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A European Committee on Foreign Investment?*

by

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On September 13, 2017, the European Commission (Commission) presented a proposal for regulating the screening of FDI flows into the EU¹ (based on Art. 207(2) of the Treaty on the Functioning of the EU (TFEU)), as requested by France, Germany and Italy. Although the proposal requires member states to notify the Commission of planned or completed non-EU FDI (i.e., M&As and greenfield investment) that are under scrutiny according to national legislations, it also provides the Commission with the power to monitor FDI that could affect projects of EU interest on grounds of security or public order. The Commission would only have the power to issue non-binding opinions (that members should take into account) on whether the FDI at issue represents a risk for EU security or public order. Moreover, the proposal does not require those members that still do not have a form of FDI control to adopt such a measure. It is unclear, thus, how these states could notify the Commission of projects that raise concerns without a screening mechanism.

EU Nordic members have already declared that they will oppose the Commission's proposal which, in their view, could harm free trade. Similarly, Greece, Portugal and Spain also are dissatisfied with the proposal. They might prefer an EU body for monitoring non-EU FDI that would neither grant screening power to the Commission, nor affect existing national mechanisms. Other member states could oppose any EU intervention on FDI for opposite reasons. Indeed, some of them may wish to keep FDI screening on security grounds under their exclusive control, given their "sole responsibility" in protecting their national security, as recognized by Art. 4(2) of the Treaty on EU (TEU), although this provision should be interpreted restrictively.²

Alternatively, an act harmonizing the existing national measures of FDI control could be proposed that would not include any consultative power for the Commission, but that instead would require member states that still lack an FDI screening system to adopt one. Moreover, such a EU act could include clear guidance to states to adopt or amend their national measures of FDI control or the protection of EU security and public order.

Beyond the mentioned options, the most ambitious idea would be the establishment of a European Committee on Foreign Investment (ECFI) that would replace existing national mechanisms.³ Indeed, the most recent case law of the EU Court of Justice confirms that the EU's exclusive competence on FDI (i.e., Art. 207(2) TFEU) covers not only FDI liberalization and protection, but also restrictions adopted on public interest grounds.⁴ Hence, it could be argued that the EU has gained the exclusive power to adopt measures to limit non-EU inward FDI.

An ECFI could be modeled on both the Committee on Foreign Investment in the United States and the Canadian FDI control system under the Investment Canada Act (ICA), to protect the EU's economy, security and public order. Indeed, the US notion of security is broad and covers sectors linked to defense and critical technologies and resources. This concept of security, together with the "net benefit test" provided by the ICA (according to which the government must consider the effects of FDI on the economy, e.g., employment and productivity), could be points of reference.

Obviously, an ECFI could not exactly replicate these models. Indeed, it should consider the responsibilities of member states in protecting their essential interests regarding defense, as recognized in Art. 346(1)(b) of the TFEU: members are free to adopt any measures necessary to protect their military production, including restrictions on foreign ownership.⁵ Therefore, given that EU competence is limited in this sector, an ECFI could be provided with the power to screen non-EU FDI at least in non-military strategic sectors (e.g., energy, telecommunications, transport, hi-tech industries, banking, critical infrastructure). In particular, an ECFI should be able to block (or condition) inward FDI that affects security and critical economic concerns (without violating the EU's international obligations).

EU-wide FDI screening would be more efficient than the present system based on national measures: it would reduce a number of FDI limitations, as well as the number of competent authorities.⁶ An ECFI would provide foreign investors a simple, transparent and predictable framework of FDI control, while serving the European general interest.

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¹ COM(2017) 487.

² Indeed, since the EU has gained exclusive FDI competence, states' competence on national security cannot be broadly interpreted, so as to impinge on the EU's exclusive competence. That would constitute a violation of the principle of conferral (Art. 5 TEU).

³ For similar conclusions, see R. Vidal Puig, "The scope of the new exclusive competence of the European Union with regard to 'foreign direct investment,'" *Legal Issues of Economics Integration*, vol. 40 (2013), p. 161.

⁴ ECLI:EU:C:2016:992, paras. 326-337, and ECLI:EU:C:2017:376, paras. 98-109.

⁵ ECLI:EU:C:2014:2139, para. 37.

⁶ Only Bulgaria, Estonia, Luxembourg, Hungary, and Malta do not have any limitation on FDI ([http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI\(2017\)603941_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017)603941_EN.pdf)).

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