

Our position

FINAL

Proposal for an EU framework on foreign investment screening

A Europe open for market-led investment from abroad



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The US business community in Europe welcomes the European Commission's balanced and proportionate proposal introducing an EU framework on foreign investment screening. AmCham EU recognises the valid public policy concerns sought to be addressed by this proposal to ensure that foreign investments into Europe take place according to market-based principles. If implemented correctly, it should ensure that Europe remains open for market-led investment from abroad by complying with international law. It should also improve information-sharing and coordination, and ensure that the balance of power remains with EU Member States. Some improvements should be made so that administrative burdens are kept to a minimum, no unnecessary delays occur and that the screening process ensures the appropriate level of confidentiality. AmCham EU looks forward to discussing these issues with European legislators as the process moves forward.

AmCham EU's principles on investment screening

On 13 September 2017, the European Commission proposed a regulation to implement an EU framework on foreign direct investment screening. Its goal is to set some minimum common standards for investment screening by Member States without, however, mandating the establishment by Member States of investment screening. The proposal further provides for investment screening by the European Commission in some instances but does not make the opinion of the Commission binding.

AmCham EU welcomes the proposed regulation because it will allow the transatlantic partnership to ensure that foreign investment in the global economy is conducted in line with common market-based principles and not unduly influenced by policy-driven state intervention, while at the same time seeking to address valid public policy concerns. There is nothing new to countries, including EU Member States, screening foreign investment on grounds of security and public order concerns. Attempts to further enhance European cooperation on this matter should be welcomed, as a natural extension of the EU single market and part of its Common Commercial Policy. AmCham believes that Europe remains open for business with this proposal. The below principles and recommendations therefore do not question the basic premise of the Commission proposal but rather suggest further improvements to enhance legal certainty. Some of these suggested improvements have already been made by the European Parliament.

AmCham EU proposes the following principles and recommendations for the investment screening proposal:

- The investment screening must comply with international law and act to boost and not deter foreign investment globally.

AmCham EU welcomes that the substantive grounds allowing screening in Articles 1 and 2 of the proposal are in line with the EU's obligations arising from international agreements such as the WTO Agreement. This ensures that Europe will continue to benefit from foreign investments that drive jobs and growth and ensures the necessary legal certainty for foreign companies to continue to invest in the EU. The list of factors in Article 4 which Member States may "take into consideration" when screening foreign investments should have a clear focus. For example, the Article could be clarified by indicating that the control of an investor of a third country government is one of the key contributing factors to trigger a review. However, the criteria to assess such control should be kept open in order to give the Member States and Commission the necessary flexibility to make a case by case analysis and to prevent gaming of the system.

AmCham EU also takes note that the European Parliament's rapporteur Franck Proust (EPP, France) included reciprocity as a screening criteria (Article 4.3a.5) because it may help to create conditions for outgoing European investments into other markets similar to what companies from third countries enjoy in Europe.

- Respecting Member States' powers while overall strengthening controls through information-sharing and coordination.

The European Commission's proposal provides for a balanced foreign investment screening framework as it leaves the screening decision up to the Member State and creates mainly information-sharing and coordination obligations in Articles 7 and 8 respectively. Member States and the European Commission – in case of Union interest – can issue non-binding opinions that the Member State of the targeted investment has to take into account but is not obliged to follow. The proposal also does not contain an obligation to set up a screening process for those Member States that do not have such a system in place. AmCham EU welcomes the fact that the European Commission's proposal is in line with the principle of proportionality.

- The investment screening process should keep administrative burdens to a minimum.

Investment screening processes add elements of uncertainty for business. Foreign investors will benefit from the greater harmonisation of the screening processes in the EU by Article 6, which seeks to set common standards for the different national processes such as the right to judicial redress and information obligations for authorities towards the companies involved. It is crucial that the implementation of the proposed Regulation does not result in a duplication of administrative formalities that may already exist under other EU instruments, such as competition law.

For instance when drafting factors and criteria for screening foreign investment in Article 4, it is important to bear in mind the distinction between the screening and merger review processes. Both have different goals, and the screening proposal should not become a tool to circumvent procedural rules and legal standards included in the applicable merger review procedures (and *vice versa*). In this regard, assessing the "consolidation or establishment of monopolistic structures" (Amendment 40), as referred to in the draft Parliament report, seems more relevant for a potential merger review procedure rather than being a factor to determine if a foreign direct investment is likely to affect security or public order.

- The investment screening process should not lead to unnecessary delays in the investment.

By allowing other Member States and the European Commission to participate in the screening process, the new framework will inevitably lead to longer periods of investment screening. According to Article 8(5) of the Proposed Regulation this could mean 50 additional days when other Member State (+25 days) and the Commission (+25 days) have issued their non-binding opinions after they have received the necessary information on those investments they believe impacted. Giving the Commission only 10 days to issue its opinion as proposed by rapporteur Franck Proust would have been a step in the right direction (Amendment 48), but unfortunately was not included.

- The investment screening process should ensure confidentiality.

Article 11 of the Proposed Regulation obliges Member States and the European Commission to "ensure the protection of confidential information", but provides little guidance on how this will be done in practice – other than "all necessary measures" should be taken (recital 20). Frank Proust added a reference to the Commission decisions (EU, Euratom) 2015/443 and (EU, Euratom) 2015/444 on security and security rules for protecting EU classified information and Articles 6 and 11. This already represents an improvement for confidentiality within the EU institutions to the Commission's proposal, but is not sufficient to guarantee confidentiality within Member States. More detailed rules on (technical) safeguards should be developed towards that end, be it directly in the regulation or through implementing and delegated acts.

Conclusion

AmCham EU recognises the valid public policy concerns sought to be addressed by this proposal to ensure that foreign investments into Europe take place according to market-based principles. US business furthermore appreciates that the policy is firmly based on the EU's international trade obligations. By ensuring that investment screening does not lead to uncertainty and/or unnecessary delays for business, it is clear that Europe can remain open for business and continue to act as a standard-bearer for an open, global economy.