



EU Targets Insufficient Monitoring of Foreign Investment

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Solutions in the EU for screening foreign direct investments remain insufficient and overdue. Although the European Commission (EC) is trying to complement and improve them through non-binding guidelines, which should tighten the sanctions regime, it is up to the Member States to increase their ambition in this respect through a wider exchange of investor information and the abandonment of so-called golden visas and similar schemes.

The EU is the world's largest recipient of foreign investment. Although this money contributes to economic growth, it can also be a source of income and provide access to technology for countries or associated investors [whose interests are contrary to those of the EU](#), such as those supporting Russian aggression against Ukraine or subject to sanctions. According to EC data, individuals and companies from Russia, the sixth-largest investor in the EU in 2020, controlled about 17,000 EU companies and held minority shares in 21,000 others. Profits from these firms may counter the effects of economic sanctions imposed on Russia. Such investments may also reduce the competitiveness of the EU market vis-à-vis, for example, China (the eighth-largest investor in 2020) by facilitating access to the technology and know-how of EU companies. They potentially can allow access of foreign entities to the critical infrastructure of Member States (transport, energy, etc.), which poses a threat to the security of the EU.

Regulation of Screening Procedures. In 2019, in view of the increase in investments from China and Russia, among others, the EU adopted a regulation establishing a framework for screening of foreign direct investments (FDI) into the Union and left the monitoring to Member States. In principle, it is the duty of EU members to inform each other and the Commission about FDI that may affect security and the public order and to provide additional information and comments. The EU has specified armaments, energy, and dual-use sectors, among others, as particularly vulnerable. When notifying partners, countries are to look for ties or control of the investor by a third country, the risk of involvement in criminal activities, and

gauge the impact on critical infrastructure, technologies, or media. The EU left final approval for the transaction to the country on whose territory it is carried out; nevertheless, it should "give due consideration" of the positions of other countries and the EC before permitting it. In the case of investments that may have an impact on projects or programmes of Union interest, the country should "take utmost account" of the EC's opinion and provide an explanation if it fails to take the action recommended by the Commission.

In April 2022, in order to tighten the sanctions regime introduced in response to Russia's aggression against Ukraine, the EC issued additional guidelines on FDI from Russia and Belarus. Among other efforts, the EU made countries aware of attempts to circumvent the regulation using shell companies registered in the EU only for the purpose of making or acting as intermediaries in investments for Russian entities. It also recommended extending the monitoring to include transactions already executed and portfolio investments (which do not lead to the acquisition of control over a company, but derive profits from it). Since tightening the system of sanctions and liquidating foreign influence in the EU is not possible without cooperation with the private sector, the EC called on businesses to carry out due diligence of their partners from Russia and Belarus.

The effectiveness of monitoring foreign investment in the EU is also influenced by rules in other areas, such as the fight against terrorist financing and money laundering. Banks use these rules to verify the ownership structure of a company before opening an account and later. In addition, in December 2022, the EU adopted the Regulation on Foreign

Subsidies Distorting the Internal Market, which will apply from July and concerns financing by third countries of companies operating on the EU market. Through it, the Union will gain extensive monitoring powers, but its effectiveness will depend on the adoption of implementing regulations that are still being developed by the EC.

Gaps in EU Action. The EU regulation has encouraged some countries, including Poland, Slovakia, and the Netherlands, to introduce their own FDI screening mechanisms. As the mechanism is not a requirement, only 18 EU members have such a tool and national procedures vary. For example, France, Spain, and Germany have developed additional FDI controls related to the deployment of 5G technology. Interpretation of the criteria for notification also remains uneven: some states report all FDI, while others are more selective (e.g., Germany, Finland, Italy). Their risk assessment also differs. For example, in 2021, under pressure from the EC and the U.S., Croatia revoked a decision consenting to the management of the port of Rijeka by a Chinese investor, but in 2022, Germany accepted the purchase of shares in the port of Hamburg by the Chinese firm Cosco. In another case, an Italian drone manufacturer, Alpi Aviation, was taken over by a shell company associated with Chinese state-owned enterprises, which was established after the transaction.

The EU regulation covers only FDI and generally skips the problem of [golden passports \(CBI\) and visas \(RBI\)](#), which grants citizenship or residence rights in exchange for significant investments, which in practice facilitates wider access to the EU market for certain foreign investors. Although the EC managed to persuade Bulgaria (April 2022) and Cyprus (2021) to give up their CBI regimes, Malta and Austria still offer them (on 29 September 2022, the EC initiated proceedings against Malta). Most of the CBI and RBI rights issued so far probably have been bought by the Chinese, but the EU countries usually do not disclose information on this subject. The EC assumes that among the beneficiaries of a CBI there are persons subject to sanctions, and therefore it calls on countries to identify and revoke decisions granting them these benefits. However, the revocation of passports already issued is legally problematic. For example, in 2022, Latvia made it possible to deprive citizens of those who support the violation of the territorial integrity and sovereignty of democratic states, but only if they do not become stateless as a result. It is using the law to deprive Piotr Aven, a sanctioned oligarch and the former president of Russia's Alfa Bank and general financial director of the Fin Pa investment fund, of his passport. The EC also

recommends a thorough verification of applications for RBI and suspension of the programmes for Russians and Belarusians, but that ignores investors from other countries that could infringe the EU's interests.

An additional element that may weaken the screening of foreign investments may be the decision of the Court of Justice of the European Union (CJEU) of 22 November last year on the Anti-Money Laundering Directive. The CJEU declared invalid a provision requiring states to make publicly available information on beneficial owners—the persons actually behind companies registered in their territories. Although it has allowed disclosure of this data to journalists, the new rules on access to information remain undefined. In practice, this can make it difficult to monitor harmful investments; so far, many of them have been revealed by media investigations or non-governmental organisations.

Perspectives and Conclusions. Russia's full-scale invasion of Ukraine and the need to tighten the sanctions system have revived the discussion about the threats associated with the inflow of foreign capital to the EU. However, the Union's actions to date in this area remain reactive and therefore insufficient. For example, while the FDI screening regulation has been in place since October 2020, the largest inflow of Chinese investment occurred in 2016; in the case of CBI, the Commission recommends depriving Russians of passports that have already been granted, which is problematic from the point of view of procedure and human rights. The effectiveness of the protections is further weakened by the reliance of the regulation on the goodwill of EU countries. While they are trying to harmonise Member State practises, the EC issuing non-binding guidelines and the CJEU rulings on case law sometimes lead to the two institutions going in different directions. All these factors translate into significant gaps in the system of screening foreign investments in the EU, which may be detrimental to the internal market and the effectiveness of Union actions. The ongoing assessment of the application of the regulation, the results of which the EC will present in October this year with possible proposals for changes, is an opportunity to improve the regulation (for example, setting the obligation for countries to introduce screening mechanisms and clarifying the criteria for reporting FDI). The adoption of such joint measures is in the interest of Poland, which since the beginning of Russia's aggression against Ukraine has been seeking to limit its influence in the EU. To this end, it can cooperate with the Baltic states, which are practised in disclosing inflows of harmful capital into the EU.