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#COVID19
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COVID-19: THE URGENT NEED FOR STRICTER FOREIGN INVESTMENT CONTROLS

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Introduction

The global pandemic is shaking up the EU's agenda and Europeans are eagerly waiting for the October 2020 deadline to set up the EU's Foreign Direct Investment (FDI) screening mechanism.[1] Whether the recession that is triggered by the health crisis is severe but temporary or whether it is a shock that brings about structural change in the global economy, the weakening position of European companies will create many opportunities for corporate takeovers at bargain prices. The 2008 crisis has shown that strategic assets must be protected against investments that undermine the strategic autonomy of a member state or the single market, which is built on the physical and digital interconnection of national economies.[2] The aggressive acquisition of a company in one member state can create dependencies in an entire supply chain and therefore affect several member states. Takeovers of European companies by investors from China, Hong Kong and Macao have been sharply increasing (from five thousand to twenty-eight thousand between 2007 and 2017), particularly in countries weakened by the sovereign debt crisis.[3] This has prompted collective European vigilance to protect the single market, especially because state-owned enterprises and investment funds, which are increasingly active in M&A, remain opaque about their governance and the origin of their financing.

1. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investment into the Union.
2. For the OECD, the main objective of FDI is to influence the management of a company, whereas cross-border portfolio investment is mainly aimed at financial gain. OECD Benchmark Definition of Foreign Direct Investment, 4th edition, 2008, p.22.
3. Foreign Direct Investment in the EU. Following up on the Commission Communication 'Welcoming Foreign Direct Investment while Protecting Essential Interests' of 13 September 2017, SWD (2019) 108 final, EC, 13 March 2019, p.13.

The planned European mechanism preserves the competence of member states to prohibit or authorise FDI projects and only encourages them to set up a screening system. A FDI that is subject to control has to be notified to the other member states and the European Commission and all relevant information has to be transmitted so that the Commission can issue a non-binding opinion on investment projects that pose risks to the security and public order of more than one member state or to European programmes such as Horizon 2020 and Galileo. But there are still only fifteen member states with a screening mechanism.[4] The European Commission therefore took the initiative on 25 March to call on all member states to deploy all possible means to protect their strategic assets, particularly in the field of public health.[5] This is a strong political commitment by the Commission, which has hitherto been careful to preserve the delicate compromise between the member states that balances security and free trade.

The world economy has plunged into an unprecedented crisis, with a drop in annual GDP growth estimated at an average of two per cent per country for each month of containment.[6] It remains unclear if there is cyclical contamination ahead and how much time is needed for a full return of economic activity. **We must therefore move fast to equip all member states with screening capacity and speed up the implementation of European coordination** by starting to strengthen it immediately.

It is more essential than ever that the measures are proportional. FDI is as necessary for recovery as it is harmful if it further weakens the economy. This could be the case if strategic assets are targeted, notably technological know-how. A surge of protectionist measures, including export restrictions, would undermine the single market and create new imbalances around the world. **But the limits of economic interdependence, highlighted by the lack of self-sufficiency in medical equipment, underline the security and geopolitical stakes of trade and investment.** The willingness to defend the EU's economic sovereignty has been repeatedly expressed by Emmanuel Macron[7] and by Ursula von der Leyen[8] when she assumed the presidency of the European Commission. More recently, Angela Merkel[9] also struck a similar tone. We should accelerate this trend by stimulating a debate on the degree of dependence which, depending on the sector, is sustainable vis-à-vis third countries. Looking through the security prism is even more necessary since the massive recourse to state financial aid to absorb the pandemic and the crisis will also generate competition distortions in the medium term. This will make some countries, sectors or companies even more vulnerable to investors who are backed by large public subsidies.

In addition to the European Commission's warning and in light of the unprecedented crisis, the October 2020 targets have to be revised immediately. First, the crisis reveals the limits of the European current control capacities. Second, beyond the consolidation of these capacities over time, we must also anticipate a profound transformation of the political economy of FDI. Third, we must plan for measures that will help prepare for this change.

4. Austria, Czech Republic (since 6 April 2020), Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Rumania, Spain. The United Kingdom, which exited the EU on the 31st January 2020, in not included. List of screening mechanisms notified by Member States, DG Trade, EC, 15 April 2020..

5. Guidance to the member states concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), C (2020) 1981 final, 25 March 2020.

6. OECD updates G20 summit on outlook for global economy, OECD, 27 March 2020.

7. « Emmanuel Macron demande à "renforcer la souveraineté économique européenne" », *Le Parisien*, 23 April 2020.

8. « Une nouvelle équipe pour défendre la souveraineté économique de l'Europe », Jorge Valero, *Euractiv*, 12 September 2019.

9. « Coronavirus won't kill globalization, but will clip its wings », Jakob Hanke Vela, *Politico*, 7 April 2020.

1 ▪ THE DELAY OF MEMBER STATES TO SCREEN FDI IN THE COVID-19 ERA

Given the rapidly worsening economic situation, the October 2020 deadline for implementing the European mechanism now seems too far in the future. This timeline could only be maintained if any transaction in the EU during the preceding fifteen months would become subject to retroactive control.[10] On 16 April 2020, EU Trade Commissioner Phil Hogan therefore called on member states to speed up the exchange of information on FDI projects before October.[11] This would be essential to develop collective intelligence across the single market, which is based on the analysis of both the origin of FDI and its targets. But the inertia of many member states in setting up a control mechanism, the diversity of the various existing models and the lack of an effort to harmonize the operating criteria limit the screening capacity of Europeans.

1.1 ▪ Growing divergence between member states

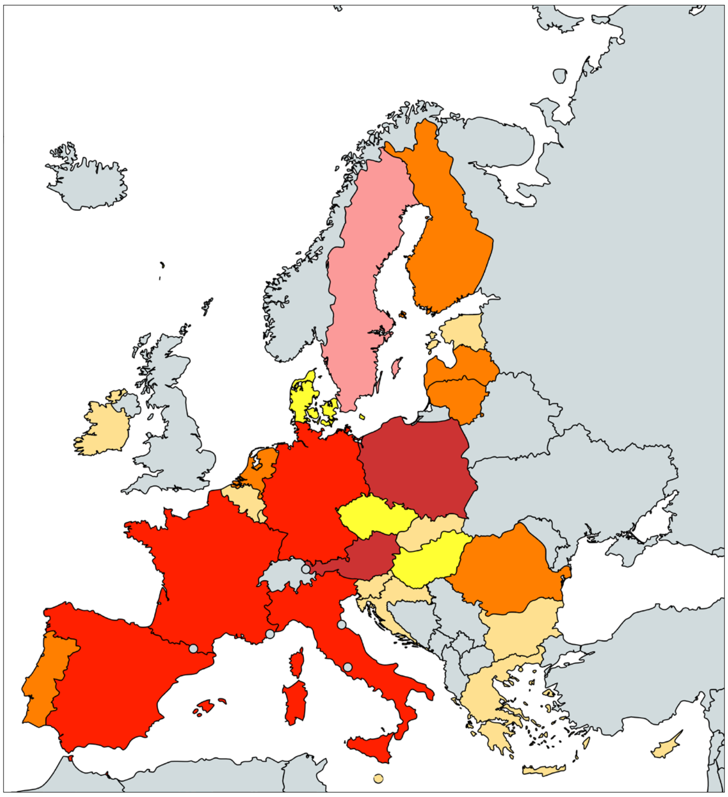
While FDI control mechanisms are more common among the old industrial powers (e.g. the United States, Canada, Japan and Australia) than amongst emerging economies, many European member states are still lagging. Indeed, half of the EU member states didn't have a screening mechanism when the European instrument was adopted.

A compromise was reached in the spring of 2019 within a reasonable period–despite the strong reluctance of several member states.[12] The result was a non-binding measures, according to which member states are only encouraged to set up a control mechanism with minimum standards (in particular transparency of rules and procedures, non-discrimination vis-à-vis third countries, protection of confidential information, right to judicial review of decisions by national authorities). Moreover, they are required to notify FDI under screening to the European Commission and other member states. The aim is to build a culture of information exchange and transparency among the EU-27, while preserving the confidentiality of strategic data.

To avoid arousing renewed mistrust among member states, the European Commission has not sought to promote one model of supervision, which could be inspired by the mechanism of one member state orthe American model of the CFIUS (Committee on Foreign Investment in the United States) which had been further strengthened in 2018 by the FIRRMA (Foreign Investment Risk Review Modernization Act).[13] Over the last year, Washington has been exerting pressure on its trading partners to align themselves with its policy of economic decoupling vis-à-vis China. As was the case with Israel,[14] this includes a strong incentive to establish a screening mechanism for FDI, a centrepiece of an arsenal of retaliation (weaponisation) against Chinese competition.

10. Guidance to the member states concerning foreign direct investment, *Idem*, p2.
11. This exchange of information began to develop between Germany and France and is only on the basis of informal cooperation.
12. The initial reluctance came from Scandinavian countries and countries in the South; both wanted to preserve their attractiveness to ensure economic recovery after the sovereign debt crisis. Eastern European member states were similarly hesitant.
13. TITLE XVII—Review of Foreign Investment and Export Controls, FIRRMA, 2018.
14. « Israel Panel to Monitor Chinese Investments Following U.S. Pressure», Noa Landau, Haaretz, 30 October 2019.

MAP 1 ■ FDI Screening Mechanism in the EU and changes made after 2017



Legend

- Updated mechanism because of the Covid-19 crisis
- Updated mechanism or under review fater 2017
- Mechanism which has not been updated since 2017
- New screening mechanism
- No screening mechanism
- Considering a screening of FDI

Sources : Jacques Delors Institute (European Commission, UNCTAD, Euractiv, as of 24 April 2020).

In addition, some member states (in particular France and Germany) that have existing screening mechanism, based on internationally recognised standards, responded to requests by other member states and encouraged the exchange of good practices by translating their reference texts. (Note that they were not proactively promoting their model to other member states.) While the European Commission is organising itself internally for the October 2020 deadline, the regulatory framework's knock-on effect remains limited. Only the Czech Republic has introduced screening[15] and Sweden announced that it will have a system in place by 2021.[16]

This inertia of many member states is even more problematic in the current context. Some of the member states, alongside other countries around the world (such as the United States and Japan), are strengthening their mechanisms. In the face of the recession, several member states (France,[17] Germany, Italy, Poland, Spain) have tightened their arrangements in recent weeks.

While the attention of governments will be limited as they are mobilising for health emergencies, one can expect **a growing gap between the control capacities of member states. On the one side there will be very strict systems. On the other, there won't be established procedures. The wide range of instruments across the single market will limit the efficiency of the future European mechanism**.

15. "Implementation of the Regulation (EU) No 2019/452 from March 19, 2019 establishing a framework for the review of foreign direct investment to the Union in the Czech Republic", ecovislegal.cz, 2019
16. "A system for examining foreign direct investment in protected areas", Swedish Ministry of Justice, 22 August 2019.
17. Loi Pacte, 22 mai 2019.

1.2 ▪ Lack of consensus on the definition of national security

Among those with a mechanism, there are both old member states and the six countries that joined the EU after 2004 (Hungary, Latvia, Lithuania, Poland, Romania and most recently the Czech Republic). This group also includes liberal Scandinavian member states and more interventionist Mediterranean countries. The disparity and the heterogeneity of adopted models is due to a great diversity of risk perception and precaution.

The Treaty on European Union specifies that 'national security remains the sole responsibility of each Member State'.[18] Nevertheless, several community assistance mechanisms have been put in place.[19] The legal interpretation depends on several principles, such as sovereignty, independence, stability and sustainability. It also evolves in line with the new risks that emerge.

However, **unlike some countries such as Canada, Japan or Australia, the EU does not include in its regulation the concept of economic security.** The latter is linked to the process of European integration, as well as the prosperity and resilience of the EU (although it is not defined in the Treaties).[20] Derogations under EU law cannot be based on criteria of economic competitiveness, but only to defend 'public policy, public security and public health' and must be proportionate.[21]

The diversity of existing systems

By preserving the sovereign competence of member states over FDI, a wide variety of screening mechanisms have been put in place. They can be benchmarked by several criteria, including the listing of sectors that are subject to control, thresholds for planned investments, ex-ante vs. ex-post control, procedural deadlines, the organisation of the institutions responsible for screening, the availability of human and financial resources, ...

The 2016 peak in Chinese investment in Europe has given rise to a tightening of existing systems, which is in turn leading to greater convergence (such as an extension of the lists of concerned sectors, a lowering of thresholds, a traceability of takeovers). But in the absence of a coordination effort that would have made it possible to provide all member states with an equivalent capacity to monitor, identify and control FDI, the disparities that persist reduce the effectiveness of the future European mechanism and leave the Commission with a heavier task, notably to screen FDI not submitted to national screening.

- **The main reason for the convergence of the screening mechanisms is related to the gradual extension of the list of sectors that are subject to control.** The list depends on an evolving perception of the strategic character of particular industries and the emergence of new sectors which play a key role for the security and competitiveness of a country.

18. Art 4-2 of the TEU.
19. These mechanisms include the 'mutual defence' clause (Art. 42 TEU) for cases of armed aggression, and the 'solidarity clause' (Art. 222 TFEU) which allows the EU and the member states to act 'jointly in a spirit of solidarity' to prevent terrorist attacks on the territory of EU countries and to provide assistance to other member states in the event of a natural or man-made disaster.
20. See the economic priorities of the Global Strategy (EUGS 2016)
21. MEMO - Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, DG Trade, European Commission.

In addition to traditional defence and dual-use sectors, there is critical infrastructure comprising both physical and information technology facilities, networks, services and assets. In the event of disruption or destruction, there can be serious implications for health, the security or economic well-being of citizens or the functioning of member states (transport, information and communications, data storage, AI, nuclear technology and space infrastructure, financial infrastructure) and sensitive installations (including some real estate, supply of essential inputs (energy and food, water, services, public health).[22]

- **The time limits for the various stages of the procedure** (filing, investigation, decision, extension), which can vary from forty-five days to six months, tend to be extended to give more flexibility to the authorities responsible for investment screening.

- ***Ex-ante vs. ex-post***: There has been a shift towards *a priori* procedures. In France, for example, this is based on a voluntary request from companies that allows them to anticipate the possibility *a posteriori* cancellation of the investment.

- **However, there is much more heterogeneity regarding investment thresholds** above which screening is required, i.e. the share of capital or voting rights acquired in an undertaking whose registered office is located in a respective country. While Finland had lowered its threshold from 33 per cent to 10 per cent in 2012,[23] France has recently lowered it from 33.33 per cent to 25 per cent in December 2019[24] and again since the 29 April 2020 to 10% for non-EU FDI until the end of 2020; and Japan to 1 per cent from 22 May 2020.[25] This disparity is compounded by varying thresholds, which depend on the sectors and countries of origin of the potential investor. Some, such as Germany and France, make a distinction between FDI from other member states and from third countries, while others apply the thresholds to all FDI, including intra-European FDI.[26]

The heterogeneity of the existing systems and the inertia of some member states are even more problematic as the unprecedented recession could lead to a profound transformation of the political economy of FDI.

2 ■ THE POLITICAL ECONOMY OF FDI UNDER HIGH PRESSURE

The Covid-19 crisis is already amplifying trends of recent years (stagnation in volumes, increased caution and the desire to strengthen the conditions for fair competition). But a deeper change in the political economy of FDI must be anticipated. This would urgently require several new initiatives:

- After the sharp worldwide decline in FDI volumes that was caused by the 2008 crisis, the following decade was marked by stagnating volumes, with an average growth rate of less than 1 per cent per year between 2008 and 2018. This is in stark contrast to rates of more

22. Europa-lex, Protection des infrastructures critiques;
GALLAND J.-P. 2010. « Critique de la notion d'infrastructure critique », *Flux*, 2010/3 (n°81), p.6-18
23. UNCTAD.
24. Pacte Act, May 22, 2019.
25. SUGITA H. 2020. What upcoming changes to Japan's FDI regime mean for non-Japanese investors, *orrick.com*, 27 March 2020.
26. In some cases, members of the EEA or EFTA are considered to be equivalent to EU member states.

than 20 per cent before the 2000s. Indeed, 2019 was even the fourth consecutive year with a decline in investment flows (inward and outward).[27]

- At the same time, member states have been paying increasing attention to the immediate or cumulative impact of FDI. FDI is critical element of globalisation, as there is a positive correlation between outward investment and exports from the country of origin. The greater number of countries from which investments originate and the greater number of recipient countries, beyond historical partners, has created security challenges. As the strengthening of economic interdependence through production chains became increasingly disconnected from national strategic interests, governments have become increasingly suspicious.

- The threefold FDI increase from Chinese, Russian and Emirati state-owned enterprises between 2007 and 2017 has prompted the European Commission to seek a level playing field with third countries.[28] **The full range of direct or indirect subsidies that impart Chinese companies with an unrivalled investment capacity have a crowding out effect on other investors. This is contributing to China becoming a 'systemic rival' of the European Union.**[29] However, the negotiating mandate of the EU-27 for future post-Brexit relations with the United Kingdom pays the same attention to the level playing field.[30]

Several signals point to a deeper transformation

- **A drastic global decline in FDI volumes.** At present, even without the ability to predict the impact of the crisis in the medium term, the immediate shock will push companies to concentrate financial resources on rescuing their main activities. Investments are postponed and expansion projects are suspended, causing a sharp drop in the volume of global FDI in 2020, which is expected to range from -30 per cent to -40 per cent, depending on the scenario of the pandemic's evolution.[31]

  Moreover, the economic crisis is not changing the aggressive line of Donald Trump's trade policy.[32] American companies remain the leading investors in the EU, but they are subject to Washington's increasing demands for decoupling, firstly from China but also from the EU. This could reduce transatlantic investments even more sharply and push the member states to be less cautious regarding some investments.

- **A shortening of supply chains and/or renationalisation.** The desire to better anticipate future risks - pandemics, food shortages, cyber security, climate change or others - and to strengthen the resilience of member states and the single market will contribute, where possible, to the reshoring of investments to ensure the self-sufficiency of a country or the EU, or at least to relocating part of production if the supply of raw materials still depends on third countries.[33] This trend would still only concern some sectors, starting with the medical sector, as it involves, in particular, public measures of nationalisation. In addition,

27. "Global Foreign Direct Investment Slides for Third Consecutive Year", CNUCED, 12 June 2019.
28. Foreign Direct Investment in the EU, *Idem*, p2.
29. 'EU-China – A strategic outlook", European Commission, 12 March 2019.
30. FABRY E. 2020. 'Brexit: the worst is yet to come!' *Blogpost*, Jacques Delors Institute, 21 February 2020.
31. Trade and Investment Working Group (TIWG) Report on Covid-19 crisis: implications for trade and investment, IMF, ITC, OECD, UNCTAD, WB, and WTO, April 2020.
32. Rather than suspending retaliatory trade measures, such as existing tariffs on aluminum steel imports, Donald Trump has recently strengthened them.
33. WILFERET B. 2020. 'Le coronavirus et la mondialisation', *Telos*, 14 April 2020.

this requires a very intricate tracing and mapping of supply chains and to assess potential vulnerabilities.
On the other hand, companies themselves will seek to reduce the risks of the supply disruption that is caused by a new crisis. They will no longer want to depend on an exclusive supplier and will further reduce the geopolitical risk linked to their investments. This could lead to a greater diversification of production sites and therefore investment. The stability of the regulatory framework of the single market, and the close proximity to a consumer market which limits logistical issues (near-shoring), could prove particularly attractive for FDI which, by coming to Europe, would seek to escape the instability created by a lasting trade confrontation between the United States and China.

- **The Wild West of government subsidies.** In addition to the massive public investment to fight the pandemic, the state aid needed to combat the economic crisis will result in an overbidding of exceptional measures. The single market competition rules that apply to public subsidies have themselves been temporarily suspended. An international race to the bottom risks shattering not only the recent trilateral initiative recently launched by the US, the EU and Japan to reduce industrial subsidies,[34] but destroying the whole set of WTO rules on subsidies. Such a scenario would narrow the gap between China's investment capacity and that of other WTO members. If it does not push other WTO members to strengthen WTO disciplines, Europeans must be prepared to become exposed to significant distortions of competition.

- **The geopolitical prism.** The increased role of governments in the functioning of the economy and the closer links between investment and security, which have been brought about by this crisis and which are already giving rise to protectionist reflexes within the single market, mark the transition to a resolutely geopolitical era of investment.

Decreasing FDI flows and offensive investments require Europeans to **move from the limited range of their screening capacity to a more sophisticated system that needs to be put in place quickly**.

3 ▪ QUICKLY ANTICIPATE TOMORROW'S VULNERABILITIES.

Economies that are highly integrated into world trade, such as the European economies, are particularly affected by the disruption of supply chains due to containment, especially if new phases of containment are needed to overcome the pandemic.

This makes the single market even more strategic as the backbone of European business. All that the EU-27 can do to preserve and consolidate it is an insurance policy. Without goals or claims for independent production, it can increase the resilience of firms when they emerge from the crisis.

Nationalist reflexes (such as export restrictions between member states) which provoke an over-emphasis on unilateral initiatives and increasing divergences between member states must be limited, at the risk of a progressive fragmentation of the single market. There is currently the risk of a tit-for-tat protectionism in the world economy, which would weaken multilateral rules in the long run. Close coordination of the EU-27 should aim at preserving

34. FABRY E. 2020, "Industrial Subsidies are at the Heart of the Trade War", Blogpost, Jacques Delors Institute, 21 February.

the visibility and stability which European companies need and which would also be attractive for non-European FDI.

As we are heading deeper into the crisis, a distinction must be made between medium-term measures, which will make it possible to strengthen the resilience of Europeans in the face of new crises of viral, climatic or other origin by reinforcing the strategic autonomy of Europeans in some sectors, and short-term measures, which will prevent the fragility and fragmentation of the single market.

Strengthening the capacity to monitor FDI is part of this. The initiative taken in recent days by France, Italy, Germany, Poland and Spain, to strengthen their FDI screening systems is a step in the right direction. But without coordination among the EU-27, the vulnerabilities of the single market will increase.[35] The urgency of the situation requires that all member states set up screening mechanisms quickly, while ensuring that certain operating principles are harmonised. In order to ensure rapid implementation, the European Commission must assume a coordination role and propose new guidelines. They need to be more detailed than the March 2020 guidelines,[36] and could lead later on to a review of the April 2019 regulation, to harmonise certain criteria:

- **A temporary extension of the scope of application of national screening mechanism.** Taking into account the existing competence of member states on FDI and the ability of the European Commission to issue an opinion, harmonising the list of screened sectors would ensure that the meshes of the net are equally sized throughout the single market. Furthermore, as early as March 2020, Australia, like Italy, announced that screening would henceforth cover all FDI, to **create a shield against takeovers of bankrupt companies, particularly in sectors that are strategic for supply chains**, such as aviation and maritime freight.[37] In its wake, India has just announced on 18 April a systematic screening of FDI from neighbouring countries, starting with China.[38] **The exceptional nature of this crisis should also encourage Europeans to protect their economic assets by breaking with the orthodoxy that there has to be a clear distinction between national security and economic security.** This would allow for an extension of the list of sectors under scrutiny, including the tourism sector, where some flagship companies are in danger of being sold off.
  Recent statements by Angela Merkel[39] align the German and French position to consolidate the EU's economic sovereignty and are a step in this direction. The issue at stake is much broader than just screening FDI, but it requires better identification of sectors that are strategic for a country's economy and resilience. While the Chancellor referred to this work for the post-crisis period, we must start this debate now to protect existing

35. While Italy extends the list of strategic sectors subject to screening, including, temporarily, those from other Member States; Spain suspends all FDI targeting strategic sectors (physical or virtual infrastructure, critical or dual-use technologies, critical energy and raw materials, information control and media) and lowers the screening threshold to 10%. Germany, for its part, assessed a "real threat" to security or public order and will now assess a "foreseeable threat"; FDI cannot be carried out while it is being examined by the authorities. Poland, announced on 23 April that it would filter all investment from outside the EU. "Poland launches new rules to prevent takeovers by non-EU investors", Euractiv, 24 April 2020. France announced on 29 April that it would tighten controls in the biotechnology sector and lower the control threshold to 10% for non-EU FDI until the end of 2020.
36. Guidance to the member states concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), C (2020) 1981 final, 25 March 2020.
37. "Australian authorities to check every proposed foreign investment during coronavirus crisis", *The Guardian*, 29 March 2020.
38. "Government nod must for investment from China and its neighbours", *Economic Times*, 18 April 2020.
39. "Coronavirus won't kill globalization, but will clip its wings", Jakob Hanke Vela, *POLITICO*, 7 April 2020.

capacities, beginning with better resilience in energy supply, connectivity and logistics. **On the other hand, in order to prepare a way out of the crisis, this decision should be accompanied by a sunset clause that can be revised according to the evolution of the crisis. This would allow to limit again the scope of application according to the proportionality principle.**

- **Short processing time**: Japan's quasi-systematic due diligence system is generally limited to two weeks to compensate for very strict screening measures, including very low thresholds for capital ownership.[40] Care should be taken to shorten processing times so that the systems do not place too much burden on companies and preserve the attractiveness of the single market.

- **Adequate financial and human resources:** as there is risk of a potentially large number of bankruptcies in Europe, a case-by-case approach either within the member states or within the European Commission is insufficient. There is at present no additional funding, nor is there a dedicated budget under negotiation for the next multi-annual financial framework. The European Commission's monitoring capacity, based on the expertise of the various Directorates-General, is therefore likely to be limited. However, DG Trade had a total budget of EUR 16.5 million in 2016, which covers its entire range of tasks, and should remain constant in 2020.[41] (Note that less than 700 people are currently working in DG Trade). By way of comparison, for the operation of the CFIUS alone, the Committee on Foreign Investment in the United States Fund amounts to USD 20 million per year for the 2019-2023 period. In addition, the Fund can also be financed by filing fees of less than 1 per cent of the value of the transaction or USD 300,000 (annually adjusted for inflation).[42]

  The development of industrial ecosystems, which the European Commission calls for in its new industrial strategy of 10 March 2020, would encourage earlier detection of the threats that FDI projects can pose to an entire value chain. All economic actors–large companies, subcontractors, research laboratories, universities, or others–would be encouraged to send alarm signals. The establishment of such ecosystems could also help to map the strategic dependencies more rapidly and thus identify vulnerabilities that exist in supply chains across the single market.

  However, it is even more important to strengthen the European Commission's resources for market monitoring, data processing and analysis, which will enable it to accurately assess the potential risk associated with an FDI. Given that at the beginning of 2019 the Chinese government already has a majority position in 6 of the 14 European ports in which it has invested should thus lead us to question the long-term impact of China's increasing control over European port infrastructures more actively.[43]

- **The system must allow a tracing of the chain of control beyond the direct investor.** In Europe, the vast majority of acquisitions are made by industrial groups, but state-owned companies and investment funds, which remain very opaque about their financing, are increasingly active. Beyond the sole criterion of the capital threshold, it is necessary to

40. However, it can be extended to 5 months if requested by a department.
41. European Commission, "Key figures. 2019"; European Commission, "Strategic Plan 2016-2020". However, DG Trade also received €1.5 million in 2017 for the operation of the Investment Court System; funding could amount to €10 million in 2020.
42. Review of Foreign investment and export controls, section 1723, FIRRMA.
43. FABRY E. & D'ANDRIA J. 2019. "The challenges of Chinese investment control in Europe", *Policy brief*, Jacques Delors Institute, February 2019.

identify whether the control is not only economic but directed, in the political sense of the term, by a natural or legal person. The stakes are twofold. On the one hand, it would make it possible to take into account the problem of subsidies from which foreign investors could benefit and the crowding out effect of other investors who do not have the same support; on the other hand, it would make it possible to **identify foreign government influence and geopolitical risk.** The issue at stake is therefore as much about trade policy as it is about competition policy and the EU's foreign policy.

This is even more crucial since not all member states make a distinction between European and third-country investors and a European holding company can be considered as a European investor and is therefore exempt from control on the grounds of crossing the threshold when it is in fact controlled by a third-country investor. This was the case in France with the 2012 decree that had abolished the concept of 'indirect shareholding' until the reform that came into force on April 1st 2020. Now only investors that are completely controlled in the EU can be considered European.

The challenge to converge national models on the traceability of the ultimate beneficial owner is even more essential. Such a system will be more efficient in identifying the ultimate investor from a third country. The risk assessment would also make it possible to strengthen the mutual confidence of member states. This is required to more actively remove controls on intra-European FDI. Strategic autonomy and economic sovereignty are more easily envisaged at the EU level than at the national level. Since the recession is even contributing to an increase in mistrust by member states of potentially aggressive intra-European takeovers, for example in Italy[44], strengthening European economic sovereignty would require exemptions from intra-European FDI screening.

In the United States, the FIRRMA review, for its part, has made it possible to target any investment that gives access to American technological know-how by seeking to capture various ways of exerting influence on a company (such as, for example, the power to appoint members of the Board of Directors).[45] In particular, this makes it possible to control minority operations that provide access to know-how.

The precautionary measures implemented within the European system should therefore aim to obtain more transparency and traceability from a potential buyer on its sources of financing and the control which it can itself be subject to by the ultimate beneficial owner. The Dutch government's proposal of December 2019 goes in this direction.[46] It aims to combat the distortions created by unauthorised public subsidies within the single market, or an unregulated dominant position in the country of origin, as well as practices that are not in line with European competition policy.[47] The current context calls for an accelerated publication of the white paper to better combat market distortions, which is prepared by the European Commission's DG Competition and was initially announced for June.

44. See footnote no. 34.
45. The screening of foreign holdings in pension funds would have to be strengthened further.
46. "Non-paper strengthening the level playing field on the internal market - the Netherlands".
47. Specific supply constraints, price and product differentiation between different market operators for comparable transactions, wholesale and retail prices that do not reflect market prices and/or production costs, investment in companies with no apparent profitability, ...

CONCLUSION

The protection of strategic assets requires a much more extensive toolbox than FDI screening. In particular, research cooperation between companies, universities and governments, which is as fundamental as it is conducive to the transfer of know-how, is beyond the control of FDI, even though it has recently developed strongly (with China in particular).[48] The introduction of regulations that require a declaration of the cooperation agreement would also make it possible to monitor them. In addition, beyond the rescue plan on which Europeans will agree to manage the health crisis, the collective investment capacity and political will of the EU-27 must be strengthened to mobilise all available instruments (EIB, European Investment Fund, etc.) to counter takeover bids for strategic European assets, as has just been done for the German pharmaceutical company CureVac that was faced with an American takeover attempt.[49]

The economic, social and political vulnerabilities and imbalances caused by this crisis will undoubtedly exceed our ability to forecast. Regarding predatory investments, we must also remember that even though the primary threat is the unequalled investment capacity of Chinese state capitalism, it can also come from other countries, including allies like the United States.[50] It furthermore does not exclude aggressive takeovers between member states.

Beyond the need to ensure a level playing field, it is already apparent that the crisis calls for exceptional measures. The challenge is to succeed in preparing a way out of the crisis now so that these exceptional measures make it possible to preserve our model of a liberal economy rather than enshrine an uncontrolled transition to a managed economy and the end of democracy. The leadership that the EU-27 manage to assume in defending the liberal economy will be more decisive than ever for the international order.

The EU-27 should thus agree even more rapidly on the extension of the scope of application of FDI control, since they would be designed to be temporary. In the face of an unprecedented economic crisis, the convergence of national filtering models is an important preliminary step to strengthen the resilience of member states and increase the strategic autonomy of the single market as a whole. It would be necessary to ensure that this convergence includes a requirement for traceability of the chain of control to the ultimate beneficial owner so that, in the medium term, intra-European investors can be exempted from these controls, which would be a guarantee for mutual trust among Europeans.

48. KRATZ A., HUOTARI M., HANEMANN T. & ARCESATI R. 2020. "Chinese FDI in Europe: 2019 Update", *MERICS*, 8 April 2020.
49. Coronavirus: Commission proposes funding to CureVac laboratory, which develops innovative vaccines, 16 March 2020.
50. At the beginning of February 2020, the United States announced that it wanted to buy the Finish company Nokia in order to strengthen its strategic autonomy in the area of 5G vis-à-vis China.

L'Europe pour les citoyens

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