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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
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No. 411 June 9, 2025

Preventing the misuse of antitrust against FDI: key action points

by

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Amid economic downturns and geopolitical tensions, governments implement protectionist policies. A recent example is the US trade policies under President Trump, targeting China, Canada, Mexico, and the EU. Additionally, FDI is increasingly regulated through screening mechanisms aimed at limiting market access for economic and political competitors. Governments prioritize national sovereignty, self-sufficiency and resilience, particularly in critical sectors such as AI, quantum computing, microchips, advanced manufacturing, biotechnology, and clean energy.

Antitrust has become a tool for global protectionism. Governments manipulate competition policy (CP) to block or constrain FDI, reversing decades of pro-market reforms. This trend is not limited to state-capitalist and populist regimes, but extends to advanced Western economies. Two key factors enable this shift:

- *Regulatory discretion and political influence*: CP grants judges broad discretion under the "rule-of-reason" approach. This flexibility allows government to "capture" national authorities, selectively enforcing rules to benefit domestic firms while discriminating foreign competitors.

- *Lack of supranational enforcement*: CP offers a means to circumvent the legal constraints and lengthy procedures imposed by multilateral organizations (e.g., the WTO) and international trade and investment agreements. The absence of a supranational authority to enforce global competition rules and impose sanctions enables governments to manipulate CP for protectionist purposes.

A few examples illustrate this trend. China's weaponization of CP in its microchip war with the US is well-documented. In late 2024, Chinese antitrust authorities opened a probe into the US' leading chipmaker Nvidia, trying to impose steep fines and disrupt its operations in China. Previously, Chinese antitrust authorities applied delaying tactics to international acquisitions requiring its approval, along with other regulators worldwide, withholding approval within the agreed timeframe (in 2018 Qualcomm vs. NXP Semiconductors; in 2023 Intel vs. Tower Semiconductor). The misuse of antitrust also extends to the US-EU relationship. The EU's antitrust regulation has been criticized

for protecting European national champions when the Commission forced significant restructuring of the merger between US-based Boeing and McDonnell Douglas due to the negative impact on rival EU Airbus and when it repeatedly blocked or imposed restrictions to mergers such as General Electric (vs. Honeywell), MCI WorldCom (vs. Sprint), Time Warner (vs. EMI), and UPS (vs. TNT Express).

Given this context, fostering an environment conducive to FDI requires reforms at both national and international levels to restore CP's integrity and refocus its primary objective on ensuring fair competition.

National-level reforms

- *Restricting non-competitive objectives*: the gradual incorporation of non-competitive objectives into CP through legislative amendments and regulatory practices should be reconsidered. Independent authorities should not be tasked with pursuing social objectives such as redistribution, environmental protection, unemployment, wage growth, privacy and data security, or national strategic sovereignty. Independence requires limited and mandated powers. While antitrust policy intersects with broader social and economic policies, these issues fall within the purview of governments, which inherently serve multiple objectives. Expanding CP's scope risks undermining its independence and turning it into a tool favoring national industries.

- *Rebalancing the rule of reason toward rule of law principles*: CP should be governed by principles that constrain discretionary authorities and provide clear guidelines for a "rule-of-reason" analysis. This requires: (i) transparency, clarity and accessibility of regulations; (ii) equal legal protection for all entities, ensuring non-discriminatory enforcement; (iii) predictability, enabling businesses to anticipate enforcement actions and adjust their practices accordingly; and (iv) consistent application of laws to ensure compliance.

- *Enhancing enforcement capabilities*: governments should strengthen CP authorities by providing greater resources and enforcement powers. This could be supported through mechanisms such as private enforcement, leniency programs, commitments, and settlements, ensuring more effective investigations and sanctions.

International-level coordination

While national reforms are crucial, their success ultimately depends on international cooperation. Without multilateral oversight, unilateral CP reforms risk being exploited by nations engaging in protectionism.

Establishing a credible forum for policy coordination is essential. Ideally, this would involve a supranational body with the authority to enforce binding global competition laws and impose sanctions. However, given the current geopolitical climate, such a solution remains impractical. "Soft coordination" through organizations such as the OECD, UNCTAD and the International Competition Network may serve as a temporary palliative, offering limited guidance but lacking enforcement power. Likewise, attempts to integrate competition policy into the WTO framework have largely been ineffective.

To break the deadlock, some scholars suggest that bilateral and regional free trade agreements (FTAs) could provide a pragmatic alternative. The inclusion of competition-related provisions in FTAs has been increasing, though enforcement remains limited. "Localized harmonization" among FTA partners—who often share economic affinities and regulatory frameworks—may provide a

foundation for future cooperation on CP. Regional agreements such as the Regional Comprehensive Economic Partnership (RCEP)—including Australia, China, Japan, Republic of Korea, New Zealand, ASEAN—may serve as potential models.

In conclusion, given the unfeasibility of supranational enforcement, national and regional reforms remain the most viable pathways forward. Safeguarding CP's integrity necessitates limiting discretionary enforcement, enhancing independent regulatory oversight and fostering international cooperation. While MNEs often align with national interests to secure strategic advantages, they must actively support policy reforms, recognizing that the long-term governance of competition policy will play a crucial role in shaping global economic and political dynamics.

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