

EU Foreign Direct Investment Screening: Europe qui protège?

The EU Regulation on the Screening of Foreign Direct Investments was finally agreed in March 2019 and will enter into force in April.¹ There will be a period of adjustment of 18 months, after which the new system becomes operational. The Regulation coordinates and partially harmonises the national FDI screening mechanisms that are currently in place in approximately half of the Member States. Its adoption follows the much more aggressive use of FDI screening by the US, first in the wake of the September 11 terror attacks and subsequently in the context of the rising tensions with China inter alia in the field of trade.

The Regulation enters into force against the background of increased calls for the EU to adopt a more protective role. A good example is provided in the recent visions for European integration set out by the French President Emmanuel Macron and the new leader of the German Christian Democrats, Annegret Kramp-Karrenbauer.² In many respects the radical, progressive proposals of Macron and the cautious, conservative views of Kramp-Karrenbauer were in conflict with each other. However, on one issue they agreed: the EU needs to become more active in protecting European interests in the global arena. Both leaders made explicit reference to China, while the European Commission and the EU's High Representative for Foreign Affairs and Security Policy have recently called the country a 'systemic rival' and proposed actions to promote a more balanced and reciprocal trade and investment relationship, a level playing field, and the protection of critical infrastructure and the technological base in Europe.³

At a superficial first glance, the new Regulation might appear tailor-made to answer these calls. It is based on Article 207 TFEU, which gives the EU an exclusive competence in the field of common commercial policy. Since the Lisbon Treaty, this includes foreign direct investment. The instrument is a directly applicable regulation and the Commission is given an important role in the screening process. Good reasons could be offered for a heavy EU involvement: in the absence of a European response, foreign investors might be able to divide and rule, playing one country against another. An investment in one country could also create risks for the others in an increasingly integrated and interconnected Europe. Yet there are also powerful countervailing forces that militate for a central role for individual Member States. According to Article 4(2) TEU, national security remains the sole responsibility of each Member State. Different countries have very different perceptions of security threats. This reflects their different economic and geopolitical situations, among other things. Germany may be concerned about Chinese government controlled undertakings taking over key German companies, but Portugal may see the investments as beneficial,⁴ while Poland's security establishment worries about the Suwalki Corridor rather than the Belt and Road Initiative. As long as different Member States look in very different directions when thinking about threats to national security, far-going integration will remain difficult – it is not Europe that protects, but individual Member States.

In reflection of some of the tensions described above, the Regulation adopts a highly unusual approach: it does not compel Member States to engage in the screening of foreign direct investments, but if they do, it

¹ Regulation (EU) 2019/... of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CONSIL%3APE_72_2018_REV_1. The Regulation was analysed in J de Kok, 'Towards a European Framework for Foreign Direct Investment Reviews' (2019) 44 ELRev 24.

² President Macron, 'Renewing Europe' (March 2019) available at <https://www.project-syndicate.org/commentary/three-goals-to-guide-european-union-renewal-by-emmanuel-macron-2019-03>; Annegret Kramp-Karrenbauer, 'Making Europe Right' (March 2019) available at <https://www.welt.de/politik/article190051703/Annegret-Kramp-Karrenbauer-Making-Europe-Right.html>.

³ 'EU-China – A strategic outlook', JOIN(2019) 5 final.

⁴ 'Portugal PM warns on EU protectionism over China investment screening', Financial Times, 3 March 2019.

sets out a mechanism of coordination and provides for partial harmonisation. Other Member States and the Commission may offer their comments or opinion to the Member State that is conducting the screening. The screening process itself must comply with requirements such as non-discrimination, a certain level of transparency, the protection of commercial secrets, and a possibility to seek recourse. There are undoubted practical benefits: for example, the coordination mechanism allows the Member States with greater resources to share intelligence that may be unavailable for smaller countries.

Yet there are also dangers and flashpoints. In particular, the Regulation provides that the screening grounds are security or public order. This represents a rejection of some of the earlier proposals that would have included economic grounds as well. But questions remain: under Article 4 of the Regulation Member States may consider the effects of the investment undergoing screening on critical technologies, including artificial intelligence, robotics, semiconductors, aerospace, energy storage, quantum technologies as well as nanotechnologies and biotechnologies. If a Member State takes a wide view of security in the context of the Regulation, economic considerations will easily slip into the assessment. Further, it is not clear how far the Treaty rules on free movement of capital actually allow Member States to go in this respect. Free movement of capital has an *erga omnes* effect: it applies also between Member States and third countries. However, the case law has established that Member States may be able to offer justifications for restrictions on capital movements between the EU and third countries that would be rejected in the intra-EU context,⁵ but the full extent of this increased national regulatory autonomy is not laid down with any precision.

The Regulation is designed to protect Europe from suspicious foreign investments but it may also have the surprising effect of strengthening the position of third-country investors. Prior to the Regulation, some national screening mechanisms were outside the scope of EU law. This was due to the case law of the Court that sought to distinguish between the right of establishment and the free movement of capital. Under this case law, a national rule that only ever applies to situations where investors seek to exert a definite influence on the target company falls exclusively within the freedom of establishment,⁶ which does not protect third-country investors. As a result, a national screening system that solely concerned situations where a third-country investor was acquiring control of the target firm was not governed by the four freedoms at all. By contrast, the Regulation now brings national screening mechanisms within the scope of EU law. An investor may raise concerns if a decision does not reflect the grounds set out in the Regulation or if the process does not comply with its requirements. Further, other EU instruments such as the Charter of Fundamental Rights become applicable. For example, how well do national rules, and even the Regulation's requirement of a possibility to 'seek recourse'⁷ against screening decisions, reflect the right of access to courts found in Article 47 CFR? The protection that Europe offers may in fact end up benefitting third-country investors just as much as EU citizens.⁸

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⁵ See e.g. Case 446/04 FII Group Litigation EU:C:2006:774 at para 171.

⁶ Case C-35/11 FII Group Litigation EU:C:2012:707 at para 98.

⁷ Article 6 of the original proposal, COM(2017) 487 final, talked of 'judicial redress'.

⁸ For a debate covering many aspects of the Regulation, see Verfassungsblog, 'A Common EU Law on Investment Screening' at <https://verfassungsblog.de/category/focus/a-common-eu-law-on-investment-screening/>.