

Keeping EU markets open to foreign investment and protecting key technologies: the narrow gate

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1. Introduction

The view in some (not all) European capitals seems to be that there is a regulatory gap when non-EU (viz. from China and the Gulf States) State-owned/ State-subsidized companies take over European companies that control key technologies.

This is because existing instruments only kick in when there is a public security threat or a lessening of competition in the meaning of the EU merger control rules. But there are no rules to address a form of unfair competition consisting in a company leveraging State support to acquire another company.

In the second half of this year, some Member States – notably Germany - have adopted new rules to screen foreign investments. Other Member States have continued to welcome foreign investments. In particular, Italy raised through the ranks of the prominent at the Kearney's FDI Confidence Index, measuring countries' capacity to attract foreign capitals, going from the 16th to the 13th place - only Sweden (15th place) made a larger gain in the ranking.

While it remains committed to free trade and open markets, the European Commission is carefully considering a foreign-investment screening instrument. In a recent speech, EU Commissioner for Competition Margrethe Vestager confirmed the Commission's intentions. She also expressed that "this issue isn't simple". Here is why.

2. The European Court of Justice as the guardian of free movement of capital

Screening of foreign investment and the related vetting process usually comes within the scope of Article 63 TFEU, protecting free movement of capital to the benefit of EU but also non-EU companies.

If a private party believes that a national rule is contrary to this Treaty provision, it can challenge the rule before a national court. In parallel, the wronged party can lodge a complaint against the offending Member State before the European Commission and to request to open an infringement procedure and the deferral of the Member State to the Court of Justice.

Europe's highest Court has indeed had many occasions to rule on national measures designed to protect national companies from foreign investments. The Court's approach essentially follows three steps:

- a. First of all, the Court seeks to determine if the national measure has the effect of dissuading investors.
 - This test is easily met and more often than not foreign-investment screening measures have been found to be restrictive of free movement of capital.
- b. Second of all, the Court checks if the restriction is justified on grounds of public policy or public security. By contrast, the Court ruled out that an interest in generally strengthening the competitive structure of a given market could be a valid reason to restrict free movement of capital.
 - More specifically, in 2005, when Italy sought to block EDF's takeover of a key energy producer on the grounds that the acquisition unfairly leveraged on EDF's State backing and France's lack of reciprocal access to its energy market, the Court struck down the Italian measure as an impermissible restriction.
- c. Lastly, assuming the measure is justified, the Court then checks if the measure is proportionate.

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- The Court has been invariably critical of measures that leave too much discretion to national authorities, only allowing procedures based on objective, non-discriminatory criteria which are known in advance.

3. Conclusion

The Commission promised to unveil further details about its foreign-investment screening proposal in the State of the Union speech due on September 13, 2017. It remains to be seen how this proposal will fit in the narrow gate developed by Europe's top Court. Prohibiting investments because of allegedly unfair State intervention indeed does not seem simple.

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