

## European Commission's Proposal for a Regulation on the Screening of Foreign Investments in the Union and repealing Regulation (EU) 2019/452

### *AEGIS Europe feedback*

#### **Introductory remarks**

The EU industrial sectors grouped within AEGIS Europe represent the entire value chain ranging from commodities such as ferro-alloys, non-ferrous metals or ceramics to end products like railway and maritime equipment, ships, bicycles or solar panels. Our members account for an annual turnover of €530 – €550 billion and 1.65 – 1.7 million of jobs across the EU.

AEGIS Europe takes this opportunity to give input in the context of the revision of the Foreign Direct Investment Screening Regulation (hereinafter the Proposal) which it very much welcomes. The European Union needs to ramp up its existing foreign direct investment screening mechanisms in order to preserve Europe's strategic autonomy and ensure a global competitive level playing field.

The Proposal put forward by the Commission is a step in the right direction; however, AEGIS Europe considers that it can be improved.

#### **Streamlining FDI mechanisms across all Member States**

##### **Mandatory screening:**

AEGIS Europe welcomes the proposal to adopt a single **legal framework across EU countries** allowing to properly assess foreign direct investments that pose a threat to security or public order and addressing loopholes and fragmentation across Member States as regards the current legal framework. At present only 22 Member States have implemented a screening mechanism.

**Article 3 of the Proposal introduces the mandatory requirement for Member States to establish screening mechanisms with a number of minimum requirements.** According to Article 4(4), there is an obligation to impose authorisation requirement for foreign investments where the Union target established in their territory is part of, or participates, in projects or programmes of Union interest (Annex I) or is economically active in one of the areas listed in Annex II. Furthermore, Article 4(2) point (g) also ensures that foreign investments subject to an authorization requirement shall be screened before the foreign investment is completed. AEGIS Europe welcomes such proposals, although the scope of Annex I and Annex II still remains too narrow and requires further extension as detailed below.

**Establishing a mandatory screening mechanisms with minimum requirements is of particular importance:** first, since it allows a better coverage of foreign direct investments across Member States and thus diminishing the risk of loopholes within the different EU jurisdictions and second, it introduces minimum requirements, such as the authorization requirement for foreign investments in key-areas.

##### **Better harmonization in terms of procedures through the cooperation mechanism:**

AEGIS Europe welcomes the establishment of a cooperation mechanism meant to enable Member States and the Commission to exchange information on foreign investments likely to negatively affect security or public order, assess their potential impact and identify potential concerns. Another positive development is the introduction of specific common procedures and requirements to be applicable against foreign investments.

**Our membership supports the provisions aimed at achieving better harmonization in terms of procedures**, in particular Chapter 3 of the Proposal, which introduces a number of procedures for Member States to notify the Commission and other Member States via the cooperation mechanism any foreign investment in a Union target established in their territory.

It is particularly positive that Article 5(3) allows **Member States to notify a foreign investment in situations beyond the remit of Article 5** (e.g. when is part of or participates in projects or programmes of Union interest, is economically active in identified areas or the foreign investor or the foreign investor's subsidiary in the Union is directly or indirectly controlled by the government), which could be of interest to other Member States and the Commission from a security or public order perspective.

Furthermore, Article 10 introduces harmonized requirements in terms of information that shall be provided via the notification system. **AEGIS Europe welcomes such requirements, in particular when it comes to the need to provide specific information about the investor** (name, global ultimate owner, ownership structure, description of the investment, among others) which contributes to a better assessment of the investor and supports a deeper screening exercise from Member States.

## **Enhancing the scope of screening mechanisms**

### **EU programmes and projects (Annex I of the Proposal):**

**AEGIS Europe welcomes the fact that the Proposal as it stands has expanded the scope of the screening mechanism to EU programmes and projects (Annex I of the Proposal)** and covers programmes such as Horizon 2020, Horizon Europe, Trans-European Networks for Transport (TEN-T), Connecting Europe Facility (CEF) and Important Projects of Common European Interest (IPCEI).

However, the Proposal still lacks additional important EU programmes and projects, such as the **European Structural and Investment Funds (ESIF)** where, thanks to the Cohesion Fund, the European Regional and Development Fund and the Just Transition Fund, Member States also allocate EU funding to boost investments in critical infrastructure or technologies.

Moreover, the Proposal should also include instruments beyond the framework of the **Multiannual Financial Framework (MFF) instruments**, such as NextGenerationEU: applying FDI screening to critical infrastructure projects financed under these potential new programmes or instruments is very pertinent.

Finally, the European Investment Bank should also play an active role in the context of these projects and programmes of Union interest and support EU businesses.

### **Sectors and items (Annex II of the Proposal):**

A novelty introduced in the proposal is Annex II that contains a list of items that are of particular importance for the Union's security or public order interest and that are therefore bound to represent the object of foreign direct investment screening. Moreover, Article 4(4) point (a) of the Proposal

introduces an obligation for Member States to ensure that their screening mechanisms impose an authorisation requirement for foreign investments related to Annex I and Annex II. However, the items listed in Annex II are in most cases transversal in terms of their applicability in specific sectors and industries, which may create different legal interpretations regarding the obligation to be screened against foreign investments, or sometimes even too wide, as in the case of the “Net-Zero Technologies”.

For instance, Article 13 looks at foreign investments that are likely to negatively affect security or public order, in particular when it comes to the security, integrity and functioning of physical or virtual critical infrastructure (Article 13(3) point (a)) and to the availability of critical technologies (Article 13(3) point (b)).

Although the Commission is empowered to adopt delegated acts as per Article 19 in order to amend the list of projects and programmes of Union interest, as well as to amend the list of technologies, assets, economic activities, etc., **AEGIS Europe believes that the scope of Annex I and Annex II is too narrow and an enlargement thereof should be envisaged.** Our membership would welcome an enlargement of the scope so that it covers the **Rail Supply<sup>1</sup> and the Maritime Technology<sup>2</sup> industries** given the significance of the “resilience of infrastructures of particular importance for the security or public order interests of the Union” and the “advancement of technologies of particular importance for security or public order of the Union” as per points (a) and (c) of Article 19(2).

## Ultimate origin of the investor and intra-EU investments

### Ultimate origin of the investor:

**AEGIS Europe welcomes Article 5(1) point (b) of the Proposal which sets out that Member States should notify the Commission and the other Member States,** through the cooperation mechanism, of situations, among others, that the **foreign investor or the foreign investor’s subsidiary in the Union is directly or indirectly controlled by the government, including state bodies, regional or local authorities or armed forces of a third country.** FDIs made by foreign investors that are owned or controlled by a third country can unlevel the playing field within the internal market as they will not be subject to the same rigorous competition and State Aid rules as their European counterparts. Moreover, foreign investors that are owned or controlled by the State of a third country may seek to acquire control of or influence in European undertakings and use these assets to the detriment not only of the EU’s technological edge but also its security and public order.

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<sup>1</sup> The Rail Supply Industry covers the manufacture of locomotives and rolling stock, tracks, electrification, signalling and telecommunication equipment, parts and associated services;

<sup>2</sup> The Maritime Technology Industry covers commercial and naval shipyards and their supply chain of maritime systems, equipment and services. The maritime technology industry is of particular importance for the security or public order interests of the Union as it builds, equips and maintains naval capabilities that are paramount for preserving Europe’s strategic autonomy, defending its maritime borders, and securing its critical maritime and underwater infrastructure. Building and maintaining advanced naval military assets require a strong industrial value chain in commercial shipbuilding. Indeed, commercial and military shipbuilding are closely connected, sharing up to 70% of materials, supply chains, jobs, and skills. Because military orders mainly come from governments, it is important for the shipbuilding industry to maintain its capacities, jobs, supply chains, and know-how with a critical mass of commercial orders. Therefore, preserving a thriving European maritime technology industry is a critical security concern.

**AEGIS Europe also welcomes Article 10(1) which lists the information to be provided in the notification**, namely: the name of the investor, the global ultimate owner of the investor and the Union target, the ownership structure of the investor and, where applicable, of the corporate group to which the investor is part.

#### **Intra-EU investments:**

While strengthening national FDI screening mechanisms, it is important to ensure that **intra-EU investments are not made more cumbersome**, as many national FDI screening mechanisms also encompass FDI from within the EU. Such practices lead to additional administrative burden for European investors.

**AEGIS Europe considers that Article 5(1) point (b) introduces a suitable approach when it comes to balancing the administrative burden against the risk of having EU foreign investors or its subsidiary in the Union that are directly or indirectly controlled by a government of a third country, which may lead to circumventing national FDI mechanisms.** This can happen if a foreign investor establishes a subsidiary in a Member State in which a screening mechanism is not enforced, organizes its future investments through that subsidiary, or if the target company's assets are transferred before the actual FDI is made to an entity in another Member State without a screening mechanism or with less stringent screening procedures.

Furthermore, this provision in the Proposal is also aligned with the European Parliament INTA Committee exchange in January 2024, in which some Members of the Parliament were of the opinion that intra-European investments should be also scrutinized when the owner of the entity in question making the investment is located in a third country.

### **Enhanced role of the European Commission**

While the decision on investment policy remains first and foremost in the hands of Member States, a platform that facilitates cooperation and collaboration between the European Commission and Member States should be established under the FDI legal framework. Compared to the current Regulation, **the Proposal establishes positively an increased role of the European Commission in certain cases**, especially in the framework of the cooperation mechanism. For instance, according to Articles 8 and 11(4), Member States have to consider the Commission's opinion and other Member States' comments before taking any decision of their screening exercise on whether or not to clear the foreign investment in question.

Nonetheless, **AEGIS Europe believes that Article 8(8) creates a loophole by mentioning exceptional circumstances** that enable the notifying Member State to issue a screening decision before the deadlines established in the Proposal, when it considers that there are overarching security or public order reasons that impose it. Moreover, Article 7(5) of the Proposal relates to situations where Member States submit comments and the Commission issues opinions on notified foreign investments, and the Member State concerned shall give utmost consideration to such comment or opinion. As previously stated, although the ultimate responsibility of investment policy remains in the hands of Member States, **AEGIS Europe considers that the wording "utmost consideration to such comment or opinion" remains too vague and may lead to discarding such comment or opinion from Member States and the Commission.**

Overall, **AEGIS Europe is of the opinion that the role of the European Commission must be further strengthened, in particular with regard to “critical infrastructures” and “critical technologies”**. The Commission, as well as the Member States, must have a leading role in preparing their opinions/assessments prior to any decision on whether or not accepting foreign investments that pose a risk to security or public order. This cooperation mechanism should be further developed so that it includes criteria and parameters facilitating the evaluation of the impact of a foreign direct investment.

Last but not least, the FDI Regulation should be consistent with the EU’s trade toolbox i.e. the International Procurement Instrument (IPI) and Foreign Subsidies Regulation. Whereas the IPI Regulation takes a strong stance on reciprocity in the field of public procurement in order to support the opening of international procurement markets and creating a robust leverage, the Foreign Subsidies Regulation is designed to tackle challenges related to unfair competition (i.e. subsidies coming from foreign State-Owned Enterprises that operate in the EU market on a distortive basis). Therefore, it would be critical to have a reciprocity check to assess openness towards investment within the third country from which the FDI targeting the EU market originates.

Against this background, **AEGIS Europe strongly believes that the Proposal's requirements should take a holistic approach and complement other legal instruments available to the European Union**, in order to maintain the Union as a prime destination for foreign investments, while simultaneously ensuring fairness for European economic operators and preventing any potential disadvantage that would create even more strategic economic dependencies.