Council of the European Union

Brussels, 27 April 2018
(OR. en)

8456/18

Interinstitutional File:
2017/0224 (COD)

COMER 38
FDI 21
COMPET 254
IND 110
CODEC 659

COVER NOTE

From:	European Economic and Social Committee
To:	General Secretariat of the Council
No. prev. doc.:	12137/17 COMER 92 FDI 23 COMPET 601 IND 212 CODEC 1390 + ADD 1
Subject:	OPINION of the European Economic and Social Committee 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 - COM (2017) 487 final - 2017/0224 (COD)

Delegations will find attached the above-mentioned opinion.

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Encl.: REX/498 - Screening of foreign direct investments into the European Union

European Economic and Social Committee

REX/498
Screening of foreign direct investments into the European Union

OPINION

European Economic and Social Committee

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
[COM(2017) 487 final – 2017/0224 (COD)]

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Consultation	Council, 15/11/2017
Legal basis	Article 207 TFEU
Section responsible	Section for External Relations
Adopted in section	28/03/2018
Adopted at plenary	19/04/2018
Plenary session No	534
Outcome of vote (for/against/abstentions)	203/1/3

1. Conclusions and recommendations

1.1 The European Economic and Social Committee (EESC) emphasises that foreign direct investment is a major source of growth, jobs and innovation. Foreign direct investment has always been a key factor for positive economic and social development in the EU. The EESC supports an open investment environment and welcomes foreign direct investment.

1.2 The EESC notes that foreign investment, while useful, may also carry risks and jeopardise national security and public order in one or more Member States.

1.3 The EESC calls for the EU's openness towards foreign direct investment to be complemented by robust and effective policy measures.

1.4 The EESC welcomes the Commission's 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, but notes that the extent of the problem is not yet fully known, as the Commission did not analyse investment flows and their impact when initiating the legislative procedure.

1.5 The screening of investments in businesses and entities that are of strategic importance for national security and public order of the EU is patchy and uncoordinated: some countries have a screening procedure while others do not, meaning that investments in the latter countries are not screened at all. A system at EU level must remedy this shortcoming, remove disparities between Member States, and safeguard national and European interests.

1.6 Member States that have procedures to screen foreign direct investment, and countries that do not have such procedures, must be able to provide and receive equally reliable information, including in the form of annual reports submitted to the European Commission in cases where the Member States or the Commission determine that planned or already completed foreign direct investment in a Member State might be detrimental to security or public order.

1.7 The EESC welcomes the fact that the proposal for a regulation specifies the fundamental procedural requirements for the screening mechanisms, such as transparency, non-discrimination between third countries and judicial review, thus increasing both investment certainty and legal certainty.

1.8 The EESC points out that the EU has exclusive competence when it comes to foreign direct investment. Where national screening systems exist in the EU Member States, the legal basis for these systems must be created so as to avoid legal uncertainty.

1.9 The EESC is concerned that the European Commission only reserves the right to screen investment when such investment might affect projects or programmes of Union interest. Where foreign direct investment has a cross-border impact on the whole EU or parts of it, the EU needs to make use of its competence in terms of investment screening.

1.10 The meaning of "security" and "public order" is not sufficiently clear in the Commission draft. The EESC points out that the economic sectors that might be involved in screening are uncertain as to whether strategic sectors and key technologies are also covered by these concepts. The EESC calls on the European Commission to make further efforts to clear up this issue.

1.11 The EESC supports the mandatory establishment of contact points in the Member States and is in favour of setting up a group to coordinate investment screening in the EU. At the same time, the role of these two bodies, the level of representation, and the relationship of these bodies to each other is not entirely clear. The Commission should make sure to clarify this matter.

1.12 The EESC recommends involving the social partners and civil society in an appropriate way.

1.13 The EESC suggests extending investment screening to sensitive areas of infrastructure and facilities that maintain societal functions. These include energy and water distribution, transport, digital infrastructure, financial services and financial markets, as well as the health sector.

1.14 The EESC supports broadening investment screening to key technologies, where an investor is controlled by, or has close ties to, a third country's government. The EESC suggests that the regulation should include a separate screening procedure for foreign direct investment made by third-country governments, or investors with close ties to such governments.

1.15 The EESC is convinced that the screening process is more effective if it is applied to planned foreign direct investment rather than direct investment that has already been carried out; it calls on the Commission to include this suggestion in the proposal for a regulation. Above all the Committee recommends a post investment monitoring.

1.16 The EESC, in the interests of investment certainty, recommends that time limits be set, both for deciding whether investment screening will take place, as well as for the full screening process itself.

1.17 The EESC points out that the confidentiality of commercial data must be guaranteed during the screening procedure, so as not to deter potential investors.

1.18 The EESC recommends collaborating on investment screening with the United States and other trade partners, and also advocates harmonising international rules on screening foreign direct investment. The United States' Committee on Foreign Investment (CFIUS) could serve as an example in this regard.

1.19 Although the issue of reciprocity is not addressed in the proposal for the Regulation, the EESC calls on the Commission to apply the principle of reciprocity in all cases of the EU negotiations with the third countries on FDI as more non-EU investors purchase EU businesses and entities while the EU investors often are facing barriers to investing in other countries. Above all the Committee calls for the speed-up of the negotiations about the investment agreement with China.

2. General comments

2.1 The EESC essentially supports the key positions of the European Commission's proposal for a regulation establishing a procedure for screening of foreign direct investments into the European Union, which stipulates that the European Union is open to foreign investment and that foreign direct investment contributes to the Union's growth by enhancing its competitiveness, creating jobs, bringing in capital, technologies, innovation and expertise, and opening new markets for the Union's exports.

2.2 It is, however, a cause for concern that foreign investors – principally state-owned enterprises – are strategically acquiring European businesses that possess key technologies, and that they are poised to take over infrastructure, important future technologies and other assets that are important to guaranteeing the security of the Member States and the EU as a whole.

2.3 There has been a noticeable rise in investment from third countries in the EU over the last ten years. The European Commission Communication on "Welcoming Foreign Direct Investment while Protecting Essential Interests" contains statistics showing that most investment comes from the United States, Canada and Switzerland, followed by Brazil, China and Russia. During the financial crisis of 2008, Chinese investment in EU Member States increased tenfold! It rose from EUR 2 billion in 2009 to almost EUR 20 billion in 2015. In 2016 alone, Chinese direct investment in the EU came to EUR 35 billion. This was 77% more than in 2015 – and 1 500% more than in 2010. Investment by EU companies in China, meanwhile, decreased by 25% in 2016.

2.4 In February 2017, three Member States – France, Germany, and Italy – called on the European Commission to review the rules for foreign direct investment into the European Union. This call was prompted by concern about technological expertise being lost to other countries, as a growing number of non-EU investors are purchasing EU technologies to promote these countries' strategic aims while EU investors are often confronted with obstacles to investment in other countries. The three Member States pointed out that the principle of reciprocity should be upheld if EU investors are given only limited access to markets outside the EU. The three Member States called on the European Commission to develop a European instrument to "prevent any damage ... through one-sided, strategic direct investment made by foreign buyers in areas sensitive to security or industrial policy, and to ensure reciprocity. The state instruments that are currently available at the level of EU Member States are not sufficient to guarantee protection of this kind."

2.5 The European Parliament's resolution of 5 July 2017 called on the Commission and the Member States to screen third countries' foreign direct investments in the EU strategic industry, infrastructure and key future technologies.

2.6 The European Commission has presented a proposal for a regulation that puts forward a legal framework to screen foreign investments from third countries.

2.7 The European Commission has decided to limit this proposal to the areas of security and public order so as to reach a minimum level of agreement between the Member States. Following the

Commission explanation, these encompass, for example, electronic communications, cybersecurity, critical infrastructure protection, and industrial competitiveness in cybersecurity products and services.

2.8 The definitions of "security" and "public order" alone are not clear enough in this context to avoid problems and differing interpretations. The EESC points out that the economic sectors that might be involved in screening are uncertain as to whether strategic sectors and key technologies are also covered by these concepts. The EESC calls on the European Commission to make further efforts to clear up this issue.

2.9 The EESC notes that the European Commission fully recognises that the Member States must retain the necessary flexibility in screening foreign direct investment (see COM(2017) 494). This would mean that only Member States can make decisions regarding foreign direct investment from third countries.

2.10 The EESC has always been of the view that the EU's trade and investment policy "has to fit with" and be consistent with economic and other policies of the Union, including "protection of the environment, decent work, health and safety at work". An effective EU investment strategy has a crucial role to play in maintaining EU competitiveness at a time of rapid economic change and major shifts in relative economic power around the world.

2.11 The EESC points out that the EU is one of the most open economies for foreign direct investment. Inward investment to the EU is constantly growing. It is increasingly focused on strategically selected sectors and companies that are larger than average, and increasingly comes from state companies or investors with close ties to governments.

2.12 At global level, meanwhile, the Commission is of the view that restrictions on foreign direct investment have been growing since 2016. EU investors often do not enjoy the same rights in third countries as investors into the EU. As early as 2011, the EESC expressed its regret that the Commission had not taken a position on takeovers of strategically sensitive businesses when moving "towards a comprehensive European international investment policy", and encouraged it to consider reciprocity.

2.13 The EESC stresses that the three aforementioned Member States (which suggested developing a European instrument to screen investment) noted to upheld the principle of reciprocity if EU investors are given only limited access to markets outside the EU. The proposal for a regulation does not address the question of reciprocity. However, as far as foreign direct investments are concerned, the principle of reciprocity should be applied in all cases of EU negotiations with third countries on FDI.

2.14 Furthermore, the strategic focus of the foreign investment in the EU is on acquiring European companies that develop key technologies or maintain infrastructure with a vital role in fulfilling essential societal and economic functions. The combination of these developments has caused justifiable concern among European citizens, companies and Member States. These concerns need appropriate responses, as set out in the Commission's reflection paper on globalisation published on 10 May 2017 and in the **State of the Union address** on 13 September 2017.

2.15 The EESC calls for the EU's openness towards foreign direct investment to be complemented by robust and effective policy measures.

2.16 The EESC emphasises that some Member States realised some time ago that foreign investment, while useful, may also carry risks and jeopardise national security and public order. This is particularly the case where investment is geared towards strategically important businesses and entities. These Member States therefore set up national screening systems for foreign investment.

2.17 The EESC notes that the screening of investments in businesses and entities that are of strategic importance for national security or the security of the EU is patchy and uncoordinated: some countries have a screening procedure while others do not, meaning that investments in the latter countries are not screened at all. Given such conditions, it is clear that neither the Member States nor the EU itself can be shielded from investment aimed at taking over important businesses and entities in cases where a third country has planned thoroughly and makes use of opportunities for manipulation so as to attain its political and economic goals. The system to be brought in by the EU must remove disparities between Member States, and safeguard national and European interests.

2.18 In the EESC's view, the investment screening proposed by the European Commission is a first step in the right direction, but it will not satisfy all these requirements. The proposal does not even require the Member States to put in place their own investment screening.

2.19 The EESC realises that, with this regulation, the Commission is striving to safeguard legal certainty for those Member States that have established national investment screening mechanisms.

2.20 The EESC welcomes the fact that the proposal for a regulation specifies the fundamental procedural requirements for the screening mechanisms, such as transparency, non-discrimination between third countries and judicial review, thus increasing investment certainty.

2.21 Although the regulation aims to gather more information within the EU on foreign direct investment, and to monitor the use of selection mechanisms by the Member States, in practice it will be very difficult to ensure harmonised implementation at EU level. Member States that have procedures to screen foreign direct investment, and countries that do not have such procedures, must provide and receive equally reliable information, including in the form of annual reports to be submitted to the European Commission in cases where the Member States or the Commission determine that planned or already completed foreign direct investment in a Member State might affect security or public order.

2.22 The EESC supports the Commission's proposal to require the Member States to establish contact points, and the proposal to form a coordination group consisting of Member States' representatives. At the same time, the role of these two bodies, the level of representation, and the relationship of these bodies to each other is not entirely clear. The Committee recommends involving the social partners and civil society in an appropriate way.

2.23 The EESC is concerned that the European Commission only reserves investment screening for cases when an investment might affect projects or programmes of Union interest. If the Member States are largely responsible for screening foreign direct investment, then there is a risk that a foreign investor that wants to take over important businesses and entities will select the country that is most vulnerable to such investments as an entry point to make their first investment, thus gaining access, via the internal market, to countries with stronger investment protection.

2.24 The EESC points out that the EU has exclusive competence when it comes to foreign direct investment, which falls under the exclusive competence for the common commercial policy conferred in the Treaty of Lisbon. According to Article 207 TFEU, foreign direct investment is part of the EU's common commercial policy. Article 206 TFEU states that the EU shall contribute to "the progressive abolition of restrictions on international trade and on foreign direct investment".

2.25 In the EESC's view, the EU should make use of its competence in terms of foreign direct investment, where the investment has a cross border impact on whole EU or parts of it. The Commission needs to be able to both screen investments and decide whether they are permissible. Member States must have binding consultation rights and must, via the coordination group that is to be formed, be involved in the decision-making process regarding foreign direct investment.

2.26 The EESC draws attention to the fact that the EU, in the European critical infrastructures directive (ECI Directive) and the network and information systems directive (NIS Directive), has defined sensitive areas that affect essential security concerns. "Critical" infrastructure, as defined in the ECI Directive, includes facilities and systems that are essential for the maintenance of vital societal functions, health, safety, security, or economic or social well-being. The NIS Directive concerns service organisations that are essential to "critical" societal and economic activities. These include energy, transport, financial services and financial markets, as well as the health sector and water distribution.

2.27 As early as 2011[1], the EESC emphasised that trading partners such as Canada and the United States have mechanisms to screen foreign direct investment, and that investment should be part of a wider EU foreign policy.

2.28 The EESC points out that the United States has a wide-ranging and very flexible investment screening toolkit. Foreign investment is reviewed at federal level in the United States by CFIUS, an interministerial committee. This committee can suspend, prohibit or impose conditions on a transaction it wishes to reject. Its main task is to examine the national security risks posed by mergers and takeovers that could lead to foreign control of a US company. National security risk is defined as when the United States' security is affected due to a takeover of a critical technology or infrastructure components. The screening is detailed by CFIUS in its own regulations, which enables it to adapt this definition. This form of investment screening could also be of interest to the EU.

1 REX/320 – EESC opinion on European international investment policy, rapporteur: Mr PEEL.

2.29 China has sectoral restrictions on foreign investment. China's National Development and Reform Commission (NDRC) and its Ministry of Commerce (MOFCOM) have adopted the 2017 Catalogue of Industries for Guiding Foreign Investment. It contains a national "negative list" with the sectors in which foreign investment is restricted or prohibited. "Restricted" means that prior authorisation from MOFCOM is required. Drawing up this list enables the government to implement its restrictions and conditions. This negative list includes both politically sensitive areas, such as print media, and manufacturing of complete automobiles, for which there is a special rule on joint ventures. For sectors with no restrictions, the government requires only that the foreign investment projects are registered.

2.30 The EESC notes that the "Made in China 2025" strategy lists key sectors: next-generation IT; high-end numerical control machinery and robotics; aerospace and aviation equipment; maritime engineering equipment and high-tech maritime vessel manufacturing; advanced rail equipment; energy-saving vehicles and NEVs; electrical equipment; agricultural machinery and equipment; new materials; biomedicine and high-performance medical devices. More takeovers of European companies in these sectors are to be expected.

2.31 The EESC notes that there are foreign direct investment-related reservations with regard to more countries than just China. Russia's investments, particularly in the energy sector, are causing concern in the countries affected due to potential dependencies in this strategic sector.

2.32 The EESC considers the scope of application of the proposed investment screening to be too narrow, and suggests broadening such screening to strategic areas and in particular to key technologies. "Made in China 2025" should be taken into account when deciding on these strategic areas.

2.33 The EESC believes that this kind of investment screening – that also covers strategically significant key technologies – is compatible with WTO rules. The EU has enacted the Agreement on Subsidies and Countervailing Measures (ASCM). It is, therefore, possible to reject foreign direct investment if essential security interests are at stake, which happens, in the EESC's view, when societal values have to be upheld. Foreign direct investment can be restricted more comprehensively if an investor is controlled by, or has close ties to, a government.

2.34 The EESC shares the Commission's view that screening procedures should consider whether a foreign investor is controlled by the government of a third country, including via substantial financial resources. The EESC suggests that the regulation should include a separate screening procedure for foreign direct investment made by third-country governments, or investors with close ties to such governments.

2.35 The EESC is convinced that the screening process is more effective if it is applied to planned foreign direct investment rather than direct investment that has already been carried out; it calls on the Commission to include this suggestion in the proposal for a regulation. Above all the Committee recommends a post-investment monitoring.

2.36 The EESC welcomes the Commission's proposal for a regulation, but it is evident that the extent of the problem is not yet fully known. The Commission did not analyse investment flows and their impact when initiating the legislative procedure; only later did it proceed to analyse investment flows.

3. Specific comments

3.1 The EESC recommends collaborating with the United States and other trade partners. International harmonisation of rules on screening foreign direct investment would limit conflicts and promote investment certainty. Efforts should at least be made to enter into dialogue with countries such as China on their domestic and international investment policy. The objective should be investment and trade agreements that are guided by EU standards and the principle of reciprocity. Above all the Committee calls for the speed-up of the negotiations about the investment agreement with China.

3.2 The duration of ongoing screening could become a significant obstacle to potential investors, and could hamper a country's overall competitiveness. In order to reduce these negative effects, EU investment screening should last no longer than the time specified for national procedures.

3.3 So as to avoid an additional administrative burden, there is a need to examine whether a minimum investment amount – above which investments must be screened – should be set. The fact that start-ups can also be of considerable significance to key technologies needs to be taken into account.

3.4 Although the regulation aims to gather more information on foreign direct investment in the EU, and to monitor the use of screening mechanisms by the Member States, in practice it will be very difficult to ensure harmonised implementation at EU level. This is due to the fact that there are differences between Member States that have mechanisms to screen foreign direct investment, and those that do not. The system should not create unequal rights and obligations in relation to the cooperation among the countries and the European Commission on the exchange of information in cases where certain planned or completed foreign investments might have an effect on security or public order.

3.5 The regulation does not require Member States that receive comments from other Member States to take due account of them. The same applies to Commission opinions relating to a Member State that was unable to fully comply with these Commission opinions. These cases require more detailed explanation. It is not clear what consequences (if any) are to be expected if the Commission considers a Member State's explanation to be inadequate.

3.6 The future development of investment screening should – at least – take into account additional factors that can affect security and public order: practices that distort fair trade; constraints on competition; missing transparency of investments. Investment and trade policy have to be part of the industrial policy of the EU.

Brussels, 19 April 2018

Luca JAHIER
The president of the European Economic and Social Committee