EU FDI screening and its impact on Chinese investments

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On September 13, 2017, the European Commission (the **Commission**) adopted a proposal for a regulation establishing a framework for the screening of foreign direct investment (**FDI**) into the EU on the grounds of security or public order (the **proposed Regulation**).[2]

This means that, as in the US, significant FDI in the EU will be subject to a rigorous screening and approval process once the proposed Regulation comes into force.

Why is the EU launching this FDI screening framework? What is the EU FDI Screening Framework? Will the upcoming EU FDI screening framework be comparable to CFIUS? What impact will EU FDI screening have on Chinese investments? We aim to answer these questions in this article.

[2] The proposed Regulation is available at https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF.

I. Why is the EU launching its FDI screening framework?

There are a number of reasons for this – Chinese investments into the EU have increased dramatically, the EU is keen to welcome FDI while also wanting to protect essential interests, and China State Owned Enterprises (SOEs) may be considered opportunities as well as threats.

Chinese investments into the EU have increased dramatically

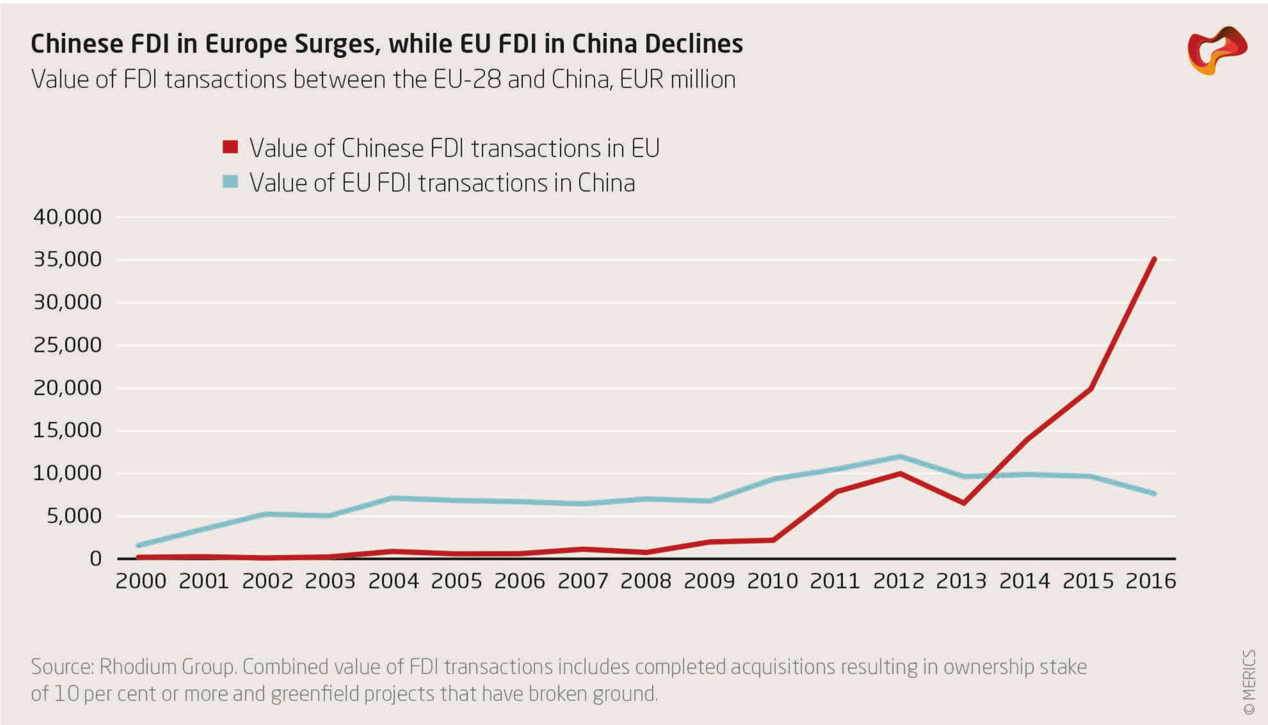
Chinese investments into the EU began to increase following the 2008 financial crisis. In 2009, Chinese investments in the EU amounted to roughly €2 billion. By 2015, the amount has increased to over €20 billion, representing a tenfold growth in just six years. In 2016, Chinese investments in the EU reached a total of €35 billion, a 77% increase from 2015 and more than 17 times greater than in 2009.

The growth is not only reflected by volume but also by value. In 2016 alone, acquisitions valued at over €2 billion included: the acquisition of Syngenta by ChemChina, with a record deal value of EUR 40.7 billion; the acquisition of 10.5% of the shareholding in UK National Grid by CIC, more than EUR 13 billion; the €6.7 billion investment by the Tencent-led consortium in the Finnish gaming company Supercell; Midea's €4.4 billion acquisition of German robotics company KUKA; and the 49% stake by a Chinese consortium in UK data center operator Global Switch, valued at €2.8 billion.[3]

The EU's attitude - welcoming FDI while protecting essential interests

While southern Member States welcome FDI, the European Commission maintains a much stricter scrutiny in such matters. As Mr. Juncker, president of the Commission, has said, "We are not naïve free traders. Europe must always defend its strategic interests"[4]. In recent years, major Chinese acquisitions have touched "essential interests" of the EU including: technology, infrastructure and national security.

As concerns technology we can take the above-mentioned KUKA acquisition as a key example. As one of the most important automotive developers in Germany, KUKA's acquisition drew huge public attention, with concerns about protecting a critical national technology. One of the most famous examples on the infrastructure front is COSCO's acquisition of 51% stake in the port of



Source: Merics paper on China, "Record flows and growing imbalances – Chinese investment in Europe in 2016".

[3] Merics (Mercator Institute for China Studies), "Record flows and growing imbalances – Chinese investment in Europe in 2016", Merics papers on China, January 2017, Page 6, available at http://rhg.com/wp-content/uploads/2017/01/RHG_Merics_COFDI_EU_2016.pdf.
[4] European Commission, "State of the Union 2017 - Trade Package: European Commission proposes framework for screening of foreign direct investments", Brussels, 14 September 2017, available at http://europa.eu/rapid/press-release_IP-17-3183_en.htm.

Piraeus, Greece's largest port in mid-2016. In terms of national security and public order – we have the example of Aixtron where: the German government withdrew its initial approval for the potential Chinese takeover of German semiconductor manufacturer Aixtron, after the US government blocked the sale of the company's US assets and informed Germany.

China SOE investments - opportunities or threats

In the explanatory memorandum accompanying the proposed regulation, the Commission explains that there have been some concerns about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons, and that EU investors often do not enjoy the same rights to invest in the country from which the investment originates.[5] Investments made by Chinese SOEs are encountering more and more opposition in EU Member States.

For example, let's consider the failed investment plan of State Grid in Belgium. After State Grid was blocked by Australia from acquiring a 50.4% stake in electricity distribution firm Ausgrid,[6] its €830 million investment in Belgian power and gas distribution system operator Eandis was also rejected. This was because the Belgian State Security Agency warned of the link between State Grid and the Chinese authorities, and the risk that Belgian technology could be used for military purposes.[7] Chinese authorities and their interests in strategic sectors inevitably raise concern for target state government.

Due to the rapid growth of Chinese investments, and especially the particular focus on EU strategic sectors, the role of SOEs, and the uneven playing field for foreign investors in China, FDI, especially Chinese investment, is seen not only as opportunity but also a challenge. In certain circumstances it is even viewed as a potential threat to the EU. Consequently, the EU has now decided to increase its scrutiny regarding FDI from third countries, including China, by establishing a screening framework at an EU level.

[5] The proposed Regulation, page 2
[6] TIAS School for Business and Society, "Perspective on China: Chinese Investments in 'Strategic Sectors'", October 6 2016, available at https://www.tias.edu/en/knowledgeareas/area/strategy-leadership/article/perspectives-on-china-chinese-investments-in-strategic-sectors.
[7] *Idem*

II. What is the EU FDI screening framework?

The current status

Only 12 out of the 28 EU Member States (namely Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and the UK), have an existing FDI screening system in place on grounds of security or public order, in line with international and EU laws. However, EU Member States' FDI screening mechanisms vary significantly in scope (including the review of intra- or extra-EU FDI, differing screening thresholds, and the breadth of sectors covered beyond defense) and in design (prior authorization versus ex-post screening of FDI).[8]

Currently, there is neither harmonized legislation at the EU level for FDI screening nor a competent centralized organism, like CFIUS in the US. Each Member State is fully sovereign and autonomous in this area, for establishing and/or for the ongoing operation of such a mechanism. The EU Commission has no competence, decision-making powers, or influence in this matter.

[8]EPRS, "EU Framework for FDI Screening", January 2018, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614667/EPRS_BRI(2018)614667_EN.pdf

Country	Market access	FDI scrutiny procedure	FDI scrutiny practice		Sectors of FDI reviews/limitations	
	limitations or prohibitions	formal or informal	case-by-case scrutiny	automatic scrutiny	only defence	defence and/or other sectors
Belgium	✓(2015)	no	n/a	n/a	no	✓maritime transport
Bulgaria	no	no	no	no	no	no
Czech Republic	✓(2015)	no	n/a	n/a	no	✓banking, insurance and defence sectors
Denmark	✓	✓	no	✓	✓	✓electricity and gas infrastructure
Germany	no	✓	✓	no	no	✓
Estonia	no	no	no	no	no	no
Ireland	✓	no	n/a	n/a	✓	no
Greece	✓(2015)	no	n/a	n/a	no	✓land
Spain	✓	✓	✓(non-defence)	✓(defence)	no	✓
France	✓(2015)	✓	no	✓	no	✓
Croatia	✓(2016)	no	no	no	no	✓maritime transport, rail transport, etc.
Italy	✓(2015)	✓	✓	no	no	✓
Cyprus	✓(2015)	no	n/a	n/a	no	✓energy, TV/radio, etc.
Latvia	✓(2015)	✓(no legal framework)	✓(recently: energy, transport)	no	no	✓land
Lithuania	✓	✓	no	✓	no	✓
Luxembourg	no	no	no	no	no	no
Hungary	✓(2015)	no	no	no	no	✓farmland, defence industries, etc.
Malta	no	no	no	no	no	no
Netherlands	✓(2015)	✓(no legal framework)*	n/a	n/a	no	✓transport, energy, defence and security, etc.
Austria	✓(2015)	✓	no	✓	no	✓
Poland	✓	✓	no	✓	no	✓
Portugal	✓(2015)	✓	✓	no	no	✓
Romania	n/a	✓Supreme Defence Council, no action yet (2015)	n/a	n/a	no	✓
Slovenia	✓(2015)	no	no	✓	✓	no
Slovakia	no	✓no legal framework (2016)	✓	no	no	✓
Finland	n/a	✓	✓(non-defence)	✓(defence)	no	✓
Sweden	✓	no	no	no	✓	no
United Kingdom	✓	✓	✓	no	no	✓

Chart: FDI security-related screening procedures at EU Member-State level
Source: European Parliament Research Service, "Foreign direct investment screening – a debate in light of China-EU FDI flows".

The proposed Regulation

In February 2017, Germany, France and Italy submitted a letter to the European Commission regarding their concerns that the lack of reciprocity would lead to a potential sell-off of European expertise, because current instruments are not sufficiently effective. In September 2017, the Commission issued the proposed Regulation.

Substantial requirements

The proposed Regulation does not require Member States to adopt or maintain a screening mechanism for FDI. Rather its objective is to create an enabling framework for Member States to put a screening mechanism in place, and to ensure that the basic requirements of such a mechanism will should be met. In this regard, the Commission sets out the following substantial requirements for EU Member States:

1. **Definition of FDI:** the Commission defines FDI as "investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity". Notably, not only will a direct investment be regulated by the proposed Regulation; an effective participation or actual control of a domestic undertaking will also be regulated. This means there will likely be a stronger background check of foreign investors as well as beneficiarl owners once the proposed Regulation comes into force.

2. **Screening of FDI:** the Commission notes that Member States may maintain, amend or adopt mechanisms to screen FDI on the grounds of security or public order. The Commission may screen FDI that is likely to affect projects or programs of EU interest on the same grounds. This principle defines the basis of FDI screening as security and public order. According to the European Court of Justice (ECJ), security and public order must be interpreted strictly: there should be a genuine and sufficient serious threat to a fundamental interest beyond merely pure economic interest. The Commission has indicated that such interest should not be determined unilaterally by the Member States without any control by the EU. Second, both the Commission and Member States have the competence to screen FDI, while the Commission may exercise its exclusive competence when EU interests are likely to be affected by FDI. Furthermore EU Member States may maintain their existing national FDI screening mechanism, provided that they are in line with the proposed Regulation. As long as the basic requirements set out in the proposed Regulation are met through national laws, the EU Member States are allowed to not establish a screening mechanism.

3. **Factors taken into consideration in screening:** the Commission sets out a non-exhaustive list of factors that should be taken into account in determining whether FDI is likely to affect security or public order, being, inter alia:

    - critical infrastructure, including energy, transport, communications, data storage, space or financial infrastructure, as well as sensitive facilities;
    - critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology;
    - the security of supply of critical inputs; or
    - access to sensitive information or the ability to control sensitive information

The proposed Regulation offers a non-exhaustive list, which means, by establishing or amending national regime, Member States may take their own interest into account.

It also mentions that consideration may be given as to whether the foreign investor is controlled by the government of a third country, including through significant funding. Aiming to regulate foreign state-owned or state-related investors, this paragraph in the explanatory memorandum reflects the concern about the SOEs expanding as discussed above

Procedural requirements

There are three important procedural requirements – transparency and non-discrimination, notification and annual report, and the cooperation mechanism.

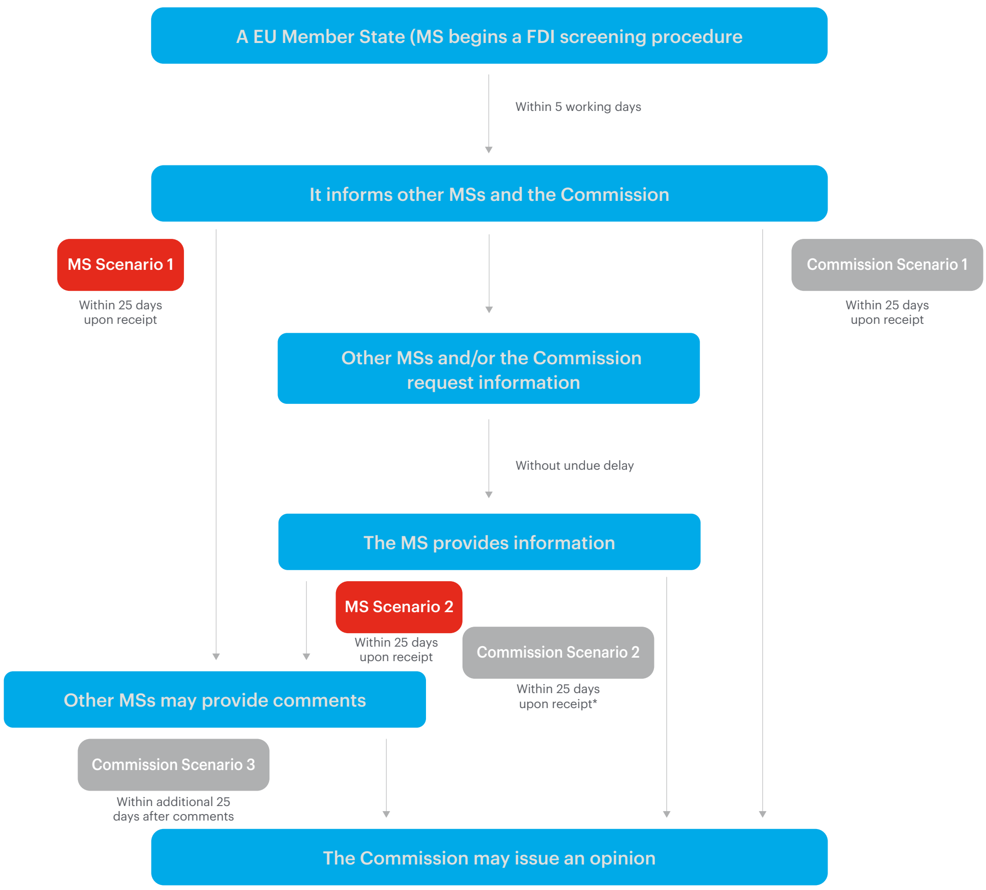
Under the rule of transparency and non-discrimination, the Commission requires Member States to establish a screening mechanism that is transparent and non-discriminatory between third countries;

With respect to notification and annual reporting, Member States shall notify the Commission of their existing screening mechanism within 30 days after the proposed Regulation enters into force. Member States most notify any amendments to an existing mechanism or the adoption of a new screening mechanism to the Commission within 30 days of such mechanism entering into force. Second, Member States with a screening mechanism must provide the Commission with an annual report on the application of their screening mechanism including information relating to FDI screening, any prohibitions or conditions imposed, etc. Member State without a screening mechanism must provide an annual report covering FDI in their territory to the Commission.

Cooperation Mechanism: when FDI not subject to the Commission's review is undergoing screening in one Member State, that Member State must inform the Commission and the other Member States. If deemed necessary, other Member States and the Commission may request information from the Member State where screening is taking place, such as information about the ownership structure, the ultimate controlling shareholder, the value of the FDI, the funding of the investment. Upon receipt of this information, the other Member States may then provide comments to the Member State, forwarding these to the Commission in parallel. The Commission may then issue an opinion addressed to the Member State. The Member State must give due consideration to the comments and the opinion. Below is a chart explaining the cooperation mechanism.

Entry into force

States must then, as discussed above, proceed with the notification to the Commission. The proposed Regulation is not expected to come into force before the end of 2018, as it requires both the approval of the European Parliament and the Council of the EU.



* The Commission may request additional information, and issue an opinion within 25 days after receiving the additional informations

III. Will the upcoming EU FDI screening framework be comparable to CFIUS?

CFIUS as model?

Competence: Established in 1988 in reaction to Japanese acquisitions of US companies in the 1980s, the mandate of the Committee on Foreign Investment in the United States (the "CFIUS") aims to protect the US against national security threats that might emerge from foreign takeovers of US firms.

Three threats rules: Although the definition of threats to national security was left open in the CFIUS 2009 regulation, a firsthand examination of CFIUS cases has been made by an eminent scholar, Professor Theodore H. Moran and shows that such threats may be classified into the following three distinct types[9]:

- "The first threat derives from a possible leakage of sensitive technology to a foreign company or government that might deploy or sell such technology so as to be harmful to UA national interests".[10]
- "The second threat springs from the ability of the foreign acquirerer, acting independently or under instructions from the home government, to delay, deny, or place conditions upon provision of output from the newly acquired producer".[11]
- "The third threat derives from the potential that acquisition of a US company might allow a foreign company or its government to penetrate the US company's systems so as to monitor, conduct surveillance, or place destructive malware with in those systems".[12]

Chinese investments facing CFIUS - a case study

For several years, significant Chinese investments in the US, or even outside the US, have been subjected to CFIUS screening reviews.

In 2015, CFIUS claimed jurisdiction over the proposed acquisition of 80% of Philips' Lumileds division by GO Scale Capital, over which Nanchang Industrial Group of China, among others, holds control. Permission for the deal was refused due to the large Philips presence in the US.

"Although neither Philips nor CFIUS would comment on why the acquisition was blocked, it became clear that the sale of this affiliate would involve transfer of the sensitive gallium nitride technology (that Lumileds possesses) to parties that could be accessed by the Chinese government", falling into the scope of the first threat, according to the analysis of Professor Moran.[13]

The same underlying principle was applied by CFIUS in 2016 in its recommendation to abandon the proposed sale of the German semiconductor firm Aixtron to China Fujian Chip Investment Fund LP. CFIUS once again "focused on potential leakage of gallium nitride technology (GaN) since Aixtron, like Philips, is a key supplier of GaN products to NATO defense contractors".[14]

Regarding the second threat, a Chinese acquisition of a Canadian rare earths mining company case in 2015 clearly illustrates the threat of denial or manipulation of access to critical inputs for which there are few readily available substitutes.

"In 2015 a Chinese mining company made a non-public proposal to acquire a Canadian mining firm that owned rare-earths properties in Canada, the United States, and South Africa. China already controls approximatively 90 percent of rare-earth export that are critical for the aerospace and automotive industries. The Chinese government has ordered the withholding of rare-earth exports to Japan during periods of time when disputes about islands claimed by both China and Japan have flared up. CFIUS joined its counterpart in Canada in advising the parties (even prior to public announcement of the proposed acquisition) that the deal would not be permitted to go through."[15]

Chinese investments have also been subject to CFIUS screening under the third threat of penetration, surveillance and sabotage.

[9]Theodore H. Moran, "CFIUS and national Security: Challenges for the United States, Opportunities for the European Union", Feb. 19, 2017 draft, Peterson Institute for International Economics, available at https://piie.com/system/files/documents/moran201702draft-c.pdf.
[10]*Idem.*
[11]*Idem.*
[12]*Idem.*
[13]*Idem.*
[14]*Idem.*
[15]*Idem.*

In the 2007 Huawei–Bain Capital–3 Com Case, the acquisition of 3 Com, a leading US hardware and software network company, by Bain Capital, in which Huawei holds only 16.5% of shareholding, was abandoned. Most likely this is because, should the deal be concluded, a threat might exist that Huawei could "insert some capacity for infiltration, surveillance or sabotage (via "blackdoors" or trapdoors") into the goods and services provided by the acquired company".[16]

The 3 Com case has plagued Huawei ever since. In 2011 CFIUS blocked Huawei from acquiring the cloud computing-related technology of, and hiring employees from, insolvent US firm 3Leaf Systems.

More recently, the US mobile giant AT&T announced that it was pulling out of a deal to sell Huawei smartphones, as a result of political pressure on AT&T by American politicians. The politicians had written to the telecoms regulator the Federal Communications Commission (FCC) – which must approve the sale of phones and other devices in the US – saying they had "long been concerned about Chinese espionage in general, and Huawei's role in that espionage in particular".[17]

Another recent case is that of the blocked US$1.2 billion sale of MoneyGram to Ant Financial under Alibaba group, in January 2018. CFIUS rejected this proposal in response to concerns over the safety of data that can be used to identify US citizens.[18]

Will the upcoming EU FDI screening framework be comparable to CFIUS?

Obviously, CFIUS review has become an extremely powerful means for screening and blocking foreign takeovers of US firms, in particular Chinese M&A projects, which are considered to be threats to the US national security. However, will the upcoming EU FDI screening framework be comparable to CFIUS?

We don't think so, although, CFIUS' underlying principles, *i.e.*, the famous three threats rules, its evaluation method, its decision-making, and its legal theory, will undoubtedly exercise significant influence on the EU FDI screening framework.

Why such an assessment?

First, the political background and the central governments' decision powers differ significantly between the EU and the US. In the US, the Federal Government has exclusive competence as concerns public security and defense matters and thus has final decision-making power. Under the EU framework, both public security and defense matters are the exclusive competence of the individual Member States. The EU Commission has no final decision-making power on such matters, its powers being limited to the recommendation provided for under the proposed regulation, although as noted Member States are required to "take utmost account" of the Commission's recommendation and must justify any decision not to follow it.

Second, EU Member States views are much more divergent than those in the US when facing third country FDI, namely Chinese investments.

According to Rasmussen Global, "Questions about how to cope with the massive surge in Chinese investment since the mid-2010s have laid bare three cross-cutting cleavages in Europe: (1) government versus private sector; (2) concerns with national security versus commitments to open markets; and (3) East-West as well as North-South divisions". [19]

Last, the screening framework proposed by the draft regulation does not seem to be comparable to CFIUS. The Commission, fully aware that imposing a one-size-fits-all centralized mechanism like CFIUS in the USA, would not be supported by all Member States, and thus has proposed a middle-of-the-road compromise. The proposed Regulation aims to set up an EU framework for FDI screening and a cooperation mechanism between Member States and the Commission that is based on information sharing. [20]

In particular, this framework comes into play when a foreign investment in one EU Member State may affect the security or public order in another. However, under such framework, Member States are not obliged to adopt an FDI screening mechanism, nor will the EU Commission

[16]*Idem.*
[17]Charles Arthur, "Will AT&T's call to drop Huawei end phone maker's US hopes?", available at https://www.theguardian.com/technology/2018/jan/13/huawei-china-american-atandt-deal-loss-end-us-ambitions-cyber-security-fears.
[18]Greg Roumeliotis , "U.S. blocks MoneyGram sale to China's Ant Financial on national security concerns", Reuters, January 2, 2018, available at https://www.reuters.com/article/us-moneygram-intl-m-a-ant-financial/u-s-blocks-moneygram-sale-to-chinas-ant-financial-on-national-security-concerns-idUSKBN1ER1R7.
[19]Rasmussen Global, "Foreign Investment Screening and the China Factor – New protectionism or new European standards?", Nov. 16, 2017, available at https://rasmussenglobal.com/media/foreign-investment-screening-china-factor-memo.
[20]*Idem.*

have any absolute blocking power or veto over FDI deemed to pose a threat to security or public order.

These are some of the reasons why we believe that the upcoming EU FDI screening framework will not be comparable to CFIUS.

IV. What impact will EU FDI Screening have on Chinese investments?

Although not really comparable to CFIUS, the EU FDI screening framework, once it comes into force, will have significant impact on third country FDI, in particular those from China.

The proposed Regulation "seeks to a) increase transparency between member states and the Commission on strategic investment, including cross-border investment; b) raise awareness about the issue of FDI in strategic sectors among member states without a screening mechanism (only 12 member states have one); c) raise the issue of security but leave decisions on specific cases to the member states; and d) allow the European Commission to screen FDI affecting projects of an EU interest, i.e. projects funded by the EU or subject to EU legislation".[21]

Given this background, the first impact we can anticipate will likely be increased sensitivity towards any Chinese takeovers in the EU, especially those touching strategic sectors. For those foreign investors, access to certain strategic sectors will be conditional or may even simply be precluded, especially in sectors relating to critical infrastructure, critical technologies, the security of supply of critical inputs, and the access to sensitive information.

Second, the complexity and uncertainty of FDI deals touching strategic sectors in EU will certainly increase. Apart from the traditional takeover steps, like market screening, financial advice, DD, negotiation, SPA, deal financing and closing, a complex, uncertain and time consuming FDI screening procedure might be added. Even post-closing screening may not be excluded. Here in particular we expect that the uncertainty will become more important and may plague those deals for a long period after closing.

Last, transaction cost of such deals involving FDI screening procedures will obviously be higher than before.

[21] *Idem.*

V. Advice to Chinese investors

Even before the entry into force of the proposed Regulation, Chinese investors should take into account the likelihood of FDI screening in strategic sectors in the EU, and should proceed to a full assessment of risks already at the market screening stage.

At this stage, the international strategic investment team and the investment advisor may play an important role in determining if the takeover of the EU target might be considered as presenting serious threats to the security or public order in the EU. Comprehensive and objective analysis and evaluation should be undertaken in order to assess such risks.

During the transaction stage, in particular in the drafting of the SPA, a series of clauses and mechanisms could be proposed in the condition precedent chapter. These could be designed to allow one or both parties, to exit without damage, harm and indemnity should the deal be refused by the national authorities or in case of an adverse opinion issued by the EU.

Last, even after the closing, post-closing FDI screening might occur. Thus it is advisable to already make preparations for a worst case scenario in the SPA, including the necessary remedies.

Conclusion

Although qualified as "the EU 11th hour awakening" [22], the EU FDI screening framework, once it comes into force, will have significant impact on third country FDI, in particular those from China

Access to certain EU strategic sectors will be conditional or even totally precluded. The complexity and uncertainty of FDI deals which touch strategic sectors in the EU will certainly increase. The transaction costs of deals which involve FDI screening will obviously increase as well.

Chinese investors need to have a keen awareness for FDI screening issues, especially with respect to strategic sectors in the EU, and should undertake a comprehensive assessment of the risks at the market screening stage, during the transaction and even after the closing.

Last, there may also be some uncertainty around how the Commission and each of the EU Member States will implement the proposed Regulation.

[22] Rasmussen Global, *op. cit.*

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