

In Search of a Role for the Member States and the EU to Establish an Investment Screening Mechanism

1. The risks of investments in enterprises, which are relevant for public security and services, depend on their source and their form. Direct investments are more dangerous than portfolio investments, since direct investments enable the investor to exert influence on the enterprise and its market strategy. Furthermore, third states investments are more dangerous than investments from other Member States of the EU because there is no common legal system with mutual commitments to offer protection of legal interests.

- 2a. National screening mechanisms for direct investments out of third states in enterprises that are relevant for public security and services have to meet the requirements arising from fundamental freedoms. In such cases, the European Court of Justice (ECJ) applies the freedom of establishment because of investor's objective to exert influence on the enterprise. Thus, the freedom of movement of capital is blocked out and not applicable.

Art. 207 para. 2 TFEU gives the EU an exclusive competence to establish a screening mechanism on direct investments due to Arts. 2, 3 para. 1 lit. e) TFEU. Normally, exceptions will only apply where the Union empowers Member States in a manner which is concrete enough to preserve the unity in exercise of exclusive competences across the Union. The planned screening regulation is not in accordance with this requirement.

National screening mechanisms for direct investments out of third states can be explained by involving Art. 64 paras. 2, 3 TFEU. These competences are shared between the Union and the Member States pursuant to Art. 2 para. 2 TFEU. They can be used to adopt secondary law, although the freedom of capital movement is not applicable in third state cases, because of the explicit wording of Art. 64 paras. 2, 3 TFEU.

- b. In accordance with the jurisdiction of the ECJ, national screening mechanisms which deal with direct investments from other Member States have to be measured against the freedom of establishment. These rules can be justified by compelling reasons relating to general interest. However, the ECJ interprets the principle of proportionality in the case of direct investments very strictly. Thus, a prior checking of the share purchase is usually not possible.

- c. National rules for portfolio investments can only be measured against the freedom of movement of capital. They can be justified by the same reasons which have been taken into consideration above, but they are not invoked, because portfolio investments by definition have no enduring effect on the market strategy of enterprises. Thus, they are only justifiable by reasons relating to the balance of payments or fair taxation.

- 3a. The Union has to abide by the principle of conferral for measures dealing with direct investments from third states. Art. 207 para. 2 TFEU requires a framework for implementing the common commercial policy. Its objective is to enable the Union to create regulations with abstract general benchmarks in order to represent the overall interest of the Union instead of the individual interest of each Member State.

The planned screening regulation allows other Member States and the Commission to give statements to direct investments out of third states. Further it proposes some requirements for national screening mechanisms. However, there is no obligation to follow these suggestions or a statement particularly by the Commission. Hence this regulation represents no common but rather an individual commercial policy.

Art. 64 paras. 2, 3 TFEU allow the Union to adopt measures dealing with direct investments out of third states, too. The Union can use Art. 64 para. 2 TFEU if a positive effect on the internal market is aspired, and Art. 64 para. 3 TFEU if the measure constitutes a step backwards in Union law in terms of liberalisation. The planned screening regulation can not be based on these rules as it causes additional procedures, while Union law concerning direct investments out of third states currently is missing.

- b. If an act of secondary law is aspired, which can be based on Art. 64 para. 2, 3 TFEU and/or Art. 207 para. 2 TFEU, the Union may use its competences only in accordance with the principle of proportionality. In order to not disregard the competences of Member States, it must be distinguished between decision-making competences of the Union and those of the Member States concerning direct investments.

The basic rights of investors have to be taken into account, too. Arts. 15, 16 EFRC are applicable even if the investors have their registered office in a third state. These basic rights give a larger margin of appreciation than the fundamental freedoms. Thus, the Union can use prognostic elements at the time of the share purchase – for example in matters of the governmental origin of the investment or factual pressure because of the acquisition.

Overview over the Relevant Provisions

Article 2:

(1) When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

(2) When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Article 3:

(1) The Union shall have exclusive competence in the following areas: (...)

(e) common commercial policy.

Article 64:

(2) Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

(3) Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Article 65:

(1) The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

Article 52:

(1) The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

Article 207:

(1) The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.