for 'net benefit' reviews for private investors from certain countries. The implementation of Canada's FDI screening mechanism has [shifted](#) between the [controversial](#) passing of a deal in 2016 and [blocking](#) another in 2018. In contrast, [Russia](#) shored up its limitations on FDI from foreign offshore firms and control on FDI in Russian strategic companies, and [Japan](#) introduced rules on sanctions and on [transfers](#) of non-listed shares in Japanese firms between foreign investors.

Figure 2 – Formal FDI screening mechanisms in the EU (as of February 2019)



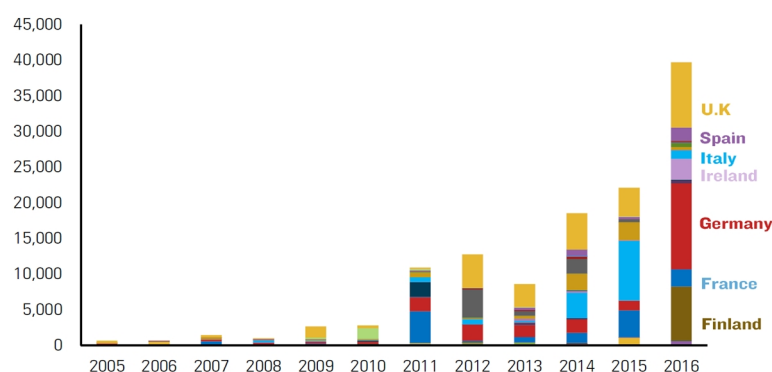
Source: EPRS update of information provided by the [European Commission](#) in 2017.

In August 2018, the [Foreign Investment Risk Review Modernization Act](#) (FIRRMA) was [signed into law](#) in the United States. It, among other things, considerably expands the scope of 'covered transactions' and the factors the US Committee on Foreign Investment in the United States (CFIUS) may consider when assessing security risks. The scope now includes purchases or leases of real estate in close proximity to sensitive US government facilities and non-controlling acquisitions in US businesses whose activities involve critical technologies, critical infrastructure or sensitive personal data of US citizens. The law extends the timelines for CFIUS investigations, introduces declaration procedures for expedited notifications, and makes declarations mandatory in certain cases such as critical technology. This is a fundamental departure from the voluntary process previously in place. The text states that CFIUS 'should not consider issues of national interest absent a national security nexus'. The specificities of FIRRMA's implementation will be determined by implementing regulations yet to be drafted.

## Is there a correlation between FDI screening mechanisms and FDI inflows?

Taking FDI from China as an example, Figure 3 shows that there appears to be no correlation between the little FDI inflow from China into non-screening countries such as the Czech Republic, Estonia and Sweden, and the large Chinese FDI inflow into screening countries like Finland, [Germany](#), France, Italy, Spain and the UK. Among the [multitude](#) of factors acting as (dis)incentives for foreign investors, the presence or absence of an FDI screening mechanism does not seem to be a decisive factor, notably if it operates under predictable conditions and is not extensively time-consuming.<sup>15</sup>

Figure 3 – Chinese FDI transactions in EU-28 in US\$ million



Source: [Rhodium Group](#), 2017.

## Parliament's starting position

Parliament's [resolution](#) of 5 July 2017 on building an ambitious EU industrial strategy as a strategic priority for growth, employment and innovation called on the Commission and Member States 'to screen third-country FDI in the EU in strategic industries, infrastructure and key future technologies, or other assets that are important in the interests of security and protection of access to them, while bearing in mind that Europe depends to a large extent on FDI'. It also called 'on the Commission to pay more attention to the role of foreign-based state-owned enterprises that are supported and subsidised by their governments in ways that EU single market rules prohibit for EU entities'.

Discussion of the issue in Parliament was initiated by ten EPP group MEPs, who tabled a [proposal](#) for a Union act on the screening of foreign investment in strategic sectors, dated 24 March 2017. They presented their proposal in the INTA meeting of 19 June 2017. Following publication of the present Commission proposal in September 2017, the INTA committee moved onto discussing that.

## Council/European Council starting position

In [June](#) and again in [October](#) 2017, the European Council called 'on the Commission and the Council to deepen and take forward the debate on how to enhance reciprocity in the fields of public procurement and investment'. In June 2017, it welcomed the Commission initiative 'to analyse investments from third parties in strategic sectors, while fully respecting Member States' competences', announcing a return to the issue. In July 2018, the European Council [called for](#) 'the



legislative proposal on the screening of foreign direct investments to be adopted as soon as possible'.

## Member State positions

In February 2017, the **French, German and Italian governments** submitted a [letter](#) to the European Commission setting out their concerns about the 'lack of reciprocity and about a possible sell-out of European expertise, which we are currently unable to combat with effective instruments', and [suggesting](#) possibilities for reacting at EU level. In July 2017, they provided an [update](#) of their position on a common approach to investment control.

In October 2017, the **UK government** [voiced](#) concern about the Commission proposal, arguing that it could lengthen the UK's screening procedure, add a burden for investors and thus harm the UK's reputation as an open and liberal FDI destination. It stressed that compulsory sharing of sensitive information would not be acceptable to the UK. It expressed its reluctance to allow the Commission to encroach on Member States' sole responsibility to maintain national security against the backdrop of the UK's plan to enhance its FDI screening via a security-focused, targeted and proportionate approach.

## Preparation of the proposal

The [proposal](#) was published exceptionally without an accompanying **impact assessment** as is [usually required](#), which the European Commission justified by 'the rapidly changing economic reality [and] growing concerns of citizens and Member States'. The Commission organised a public consultation of stakeholders (see below) and 'conducted consultations with Member States that have been actively seeking an EU intervention in this policy area and also some other Member States, irrespective [of] whether they maintain or not a national investment screening mechanism'. It announced the publication of an in-depth analysis of FDI inflows into the EU, focusing on strategic sectors, by the end of 2018. This analysis has, however, not been published as of February 2019.

## Changes the proposal would bring

The Commission proposed the creation of an **enabling legal framework** which embraces the diversity of Member States' approaches to FDI screening. The proposal neither aimed to establish EU-level screening nor to harmonise existing screening mechanisms. It thus formed a careful compromise between Member States advocating a shift of FDI screening power to the Commission and those – either with or without a formal screening mechanism in place – insisting on retaining national control. It confirmed that Member States may maintain, amend or adopt FDI screening mechanisms on grounds of security or public order under the conditions spelled out in the proposed regulation, and that no Member State would be obliged to create an FDI screening mechanism. It also confirmed that Member States retain their final decision-making power on FDI.

The proposal set out **minimum requirements** for Member States' FDI screening schemes: i.e. the possibility of judicial redress for decisions adopted under the FDI screening mechanism, non-discrimination between different third countries, deadlines, and transparency. It contained a **non-exhaustive list of factors** that may be considered in the screening process. These factors, next to critical infrastructure, critical technologies, etc., include 'whether the foreign investor is controlled by the government of a third country, including through significant funding'.

The proposal envisaged the creation of a formal **cooperation mechanism** between the Commission and Member States' future contact points, to enhance the coordination of Member States' FDI screening decisions and to increase the awareness of Member States and the Commission about planned or completed FDI that may affect security or public order. A **coordination group** comprising Member States' representatives and the Commission would be set up, and would meet regularly to discuss issues of FDI inflows into the EU.

**New transparency and information requirements** for all Member States would be set, to address the current low level of information exchange. They include an obligation for screening Member States to notify their mechanisms and future amendments within certain timeframes and to submit an annual report on their application. Non-screening Member States would need to submit an annual report on FDI inflows.

The Commission would obtain a **new competence** to screen FDI and issue a non-binding opinion if: i) FDI in a Member State may affect the security or public order of projects or programmes 'of Union interest' which involve a substantial amount or a significant share of EU funding, or which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs. The respective Member State would be required to 'take utmost account of' the Commission's advisory opinion and provide an explanation to the Commission in case its opinion is not followed; or, ii) FDI in a Member State may affect the security or public order of other Member States; the latter and the Commission may request minimum information and submit their respective comments, and the Commission may issue an advisory opinion. The FDI receiving Member State would be obliged to 'give due consideration' to the Commission's opinion and Member States' comments.

## Advisory committees

The **European Economic and Social Committee (EESC)** appointed rapporteur Christian Bäumler (Workers-Group II, Germany) and co-rapporteur Gintaras Morkis (Employers-Group I, Latvia) to draft an opinion on the screening of foreign direct investments in the EU. A public hearing took place on 27 February 2018. The EESC adopted its [opinion](#) in plenary on 19 April 2018. The opinion advocates the introduction of a mechanism at EU level that overcomes the current 'patchy and uncoordinated' approach to FDI screening, 'removes disparities between Member States, and safeguards national and European interests'. It calls for an extension of the envisaged power of the Commission to screen FDI. In particular, it considers that such screening should apply not only to investments which might affect projects or programmes of Union interest, but also to those having a cross-border impact on the whole EU or parts of it. Furthermore, it recommends involving social partners and civil society in an appropriate way, and suggests extending FDI screening to 'sensitive areas of infrastructure and facilities that maintain societal functions', including 'energy and water distribution, transport, digital infrastructure, financial services and financial markets, as well as the health sector'. Finally, the opinion supports 'broadening FDI screening to 'key technologies, where an investor is controlled by, or has close ties to, a third country's government'.

For the **Committee of the Regions (CoR)**, the Commission for Economic Policy (ECON, rapporteur Micaela Fanelli, PES, Italy) drafted an [opinion](#) on the European Commission's trade package, which was adopted in the CoR plenary session on 23 March 2018. The opinion voices concern about the potential extension of the scope of FDI screening beyond national security and public order grounds (e.g. to subsidised FDI), the time-frame of future FDI screening procedures, the lack of clarity about the extent of the powers of intervention of the Commission as well as the impact of a Member State's non-compliance with the Commission's opinion.

## National parliaments

As the proposal is based on Article 207(2) TFEU, which concerns the common commercial policy, an area of exclusive EU competence as defined in Article 3(1)(e) TFEU, it is not subject to a [subsidiarity check](#) by national parliaments. Proposals in the area of exclusive EU competence are nevertheless transmitted to national parliaments as part of the [informal political dialogue](#) which allows for an exchange of views on proposals between national parliaments, the European Parliament and the Commission.

The position transmitted by the **French Senate** [stresses](#) the need for an evolving definition of the EU's strategic interests, the list of factors that may be considered in the screening process to be non-exhaustive, the final foreign investor to be identified for the sake of transparency and the

coordination group to be permanent and tasked with working towards the convergence of national FDI screening mechanisms.

The **Italian Senate** [calls for](#) an enhanced Commission competence and for its advisory opinions to have more strength and validity. It advocates that a Commission opinion may be requested by an EU Member State and, since the notion of control is deemed too vague, that measures taken should be scaled in line with different forms of control.

The **German Bundesrat** has [voiced](#) concern about the scope of the Commission's right to screen FDI that may have an impact on projects or programmes of Union interest. As these are broadly defined and the list provided is non-exhaustive, this would allow several forms of FDI to fall under the procedure where the Commission has stronger rights. It argues that the notions of security or public order are vague and do not provide legal certainty as regards the Commission's power to intervene. It fears that Germany may no longer be able to take autonomous decisions. The Bundesrat also warns that formal and enhanced cooperation of Member States to monitor FDI may be perceived as protectionism. It stresses that the requirements of the proposal must not create a culture of control and a bureaucratic burden undermining the EU's competitiveness.

## Stakeholders' views<sup>16</sup>

At the conclusion of the Commission's [public consultation](#) of stakeholders, organised from September to December 2017, it had received three positions. The **Federation of German Industries** (BDI), which had [expressed](#) its opposition to the extension of the scope of the German FDI screening scheme in mid-2017, [emphasises](#) that clear definitions are needed to delineate the scope of the future regulation in various areas. The **Austrian Chamber of Commerce** (WKÖ), inter alia, [stresses](#) the need to take the principle of reciprocity into account, and the **Federation of European Private Port Operators and Terminals** (FEPORT) [advocates](#) eliminating the inconsistencies of the patchwork of national regulatory frameworks, thus enhancing certainty.

After the public consultation, **BusinessEurope** [highlighted](#) the need for the definitions contained in the proposal to be further clarified, for the scope of the screening mechanism to be maintained under the legal basis of security and public order, and for additional bureaucracy and costs for business to be avoided. It also stressed the importance of protecting companies' commercially sensitive information and of ensuring that the cooperation mechanism is not misused by competitors.

**AEGIS Europe** has [taken](#) the view that the future FDI screening mechanism should take into account an 'evaluation of the supply of critical inputs, a focus on investments from foreign investors controlled or subsidised by foreign governments, and the systematic assessment by the Commission of the market compatibility of FDI operations with EU state aid rules and security'.

**Orgalime**, the association representing Europe's technology industries, [questions](#) the need for a second layer of investment screening at European level. It claims that the criteria to be employed by the Commission for future FDI screening are unclear and that the Commission underestimates the negative long-term effects of the envisaged regulation.

**IndustriAll European Trade Union**, by contrast, has [welcomed](#) the Commission proposal as a step towards a more coordinated and harmonised approach to FDI screening, to increase transparency and predictability. It suggests that the following factors be considered in the screening process: reciprocity in market access, respect of core labour and international environmental standards, clearer language on critical inputs, critical sectors or critical infrastructures, and a strong emphasis on state-backed or subsidised acquisitions. It voices concern about the lack of decision-making powers at EU level and the absence of a resolution mechanism for conflicts between Member States, and suggests allowing social partners to trigger the activation of the screening mechanism.



## Academic views

**Bruegel** analysts André Sapir and Alicia García-Herrero held [opposing views](#) on EU powers to vet foreign takeovers prior to the proposal's publication. Sapir identified three reasons for an EU FDI screening mechanism and said its scope (clear definition of strategic sectors) and the heterogeneity of Member States' preferences were key issues. He argued that a vital question would be whether 'the benefits of a single EU rule (smoother functioning of the single market and greater leverage vis-à-vis foreign countries) outweigh the costs associated with different national preferences'. García-Herrero took the view that 'EU competition policy could become a convenient substitute for a European-level investment protection policy'.

Theodore H. Moran of the **Peterson Institute for International Economics** (PIIE) [supported](#) the creation of an EU body corresponding to CFIUS, with a narrow focus on national security.

The UK-based **Global Counsel** [praised](#) the Commission for remaining within the conventional boundaries of the rules of the World Trade Organization (WTO) and the Organisation for Economic Co-operation and Development (OECD) rules for FDI screening, and for not pretending that the proposal is targeted at securing the EU's technological edge, reciprocity and a level-playing field for EU firms in third markets, as this would exceed the legal basis available.

**European Council on Foreign Relations** (ECFR) analysts François Godement and Abigaël Vasselier [advocated](#) an EU-wide system of FDI screening but argued that the EU 'is not well prepared to define [FDI] screening, not to mention implement it, given the lack of human resources at the EU level, the dependence on external intelligence sources, and the sheer difficulty of identifying key technologies that relate to national security'.

## Legislative process

A first exchange of views took place on the proposal with rapporteur Franck Proust (EPP, France) during the INTA meeting of 22 November 2017. A number of technical briefings were organised to provide information, as well as a public hearing during the INTA meeting of 23 January 2018. In its meeting of 22 March 2018, INTA discussed the rapporteur's working document and draft report. Amendments were considered in the INTA meeting of 24 April 2018. After preparatory meetings, INTA adopted its [report](#), on 28 May 2018 by 30 votes to 7 with no abstentions. INTA simultaneously [adopted](#) the decision to enter into interinstitutional (trilogue) negotiations by 30 votes to 6 with 1 abstention. As there were no requests for a vote in Parliament pursuant to Article 69c of Parliament's Rules of Procedure, INTA was authorised to start negotiations on the basis of its report.

Parliament's position clarified the scope of the proposed **definitions** and added a new definition of 'foreign government-controlled direct investment'. It complemented the non-exhaustive list of **Union projects or programmes** in the annex.

It also clarified the **factors** which would have to be taken into account in the screening process, adding, for instance, media and election infrastructure, and introduced factors which may be considered, such as the degree of reciprocity of market access and a level playing field for EU companies in the foreign investor's country.

In addition, the amendments proposed on Parliament's side sought to broaden **information exchange** and **dialogue**, in order to raise awareness. They would also strengthen the sharing among Member States of the Commission's opinion and Member States' comments on a case of FDI due to take place in one Member State that might affect the national security or public order of another, or in relation to a Union project or programme, while highlighting the need to ensure the **confidentiality of sensitive information**. **Peer pressure** on a Member State in which such FDI is to take place would be increased, without affecting its sovereign right to take the final decision on that case of FDI. Such pressure would reach the highest level in the event that one third of Member States raised concerns about a specific FDI case.

Parliament suggested that **stakeholders** such as trade unions be allowed to request that Member State authorities consider activating their FDI screening mechanism, and to provide relevant information and raise substantial and duly justified concerns to the Commission.

It introduced an **Investment Screening Coordination Group** as a second institutional coordination body next to the envisaged FDI screening contact points.

As regards the **reporting requirements**, it would require all Member States to submit an annual FDI report to the Commission. Those Member States with FDI screening mechanisms would be obliged to provide additional information on the application of these mechanisms, based on which the Commission would draw up and publish an annual report outlining the investment situation in the EU, including the implementation of the future FDI screening regulation.

On 13 June 2018, the EU Member States' Permanent Representatives (Coreper) [agreed](#) on the Council's position on the proposed regulation on screening of FDI in the EU and asked the Presidency to start negotiations with Parliament as soon as possible. The trilogue phase started on 10 July 2018 and ended on 20 November 2018 with an [agreement](#) on a [provisional text](#).

The provisional text stresses that the **scope** of the regulation excludes inbound portfolio investment as well as outward FDI and market access to third countries which are dealt with under other trade and investment policy instruments. As a consequence, it includes neither reciprocity criteria nor political concepts such as 'strategic autonomy'. Language has been added which underlines that FDI screening encompasses both ex-ante and ex-post screening.

The text eliminates all references to the right of the Commission to **screen** FDI set out in the Commission proposal (Article 3(2) and Article 9 'Framework for Commission screening'), and emphasises that the final decision in relation to any case of FDI **remains the sole responsibility of the Member State** in which the investment is planned or completed.

The essential elements of the procedural framework of the **screening mechanisms** of Member States do not require Member States without screening mechanisms to create one. Existing or new screening mechanisms however must meet a number of minimum requirements, such as the principle of non-discrimination and transparency, but by no means does this amount to full-fledged harmonisation of these mechanisms. Existing mechanisms or amendments to them must be notified to the Commission, which has to keep up to date a public list of screening Member States. Such mechanisms must allow Member States to take into account the comments of other Member States, and the non-binding opinion of the Commission.

The **list of factors** remains non-exhaustive. The significant number of elements the EP has added are grouped under more generic labels, covering water, health, media, food security, and personal data. The text furthermore includes defence, aerospace, dual use items as well as land and real estate crucial for the use of critical infrastructure and others. Building on EP amendments, these factors, among others, also comprise foreign investors directly or indirectly controlled by the government, including 'state bodies or armed forces' of a third country, including through ownership structure or significant funding.

There is a duty for Member States which start screening a case of FDI to notify both the Commission and other Member States, and to provide information regarding the target entity and its activities, as well as the investor's ownership structure. The agreed legislative text divides the **cooperation mechanism** into two tracks: a procedure for FDI undergoing screening and another for FDI not undergoing screening. Each track spells out the conditions and sets the timeframe for Member States to give comments and for the Commission to provide a non-binding opinion within the meaning of [Article 288 TFEU](#) on a planned or completed FDI, to which the Member State in which the investment is planned or has been completed must 'give due consideration' in accordance with its duty of sincere cooperation under [Article 4\(3\) TEU](#). If at least one third of Member States considers that an FDI case which does not undergo screening is likely to affect their security or public order, the Commission is obliged to issue a non-binding opinion. In respect of an FDI case which is not

subject to screening in a Member State, Member States may make comments, and the Commission may provide a non-binding opinion up to 15 months after the completion of the investment, if the case may affect the security or public order in their own territory or more than one Member State. Member States which consider that an FDI case that is not undergoing screening is likely to affect their security or public order may request the Commission to issue an opinion. As for FDI likely to affect **projects or programmes of Union interest**, the Member State in which the FDI is planned or has been completed must 'take utmost account' of the Commission's opinion, and provide an explanation to the Commission in case the latter's opinion is not followed.

To ensure the **confidentiality of information exchanges** through contact points, the Commission is to provide a secure and encrypted system.

A new article on the **expert group**, set up by [Commission Decision](#) of 29 November 2017, states that the expert group provides advice and expertise to the Commission and that its discussions are kept confidential.

**Stakeholders** such as trade unions will not be able to request Member State authorities to consider activating their FDI screening mechanism, contrary to what had been proposed by the EP. They are, however, mentioned in the non-binding part of the text (recital 14) as providers of information which Member States and the Commission might consider relevant.

On 5 December 2018, Coreper endorsed the provisional text. INTA [endorsed](#) the text in its meeting on 10 December 2018 by 30 votes to 4, with 5 abstentions. The EP is due to vote on the agreed text in plenary in February 2019. Thereafter the Council would adopt the text at first reading.

The proposed regulation will **enter into force** 18 months after its adoption.

## EP SUPPORTING ANALYSIS

Grieger G., [Foreign Direct Investment Screening A debate in light of China-EU FDI flows](#), EPRS, European Parliament, May 2017.

## OTHER SOURCES

[Screening of foreign direct investment into the European Union](#), European Parliament, Legislative Observatory (OEIL).

Pohl J., Wehrle F. and Rosselot N., [Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends](#), preliminary research note by the OECD secretariat, February 2019.

<sup>1</sup> [Proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of FDI into the EU](#), COM(2017) 487, European Commission, 13 September 2017. The proposal was included in the [Commission work programme 2018](#) as a priority pending proposal ([Annex III](#)).

<sup>2</sup> See the [OECD Regulatory Restrictiveness Index](#). According to the UNCTAD 2017 world investment [report](#), in 2016 total FDI inflows into the EU amounted to US\$566 billion, up from US\$483 billion in 2015. Total FDI outflows from the EU in 2016 stood at US\$470 billion, down from US\$535 billion in 2015. The UNCTAD 2018 [report](#) indicates a sharp decline in total FDI inflows into the EU to US\$304 billion in 2017. Total FDI outflows from the EU dropped to US\$418 billion.

<sup>3</sup> [Welcoming Foreign Direct Investment while protecting Essential Interests](#), COM(2017) 494, European Commission, September 2017.

<sup>4</sup> Chinese FDI inflows into the EU in 2016 increased at an unprecedented pace of 77 % to €35 billion compared to 2015 levels, according to the January 2017 Mercator Institute for China Studies (MERICS) report [Record Flows and Growing Imbalances](#) Chinese Investment in Europe in 2016.

<sup>5</sup> [Made in China 2025](#). The making of a high-tech superpower and consequences for industrial countries, MERICS, December 2016. [Is China's innovation strategy a threat?](#) Bruegel blogpost, March 2017.

<sup>6</sup> In December 2017, the European Commission published a 466-page strong [analysis](#) of the characteristics of China's economic model prepared in the context of the entry into force of the new EU methodology for anti-dumping and anti-subsidy investigations as part of the reform of the EU's trade defence instruments.

- <sup>7</sup> The EU, for example, began negotiations on a comprehensive agreement on investment (CAI) with China in 2014. The talks cover not only post-establishment investment protection but also pre-establishment market access. Further information is available on the [EP Legislative Train Schedule](#) website.
- <sup>8</sup> Next to security-related rules for specific sectors such as energy, outlined in the Commission proposal on pages 5-8, Article 21(4) of the 2004 EU [Merger Regulation 139/2004](#) that allow for the protection of legitimate interests such as 'public security, plurality of the media and prudential rules'.
- <sup>9</sup> A January 2019 Baker McKenzie [report](#) states that in 2018 Chinese FDI in Europe declined less than in the USA, with completed deals having reached US\$22.5 billion ([infographic](#)). This is 70 % down from the US\$80 billion in 2017. Much Chinese FDI in 2017 resulted from the acquisition of Swiss chemicals firm Syngenta by state-owned ChemChina for US\$43 billion. If this acquisition is excluded, Chinese FDI into Europe saw a 40 % decline in 2018.
- <sup>10</sup> [Article 4\(2\)](#) of the Treaty on European Union (TEU) and [346\(1\)\(b\)](#) Treaty on the Functioning of the European Union (TFEU). Restrictive measures may be imposed based on grounds of security or public order according to [Article XIV\(a\) and Article XIV bis](#) of the General Agreement on Trade in Services (GATS).
- <sup>11</sup> [Foreign Direct Investment Screening A debate in light of China-EU FDI flows](#), EPRS, European Parliament, May 2017.
- <sup>12</sup> European Commission [staff working document](#), SWD(2017) 297, p. 12, [fact sheet](#) and [press releases](#) name 12 EU Member States, but the proposal mentions '13 countries' in its annex, on p.3.
- <sup>13</sup> The Act of 12 July 2012 on the amendment of the Electricity Act of 1998 ([Article 86f](#)) and of the Gas Act of 2000 ([Article 66e](#)) introduced an FDI screening mechanism for changes in control over electricity generation facilities / installations of 250 MW or higher and for changes in control in LNG storage facilities. A ministerial regulation ([Regeling melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet](#)) further elaborates on the screening mechanism for both Acts jointly. As regards electricity and gas transmission and distribution networks, there is no FDI screening, since those networks and their operators must be in public ownership and controlled by public shareholders. This is laid down in [Article 93, 93a and 93b](#) of the Electricity Act of 1998 and [Articles 85, 85a and 85b](#) of the Gas Act of 2000.
- <sup>14</sup> [Foreign Direct Investment Screening A debate in light of China-EU FDI flows](#), EPRS, [Investment Policies Related to National Security](#), OECD, June 2016; [World Investment Report 2016](#), UNCTAD, p.96.
- <sup>15</sup> In December 2017, the European Think-tank Network on China (ETNC) published its [report](#) on Chinese Investment in Europe. It uses a country-level bottom up approach with transaction data to assess FDI inflows from China into 17 EU Member States and Norway. It provides valuable insights into the sectors targeted by Chinese investors and the gap between announced and completed deals in some of the 11 central and eastern European countries, among others in the [Czech Republic](#), forming part of what is known as the '[16+1 cooperation format](#)'.
- <sup>16</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

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