

EU framework for FDI screening

OVERVIEW

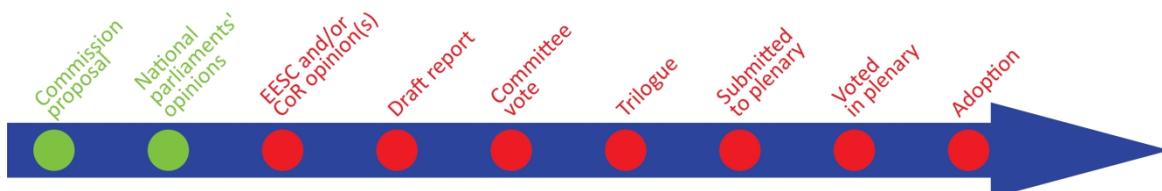
On 13 September 2017, the European Commission adopted a proposal for a regulation establishing a framework for screening foreign direct investment (FDI) inflows into the EU on grounds of security or public order. The proposal is a response to a rapidly evolving and increasingly complex investment landscape. 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 EU's decentralised and fragmented system of monitoring FDI inflows to adequately address the potential (cross-border) impact of FDI inflows on security or public order without EU-coordinated cooperation among Member States.

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

Member States, stakeholders and academia are divided in their views on the proposal.

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>	Presentation of draft report	



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.¹ 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 nationalism, 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 as a result has been a main source and destination of FDI.² 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 providers³ such as China⁴ 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 goals⁵ 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.⁶ 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,⁷ security or public order issues fall largely [outside the scope](#) of these tools.⁸

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. 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.⁹ 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.

According to the European Commission, 12 Member States (see Figure 1) have legislation in place which allows them to review FDI on grounds of security or public order, in line with international and EU law.¹⁰ EU 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).¹¹

Recent action in some Member States on FDI screening mechanisms

In July and October 2017, [Germany](#) and [Italy](#) respectively completed a revision of their 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. The [review](#) seeks, inter alia, to make targeted legislative changes to extend the scope of the current reviews to smaller foreign acquisitions (in terms of turnover) in the dual and military use sector and in parts of the advanced technology sector. The Dutch government in 2017 considered a [telecommunications sector](#) bill to block undesirable takeovers, as well as a [hostile](#) foreign takeover bill, that have not, or not yet, been adopted due to stakeholder [opposition](#).

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

Taking FDI from China as an example, Figure 2 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 the rule of law and is not extensively time-consuming.¹²

International approaches to FDI screening

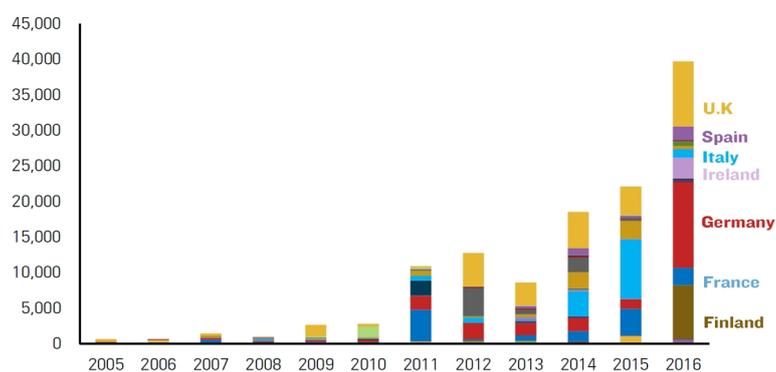
The FDI screening mechanisms set up by countries such as [Australia](#), [Canada](#), [China](#), [India](#),

Figure 1 – Formal FDI screening mechanisms in the EU



Data source: [Rasmussen Group](#) and [European Commission](#) 2017

Figure 2 – Chinese FDI transactions in EU-28 in US\$ million



Data source: [Rhodium Group](#), 2017.

[Japan](#), [South Korea](#), [Russia](#), and the [United States](#) vary significantly in scope or design.¹³ 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. In contrast, [Russia](#) shored up its limitations on FDI from foreign offshore firms and control on FDI into Russian strategic companies, and [Japan](#) introduced rules on sanctions and on [transfers](#) of non-listed shares in Japanese firms between foreign investors. The [debate](#) in the [United States Congress](#) about expanding the scope of the US Committee on Foreign Investment in the United States (CFIUS) saw two major [proposals](#). These would, inter alia, [broaden](#) the set of 'covered transactions', create mandatory notifications for certain transactions, and widen current timeframes for taking decisions.

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 International Trade Committee (INTA) meeting of 19 June 2017. Following publication of the present Commission proposal in September 2017, the INTA committee has now 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.

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 of 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**, 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.

Changes the proposal would bring

The Commission proposes the creation of an **enabling legal framework** which embraces the diversity of Member States' approaches to FDI screening. The proposal neither aims to establish EU-level screening nor to harmonise existing screening mechanisms. It thus treads 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 confirms 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 confirms that Member States retain their final decision-making power on FDI.

The proposal sets out **basic 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 contains 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 notion of 'control' is not defined.¹⁴

The proposal envisages 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 will be set up to meet regularly to discuss issues of FDI inflows into the EU.

New transparency and information requirements for all Member States are 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' in areas such as research, space, transport and energy; 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;¹⁵ ii) FDI in a Member State may affect the security or public order of another/other Member State/s; the latter – and the Commission – may request minimum information and submit its/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 State/s comments.

Advisory committees

The **European Economic and Social Committee (EESC)** appointed rapporteur Christian Bäumler (Workers-GR II, Germany) and co-rapporteur Gintaras Morkis (Employers-Group I, Latvia) to draft an opinion on the screening of foreign direct investments into the European Union. A public hearing is due to take place on 27 February 2018. The EESC is set to vote on the opinion in plenary on 18/19 April 2018. For the **Committee of the Regions (CoR)**, the Commission for Economic Policy (ECON, rapporteur Micaela Fanelli, PES, Italy) will draft an opinion on the European Commission's trade package. The opinion is due to be debated in the plenary session on 21/22 March 2018.

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 vis-à-vis third countries.

Stakeholders' views

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'.

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 current patchwork of national regulatory frameworks, thus enhancing certainty.

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

The **UK Global Counsel** [praises](#) the Commission for remaining within the conventional boundaries of WTO and 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 [advocate](#) an EU-wide system of FDI screening but argue 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 International Trade Committee (INTA) meeting of 22 November 2017. A number of technical briefings were organised to provide information, as well as a public hearing to be held during the INTA meeting of 23 January 2018.

The rapporteurs for opinion are: Geoffrey Van Orden (ECR, United Kingdom) for the Sub-Committee on Security and Defence (SEDE)/Committee on Foreign Affairs (AFET); Roberts Zīle (ECR, Latvia) for the Committee on Economic and Monetary Affairs (ECON); and Reinhard Bütikofer (Greens/EFA, Germany) for the Committee on Industry, Research and Energy (ITRE). The Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Committee on Legal Affairs (JURI) decided not to draft an opinion.

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).

- ¹ [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 into the [Commission work programme 2018](#) as a priority pending proposal ([Annex III](#)).
- ² 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.
- ³ [Welcoming Foreign Direct Investment while protecting Essential Interests](#), COM(2017) 494, European Commission, September 2017. In 2016, China for the first time [exported](#) more FDI (US\$183 billion) than it imported (US\$133 billion) and became the world's second largest capital exporter after the USA.
- ⁴ 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.
- ⁵ [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 blog post, March 2017.
- ⁶ 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.
- ⁷ The EU for example began negotiations on a comprehensive investment agreement (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 [EPRS legislative trains](#).
- ⁸ 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'.
- ⁹ [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).
- ¹⁰ 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 annexes on p.3.
- ¹¹ [EPRS briefing](#) on FDI screening, [EU-FDI screening: Legal considerations](#), Mannheimer Swartling, June 2017 and [Foreign investment screening and the China factor](#), Rasmussen Group, November 2017.
- ¹² 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 18 EU Member States and Norway. It provides valuable insights into the sectors targeted by Chinese investors according to Member States' attractiveness for China (in some cases an overwhelming focus is on real estate as a result of 'golden visa' programmes) and – in spite of the absence of FDI screening mechanisms – the gap between announced and completed deals in some of the 11 Central and Eastern European countries forming part of what is known as the '[16+1 cooperation format](#)'. The variety of more or less successful policies to attract job-creating FDI from China and the fear of deterring FDI inflows may partly explain the difference in Member States' positions to the Commission proposal.
- ¹³ [EPRS briefing](#) on FDI screening; [Investment Policies Related to National Security](#), OECD, June 2016; [World Investment Report 2016](#), UNCTAD, examples of recent policy changes, p.96.
- ¹⁴ The proposal does not introduce FDI thresholds. An acquisition of a firm using a specific technology for a small sum may indeed have a huge strategic impact, while in some cases a big acquisition sum may not.
- ¹⁵ In this case the duty of sincere cooperation laid down in [Article 4\(3\) TEU](#) would apply.

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