

EU Framework for Screening Foreign Direct Investment Agreed in Principle

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Public Policy, CFIUS

The first EU-level rules on the screening of foreign direct investment (FDI) are about to be agreed. These do not provide for the direct screening of FDI by the institutions of the Union, but rather create a framework for national initiatives and the exchange of information, and impose certain obligations on Member States to ensure a certain harmonization of any national rules for FDI screening.

On December 5, 2018, Member States' representatives in "Coreper" (the "Committee of the Permanent Representatives of the Governments of the Member States to the EU") reached a political agreement on a draft Regulation introducing an "EU framework for screening FDI". This agreement is based on a proposal made by the European Commission in September 2017. The [text](#) still needs to be approved formally by the European Parliament in a plenary meeting, and by the Council at ministerial level. This will take place at the beginning of 2019.

Main Elements of the EU Framework

The Regulation essentially creates a cooperation mechanism, allowing Member States and the Commission to exchange information and raise specific concerns about foreign investments in the EU. Its scope is limited to threats to "public order and security" (thus excluding threats of an economic nature).

The text reaffirms that national security interests are the responsibility of the Member States, which was a very important point for several countries. It makes clear that the purpose is not to harmonize the national screening mechanisms or to create an EU-wide screening mechanism. It does not even impose the obligation on all Member States to put in place a national scheme (at present, only 14 of the 28 EU Member States have an FDI screening mechanism).

Under the new cooperation mechanism, EU governments will be allowed to request information and offer comments on a foreign investment in a particular member country—though the extent of these requests was one of the last points of contention in the trilogue negotiations between the European Parliament and the Council.

The Commission will be allowed to issue "opinions" in cases of FDI concerning several Member States, or when an investment could affect a project or programme of interest to the whole of the EU, such as Horizon 2020 or Galileo. In the Commission proposal, these cases would have been screened directly by the Commission—but, as noted above, this was not retained.

Member States are supposed to give "due consideration" to any such comments, take "utmost account" of the Commission's opinion, and provide explanations if they choose not

to follow its views. But they will still have the last word on whether a specific investment in their territory should or should not be allowed.

The Council argued in favor of making the information-sharing system secret and classified, while the Parliament insisted for more transparency. A system of special contact points has been introduced to ensure confidentiality.

The factors to take into consideration in FDI screening were debated at length in the legislative process. The Commission in its proposal identified sensitive infrastructures (energy, transport, communications, data storage, financial) and sensitive technologies (AI, robotics, semiconductors, technologies with potential dual-use applications and cybersecurity), as well as “security of supply of critical inputs,” and access to sensitive information. The Council added aerospace, defense, nanotechnologies, biotechnologies, and crucial land and real estate. The European Parliament added ‘media independence’ and how a foreign investment might affect public services and food security.

The Regulation also encourages international cooperation on investment screening policies, including sharing experience, best practices, and information regarding investment trends.

First Attempts to Create a “European CFIUS”

A first initiative to create a “European CFIUS” was launched in 2011 by the European Commission, but did not find support among the Member States. The possibility of acting at the national level when there is a threat to “public security” already existed; and though the Lisbon Treaty had given the EU some competences in the field of investment, Member States were not keen at that time to give it too much power on these matters.

However, with the increasing number of Chinese investments in the EU in the last years, some countries began to consider that it might be useful to have some form of EU framework to cover national actions.

In February 2017, France, Germany and Italy wrote to the EU Commissioner for Trade, expressing their concern that “*a growing number of non-EU investors buying European technologies which could be used for strategic objectives in their own country while they themselves maintain barriers for investments from our countries.*” The letter added that they were “*worried about the lack of reciprocity and about a sell-out of European expertise which [they were] currently unable to combat with effective instruments.*”

The European Council in June 2017 had a difficult discussion on this issue. Some countries—notably, Greece, Romania, Cyprus, Luxembourg, Malta and Portugal—were cautious not to discourage the flow of foreign (mainly Chinese) investments into their territories.

But the pressure by France and Germany continued. In mid-July, Germany amended its national legislation on foreign investment in order to allow it to look at “whether foreign investments are made as a part of a country’s industrial strategy that wants to snaffle up Europe’s best technologies”, a clear reference to the Chinese “Made in China 2025” plan. At the same time, in her election manifesto, UK Prime Minister Theresa May also promised not to let foreign governments and companies that own “important infrastructure” undermine British security.

The EU Legislative Process

At EU level, the president of the Commission Jean Claude Juncker asked a small group to prepare, during the summer of 2017, an initiative on this issue to be included in his “State of the Union” address in September. On September 13, 2017, the Commission presented its formal [proposal for a Regulation](#) to the European Parliament and the Council.

In the European Parliament, the Committee on International Trade (“INTA”) was responsible for the file, with the French MEP Franck Proust as the rapporteur. The committee presented its [Report](#) to the European Parliament on June 5, 2018. This took in amendments from the Opinions of the Committee on Foreign Affairs (“[AFET](#)”), the Committee on Industry, Research and Energy (“[ITRE](#)”), and the Committee on Economic and Monetary Affairs (“[ECON](#)”).

On the Council side, Coreper adopted a “[general approach](#)” on June 13, 2018. The respective positions were then reconciled in so-called “trilogue” negotiations (between the Parliament, Council and Commission)—a pragmatic procedure that allows the institutions to try reaching a compromise without proceeding to a formal “second reading”. The trilogue reached an agreement on November 20, which was approved by Coreper on November 30.

The Italian delegate announced that his country would vote against the agreed text and the UK announced an abstention; these objections will not prevent the adoption of the Regulation as concluded by a qualified majority. It seems that the new Italian government wanted to insist on the purely national competence when investments are concerned. The British abstention is related to Brexit, and the UK has already developed a reinforced national screening mechanism.

The European Parliament is now expected to vote on the proposals in Plenary on February 11. The Council will then be able to agree the text formally. The Regulation will enter into force shortly thereafter (on the 20th day after publication), and Member States will likely be given until late 2020 to make any changes it requires to their national FDI screening schemes.

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