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WORKING DOCUMENT

on 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

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WORKING DOCUMENT

ON THE SCREENING OF FOREIGN INVESTMENTS IN THE EU

I. Introduction

In this working document the rapporteur wished to produce a written record of considerations on the complex subject of foreign investments in the European Union. Above all else, it is however necessary to recall that the EU is and will remain open to foreign investment. The need to invest in innovation is in the DNA of our economy and all Member States need such investment.

The goal is neither to prohibit nor restrict foreign investment, nor to target individual countries but rather to extend and deepen our analysis of foreign investment. The investment butterfly effect comes into play through the interdependence of European economies. A change in a controlling interest in a company can have an impact throughout the value chain in a Member State or on EU projects.

This means that we need to look at both the ultimate investor and the target in order to determine if there is a threat to security and public order.

1. Background

1.1 Investment in the EU

Globalisation has taken a turn with the rapid emergence of new players with unlimited resources, a high level of state involvement, a stalemate of multilateralism in resolving certain disputes and a desire by some states to regulate trade unilaterally.

The EU, the world's leading trading power, is not exempt from the negative effects of these phenomena, and is now tackling the question of foreign direct investment (FDI) in a changing world. Indeed, it has no choice but to do so. It is legitimate for Europe, as the world's leading destination and source of FDI, to take control over a significant driving force for its economy.

In 2015, FDI stock in the EU totalled EUR 5 700 billion, more than the USA with FDI stock of EUR 5 100 billion and far in advance of China at EUR 1 100 billion. Although only 0.4% of EU companies are controlled by non-EU investors, they nevertheless represent 13% of total turnover, 11% of added value and 6% of the EU's total employment.

More than just the size of investments, it is their origin, nature, objectives and growth which are sparking debate. Indeed, what have previously only been fears, are now being corroborated by facts and examples.

How can the advantages of foreign investments be maintained at the same time as assessing their impact on our present and future strategic economic interests? It is by raising this question that Europe will be able to continue to promote the free movement of capital. This fundamental principle of the EU allows it to remain attractive by being seen as a coherent whole rather than a collection of individuals.

On the other hand, is there not a restriction on the free movement of capital because of the impossibility of outbidding foreign investors backed by public funds? And because of the political orientation of certain investments to specific sectors present only in certain Member States? Is it not also restricted by the control of key elements in a global value chain by a foreign state enterprise? It is thus more the character of certain investments than their size that is currently providing food for thought on this issue.

1.2 Investment outside the EU

While the EU is only at the reflection stage, all the G7 countries and EU partner countries already have an investment screening mechanism in place, which they have already strengthened several times. China, Australia and Canada all strengthened their mechanism in 2015. China has obviously forbidden foreign investors from accessing its strategic sectors, but it is of course the US system that serves as a point of reference. Set up in 1975, the CFIUS is a theoretically voluntary mechanism whose system of functioning and influence make it an indispensable stage for some foreign investors in order to provide them with additional legal certainty. This mechanism does not prevent the US economy from being attractive to investors. A reform of the CFIUS is currently underway in the US in order to strengthen its scope.

The EU can find a more balanced middle way for its investors. In the US, the fact that *ex post* screening can be carried out at any time reassures investors in spite of the insecurity of the system, whereas in China, in what is in theory a secure and well-defined framework, investors are left in a situation of uncertainty due to political interventionism.

The larger the size of certain companies or merger-acquisitions involving public groups or global giants, the greater the impact on the economy, jobs or a territory. After the era of 'too big to fail' during the economic crisis, some countries are tending to strengthen their screening mechanism for large companies on the principle of 'too big to trust'. This trend tends to make foreign investment by our large European groups a little more difficult.

1.3 Imbalanced globalisation

The same observation has been made on both sides of the Atlantic as to the lack of transparency regarding where investors are from, the alleged political nature of certain foreign investments and the imbalance observed by our companies in their attempts to enter foreign markets. For the United States however, a screening mechanism has long since been a given.

A few figures allow us to demonstrate certain trends. The United States is by far the largest investor in the EU, even if its share in the stock of FDI in the EU fell from 51.3% in 1995 to 41.4% in 2015. The investors are diversified but there are some imbalances. Between 2015 and 2016 for example, Chinese investments in Europe were up by 77% while European investments in China fell by a quarter. It is no longer acceptable to tell companies that all they need to do is adapt and be more competitive in order to combat this unfair competition by themselves. The legislature is aware of the need to get a grip on this situation in order to rebalance investments from EU companies and put a stop to certain trends of unfair substitution by re-establishing a situation of fair competition.

2. Background to the proposal

At EU level the initiative originates in a joint letter from the Ministers of the Economy of three countries (Germany, France and Italy) sent to the European Commission in February 2017 in

order to examine the possibilities regarding the screening of investments made in the internal market.

The PPE group in the European Parliament moved very rapidly to initiate an EU act with 10 signatories with a view to requesting a legislative initiative from the European Commission on foreign investments. The rapporteur therefore wishes to congratulate the European Commission for bringing forward a proposal for a regulation establishing a framework for the screening of foreign direct investment in the EU, as highlighted in the State of the Union address by Commission President Jean-Claude Juncker on 13 September 2017. As its name indicates, this is not a harmonisation or a new mechanism with all the weighty additional bureaucracy that entails, but rather, a framework.

II. State of affairs of existing mechanisms

There exist many screening mechanisms around the world and within the EU. Although they have different characteristics, they all have the same aim of establishing a tighter investment framework.

1. In the EU

The Commission's proposal is a first for the EU legislature. Member States are, however, already used to dealing with the question as 13 of them have a foreign investment screening mechanism in place. Already put through their paces, these mechanisms can serve as a benchmark for those who do not yet have one in place. However there is clear deficit in awareness at national level with regard to the interests of other Member States.

Time limits, the sectors concerned and the handling of investors vary a great deal from one Member State to another. Their functioning is the subject of much documentation. Member States which have a mechanism in place have also recently been moving to strengthen their functioning. France broadened the scope of sectors concerned in 2014 and a new update is envisaged in 2018, while Germany reformed its mechanism in summer 2017.

It is very rare for an investment to be rejected outright as the necessary instruments exist enabling sufficient proportionate guarantees to be put into place to ensure the protection of public order and security, in terms, for example, of the supply of strategic goods or services. Member States must be able to ensure such guarantees.

2. Outside the EU

The move towards strengthening these mechanisms is taking place across the globe, in particular as a result of the failure of multilateralism but also due to the fact that privatisations of nationally strategic companies are increasing. For foreign investors, such privatisations represent an opportunity. For states, they are a risk that needs to be reduced.

Transparency in such mechanisms, giving investors predictability, is rare. China defines the sectors that are open to foreign investment without specifying the constraints, while the CFIUS confers on the President of the United States the power to halt a foreign investment without any possible appeal. As for Canada, it determines whether an investment represents a 'clear advantage' for its economy.

The CFIUS has sometimes prevented or reshaped a foreign investment on EU territory where

American assets are in play in the target company. Thus while cooperation with third countries is of major importance, it is not necessarily enough.

III. THE CONCEPTS

The Commission's proposal reveals many key concepts in screening mechanisms. The difficulty lies in defining them while at the same time allowing freedom for interpretation such that they can be adapted to a variety of situations. This is why it would not be judicious to try to turn these concepts into specific definitions, whereby the mechanism would no longer be viable on a case-by-case basis and subject to too many constraints.

1. Investment

The Commission has raised the question of the definition of investments, highlighting the importance of direct and sustainable relationships between investors and the company or entrepreneur for whom the funds are intended. The notion of economic ties and durability is of major importance, above all in strategic sectors.

Investors are said to be foreign when they are directly or indirectly under the ultimate control of non-EU entities or states. Member States must be able to arm themselves against artificial financial arrangements that bypass screening mechanisms, such as through shell companies or letter-box companies set up in the EU.

Above all, the EU mechanism will help to ask the right questions and simplify access to the most important information on investors (who is the ultimate investor and what is their nationality?) as well as the modalities (can the investor's nationality be obtained by means of a 'cash-for-passports' procedure?). Improving transparency with respect to the ultimate investor's origin would also serve the aim of combating tax havens and serious crime.

We must be attentive and vigilant when it comes to investments motivated by political rather than economic interests. The EU free-market economy may be destabilised by the exertion of political influence on its companies and economy. For example, as shown by the EU Chamber of Commerce analysis in China, the China Manufacturing Plan 2025 hinders free and fair competition, but is nevertheless advocated by the Chinese authorities.

2. Taking control of companies

The rapporteur supports the Commission's view that thresholds are not effective and can easily be circumvented. All investments are included in the Commission's proposal. It is therefore principally the ultimate investor that needs to be taken into account.

Control can be taken of companies in various ways (acquisition, shareholders' agreement, governance rights, choice of management, targeting of the shareholders' meeting, activist funds), whatever the assets in the possession of the investor, even if they are simply portfolio investments.

Certain practices aim to facilitate the taking of control. In particular, for example, extraterritorial laws can be applied against EU companies, with the goal of weakening them through the application of fines or by obliging them to cooperate with foreign legal systems, leading to the exposure of the most strategic company information. This can all also be done with the goal of subsequently enabling foreign investment. Investment conditions must not be

neglected.

Particular attention must be paid to investors who are under the direct or indirect control of a foreign country or army, as well as investments that lead to monopolistic structures.
In countering the taking of control over companies, it is also essential to provide the means to ensure follow-up over the duration of the investment.

3. Public order and security

The concept of 'public order and security' complies with the terms used in the GATS/WTO and allows for the description of the extent of exceptions with regard to our international commitments, and authorises Member States to restrict investments in the event of threats to public order and security. This must remain a concept and not be subjected to a precise definition in order that it remain dynamic with respect to the specificities of different Member States. CJEU case law functions accordingly. It will be necessary to give this concept a higher profile at all levels of European policy. Indeed, in the US the firmness of the concept of 'national security' facilitates its application. It is not necessary for an active threat to exist for the mechanism to be activated. Anticipation is essential.

As the public order and security context varies from Member State to Member State, a specific definition is neither possible nor desirable at EU level. All sectors, activities and companies may potentially fall under this mechanism if Member States can prove their impact on public order and security. However, due to its sensitivity, the defence sector constitutes an exception, and should be excluded from this draft regulation or at least be subject to exceptions in the event that the disclosure of certain information would be contrary to the essential security interests of a Member State on the basis of Article 346 TFEU.

4. Sensitive and/or strategic?

The same goes for the sensitivity or strategic nature of sectors or companies. The sensitivity of a company lies in its goods, services, technology or know-how being linked to important state interests in terms of public order and security.

A company's strategic nature potentially lies in its role within a value chain. Does the fact that a company is the last to manufacture a particular product make it of strategic importance? Or that a local company is the sole source of employment in an area? Can a company that produces goods for civil society anticipate that its technology may one day be of use in the military domain? Investment should not be seen solely through a single lens. The media, cultural goods (as is the case in Canada), real estate and the environment should also be taken into account, as well as technologies that our economies will become dependent on, such as artificial intelligence or big data, for example. This is all the more important since in future, these technologies, which make up one of the main sources of future growth, will underpin our whole economy.

The historic, economic and political sensitivities of each Member State, or even their regions, bring varying visions into play. The EU has however already managed to define certain sectors, mentioning energy, transport and information and communication technologies (ICT) in Article 3 of Directive 2008/114/EC on critical infrastructures.

In certain cases Member States that have a mechanism in place list strategic and/or sensitive

sectors by name in order to inform investors. Dual-use goods are considered de facto to be sensitive because they undergo particular monitoring as they are subject to export licenses. Added to these are sectors such as aerospace, space, health, raw materials, water, cyber technology, quantum technology, energy (oil and gas for example), electronic chips, gambling, land, forestry, transport and electronic communication networks and services and infrastructure such as ports etc. The indicative list provided in the regulation helps Member States flexibly adapt their screening mechanism according to their sensitivities in terms of public order and security as well as technological developments. These sectors also feature in third-country mechanisms.

The coordination group or committee set up by the Commission will allow comparison between sectors seen as sensitive or strategic by Member States, enable discussion on best practices and improve cooperation. Where appropriate, this forum will hold discussions with other civil society stakeholders and in particular the sectors concerned in order to remain informed of the specifics.

5. Reciprocity and a level playing field

From a term previously banished due to being seen as protectionist, the concept of reciprocity was used by President Juncker from the start of his State of the Union address presenting the forthcoming proposal for a regulation on FDI. This simply amounted to the readoption of the concept of reciprocity outlined in the preamble to the 1947 GATT agreement[1] (and Article XVII, paragraph 3).

Reciprocity with a view to obtaining equality is not feasible between parties at different stages of development, but obtaining equivalence is possible. There are too many barriers hindering investment by our companies abroad and the situation boils down to three alternatives for them: (forced) cooperation, (unfair) competition, or abandonment (failure). While the absence of the term reciprocity from the Commission proposal is legally justified, it cannot be justified politically.

It is not a question of punishing companies for the actions of their countries, even though politically motivated and subsidised state companies benefit greatly from the actions of their countries. This is a factor to be taken into account. It should also be underlined that most of our trading partners already have screening mechanisms in place. Moreover, third countries prevent our companies from accessing certain markets or openly put in place strategies to take over our most innovative sectors. Setting up screening mechanisms in the EU would therefore not only help to protect our public order and security, but also move towards a more positive reciprocity. The existence of clear principles with the best possible guarantees for screening, such as those defined in the regulation (for example: non-discrimination, right of appeal, transparency) will also strengthen Europe's position in negotiations with its partners when trying to obtain the same guarantees.

IV. A MULTIDISCIPLINARY TOPIC

No sector is potentially spared when it comes to foreign investment in the EU.

[1] *'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce'.*

1. Technical and political

The scientific literature, as well as the many international agreements which must be referred to, make this a technical subject with different ramifications resulting from all areas of reflection. The functioning of mechanisms must be protected from political agendas without being entirely disconnected from them. The context and alerts that politics can raise must be a source for these mechanisms without being dependent on them.

2. Economic and social

Investment policies involve the economy, international trade, industry and foreign affairs, but they must also take into account employment and territorial policies and the growing influence of foreign states in the media through their investments. This is one of the pillars of 'soft power'.

3. Industrial and technological

Initiatives for the reindustrialisation of Europe have wide-ranging support both in political and financial terms. The question of investment that we are examining here must not lead us to oppose the defence of heavy industry, a victim of unfair competition at the hands of high-tech companies. Digital technology means these industries possess all the more complementarity both in terms of their objectives and their concerns, such as in the management of data. The investment requirements are significant, and the industry has long been committed to innovation to stay competitive, while Europe must be able to guarantee security for the intellectual property and know-how of innovative start-ups.

Future European projects such as the creation of an 'Airbus of electric batteries' for the automotive or aerospace industry, or the challenges of big data, can only be implemented if European industries still have the technology and if this technology represents added value. It is therefore sensible to consider them as strategic, particularly with respect to the impact of these technologies on security issues at EU level.

V. INFORMATION: THE KEY TO THE FUTURE OF THE MECHANISM

Analysing the Commission's proposal on FDI screening requires an extensive process of contextualisation, putting the past, present and future into perspective. The proposed mechanism is simple. It does not replace the decision-making power of Member States in terms of investment on their territories. Above all, it aims to create a mechanism for the exchange of information at EU level. As information is at the heart of the proposal, the rapporteur will take particular care to define its modalities and its centralisation, which is a strength of third country systems.

1. Collecting and obtaining information

For there to be an exchange of information, information needs to exist in the first place. This is an obvious thing to say, but difficult to put into effect. It is something that has to come from the Member States. There are clearly many statistics and an abundant academic literature on the quantity of investments made in Europe or in certain Member States. Now the nature and quality of these investments need to be defined.

The strength of the EU in other areas lies in the quality of the information collected. Thus policies for combating terrorism or crime are arrived at by means of information collection efforts. How else is it possible to tell if a state's strategic interests are threatened?

Contact between Member States and investors will be more regular and will foster relationships of trust thanks to this commitment to transparency. If an investor is resistant to information sharing, this may already be a warning sign. The CFIUS proceeds in the same way. Thus investors and their investment targets work together to provide the necessary information for the authorities. Otherwise the authorities can use the best available information and plan for the worst according to their uncertainties.
In view of the restricted scope of the investments covered by such a mechanism, this is not about increasing red tape but rather offering a legal guarantee to investors. The more accurate and clear the information, the greater the certainty of a trouble-free investment that will speed up the process.

2. Information analysis

Member States with mechanisms allocate modest human and financial resources to them.
Whatever the extent of resources allocated, states must ensure they fulfil their purpose, which is to find out who the ultimate investor is, whether a state has a direct or indirect influence on the investment, and anything that will be judged as relevant by the Member State to complete its analysis.

Above all, a macroeconomic vision is vital in a context in which investment strategies also take place on a global scale, as is the case with the China Manufacturing Plan 2025 or the Silk Road (OBOR). How can one Member State alone establish whether a sector or a strategic product manufactured or subcontracted to several Member States has been co-opted? Information sharing and analysis by several Member States must identify the value and supply chains impacted, namely the direct or indirect customers of the investment target distributed around the EU (partners or suppliers).

The possibility offered to all Member States to ask questions about an investment is not in order to hinder it, but rather to encourage competition that can help safeguard the strategic interests of the state in which the investment takes place. These analyses will help to distinguish whether rules to prevent circumvention apply and whether screening is required. This approach is justified by our affiliation to a shared future and above all by our membership of a common market, the effects of which can be felt in several Member States.

3. Using and sharing information

Furthermore, the Commission will be able to issue an opinion on investments involving so-called European projects that are listed in the annex to the draft regulation. Your rapporteur does not want the annex to be an exhaustive list, and hopes that it will be added to. It should also be possible to update and therefore revise it to include new projects or programmes implemented by the EU (in particular in the aerospace, big data or electric battery sectors) by means of delegated acts. More than a right of scrutiny, it is a decision-making tool. Member States, which still have sovereignty over investments made on their territory, can thus use the information, questions or analyses of other Member States and/or the European Commission as they see fit to make an independent decision on authorising, preventing or above all modifying investments thanks to transitional or accompanying measures. The EU must be an umbrella, but Member States must also be encouraged to seize this umbrella.

So, let us hazard the question: is it not in the interests of a Member State to ask its partners for their opinion on an investment? This information sharing makes the EU an economic powerhouse and the leading global trading power.

As with anti-dumping investigations, when information is sent by an investor, it is not always complete or verifiable. In practice, some investors set up very complex financial arrangements to discourage the relevant departments from pursuing their search for the ultimate investor. Others invest in order to sell over-capacities through a company that has become an EU entity. Faced with such situations, it is important for Member States to be able to work with the best available information. Putting the burden of proof on investors must mean they have a right to reply.

There are many questions regarding the nature of the opinions from the Commission or other Member States. Nevertheless they are similar to the non-binding opinions provided in the framework of the Espoo Convention on the environmental impact analysis of large-scale projects, in particular in cross-border contexts. There is clearly a parallel with cross-border and transversal investments. Abuses by Member States will be constrained by the European Commission, which ensures that the mechanism functions properly by ensuring that opinions are not exploited.

Member States must assume their responsibilities, and it is not the role of the regulation to define exactly which procedures should be followed and what level of transparency is required in the event that the Commission or another Member State issues a negative opinion. There must be a degree of flexibility in the mechanism. This regulation imposes on States several clearly stated obligations. The opinion or the remarks made by the Commission and Member States are not binding in the Commission proposal. Although remarks can be made by entities other than the country involved, decision-making remains a national and sovereign responsibility.

However, Member States that do not commit to the mechanism may give the impression that they do not take the strategic aspects of FDIs into consideration. Companies that have a presence on their territory may not be entrusted with a project or be selected as key suppliers by European investors.

Obviously, information sent by a company or an investor to a Member State may be confidential and must be protected, particularly under the 'Trade Secrets' Directive, and used only in the context of this regulation on FDI screening. The same goes for discussions with another Member State or the European Commission. Those who are in the loop must be authorised and may be subject to serious legal action, as is already the case for EU documents. Experience shows that no confidential data has been leaked in the past during FDI screening by Member States.

These guarantees will help make these mechanisms an exchange tool with the goal of protecting the strategic interests of states, and absolutely not a tool for the competitive advantage of companies.

4. Storing information

The increase in exchanges and thus investment experience will feed national and EU investment databases. Storing information will facilitate forthcoming decision-making and help avoid repeating errors made by certain Member States or the Commission.

This draft regulation gives substance to one of the key pillars in the strengthening of the EU's

interests and brings an end to a certain naivety that had been present up until now. Foreign companies hit with anti-dumping or anti-subsidy measures, or that do not cooperate or supply false information, will be added to the lists available to all Member States. Well-versed in bad practices and benefiting from undue competitive advantage, these companies could repeat these bad practices when making investments. The same goes for any company that has not cooperated during screening enquiries or which has supplied false information. Of course, these companies may invest in Europe, but they will be more easily identifiable and be added to a list, helping to improve the vigilance of states with respect to their investments.

VI. WHEN SHOULD SCREENING BE CARRIED OUT?

The major challenge for investors is unpredictability. The screening mechanism should therefore combine the defence of the interests of Member States with the desire to provide a receptive framework for investors. This balance is also necessary for companies to prevent any chilling effect.

1. Ex ante

Neither Member States nor third countries use their screening mechanisms at the same time during an investment process. They are most commonly used *ex ante*, i.e. controls are carried out prior to the finalisation of the investment. This makes the terrain more predictable both for companies wishing to consult national authorities before investing, and for the state, which is able to anticipate the impact.

However, how can companies be thoroughly incentivised to apply to states voluntarily before investing in them? Through legally guaranteeing the investment, subject to the subsequent discovery of fraud or dishonesty at the time of making the application for approval.

Whatever the case may be, given the number of investments made, not all can be screened. Member States must therefore carry out intelligent screening by offering fully transparent legal investment guarantees to companies, involving, in certain cases, prior approval applications in the sectors concerned. In practice, both the investor and the company benefiting from the investment can work together to draw up the application with the help of experts.

2. Ex post

To achieve this, the threat of *ex post* verification of an investment can be useful in certain states in order to make screening more effective, as is the case in Austria. This is particularly so when there is a desire to circumvent the process. Examples exist in terms of fraud concerning information provided, complex financial arrangements designed to hide the ultimate investor, or letter-box companies. In effect, the potential *ex post* prohibition of an investment is a serious threat for investors and has fortunately almost never been applied. Above all, it is a question of Member States or the Commission contributing new elements by means of an opinion. The state in which the investment takes place will always be responsible for applying or not applying accompanying measures which help to preserve investor gains at the same time as guaranteeing the protection of strategic interests.

In any case, preventing an *ex post* analysis of an investment would first of all mean that Member States which have such a mechanism in place would have to modify it, which is not the objective of the regulation. This would reward deceit and suspicion, because withholding information and not sharing it would become a way to prevent the effective functioning of the investment

screening mechanism.

Very special attention should be paid to consortia. In practice, some investors serve as guarantors for foreign investors and withdraw prior to or even after the implementation of a project. In such cases, foreign investors gain an even more strategic hold and this brings the importance of *ex post* investment analysis into sharper relief.

3. Deadlines

The deadlines set for the processing of cases also vary but must be as short as possible and must not undermine the favourable climate for the creation of businesses in Member States. The rapporteur will insist that these processing periods begin from the moment when all the components required for the constitution of a full application have been provided to the Member State. The European merger control system already helps the Commission to stop the countdown until the information has been provided.

The various requests from Member States and the Commission may only delay the processing of cases very slightly and not involve any specific measures.

VII. MOTIVATIONS FOR HAVING A SCREENING MECHANISM

1. Under the current system

There is no correlation between screening mechanisms and any reduction in investment. By way of example, France has had a mechanism since 2005, and strengthened it in 2014. Nevertheless, 2017 was a record-breaking year in terms of foreign investments.

MEPs are clearly aware that an election, a referendum on leaving the EU, or statements from political leaders have more of an impact on the climate of investor confidence (foreign or otherwise) than a screening mechanism.

The EU is the only entity in the world not to have a screening mechanism in place. All the EU partner countries have adopted mechanisms (in 1975 in the case of the United States), and have strengthened them since. The rapporteur believes the EU is lagging behind in this respect. Through their screening mechanisms, Member States can be more easily alerted and sought out by third countries involved in investment on their territories, for example by means of opinions. They can have the approach explained to them, taking care however not to be exploited for commercial reasons.

For a state, having a mechanism means knowing what is happening on its territory in strategic sectors in which it may be directly involved. These mechanisms also provide unexpected opportunities for economic stakeholders. For foreign investors or banks, obtaining prior investment approval is proof of reliability and trust.

Finally, not having a mechanism can represent a competitive disadvantage. Calls for tenders supported by the European Commission encourage companies to apply with other partner companies from within the EU. Companies established in a Member State and linked to foreign direct investments that have been validated under this Member State's screening mechanism will offer an additional guarantee (in the form of a positive presumption) for partnerships at EU level.

2. Under the Commission proposal

As we have seen, in a system of information exchange the quality of information is vital, and having a screening mechanism in place helps to fulfil this objective fully.

A contact point without adequate institutional backing will not be enough to fulfil the objectives ensuring the proper functioning of this mechanism of information exchange. It would for example be necessary to coordinate with other contact points at the same time as preserving the confidentiality of the data, such as, for example, those mentioned in Directive 2008/114 on European critical infrastructure protection (ECIP). The rapporteur believes that all Member States must think seriously about creating an information retrieval screening mechanism, without being obliged to do so. The Member States retain control over investment choices: that is their right. They must also know what is happening in their country: that is a duty. Thus positive effects will be felt rapidly by all Member States.

It is a question of adopting a balanced position without being excessively transparent and providing increased legal security and fairer competition for foreign and European players. Moreover this must take place without revolutionising investment in the EU, because Member States retain their prerogative.

The European Commission's role will be to provide support and contribute to discussion. This analysis is based not on theory but on long experience of screening mechanisms in Europe and around the world.

In terms of image, Member States that do not have screening mechanisms in place must not be seen as having abandoned the idea of possessing strategic industry. This would have a negative impact.

Finally, foreign investors wishing to circumvent a Member State's national mechanism will not bring anything positive to the table whether for the Member State they have circumvented or the one they have chosen because this state will only serve as a gateway without really benefiting from the results. Having a mechanism in place will enable Member States to be chosen for the advantages they provide.

VIII. WHAT WILL THE IMPACT BE?

Globalisation must make us aware of the impact of our actions. This is something that the rapporteur wishes to take into account in this analysis.

1. Partner countries

Thanks to its economic power, the EU remains a key player in terms of trading, financial and political relationships. The competitiveness of our companies, their innovation, know-how and stability are all strengths in terms of globalisation and attract foreign investors because of this. In order for this to continue, the EU must be able to preserve its strengths without screening investments for protectionist reasons.

All our partner countries have mechanisms, some of which are entirely opaque and unpredictable, with conditions that are difficult to comply with. The impact of the lack of reciprocity can today be felt by our companies, which no longer have so many competitive advantages.

We are also obliged to recognise that, in the face of countries which have a purely transactional approach in their relations, the EU has unfortunately failed in its use of an approach based on positive incentives. Without abandoning this approach entirely, we do nevertheless need to rethink certain objectives. Obtaining a bilateral agreement on investment with China is now impossible without, for example, the actual opening of the Chinese market for our companies.

Without undermining established practices, the exchange of information between Member States on the state of investments will allow us to question the EU's insufficiently firm stance on the defence of its interests. This represents the end of a state of bliss and the beginning of a more Cartesian approach.

On the contrary, cooperation with third countries may intensify, as we are now investing with various partner countries in joint projects. This state of affairs will strengthen joint efforts around the constitution of solid prior approval applications.

2. Foreign investors

Foreign investors have already got used to these mechanisms, which are in place in almost half of the Member States and in all the largest countries around the world. The presence of these mechanisms has not held them back from investing.
As far as possible, foreign investors must have access to decisions on their investments, except where questions of national security and sensitive information come into play.

European investors will not experience any changes except for the establishment of new partnerships and synergies with foreign investors who may be encouraged to pool resources.
The principle of grandfathering must be applied to measures applied to investments made prior to the entry into force of this regulation.

3. Retaliatory measures

The rapporteur is not convinced by fears of retaliatory measures.

The draft regulation and the use of mechanisms in Member States are guided by the principle of proportionality. Investments are only prohibited on an exceptional basis. In some cases it is a question of putting attenuating measures into effect to help to make the investment sustainable and turn it into a win-win by, for example, restricting investor access and avoiding the takeover of a company or all of its patents. Very many countries have strengthened their mechanisms over the last few years, while the EU is only now considering an internal dialogue on investments. It is a question of putting the situation into context.

4. Future agreements

By defending both its own interests and those of foreign investors already present in the EU, the EU is regaining credibility among its partners. This may also facilitate the negotiation of agreements on investments with third countries. In effect, in bilateral or multilateral negotiations, it will be necessary to bring up the issue of screening strategic investments by requiring the equivalence of mechanisms or facilities for our investors where there is a bilateral investment agreement. Investment is thus also a means of safeguarding jobs.

IX. THE ROLE OF INSTITUTIONS

EU-level information exchange offers real added value in comparison to existing national

mechanisms. The macro-economic vision will help to identify trends that work across national boundaries.

1. Analysis

The Member States are at the heart of this mechanism. The coordination group or committee set up by the European Commission will be operational prior even to the definitive ratification of the draft regulation. It will be the place for reflection on the many challenges surrounding the issue. Having Parliament as an observer would be advantageous.

The rapporteur would like to encourage Member States to discuss best practices in order to direct themselves towards the establishment of efficient mechanisms within Member States. This is an opportunity to highlight the anti-circumvention aspects of this legislation.

If the EU fails in this area, it would send a defeatist signal regarding the capacity of the world's largest trading power to defend its know-how. Equally, the doubts raised in some sections of the media on the impact of foreign investments on decision-making in Member States must be countered. This Stockholm syndrome is criticised more and more often in public studies and is a concern.

2. European Commission

The European Commission would have an analytical role but not a decision-making one, acting rather as a go-between for information. Without being too intrusive and without wishing to pre-empt the decisions of Member States, the rapporteur sees it as having a balanced role in the draft regulation. Two things however must be spelled out: the content and value of Commission opinions on certain investments.

To offer real added-value, Commission opinions must go beyond investments themselves and take into account the influence of third countries through state aid in particular, or by specifying, for information purposes, the level of openness of the country of origin of the company wishing to invest.

The question of the value of Commission opinions and the formulation chosen for opinions concerning FDIs in EU projects (Article 9(5) of the regulation) is legitimate, but not new, because in Article 5 of Decision 2017/684 of 5 April 2017, Parliament and the Council already used the following formulation: '*shall take utmost account of the Commission's opinion*'.

Thus, given the strategic importance of some investments, one scenario is missing from the Commission's draft regulation. In the event that concerns about an investment are expressed by the European Commission and by at least one-third of the Member States, these Member States and the Member State in which the investment is taking place must come to an agreement together on an alternative solution.

Listed non-exhaustively in the annex, European projects can legitimately be supported by the European Commission, which already plays a major role in their organisation, financing and monitoring. It is entirely logical for the Commission to comment on investments concerning these projects when it believes it to be necessary. The Commission should also be encouraged to take a view on the impact of other investments on EU interests.

The legislature anticipates and budgets for returns on investment during discussions on these

European projects. While foreign investors benefit from the results of their investments, this may have consequences for several Member States and the very functioning of these often strategic projects. The interests of the EU are also at stake.

Specialised EU agencies may also be called on to contribute to this analytical work, in particular in the monitoring of investments in European projects.

The Commission should remain open to the desire of certain Member States to benefit from agreements in the form of a golden share in order to better preserve certain specificities.

It is to be hoped that the Commission will allocate the human and financial resources needed for the proper functioning of this mechanism and for its monitoring, especially if there is a desire for a monitoring unit or a European observatory of foreign investments with a system of alerts and a scoreboard.

It makes little sense to speak of the high cost of bureaucracy in this respect when a comparison is made between the resources allocated by Member States with a mechanism and the sums at stake in strategic sectors. The cost of not doing anything is potentially much higher than that of putting a mechanism into place.

3. European Parliament

While the process of screening must remain independent of political ambition, Parliament does have a strategic role in monitoring and raising alerts. The sometimes sensitive and therefore confidential content of some information must not entirely restrict MEPs from this FDI screening mechanism.

The annual reports produced by Member States on the use of their national mechanisms or, where no mechanism is in place, on the state of play of foreign investments, must be the subject of remarks by Parliament. This also gives Parliament a role in spearheading proposals, both to help Member States hoping to obtain a mechanism and during the revision of the EU mechanism.

Called on by companies, citizens, associations, unions and all interested parties, parliamentary representatives will be regularly alerted on the question of investments and must remain vigilant in order to prevent the exploitation of national mechanisms for purely commercial ends, at the same time as alerting the competent authorities where potential doubts exist.

MEPs must contribute to the safeguarding of EU interests. The establishment of a rule must be envisaged enabling Parliament to demand an opinion on a foreign investment from the European Commission. Where such an opinion is confidential, Parliament will obtain confirmation from the Commission that an opinion has been provided.

4. Court of Justice of the European Union (CJEU)

Screening mechanisms must guarantee a right of appeal before the national courts. The Court of Justice of the European Union may supplement this facility by ensuring the compliance of a Member State's screening mechanism with the standards defined in the regulation (for example through infringement proceedings where a Member State's mechanism does not provide the right to appeal). CJEU case law on this subject is already substantial, and offers a clear idea of judges' interpretations of Member States' justifications when using their national mechanisms.

X. RAISING AWARENESS AT ALL LEVELS

Communication and training on this new mechanism must be provided. The Commission has already played a role by making itself available to parliamentary representatives, Member States and stakeholders to respond to their questions. This work must be continued at institutional level and in the Member States, but will have to go further in the search for information on strategic sectors or foreign investment strategies identified in the EU.

1. Territories

Territories must be fully involved in national mechanisms. Regions sometimes have jurisdiction over investments and contribute, along with municipalities, to the attractiveness of their territories for foreign investors. They also have a very thorough knowledge of the economic network. All parties helping them in this respect, whether they be chambers of commerce or regional promotion agencies, are able to participate in the understanding of certain foreign investments.

2. Economic intelligence actors

The concepts of public order and security also include the concept of national and public security. It is not part of Parliament's remit to comment on the role of data gathering agencies or economic intelligence agencies in terms of economic opportunities, but it does fall within the rapporteur's remit to highlight their value for Member States.

Much as is the case in the area of combating terrorism, Member Stares are required to examine their economic and strategic insecurity by gathering information on the subject.
Coordination within agencies between experts in economic data would probably be advantageous at EU level.

3. Companies

Companies, the parties primarily impacted by investments, must be able to obtain information from Member States and EU institutions on the modalities of national mechanisms as well as on the issues raised by the current context of certain investments. They must also be informed of their eligibility for potential EU screening of investments when they participate in an EU project or programme. The legislature does not aim to make decisions on investments in the place of economic operators, but it does have a role in the provision and sustainability of public or strategic state interests, while states have a monopoly over their own legitimate interests.

Companies can also submit remarks with regard to their status as strategic companies in certain sectors, for example, or take part in the monitoring of investments.

Member States should encourage companies to insert 'change of control' clauses into their articles of association and contracts in respect of their most sensitive suppliers or partners in order to protect themselves against value chain unpredictability, which may lead to a lack of knowledge of their sector. Directive 2004/25/EC on takeover bids can also serve as a framework with respect to suppliers.

The rapporteur also thinks that in creating even a modest constraint with the drawing up of this new mechanism, it would be encouraging to offer companies support in the identification of their subcontracting network and even their overall value chain.

The rapporteur encourages dialogue with companies but also within companies with staff

representatives for the implementation of strategies looking to protect know-how and technologies. Just as with goods and services, employees are strategic resources for a whole sector.

XI. FACILITATING EUROPEAN INVESTMENTS IN STRATEGIC SECTORS

This is not a question of talking about investments, their origin and their consequences without thinking about the instruments to facilitate them.

1. Past mistakes

An assessment can be formed on the basis of past practices. Privatisation has allowed foreign investors to benefit from opportunities on European territory. It is not for us to analyse this assessment here, such is the complexity of the parameters to be taken into account. The EU is sometimes viewed as a supermarket, while it ought rather to be a shop window. During the unprecedented economic crisis of 2008, the EU concerned itself more with the sale of assets than considering which operators they would be sold to in the face of the urgency of certain situations.

To this was added the obligation to transfer technologies in order to gain access to foreign markets. European companies have been able to preserve their latest innovations in spite of the aid given to foreign sectors, which have, in the meantime, made up their technological lag. These foreign sectors have since become our direct competitors and are today able to acquire the latest EU innovations through investment.

It is now imperative to draw conclusions in order to make investment screening a balanced, measured and practical tool for the sustainable development of EU economies and thereby put an end to the 'know-how drain'.

2. European Fund for Strategic Investments (EFSI)

The current desire to better protect so-called strategic or sensitive sectors is not new. European instruments already exist as a complement to targeted national policy. The European Fund for Strategic Investments (EFSI) is currently being revised and aims to stimulate long-term economic growth through investment. It is a tool that European and foreign investors can turn to in order to take part in large European infrastructure projects within a well-defined framework. It also enables an improved response to the failures of the market. The companies concerned must therefore be protected through the annex to the regulation due to the substantial European funding.

3. Important Projects of Common European Interest (IPCEIs)

The European Commission also promotes transnational projects that are of strategic interest to the EU: these are the Important Projects of Common European Interest (IPCEIs). For Member States, the strategic aspect of the sectors or companies concerned by projects benefiting from the EFSI and IPCEI frameworks is incontestable.

These programmes must help prevent situations in which strategic EU companies that need investment are unable to find European investors. European investors must be informed and may in this way help strengthen their presence in strategic EU projects.

Like the EFSI, the IPCEIs must be highlighted for recovery or to promote European investment in strategic sectors or companies. The European Commission monitors these projects and must therefore be encouraged to issue an opinion to the Member State in which the investment is taking place.

4. European Defence Industrial Development Programme

The aim of the European Defence Industrial Development Programme is to strengthen the competitiveness and innovation of the EU defence industry. By encouraging collaboration between companies in the development of defence products and technologies, this programme represents an interest for the EU as it touches on the present and future European Defence Technological and Industrial Base.

5. European Investment Bank (EIB)

Finally, if European projects are considered to carry a strategic dimension for the independence or future of the EU, they must be able to count on investment from the EIB. The financing guarantee it is able to offer must be oriented towards EU projects and programmes in order to reduce the risk of foreign investments, in particular in infrastructure. Concrete measures could be taken such as the creation by the banks of asset portfolios for strategic companies, on the same model as is used for SMEs. As a reminder, in 2017, the EIB contributed EUR 18 billion to infrastructure projects.

6. Opening of international public procurement markets

Above all, our European debate must in parallel push forward the international instrument aiming to combat discrimination against EU companies in third country procurement contracts. Our companies must be able to access the liquidity needed to invest in the EU. Without the possibility of winning public procurement contracts abroad, European investments are in effect reduced.

Thus the creation of an FDI screening mechanism in the EU will also help support the leveraging of EU investments abroad, while at the same time providing a proportionate, dependable and balanced mechanism.

7. Competition policy

It is now time, in the context of globalisation, for the EU to redefine its competition policy to adapt it to the challenges being faced. Innovation in the EU is caught between powers that have abused state aid and the lack of reciprocity and openness. Moreover, European champions sometimes now lack the critical size needed to survive the sometimes unfair competition of international champions. One statistic reveals the urgency of the situation: while Germany invests EUR 200 million in industry 4.0, China has a credit fund of USD 40 billion. This is without taking into account additional local or regional financing.

The EU must create and support its European champions so that it can also remain in control of the norms it applies by taking into account the situation of investment and exchange flows, subsidised where applicable. The application of the EU competition laws outside its territory must continue.

XII. REVIEW CLAUSE

The creation of this new mechanism brings certain expectations with it. The rapporteur believes that the monitoring and improvement of the mechanism need to be planned well in advance, in view of the review of the regulation, three years after its entry into force.

1. Annual reports

The rapporteur supports the idea of annual reports facilitating the understanding of the state of affairs and proportionate usage of national screening mechanisms. These reports, to be sent to the European Commission, will vary from one Member State to another. In the event that there is a mechanism in place, a report on its usage will be sufficient. Where there is no mechanism in place, the Member State will have to make a report to the European Commission on investments that have taken place and help it to understand the state of affairs in terms of foreign investments on its territory. This tool will help in the sharing of best practices.

The European Commission will then summarise these reports in a public report that will allow all stakeholders and in particular Parliament to monitor developments in mechanisms and their consequences.

2. Convergence

The objective will be to create an effective, proportionate mechanism with few administrative constraints. Faced with occasionally worrying situations of states losing sovereignty due to foreign investments, the exchange of information must enable a convergence of strategies at the same time as retaining national specificities. This convergence must also bring the timescales of political and economic action together.

3. European Parliament

The European Parliament will participate actively in the review clause in order to pass on the feedback provided to it by citizens or companies. Parliamentary representatives have all witnessed hostile investments. Now we must once again become actors in the process.

4. Brexit

The rapporteur wishes to draw attention to the impact of Brexit. Once the United Kingdom has effectively left the EU, its investments will automatically become part of the framework of investments from third countries. This being so, if the UK's desire is to retain close links with the EU, it will be necessary to establish a level playing field and a balance of treatment in the British and European FDI screening regime. We do however recall that screening does not equate to prohibition and British investment will be welcome in Member States. It is not for us to go further into specific investment mechanisms here, as the UK is still a Member State.

XIII. CONCLUSIONS

Three main questions arise for the legislature: how can we continue to attract FDI? How can the need for FDI be reconciled with the protection of public order and security as well as strategic areas of the EU? And how can foreign markets be opened to EU investments? This is the balance that needs to be struck in order to provide prevention rather than cure.

The EU must remain open to foreign investment but it is necessary for the sovereignty of Member States and the protection of public order and security that a European investment screening mechanism be set up with an effective system of information exchange. This screening must not involve all investments because information overload can make for a

labyrinthine system.

By filling certain gaps in the internal market, legal certainty can be improved for our companies because the EU remains a serious continent, that protects investment rules in what is sometimes an unbalanced context of globalisation. This must result in the adoption of a pragmatic and effective system that respects its international commitments.

The draft regulation on FDI screening in the EU follows two other pillars implemented in the EU, which are designed to take action and protect, namely the modernisation of trade defence instruments and the new anti-dumping procedures.

Naivety in the face of unfair competition has come to an end. Certain barriers hinder compliance with international obligations in terms of trade and European companies are the first to come up against them. Helping these companies to enter foreign markets as well as invest on EU soil are among the EU trade policy objectives. It is time to take the question of positive but not naive reciprocity beyond European borders. In order to do so, the rapporteur will be guided by three principles during this period of examination: balance, effectiveness and credibility.