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AK Position Paper

Regulation on screening of foreign direct investments into the EU

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About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Christoph Klein
Director

Executive Summary

The European Commission has put forward a draft Regulation establishing a framework for screening of foreign direct investments. The aim is to establish an instrument for screening direct investments from third countries that could potentially have a negative impact on security or public order (such as takeovers in the fields of critical infrastructure and technology).

The Austrian Federal Chamber of Labour (BAK) considers the Commission's initiative a **step in the right direction**. It represents far greater acknowledgement by the Commission than in the past that existing prohibitions on restricting the free movement of capital could jeopardise public interest and that improved and effective protective instruments are needed.

However, the proposed Regulation has still numerous **problematic omissions** and weak points, including the **failure to include public services** amongst the expressly listed fields that come under the scope of the proposed framework for the screening of foreign direct investments, the **too narrowly formulated policy space** to restrict the free movement of capital and the **exclusive focus** on the potential threat posed to critical infrastructure and to "security and public order" by **investors from third countries**. In addition, **conflicts with current privatisation policy** within the EU have been **ignored** (such as the requirements imposed by the Troika on certain Member States concerning the privatisation of critical infrastructure). Further-

more, the Austrian Federal Chamber of Labour considers the cited **legal basis problematic**. Instead of trade policy (specifically Article 207 of the TFEU), we recommend consideration of a legal basis in the field of the internal market, since that would ensure that the Member States have greater scope of action.

The AK's position in detail

The European Commission (Commission) has put forward a draft Regulation establishing a framework for screening foreign direct investments. The aim is to establish an instrument for screening direct investments from third countries that could potentially have a negative impact on security or public order (such as takeovers in the fields of critical infrastructure and technology). The Commission's proposal is in line with the increasing importance of options for Member States to screen foreign investments. In recent years, several Member States have established instruments to impose restrictions in the public interest, on takeovers of strategically important enterprises, critical infrastructure, public services and sectors involved in crisis prevention and management.

For example, the relevant amendment of the German Foreign Trade and Payments Ordinance (AWV) in 2017 was preceded by heated **debates on the limited and, in some cases, entirely lacking scope of political action with respect to the takeover of critical infrastructure and advanced technologies by foreign investors** (for example, with regards to the takeover of the robot manufacturer Kuka by a Chinese investor). A similar statutory amendment was adopted in Austria in 2011. Separately from the Commission's present draft Regulation, the Austrian Foreign Trade Act already contains a section concerning the "restriction of shareholdings in enterprises in the interest of public security and order" (Paragraph 25a of the Austrian Foreign Trade Act). The Commission's current initiative con-

cerns a field in which until now it has taken a restrictive stance in favour of the free movement of capital and has chiefly pushed for the narrowest possible scope and applicability of the screening options potentially available to the Member States.

It should also be noted with regards to Austria that, in the course of amendment of the Austrian Foreign Trade Act in 2013, the number of fields explicitly listed as coming under the scope of the Act was reduced, with reference in particular to obligations under Union law. Current developments in some Member States and at the EU level, however, represent an opportunity for the Austrian Federal Ministry of Economy in particular to push for the broader scope of the Austrian Foreign Trade Act and the legally watertight inclusion of critical fields of infrastructure in that Act.

In that context, the current initiative of the Commission to establish a framework for screening of foreign direct investments is **a step in the right direction**. It represents far greater acknowledgement by the Commission than in the past that **existing prohibitions on restricting the free movement of capital could jeopardise public interest and that improved and effective protective instruments are needed**. However, **instead of a restrictive approach**, there is still a need for **Member States to be supported in improving and expanding their relevant protective instruments**. We therefore welcome the Commission's statement that the draft Regulation should not restrict the Mem-

ber States in adapting and establishing screening mechanisms. The Commission has also remarked that “When it comes to decisions on foreign direct investments, the European framework will maintain the necessary national flexibility. Member States keep the last word in any investment screening.”¹

However, the Commission’s draft Regulation is **in many cases too narrowly formulated and has numerous problematic omissions**, including the **failure to include public services** amongst the expressly listed fields that potentially come under the scope of the proposed framework for the screening of foreign direct investments, the **too narrowly formulated policy space to restrict the free movement of capital** and the **exclusive focus** on the potential threat posed to critical infrastructure and to “security and public order” **by investors from third countries**. For example, in view of experiences of the controversial privatisation of critical infrastructure in Europe, it represents a major omission that the potential threat from third-country investors is addressed, **but the potential negative role of EU investors is completely ignored**. The requirements imposed by the Troika with respect to **privatisation of critical infrastructure within the EU** and their negative effects on public infrastructure development are an example of lack of coherence here.

In addition, the **legal basis of the Commission’s initiative** is **problematic** with respect to the matter of competence. From a long-term perspective, that question would be of particular relevance if, contrary to the current official

statements and the relatively vague Regulation, in the future fresh conflicts arise between the screening interests of Member States and a broad interpretation of the prohibition on restriction of the free movement of capital. The Austrian Federal Chamber of Labour (BAK) considers the cited legal basis for the Commission’s draft Regulation, namely Article 207 of the TFEU, unsuitable and problematic. Taking solely (!) that competence as the legal basis for the draft Regulation would represent considerable competence creep by the Commission, with exclusion of the decision-making authority of the Member States, in the fields covered by the Regulation. By contrast, a suitable legal basis in the field of the internal market, together with the provisions on the free movement of capital, should be considered, including in consultation with the Legal Service of the Council.

In view of the above, we wish to point *in particular to the following necessary amendments* to the draft Regulation:

Amendment of the legal basis (see above)

Deletion of recital (3)

Addition to recital (6)

„Under no circumstances can this limit the competence of the Member States to restrict the free movement of capital, if there is a written or unwritten justification in accordance with Art. 65 TFEU or the jurisdiction of the ECJ.“

Addition to recital (12)

„In determining whether a foreign direct investment may affect security or public

¹ http://europa.eu/rapid/press-release_IP-17-3183_de.htm

order or any other written or unwritten justifications in accordance with the jurisdiction of the ECJ, Member States and the Commission should be able to consider all relevant factors, including the effects on critical infrastructure and services of general interest, technologies, including key enabling technologies, and inputs which are essential for security or the maintenance of public order, and the disruption, loss or destruction of which would have a significant impact in a Member State or in the Union. (...)"

„Moreover, Member States and the Commission should be able to take into account whether the foreign investment may have adverse effects on macroeconomic stability and economic, social and territorial cohesion and/or undermines the shared values in respect of services of general interest including in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in accordance with Protocol 26 of the European Treaties.“

Replacement of recital (22) by:

„Pursuant to this regulation by the Union and the Member States as well to review mechanisms at a national level it has to be ensured that international commitments undertaken in the World Trade Organisation, the Organisation for Economic Cooperation and Development, and in the trade and investment agreements concluded with third countries allow for the policy space necessary to adopt restrictive measures relating to foreign direct investment on the grounds of security and/or public order and/or other public interests.“

Addition and amendments to Article 4

„ (...) In screening a foreign direct investment on the grounds of security and public order or any other written

or unwritten justifications in accordance with the jurisdiction of the ECJ, Member States and the Commission may consider the potential effects on, inter alia:

– critical infrastructure and services of general interest, in particular energy, transport, water, health and social services, research and development, communications, data storage, space or financial infrastructure, as well as sensitive facilities;

(...)

In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may take into account whether [Insertion of an extended list]

- the foreign investor is controlled by the government of a third country, including through significant funding*
- the foreign investment may have adverse effects on macroeconomic stability and economic, social and territorial cohesion*
- the foreign investment undermines the shared values in respect of services of general interest including in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in accordance with Protocol 26 of the European Treaties“*

Should you have any further questions
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