



Beware of investors bearing gifts

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Foreign Direct Investments (FDIs) are generally considered a source of growth. However, especially investments of state-controlled foreign enterprises in critical technologies and infrastructure, such as ports, cause concerns again and again. Now, the EU intends to evaluate such investments with a specific screening mechanism.

Defending national interests in global trade is usually related to practices like dumping, subsidies, or what lately makes the headlines – pelting each other with tariffs. FDIs, in contrast, are generally regarded not as a threat to but a benefit for the economy, being a source of growth and innovation, as well as an indicator of a competitive business location. The term itself describes, in short, investments made by natural or legal persons coming from a foreign state in the EU to establish or maintain a controlling ownership of the company invested in. According to the OECD's annual report *FDI in figures*, FDI flows into the EU amounted to \$290b in 2017.

However, the generally positive appraisal of FDIs has come under pressure. "Europe must always defend its strategic interests," Commission President Juncker pointed out in his 2017 State of the Union Address. "If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure, or a defense technology firm, this should only happen in transparency, with scrutiny and debate," he underlined.

Good and bad FDIs

European ports have been the target of FDIs for many years. Global majors, like DP World (United Arab Emirates), Hutchison Ports (Hong Kong), PSA (Singapore), and COSCO and China Merchants (China), hold significant shares in container terminals in the EU. Ownership of port infrastructure remains the exception, though, given the predominant landlord model. But such investments have not always been welcomed

everywhere. In 2006, for example, the intention of DP World to take over the British company P&O, which operated six major ports in the US, became the subject of a heated national security debate in the aftermath of 9/11, eventually causing DP World to sell P&O's US business to Ports America.

Today, in the light of a strategic economic policy and the far-reaching Belt and Road Initiative, it is China's interest in US and EU companies and its willingness to fund states (and their infrastructure projects) which are at odds with EU values and policies, that evokes a desire for more control and protection against unwelcome FDIs. The European Commission's (COM) proposal for a regulation establishing a framework for the screening of FDIs is the response to such concerns, building in part on screening mechanisms in place in 13 out of the 28 EU Member States (EU-MS).

¹ This article represents the author's personal view

#Inside
#FDI#EU#Ports
#National#Union#Interests
#European Commission#Screening
mechanism



Giovanni Domenico Tiepolo – The Procession of the Trojan Horse in Troy, photo: Wikimedia Commons

On the radar screen

In the US and Germany, for instance, monitoring systems for foreign investments have been used for a long time. They aim at protecting critical infrastructures and technologies. In the US, the Committee on Foreign Investment in the United States (CFIUS) reviews the national security implications of foreign investments in US companies or operations. According to the Defense Production Act, the Committee shall review the relevant transaction to determine its effect on the national security. CFIUS may suspend or prohibit any transaction that threatens to impair the national security. A port-related case arose from COSCO's progressing takeover of OOIL, the parent of OOCL, which owns a modern container terminal in the Port of Long Beach. To meet CFIUS' concerns, the parties committed to selling all stakes in the terminal to a non-affiliated buyer.

In Germany, the Foreign Trade and Payments Ordinance vests similar powers in the Federal Ministry of Economics and Technology. The Ministry can examine whether the public order or security is endangered if a non-EU resident acquires either the entire or a direct

or indirect share in a domestic company. The Ministry can prohibit the acquisition or issue instructions. Recently, the Ministry objected to the acquisition of the German semiconductor company Aixtron by the Chinese bidder Fujian Grand Chip. This case contained several political intricacies, a US subsidiary of Aixtron and the coincidental withdrawal of a large order by a Chinese customer of Aixtron, who had a relationship with the bidder.

The proposal

The COM's proposal (COM(2017)0487) defines a framework for both EU-MS' screening mechanisms as well as for a new COM screening tool. According to Art. 3, the EU-MS "may maintain, amend or adopt mechanisms to screen foreign direct investments on the grounds of security or public order" – national security according to the context. The COM, for its part, "may screen foreign direct investments that are likely to affect projects or programs of *Union* interest on the grounds of security or public order." When screening an FDI, Member States and the COM may, according to Art. 4, consider the potential effects on, i.a., "(1) critical infrastructure, (2) critical technologies, (3) the security of supply of critical inputs, or (4) access to sensitive information." According to the Critical Infrastructure Directive 2008/114/EC, ports have been designated to the first category. When assessing an FDI, EU-MS and the COM "may take into account whether the foreign investor is controlled by the government of a third country, including through significant funding."

The proposal then lays down procedural rules for EU-MS' screening, notification, and reporting requirements, as well as mechanisms of cooperation between EU-MS and the COM. This includes the latter's right to issue an opinion where it concludes that an FDI is likely to affect security or public order in one or more EU-MS, which, on their part, shall give due consideration to such an opinion. The COM's screening mechanism is laid out in Art. 9: where the COM considers that an FDI is likely to affect projects or programs of Union interest on grounds of security or public order, it may issue an opinion addressed to the Member State where the FDI is planned. The addressee shall take utmost

account of this opinion and provide an explanation in case the opinion is not followed.

The current state of the debate

The COM's proposal struck a nerve. Hence, the general tendency of the amendments tabled in the European Parliament's (EP) Committee on International Trade was to enforce the role of EU institutions. Some Members of the EP even proposed to give up the framework approach and to endow the COM with executive powers. The report finally endorsed by the Committee on 5 June 2018 does not go that far. However, it is quite clearly targeted at Chinese policies when it states, among others, "state-led outward projects or programs", "strategic industrial goals", the acquisition of "key enabling technologies or knowledge", "significant funding", and "political presence" as criteria for the assessment.

The definition of critical and strategic infrastructure was specified, too, now explicitly including ports, rails, airports, shipyards, and transport services. In addition, the report allows for greater procedural involvement of other EU-MS, the EP, and civil society groups. As the next step, the EU institutions will enter into interinstitutional negotiations to reach an agreement.

A balancing act

For ports it is essential that the regulation strikes a proper balance between protecting national and EU interests and maintaining an open investment environment, as they are depending heavily on investments. Legal questions remain, among other things, with respect to the definition of FDI and the relationship between Art. 207 of the Treaty on the Functioning of the European Union (TFEU) on EU common commercial policy and the EU-MS' right to restrict the freedom of capital movements according to Art. 65 TFEU.

In the end, the underlying economic and political challenges will not all of a sudden become solvable by introducing a new mechanism of investment control alone. They are rooted to a large extent in the general economic and legal framework for investments, including (lacking) reciprocity in open markets, equality of opportunities, and a common understanding of state aid rules. ■



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