

**European Commission publishes proposal
for EU-wide framework for screening of
foreign direct investment**

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On 13 September 2017, the European Commission (the “**Commission**”) published the [*Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*](#) (the “**Proposal**”).

Currently, approximately half of the EU Member States screen foreign direct investment (“**FDI**”). In light of the significant increase in Chinese FDI into the European Union in recent years and the perceived regulatory gap with respect to FDI scrutiny in the European Union, certain EU Member States are increasingly concerned about the need to strengthen the European Union’s capacity to defend its strategic industrial expertise. In February this year, the German, French and Italian ministers of economy formally called on EU Commissioner for Trade Cecilia Malmström to take action to that effect.

The Proposal aims to establish a common framework for reviewing whether FDI from third countries into the European Union affect security or public order. Furthermore, the Proposal aims to establish a cooperation mechanism for those Member States that already have (or will have) FDI screening mechanisms in place. Under the Proposal, Member States are, however, not obliged to establish FDI screening mechanisms.

That common framework and cooperation mechanism will apply to a wide range of investments which establish or maintain direct links between investors from third countries and undertakings carrying out an economic activity in Member States. Although the Proposal adopts a broad definition of FDI, it expressly excludes portfolio investment from its scope.

The main features of the new Proposal are as follows:

- FDI from third countries is to be reviewed on grounds of security or public order

The Proposal limits the grounds for reviewing FDI from third countries to “security or public order”. The Proposal contains a non-exhaustive list of factors that may be taken into account when determining whether FDI affects security or public order. However, it does not define “security or public order”.

Relevant factors include (i) critical infrastructure (e.g. energy, transport, communications, data storage, space or financial infrastructure); (ii) critical technologies (e.g. artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology); (iii) security of supply of critical inputs; and (iv) access to sensitive information or the ability to control sensitive information.

In addition, the fact that a foreign investor is controlled by the government of a third country may also be taken into account.

- The Commission may review FDI affecting projects or programs of Union interest on grounds of security or public order

If a planned or completed FDI in one of the Member States is likely to affect projects or programs of Union interest, the Commission has the power to issue an opinion with respect to that FDI and request all necessary information for its screening. Although the Commission’s opinion is non-binding, the concerned Member State must *“take utmost account of the Commission’s opinion and provide an explanation to the Commission in case its opinion is not followed”*.

The Commission’s competence is contingent on the project or program being “of Union interest” meaning, in particular, that it involves substantial EU funding or was established by EU legislation regarding critical infrastructure, critical technologies or critical inputs. For the purpose of increased legal certainty, an [annex](#) to the proposed regulation contains an indicative list of projects and programs having a Union interest, such as Horizon 2020, the European Union’s satellite program Galileo and the European Union’s earth observation program Copernicus.

- More harmonisation and cooperation between Member States with FDI screening mechanisms in place

The Proposal introduces common principles, such as the protection of confidential information and the availability of judicial redress, that apply to Member States with their own FDI screening mechanisms in place.

For the purpose of assessing the cross-border impact of FDI, the Proposal also establishes a cooperation mechanism requiring Member States to inform the Commission and other Member States of ongoing FDI screening procedures. Where a Member State considers that a planned or completed FDI in its territory is likely to affect the security or public order of other Member States, those other Member States and/or the Commission will have the opportunity to comment on such planned or completed FDI before the Member State concerned takes its final decision.

Pursuant to the ordinary legislative procedure, the Proposal will be submitted to the European Parliament and the Council. Any final legislative measure is to be expected – at the earliest – at the end of 2018 or beginning of 2019.

In parallel with the Proposal, the Commission will carry out, by the end of 2018, an in-depth analysis of FDI flows into the European Union raising certain security or public order concerns. In addition, the Commission will set up a FDI coordination group, chaired by the Commission and composed of representatives of the Member States. That coordination group will serve as, amongst other matters, a forum for exchanging ideas and sharing best practices with respect to FDI flows from third countries into the European Union.

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