REGIONE TOSCANA

Consiglio Regionale

Premio tesi di Laurea
“David Sassoli”
edizione 2023

Presentazione

La scelta del Consiglio Regionale della Toscana di dedicare un premio di laurea a David Sassoli è un piccolo modo per tenere viva la memoria di tutto ciò che ha rappresentato nella sua vita.

Il Premio Sassoli non è soltanto un tributo all'eccellenza accademica, ma anche un omaggio all'immenso impegno di un uomo che ha dedicato la sua vita all'ideale dell'integrazione europea.

David è stato un politico appassionato, leader leale, rigoroso, ha saputo nutrire con la sua cultura un'iniziativa politica al servizio delle persone e delle Istituzioni. Un uomo del dialogo, sempre alla ricerca del bene comune, ma fermo nel difendere i valori della solidarietà e della libertà. Sassoli ha saputo avvicinare l'Europa alle cittadine e ai cittadini e questo senza dubbio rappresenta una delle sue più importanti eredità.

Oggi l'Unione Europea, grazie anche al suo contributo, rappresenta una dimensione essenziale, irrinunciabile per la nostra democrazia e per la libertà di ogni cittadino europeo. Senza le istituzioni europee i singoli Stati sarebbero impotenti di fronte alle sfide globali del nostro tempo: dai mutamenti climatici ai fenomeni migratori, dalle dinamiche demografiche a quelle geopolitiche condotte da attori di dimensione continentale fino ai poteri economici e finanziari che travalicano i confini e condizionano i mercati.

La nostra Europa non è perfetta, ma è la migliore garanzia per tutti i nostri cittadini.

Pubblicando le tesi vincitrici del premio, vogliamo tenere insieme il ricordo di David offrendo anche una prospettiva futura che solo i più giovani, coi loro occhi e il loro studio possono offrire per aspirare all'Europa della speranza tanto cara al Presidente Sassoli.

Spero, dunque, che questa collana possa ispirare ulteriori ricerche e riflessioni su questi temi cruciali, contribuendo a costruire un'Europa più inclusiva, solidale e democratica, proprio nel solco tracciato da David Sassoli.

Dobbiamo guardare all'Europa come luogo delle opportunità, come sogno per realizzare il proprio futuro, come orizzonte per le nuove generazioni.

L'Europa unita è l'eredità che Altiero Spinelli ci ha lasciato col suo "Sogno Europeo" nato sull'isola di Ventotene. Un sogno e un patrimonio di libertà di cui oggi noi dobbiamo essere non solo testimoni ma, soprattutto, custodi.

Antonio Mazzeo
Presidente del Consiglio regionale della Toscana

Prefazione

È con grande soddisfazione che salutiamo la pubblicazione di questa tesi che ha conquistato uno dei riconoscimenti assegnati nell'ambito del premio di laurea intitolato a David Sassoli.

Si tratta di un'iniziativa che abbiamo fortemente voluto come Commissione Politiche Europee e Relazioni Internazionali del Consiglio Regionale della Toscana, trovando pieno e fondamentale sostegno da parte dell'Ufficio di Presidenza della nostra Assemblea a partire dal Presidente Antonio Mazzeo.

Valorizzare le idee e le proposte delle giovani generazioni ci è sembrato il modo più bello ed emozionante per ricordare ed onorare David Sassoli.

Un'esperienza che nel giorno della consegna dei riconoscimenti tiene insieme emozioni contrastanti, quali il dolore per una scomparsa tanto rilevante e al tempo stesso la gioia nel vedere evidenziato il lavoro delle ragazze e dei ragazzi, guardando soprattutto alle prospettive di un'Europa che deve essere rafforzata e costruita partendo proprio dalle idee delle giovani generazioni. Ed a questo David Sassoli teneva moltissimo.

E noi teniamo moltissimo anche al supporto che abbiamo ricevuto dal mondo delle Università toscane e vogliamo ringraziare le docenti ed i docenti che hanno accettato di far parte della commissione che ha scelto le tesi da premiare, perché, con la loro competenza e passione, hanno dato un valore aggiunto a questa nostra iniziativa: una commissione presieduta da Jacopo Cellini dell'Istituto Universitario Europeo e composta da Benedetta Baldi dell'Università degli Studi di Firenze, Edoardo Bressanelli della Scuola superiore Sant'Anna di Pisa, Massimiliano Montini dell'Università degli studi di Siena, Manuela Moschella della Scuola Normale Superiore di Pisa, Luca Paladini, dell'Università per Stranieri di Siena, Saulle Panizza, dell'Università di Pisa.

E la pubblicazione che state per sfogliare rappresenta anche un altro obbiettivo che abbiamo fortemente voluto e che porterà alla creazione di un'apposita collana all'interno delle pubblicazioni del Consiglio Regionale della Toscana. Queste tesi resteranno dunque segno tangibile di un impegno che guarda all'Europa ed anche di un'iniziativa che è stata inserita tra le attività istituzionali del nostro Consiglio Regionale e che dunque affidiamo alle colleghe ed ai colleghi che arriveranno dopo di noi.

Tutto questo non si sarebbe potuto realizzare senza lo straordinario impegno e lavoro dei componenti della "Commissione Europa" che ho avuto l'onore di guidare e che, in questa XI Legislatura, è stata composta da Giovanni Galli (vicepresidente), Anna Paris (vicepresidente segretaria), Irene Galletti, Valentina Mercanti, Fausto Merlotti, Massimiliano Pescini, Marco Stella, Andrea Vannucci e Gabriele Veneri.

E' tutto loro il merito dei risultati raggiunti ed è a loro che va il mio grazie che estendo anche a tutti gli uffici ed al personale che ci ha accompagnato in questo percorso.

E mi sia permesso, infine, di rivolgere un pensiero ai familiari di David Sassoli che in questi anni hanno sempre dimostrato grandissima attenzione a questa nostra iniziativa: a loro va un abbraccio fortissimo, unito all'impegno che vale per l'oggi e per il domani, è quello a tenere sempre vivo il ricordo di un uomo come David che ci ha fatto sentire orgogliosi di essere toscani, italiani ed europei.

Francesco Gazzetti
Presidente Commissione Politiche Europee
e Relazioni Internazionali del Consiglio Regionale della Toscana

UNIVERSITÀ DEGLI STUDI FIRENZE

Scuola di Giurisprudenza

Corso di Laurea magistrale in

Giurisprudenza italiana e francese

The EU Framework for the Control of Inward Foreign Direct Investment.

A Study on the Safeguard of Security and Public Order for a Competitive Social Market Economy.

Prova finale in Diritto dell'Unione europea

Relatrice
Prof.ssa Adelina Adinolfi

Candidato
Pietro Chiarelli

Anno Accademico 2022/2023

A mio padre,
da sempre e di fronte ad ogni traguardo,
il mio modello di probità, altruismo, generosità e dedizione.

Pour que l'Union européenne fonctionne, il faut la compétition qui stimule, la solidarité qui unit et la coopération qui renforce.
Jacques Delors

Abbreviations

Bilateral Investment Treaty	BIT
Committee on Foreign Investment in the United States	CFIUS
Court of Justice of the European Union	CJEU
Common Commercial Policy	CCP
European Union	EU
Foreign Direct Investment	FDI
Free Trade Agreement	FTA
International Monetary Fund	IMF
Organisation for Economic Co-operation and Development	OECD
State-owned enterprise	SOE
Sale and Purchase Agreement	SPA
Treaty on the European Union	TEU
Treaty on the Functioning of the European Union	TFEU
Treaty on the European Communities TEC	TEC
World Trade Organisation	WTO

Foreword

"There is no sovereignty in solitude. There is only the deception of what we are, in the oblivion of what we have been and the denial of what we could be", former European Central Bank President Mario Draghi said in his first address to the Senate as Italian President of the Council of Ministers. "In the areas marked by their weaknesses – President Draghi claimed – the Member States cede their *national* sovereignty to acquire *shared* sovereignty".

There is a field that has always constituted the core of the concept of sovereignty since the very birth of the modern State in Europe: the protection of the security of the State itself, that of its territories and that of its citizens. However, the fast-paced evolution of global relations around the world has profoundly shaped both the role of State action and that of sovereignty, namely in relation to the safeguard of security, allowing for unprecedented sources of threats thereof.

Indeed, the new century has progressively enhanced the awareness that the risks to national security do not only derive from the deployment of military forces or other violations of international law, but also from distortions of the global economic framework characterized by the progressive dismantlement of capital controls and the increase of foreign direct investment, established starting from the Bretton Woods Agreements, thus fostering further economic integration among sovereign states.

In fact, over course of the second half of the last century, the global international investment framework was characterized by a steady trend aimed at increasing market liberalization and incentivizing the establishment of foreign investors, through the pursuit of an open investment climate. This approach, which is far from being abandoned today, was based on the righteous assumption according to which foreign direct investment represents a fundamental tool to promote economic development, in consideration of the favorable implications on, to name but a few, the levels of employment, liquidity injections in capital markets and levels of competition.

Notwithstanding, as a result of the recent developments of the global economic framework, risks and threats deriving from the flow of international investments and associated with the national security of host economies are increasingly observed. Indeed, policymakers around the globe are witnessing a growing trend where investments are carried out based on political considerations, rather than purely financial and economic factors, particularly in strategic sectors (*e.g.,* defense, critical infrastructure, media, energy supply) and sometimes at the hands of state-backed actors.

This phenomenon has prompted for the introduction of investment screening mechanisms, that are aimed at assessing and evaluating the risks that a certain operation may give rise to for the safeguard of the essential security of the State concerned by the operation, so as to avoid any compromission thereto.

Therefore, the question that these mechanisms raise is the complex paradox under which States find themselves in need to hamper a cornerstone for economic development or growth. The solution to such question, which is far from being straightforward to find, consists in the determination of a balance between the safeguard of national security and that of an open investment environment.

Against this background, and in the face of these new global trends, the Member States of the European Union have increasingly adopted national investment screening mechanisms, in order to ensure the protection of their own national security.

However, in light of the highly advanced and unique process of integration that has led, as President Draghi claimed, to the transfer of significant shares of national sovereignty within those areas that are characterized by the vulnerability of Member States, these have inextricably tied their destinies on countless fields.

This has inevitably led to a rethinking of the concept of sovereignty within the European Union, suffice it to say that twenty Member States to date have decided to give up their power to "mint coins", that has always characterized the role of sovereign States, allowing for the genesis of the single currency. Nonetheless, when it comes to the protection of national security, the Member States have expressly wished to maintain a "sole responsibility" with that regard.

This determination started to shake when – at the beginning of the last decade – the risks to national security associated with foreign investment became more evident. It was indeed from some Member States that came the first impetus to cooperate in this field, the access to some relevant information that fellow Member States may have – for instance – being key to effectively carry out the assessment under national law. This movement resulted in the adoption of a cooperation mechanism of mandatory information sharing and pooling and on the establishment of common principles for national investment screening mechanisms.

Therefore, by undertaking this new form of cooperation, it seems that the Member States have decided once again to cede national sovereignty, while aiming at gaining in turn the capacity to jointly exercise – in the words of President Draghi – a "shared sovereignty".

In consideration of the sensitivity of this field, for it touches the core of the national sovereignty of Member States, it is first and foremost noteworthy that they even decided to jointly act. Hence, it is in this regard that the very fact that this process was undertaken should not be underestimated and shall be borne in mind while analyzing the quality of the framework that was ultimately established.

Moreover, the paradox highlighted above regarding the establishment of investment screening mechanisms in general is especially relevant in the European context both on a national and supranational level. If the high attractiveness of the EU Internal Market should not be undermined, also in consideration of such attractiveness, the EU and its Member States should always be careful not to confuse the establishment of a foreign investor with a threat to their security or, in other terms, a gift with a Trojan horse. For some, this necessarily means that the Union should fear, as a modern Laocoon might say, the *Danaos* (or the Chinese) even if *dona ferentes*, while others believe that this should rather warn of the need for a more cautious and pragmatic attitude.

Focusing on the European Union, this thesis aims at carrying out an analysis of its framework for the control of foreign direct investment, stemming from the scope of

possibilities that the division of competences enshrined in the Treaties leaves for Union action, in the attempt to preserve the highly competitive and attractive social market economy that was established over the course of the European integration process.

Namely, the objective set for this thesis is to evaluate whether, in the face of the new complex geo-economic scenario, the European cooperation mechanism is a tool that is moving in the right direction, *i.e.* an efficient response to the risks and ultimately the placement of national screening authorities in a position to better perform the assessment of the risks associated with foreign investment. In other terms, the attempt will be to assess whether the Member States eventually gained the "shared sovereignty" referred to above.

Moreover, in light of the intersections between national security and other policies of the European Union, and namely antitrust, a definitive appreciation of the cooperation mechanism passes from an evaluation of its coherence with these different sets of policies.

The research and analysis work – aimed at solving these relevant policy questions – was carried out alongside an internship within the International Investment Governance Team of the Investment Division (Directorate for Financial and Enterprise Affairs) of the Organization for Economic Development and Co-operation. Its outcome incredibly benefited from the practical work conducted using an evidence-based method under the guidance of the officials of the Team and from the active engagement with experienced policymakers within the Organization and national delegates partaking in the Investment Committee of the OECD.

Positively influenced by the working method adopted by the Organization to conduct its vast policy analysis, this thesis attempts to focus on the practical implications of the legal provisions examined, to provide for evidence supporting its statements and to suggest, whenever it can be envisaged, a potential solution to the shortcomings that may be identified in the current European framework. Therefore, as interesting and intellectually stimulating as they may be, more theoretical approaches focusing, for instance, on geopolitical considerations shall not be upheld.

Accordingly, in consideration of the importance of national legislation in the actual regulation of the control of foreign investment, great importance is attributed thereto, hence the reason why the thesis shall refer constantly to national law establishing investment screening mechanisms.

In order to answer the complex questions raised above, I shall first analyze the structural framework established by the Treaties in this field. Notably, the first chapter will be devoted to the study of the notion of foreign direct investment in EU law, with an approach aimed at highlighting the legal implications of the qualification of an operation as such[1]. Then, I shall consider the division of competences in the field resulting from the Lisbon Treaty, that left up a complex scenario under which foreign direct investment represents an exclusive competence of the European Union, while the Member States maintain the "sole responsibility" with regard to investment screening mechanisms, from which may stem many difficulties and boundaries for the adoption of a joint European approach to national security concerns associated with inbound foreign investment[2].

Furthermore, the second chapter will be devoted to the Regulation that was ultimately adopted to govern the cooperation among the Member States within the screening of extra-EU direct investment.

After a brief introduction of the contributing factors that prompted the Union and its Member States to jointly act[3], that does not have the ambition to exhaustively describe all of them, I shall pursue the analysis of the Regulation ultimately adopted. Following a presentation of the structure of the Regulation[4], I shall consider several legal and practical issues deriving from the enforcement of the Regulation that I selected as the most pressing ones, *e.g.* the access to information allowed by the Regulation, the discrepancies among national investment screening mechanisms, the sensitivity of the topic of confidentiality and the applicable notion of security.

[1] Chapter 1, Paragraph 1.
[2] Chapter 1, Paragraph 2.
[3] Chapter 2, Paragraph 1.
[4] Chapter 2, Paragraph 2, Sub-paragraph 1.

I shall conclude the second chapter by analyzing the various calls for a European screening authority and advance a personal normative statement on the desirable developments of the European framework for the safeguard of security and public order within international investment[5].

Finally, the third chapter aims at studying the relationship between national security and antitrust, and notably the control of concentrations, within supranational and national law, so as to understand if the EU economic regulatory framework as a whole lacks policy coherence and, if that is the case, what remedies could be adopted to solve this question. The analysis of this relatively narrow topic shall allow to assess whether the European economic regulatory framework, having regard to growing relevance of foreign investment control, is serving its purpose of keeping the European social market economy competitive and attractive.

Therefore, I shall firstly analyze the intersections between merger review and foreign investment control focusing on institutional, substantial and procedural issues[6]. Then, I consider whether the awareness of national security concerns has led to a readjustment of antitrust enforcement practices, and – if that was not the case yet – whether such spillover would be desirable in the next future[7].

[5] Chapter 2, Paragraph 3.
[6] Chapter 3, Paragraph 1.
[7] Chapter 3, Paragraph 2.

CHAPTER 1 – Possibilities and Boundaries for the Construction of a European Response to Escalating Risks and Threats to National Security Stemming from Foreign Direct Investment.

A comprehensive analysis of the European framework for the control of inbound foreign direct investment necessarily involves a careful study of the legislative tools adopted to regulate this topic.

However, EU secondary law is more than often profoundly influenced by the letter of the Treaties and, in general, EU primary law. Indeed, it is more than often indispensable to first determine the margin of action available to the Union and, consequently, the possibilities that are open to it, as the institutional dimension can have significant implications. Moreover, in the field of foreign investment control related to the safeguard of national security, this operation is even more relevant and decisive in order to assess the efficiency and the effectiveness of secondary legislation.

In order to understand the Union's scope of action, it is necessary to initially focus on the notion of foreign direct investment (I), in relation to which the Union has acquired exclusive competence. However, the extent of this exclusive competence, also due to the peculiar process that led to its attribution, is very complex to determine. Furthermore, when it comes to foreign investment screening mechanisms, such an exclusive competence conflicts with the principle under which Member States maintain "sole responsibility" regarding national security (II).

Therefore, the aim of this chapter is to determine what the Union was entitled to do, before assessing the quality of its intervention. In other words, it is necessary to consider whether the Treaties have efficiently provided Union with the tools necessary to tackle the harmful consequences of the evolution of global economic relations, through the enablement of a European approach to the threats to security.

I. The definition of Foreign Direct Investment: the evolution of the notion, its legal consequences and its position in the EU legal system.

An effective introduction of the topic of this thesis cannot neglect an in-depth analysis of the object of investment screening mechanisms, which is the source of the potential threat to the national security of EU Member States once established in the EU internal market: foreign direct investments.

The role of apparently more descriptive paragraph is to shine a light on the bigger picture in which FDI are placed in EU law, *e.g.* the law applicable to them, their interaction with EU Treaties and fundamental freedoms, their legal regime in their complex relation between Internal Market law and national measures *etc*.

Therefore, defining the notion of FDI is not a mere desk study but it rather has two essential and relevant grounds. *Firstly,* it is useful to identify the perimeter of this thesis, for any measure and debate that falls outside the notion of FDI is excluded from its scope. *Secondly*, and more importantly, a policy analysis reason arises, which is the analysis of the scope of application of the EU Framework for FDI control, and notably that of the Regulation (EU) 2019/452[8]. Indeed, the assessment whether the definition of FDI under EU law is sufficiently clear and coherent for investors represents the first step in the study of the quality of the EU policy in this field, because it implies the analysis of compliance with the policy objective of minimizing legal uncertainty that the EU subscribed within the context of the Better Regulation policy and restated in Recital 28 of the Regulation. Moreover, a clear, straightforward, and easily intelligible definition of the notion of FDI applying to the abovementioned Regulation enables foreign investors to make reasoned business decisions, and eventually keep investing in the EU, thus supporting the openness of the European economy. What is more, a crystal-clear definition of the scope of application of the FDI Regulation allows a smooth functioning of the cooperation mechanism that tit establishes.

[8] 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 investments into the Union, OJ L 79I , 21.3.2019, p. 1–14; hereinafter "FDI Regulation".

The three words “foreign”, “direct” and “investment” – that are presented together to indicate a specific business operation – are each as heavy as a boulder under EU law and each adds a precise meaning to the notion, hence the need to analyze them singularly, for each of them determines remarkable legal consequences triggering the application of certain sets of rules and precluding that of others. To do so, the approach chosen in this paragraph is to start from the larger category – that of investment (1) – and then study the inner distinction between direct and indirect investments (2). Then, the concept of foreignness will be examined (3).

Finally, the definition eventually adopted in the FDI Regulation as a result of the evolution of each of these notions will be studied in comparison with the definitions suggested by two of the most relevant international economic organizations, namely the OECD and the IMF (4).

1. An investment: a wide notion with diverse applications and significant legal consequences.

To begin with, it is worth noting that FDI represents a specific type of investment. It is important to recognize that investments can take on different legal structures (*a*) and by defining an activity as an investment, certain legal regulations and provisions may apply (*b*).

1.1. **The legal notion of investment**.

In general terms, an investment consists in the allocation of resources in the expectation of future benefits or returns. From a financial perspective, this act implies the devotion of economic resources into an asset or a project while expecting to obtain a profit, an income, or an appreciation in value over time in a way that exceeds the cost of the investment, considering factors such as risk or liquidity. Hence, the concept of investment is exceedingly broad and encompasses a wide variety of distinct operations.

From a legal perspective, an investment can take on various legal structures, depending on the investment asset being invested in. It would thus be beneficial to provide a very brief overview of the most common legal forms an investment can take.

The probably most common example of investment (as in fact reflected in the design of investment screening mechanisms) is the acquisition of a certain amount of shares in a private company or stocks in publicly traded companies (as individual shares or as part of a mutual fund or exchange-traded fund). This operation may lead the acquirer to obtain control of the company by being able to influence the decisions adopted in the general meeting, appoint the board *etc.,* or a mere minority participation. However, even though these are the most blatant examples of investments in general and of securities-related investments in particular, the definition of investment also covers the acquisition of other securities, such as debt securities, and namely bonds.

An investment can also take the form of real estate acquisition (be it as individual properties, as part of a real estate investment trust, or through a limited liability company or partnership *etc*.).

Furthermore, an investment can manifest in the form of acquiring commodities, such as gold, oil, agricultural products.

Moreover, while these represent the principal categories of investments, there exist numerous additional types of investments that can adopt diverse legal structures, including but not limited to private equity, venture capital, hedge funds, and cryptocurrency.

Unsurprisingly, a comparative study of investment screening mechanisms reflects the vastness of this notion. In fact, every screening mechanism tends to answer to a specific policy objective that is doomed necessary by the legislator to ensure the protection of the national security of a specific country.

For example, Finland enforces two screening mechanisms, one of which is solely focused on the acquisition of real estate by foreigners, as established by the Act on transfers of real estate property requiring permission, as recently amended[9]: the regime of this screening mechanism only addresses real estate acquisition enacted by foreign investors. As Article 5 of the Act and the Report accompanying the Government

[9] Act on transfers of real estate property requiring permission, N. 470/2019, available on Finlex at: https://www.finlex.fi/fi/laki/alkup/2019/20190470, recently amended by Act N. 1098/2022, available on Finlex at: https://www.finlex.fi/fi/laki/alkup/2022/20221098.

bill for the amendment of the original version[10] shows, the rationale of this screening mechanism is that the potential threat that foreign ownership of a significant portion of Finnish real estate generates is primarily directed at the organization of national defense, the control and safeguard of territorial integrity, border control, border security and security of supply.

Conversely, Slovakia recently adopted a cross-sectoral mechanism entered into force on 1st March 2023 according to which a transaction falls within the scope of the review based on its outcome with respect to the ownership structure or corporate control: in essence, the mechanism is triggered if the foreign investors acquires the target or part of it, reaches or increases specific thresholds of shares (that vary depending on the sector concerned), or obtains the control in the target[11].

In conclusion, these examples show that the wide scope of the notion of investment is reflected in the diversity of the design of screening mechanisms around EU jurisdictions. Consequently, legislators around Europe (and beyond) shape investment screening mechanisms by focusing on the type of investment that may be harmful to national security of their country considering the specificities of their economies and thus sets the policy objective of such instrument.

It is also crucial to emphasize as a final remark that trade and investment are fundamentally different economic activities, whose different effects may be misunderstood. In fact, these two activities involve a very different level of commitment, risk and control: trade is by its own nature much more reversible as it does not necessarily imply a long-term commitment. These two activities are extremely different and imply as such very different impacts on economies, opportunities for the economic operator, and consequently different threats to national security. This thesis focuses on the risks to national security that are generated by investments, which are

[10] Government proposal HE 222 /2022 vp, 21 October 2022, available at: https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_222+2022.aspx.
[11] Article 1 § 2, Act. No. 497/2022 Coll. on Screening of Foreign Direct Investment for the protection of the security or public order, available on Slov-lex at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2022/497/.

capable of rooting deeper and stronger links with the host economy and as such be much more harmful.

1.2. The legal implications of the qualification as investment of a business operation.

While the concept of investment may still lack clarity from both a business and legal standpoint for it cannot be synthetized in a definition that immediately resumes all legal operations involved, categorizing an operation as an investment carries significant legal implications.

In fact, under EU law, investments are typically classified as one of the various financial transactions that fall under the broader category of capital movements[12]. Consequently, qualifying a business operation as an investment triggers the application of the legal regime of the free movement of capital established by Articles 63 to 66 of TFEU. Thus, the free movement of capitals is one of the four fundamental freedoms enshrined by the Treaties that under Article 26 (2) TFEU constitute the "area without internal frontiers" that is more commonly known as "internal market".

Although the freedom of capital movement is "at the heart of the Single Market"[13], the Treaties did not provide for a definition of "capital movement", hence the need to refer to secondary legislation. In fact, according to a non-exhaustive definition provided for by Directive 88/361/EC[14], this notion comprises FDI, real estate investments or purchases, securities investments (*e.g.* shares, bonds, bills and unit trusts), grants of loans and credits, and other operations with financial institutions, including personal capital operations (*e.g.* dowries, legacies, endowments) [15]. In

[12] HINOJOSA-MARTÍNEZ L., *The Scope of the EU Treaty-Making Power on Foreign Investment: Between Wishful Thinking and Pragmatism*, in *The Journal of World Investment & Trade*, 17, 2016, pp. 86-115.
[13] European Commission, Commission Staff Working Document, *On the Movement of Capital and the Freedom of Payments*, 5 March 2015, SWD (2015) 58 final.
[14] Council of the European Union, Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal of the European Communities, L 178/5, 8 July 1988, pp. 5-18.
[15] BIAN C., *National Security Review of Foreign Investment. A Comparative Legal Analysis of China, the United States and the European Union*, Routledge, 2020, p. 154.

addition, on the basis of Annex I of this Directive, the Court of Justice[16] has clarified that the nomenclature that is therein set out is merely indicative and not exhaustive.

Moreover, the European Commission has aligned to this interpretation of the notion of capital movement with regard to FDI in its Proposal for a Regulation establishing a framework for screening of foreign direct investments into the EU[17], whereby it states that "foreign direct investment is a capital movement under Article 63 TFEU".

Interestingly, academics have underlined that the provision does not focus on the capitals *per se*, but rather on their *movement*[18]: the object of the protection offered by the Treaty is therefore the movement of the capital between the Member States and the Member States and third country. It is however noteworthy that the focus on movement means that only the transactions that determine a modification in the national balance of payments and, what is more, the notion of "cross-border" movement has been largely interpreted by the Court of Justice[19].

The essential core of this freedom is enshrined in Article 63 (1) TFEU that states that "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited". Hence, it is noteworthy (if only because it has received significant criticism[20]) for the purposes of this thesis that this fundamental freedom applies both internally and externally, covering also economic relations with third States: even though some exceptions still apply, the overarching

[16] CJEC, 16 March 1999, *Manfred Trummer and Peter Mayer*, Case C-222/97.
[17] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union*, 13 September 2017, COM (2017) 487 final.
[18] HINDELANG S., *The Free Movement of Capital and Foreign Direct Investment*, Oxford University Press, 2009, pp. 48 *et seq.*
[19] CJEC, 26 September 2000, *Commission v Kingdom od Belgium*, Case C-478/98, ECLI: EU:C:2000:497.
[20] See; HINDELANG S., *Ibid.;* MOHAMED S., *European Community Law on the Movement of Capital and the EMU*, Stockholm Studies in Law, Kluwer Law International, 1999.

principle established by this judgement is the prohibition of hindrance of access to the market[21].

What is more, the Court of Justice ruled that this provision has direct effect[22] and claimed that not only does the scope of the freedom include the mere prohibitions on discriminatory restrictions and the elimination of unequal treatment[23], but it even goes beyond that[24]. For instance, the Court[25] ruled that national measures need to be considered as "restrictions" in this regard if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or deter potential investors of another Member State from investing in their capital. Therefore, it is sufficient for a measure to have the capacity of discouraging a foreign investor to carry out an investment by acquiring shares in a domestic company for the measure not to be compliant with the principles of the internal market.

Notwithstanding the fact that this fundamental freedom is – as briefly described above – "broad in scope"[26], exceptional circumstances may lead to its restriction, as further explained by the European Commission in 2015[27].

These restrictions are enshrined in Article 65 (1) TFEU. They may include fields such as tax law, where a distinction is made between taxpayers who are not in the same situation with regard to their place of residence or the place where the capital is invested (Article 65 (1) *litt.* a) TFEU). Furthermore, these restrictions may be aimed at preventing infringements of national law and regulations, notably in the field of taxation or the prudential supervision of financial institutions, and at establishing procedures for the declaration of capital movements for purposes of administrative or

[21] CJEC, 24 November 1993, *Bernard Keck and Daniel Mithouard*, Case C-267/91 and C-298/91, ECLI:EU:C:1993:905; CJEC, 14 November 1995, *Svensson and Gustavsson v Ministre du Logement and de l'Urbanisme*, Case C-484/93, ECLI:EU:C:1995:379.
[22] CJEC, 18 December 2007, *Skatteverket v A*, Case C-101/05, ECLI:EU:C:2007:804.
[23] CJEC, 24 June 1986, *Luigi Brugnoni and Roberto Ruffinengo v Cassa di Risparmio di Genova e Imperia*, Case C-157/85, ECLI:EU:C:1986:258; CJEC, 14 March 2000, *Association Église de Scientologie de Paris Scientology International Reserves Trust v The Prime Minister*, Case C-54/99, ECLI:EU:C:2000:124; see also HINDELANG S., *Ibid.,* pp. 115 *et seq.*
[24] CJEC, 4 July 2002, *Commission v Portugal*, Case C-367/98, ECLI:EU:C:2002:326.
[25] CJEC, 23 October 2007, *Commission v Germany,* C-112/05, ECLI:EU:C:2007:623.
[26] European Commission, 2017, *Ibid.*
[27] European Commission, 2015, *Ibid.*

statistical information, or – remarkably – the safeguard of public policy and public security (Article 65 (1) *litt.* b). Additionally, under Article 66 TFEU, in presence of exceptional circumstances, where movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, safeguarding measures temporarily limiting such movements of capital can be adopted if they prove to be strictly necessary. This provision has however never been used so far.

Finally, restrictions may also derive from overriding reasons in general interest (*e.g.*, the Court of Justice considered the safeguard of energy supply as a valid ground for exception in general interest)[28] and for reasons of public policy or national security.

Moreover, Article 65 (3) TFEU specifies that such measures and procedures cannot constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 TFEU.

To such end, the guidance offered by the Court of justice has been fundamental, which ruled extensively on this matter and offered a clear framework with regard to public policy and public security grounding an exception to the fundamental freedoms of the internal market.

In principle, as affirmed in a judgement of the Court issued in 1997[29], Member States retain an exclusive competence as regards the maintenance of public order and the safeguard of internal security. Hence, they "unquestionably enjoy a margin of discretion" in determining what measures are most appropriate to eliminate barriers to the importation of products in each situation. In turn, the responsibility to consider whether the Member State in question has adopted all the necessary and appropriate measures to ensure that the fundamental freedoms rests with the Court, whenever such a matter is referred to it. On the same tone, having been called upon by a Belgian national court to issue a preliminary ruling, the Court of Justice[30] claimed that this provision grants Member States with the possibility of placing restrictions, in specific

[28] CJEC, 2 June 2005, *Commission v Italy*, Case C-174/04, ECLI:EU:C:2005:350.
[29] CJEC, 9 December 1997, *Commission v France,* Case C-265/95, ECLI:EU:C:1997:595.
[30] CJEC, 5 May 1991, *Roux v Belgian State*, Case C-363/89, ECLI:EU:C:1991:41.

cases and where the circumstances justify it, on the exercise of a right directly conferred by the Treaty.

Notably, the Court of Justice has issued two important decisions that more precisely indicate the conditions under which public policy and public security may be invoked. Notably, in 1975[31] and in 1999[32], the Court of Justice explained that public policy and public security can only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society: these exceptions cannot be used by Member States with a will to pursue solely economic ends. Therefore, this means that the existence of public policy and public security are not unilaterally determined by national legislation, without any control on behalf of EU institutions, for these are entitled to strictly assess – through a restrictive interpretation[33] – whether a genuine and sufficiently serious threat to a fundamental interest of society is the actual objective of the national measure in question[34].

Moreover, in the famous *Gebhard* case law[35], the Court of Justice synthetized the four conditions for a restriction on a fundamental freedom to be acceptable: the restriction must not be applied in a discriminatory manner, it must be justified by imperative requirements in the general interest, it must be suitable for the achievement of the objective pursued and it must not go beyond what is necessary to that end.

Furthermore, the Court clarified[36] that with regard to restrictions on inbound capital (be it from third countries or from Member States) it may be that a Member State will be able to demonstrate that such a restriction is justified for a particular reason

---

[31] CJEC, 28 October 1975, *Rutili v Minister of Interior Affairs*, Case C-36/75, ECLI:EU:C:1975:137.

[32] CJEC, 19 January 1999, *Calfa*, Case C- 348/96, ECLI:EU:C:1999:6.

[33] CJEC, 13 May 2003, *Commission v Kingdom of Spain*, Case C-463/00, ECLI:EU:C:2003:272.

[34] See, *inter alia,* CJEC, 14 March 2000, *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister,* Case C-54/99, ECLI:EU:C:2000:124; CJEU, 8 July 2010, *Commission v Portugal,* Case C-171/08, ECLI:EU:C:2010:412; CJEU, 11 November 2010, *Commission v Portugal*, Case C-543/08, ECLI:EU:C:2010:669; CJEU, 10 November 2011, *Commission v Portugal,* Case C-212/09, ECLI:EU:C:2011:717.

[35] CJEC, 30 November 1995, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Mcilano*, Case C-55/94, ECLI:EU:C:1995:411.

[36] CJEC, 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECLI:EU:C:2006:774.

in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.

Therefore, it is under this angle that national investment screening mechanisms need to be looked at, in order to understand if they are compatible with EU law. Thus, even before the entry into force of the Lisbon Treaty, the Court of Justice found itself confronted to the question whether they were complaint with these strict conditions briefly described above. The Court answered positively to this question, however indicating specific principles applicable to investment screening mechanisms related to national security concerns. As authors explained[37], the Court identified three overarching principles that need to guide national legislators when drafting national investment screening mechanisms: they need to meet high standards of predictability, transparency and due process. The implications of this case law were also partly ratified by the Commission in a Communication[38] back in 2008 (that is focused on Sovereign Wealth Funds, but it also enlarges its own scope by laying out some considerations that are applicable to this subject).

Esplugues[39] further synthetized the *acquis* of these interventions by indicating four main conditions that need to be respected by national legislators. Hence, these systems must aim at protecting a legitimate general interest, they must foresee strict time limits for the exercise of opposition powers, they must list the specific assets or management decisions targeted and they must use objective and stable criteria subject to an effective review by the courts. Furthermore, legal certainty needs to guide the design of the entire system.

[37] HINDELANG S., *Ibid.*; ESPLUGUES C., *Towards a Common Screening System of Foreign Direct Investment on National Interest Grounds in the European Union*, in Culture, Media and Entertainment Law, 11 (2), 2018.
[38] Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common European Approach to Sovereign Wealth Funds*, 27 February 2008, COM/2008/115 final.
[39] ESPLUGUES C., *Ibid.*

In light of the above, what can be inferred from this brief recapitulation of the position of the Court of Justice is, first and foremost, that it played a vital role. As analyzed more in-depth in the following paragraph, national security is a "sole responsibility of the Member States" under Article 4 (2) TEU: even though this provision deprives the EU of the possibility of establishing its own investment screening mechanism even after the Lisbon Treaty that conferred upon it an exclusive competence with regard to FDI, it is possible to state without hesitation that EU institutions, and notably the Court of Justice, deeply influenced the policy making in this field by setting clear boundaries for a national screening mechanism to be compliant with EU internal market law.

In my view, the operation that the Court of Justice conducted in the case law studied above, as well as in the *golden shares* case law, is a *de-politicization* of investment screening mechanisms. In other terms, the Court recognizes that where a threat to national security exists as a consequence of the entry into the host economy of a harmful investment, it is necessary that Member States maintain an instrument to protect themselves. However, these instruments would contradict the spirit of the Treaties and become protectionist measures if they were not strictly guided by the law and left to political discretion.

An example supporting this interpretation can be found in the *golden share* case law, by comparing two of these judgements in which the Court reached two mirror opposite solutions: in fact, contrarily to what it ruled in the 2009[40] judgement on the infringement proceeding conducted by the Commission against Italy, in the 2002[41] judgement on the infringement proceeding against Belgium the Court considered that the Belgian system was compliant with EU law in so far as it was based on objective criteria and could be subject to judicial review.

Furthermore, this rules-based approach seems coherent with the spirit of the treaties and their ultimate goal, which is to attract and foster investments as a tool for economic development. Indeed, the pursuit of such an objective necessarily requires that the system is the least burdensome for investors, transparent and intelligible.

---

[40] CJEC, 26 March 2009, *Commission v Italian Republic*, Case C-326/07, ECLI:EU:C:2009:193.
[41] CJEC, 4 June 2002, *Commission v Kingdom of Belgium*, Case C-503/99, ECLI:EU:C:2002:328.

In conclusion, the qualification of an operation as an investment therefore triggers the application of clear rules, whose *leitmotiv* and guiding principle is the objective of preserving the openness of the market with the conviction that investments stimulate the economy and are as such operations that deserve a solid protection under EU law.

In this respect, investment screening mechanisms established under national law need to be considered as restrictions to the free movement of capital, and therefore must respect the strict rules provided to that end, if they want to be compliant with EU law.

After having analyzed the biggest category under which FDI is included, it is relevant to understand the first specification of *investment*. Therefore, it is necessary to understand what a *direct* investment is and in what way it is different from an *indirect* investment.

2. Direct and indirect investment: the distinction, the consequences under Union law and the impact of this distinction on the design of investment screening mechanisms based on national security concerns.

As we have seen above, the notion of *investment*, whose application to a specific business operation submits it to a strict set of legal rules, is nonetheless very wide and includes extremely diverse types of operations. Among these, a distinction is made between two macro-categories of investments: direct and indirect investments. This distinction is, as further developed in the second paragraph of this thesis, extremely relevant within the competence division framework established by the thesis, for an exclusive competence of the Union is provided in the case of foreign direct investment under Article 2017 TFEU, that does not apply to indirect investments.

This distinction is essentially based on the aim of the operation and focuses on the ultimate objective of the investor.

In fact, in a non-direct investment, which is more commonly known as a portfolio investment, investors have no intention whatsoever of controlling the company in which they invest or influencing its management. They essentially buy shares, bonds or other financial assets, merely aspiring to financial returns, be it in the short or long term, investing in the company by themselves or through financial intermediaries. In any case, a portfolio investor never achieves a share that is so significant that they are enabled to achieve the control or the capacity to influence the management of the company.

In this respect, with regard to publicly listed companies, EU law provides for a consistent regime in order to prevent "silent" takeovers of companies based on the technique of stake building in the Transparency Directive[42], which imposes a duty to disclosure the acquisition of major holdings, even non-controlling ones (*e.g.* 5 %), and

[42] Council of the European Union and European Parliament, Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, Official Journal L 390, 31 December 2004, pp. 38-57.

significant changes thereto. Moreover, whenever an investor decides to acquire control[43] of a publicly listed company, the Takeover Directive[44] imposes the duty to carry out a mandatory bid.

Therefore, the regulation of European capital markets thus underlines the distinction between a direct and non-direct investment. Whenever portfolio investors aspire to play a more substantial role than just benefitting from financial returns, this must be done under a transparent process.

On the other hand, a direct investment is characterized by the intention of the performer to acquire the control of the company or being able to exert a significant influence on it: the capital funding of a company comes with a power to dictate its major management decisions and the acquisition of an equity stake that correspond to a controlling interest. As the Court defined it, a direct (cross-frontier) investment is characterized, in particular, by the "possibility of taking an effective part in the management and control of a company"[45]. Academics coherently define direct investment as the investment that places the investor in a position to pursue entrepreneurial aims[46].

Examples in this regard are presented by Annex 1 of Directive 88/361/EEC[47]. Remarkably, the Annex mentions the establishment of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings: Advocate General Alber[48] explains that in this case the sole owner of all of a company's shares can make decisions about that company's activities on his own, no-one else being entitled to a say whose views they must heed.

---

[43] The notion of control is not defined by the Directive, but by national implementing acts. For instance, § 29 of German Wertpapiererwerbs und Übernahmegesetz sets a threshold of 30% of voting rights in the target company.

[44] Council of the European Union and European Parliament, Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids, Official Journal L 142, 30 April 2004, p. 12-23.

[45] CJEC, 2 June 2005, *Commission v Italy*, Case C-174/04, ECLI:EU:C:2005:350.

[46] HINDELANG S., *Ibid.*

[47] *Ibid.*

[48] CJEC, Opinion of Advocate General Alber, 14 October 1999, *Baars*, C-251/98, ECLI:EU:C:1999:502.

The Annex also mentions the participation in new or existing undertaking with a view to establishing or maintaining lasting economic links. The appreciation of this type of investment is slightly more problematic because it implies the interpretative evaluation of such links, that the court has repeatedly defined, on the basis of Annex 1 of Directive 88/361/EEC[49], as the fundamental feature of this type of investment with regard to its ultimate outcome. It is thus necessary to prove that the outcome of this investment is the establishment or maintenance of *lasting* and *direct links* between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry out an economic activity. According to the Court[50], the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or otherwise, to participate effectively in the management of that company or in its control.

What is however important to note with regard to these investments is the fact that for the control there are no fixed thresholds (unlike what described with regard to the rules of Capital Markets law where the Takeover Directive leaves the decision to the national implementing measures that however normally establish fixed thresholds). In general, EU institutions when it comes to defining such links prefer to focus on the notion of control, rather than fixing a threshold[51].

Among direct investments a distinction is usually provided when referring to FDI: they may take the form of a greenfield investment or of a brownfield investment.

Greenfield investments consist in the creation of a new company or the establishment of facility or a new subsidiary: this form of market entry is employed whenever the investor aims at achieving the highest degree of control possible over the

[49] Council of the European Union, Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal of the European Communities, L 178/5, 8 July 1988, pp. 5-18.
[50] CJEC, 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECLI:EU:C:2006:774.
[51] CJEC, 13 April 2000, *Baars*, Case C-251/98, ECLI:EU:C:2000:205; European Commission, *Staff Working Document on Foreign Direct Investment in the EU Following up on the Commission Communication "Welcoming Foreign Direct Investment while protecting Essential Interests*, 2019, SWD (2019) 108 final.

activity conducted by the entity: *e.g.*, if a subsidiary is established, the investor (a parent company) owns 100% of the shares in the company.

Brownfield investments, on the other hand, take the form of M&A operations, determine the transfer of the ownership of existing assets (in an asset deal) or of a significant amount of shares (in a share deal) to another owner: if the investment consists in a merger, the two companies are merged and form one single company, while in an acquisition the company is simply taken over by the investor.

Nonetheless, as important as this distinction is, it is noteworthy that investment screening mechanisms based on national security in EU as well as non-EU jurisdictions merely focus on established undertakings rather than the establishment of new enterprises or the creation of new areas of activity within an existing enterprise.

Indeed, as the OECD[52] recently found, subjecting greenfield investment directly to acquisition-related mechanism is a more rarely followed path, and – as of 2020 – only observed in Australia, Canada and Hungary. In addition, some transition economies such as India, Mexico and Argentina apply sector caps to highly sensitive sectors such as defense production, telecoms *etc*. This remains quite a restricted phenomenon, considering that the study into question analyzes 62 economies. This could in principle be justified by the requirement of licenses and permissions in some cases but remains a disputable choice of policymakers around the world: firstly, licenses and permissions are not required in all fields that may be sensitive for national security so that potential ownership-related risks are addressed and, secondly and more importantly, a greenfield investment is just as potentially risky for national security as a brownfield investment.

It is in fact probably for this reason that newly adopted screening mechanisms have included greenfield investments in their scope of application, as Slovakia did for its cross-sectoral screening mechanism entered into force on 1st March 2023[53].

[52] OECD, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies,* 2020, https://oe.cd/natsec2020.

[53] Law no. 497/2022 of 23 December 2022, Article 1, §5.

With regard to the applicable law, since both direct and portfolio investments fall within the bigger category of investments, they are subject to the free movement of capitals. As the Court repeatedly claimed[54], for the purpose of former Article 56 (1) TEC, movements of capital include direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control (direct investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (portfolio investments).

Notwithstanding, foreign non-direct investment are excluded by the scope of CCP, and thus from the exclusive competence that the EU holds in that field. Notably, according to the important Opinion 2/15[55], that will be further analyzed in the next paragraph, portfolio investments, that are coherently defined as "investments made without any intention to influence the management and control of an undertaking", cannot constitute the object of an international agreement negotiated and concluded by the Union by virtue of its exclusive competence over CCP (enshrined in Article 207 TFEU). In fact, the conclusion of such agreement concerning non-direct foreign investment is, as EU primary law currently stands, not possible for the EU does not have exclusive competence to do so. Even though one may object that the exclusion of portfolio investment from CCP does not exclude a relevant competence of the Union in the field descending from Article 63 TFEU, this interesting debate does not constitute the object of this thesis.

What is worth noting in this regard though is that an EU act aimed at screening FDI cannot, following this position of the Court, concern non-direct investments as well. In fact, as it will be further analyzed in the next paragraph, the Regulation eventually adopted was grounded on Article 207 (2) TFEU, which entitles the EU to adopt "measures defining the framework for implementing the CCP". Accordingly,

[54] See *e.g.* CJEC, 16 March 1999, *Trummer and Mayer*, Case C-222/97, ECLI:EU:C:1999:143.
[55] CJEU, Opinion of the Court of 16 May 2017, *Free Trade Agreement with Singapore*, Opinion 2/15, ECLI:EU:C: 2017:376.

since non-direct investment are not part of the CCP, this act cannot cover them, as the FDI Regulation coherently confirms in its Recital n. 9.

To my reading, however, a mechanism to restrict such investments could be foreseeable under EU primary law. The ground for its adoption would need to be found in Article 64 (3) which, as it will be analyzed more in-depth in the next paragraph, provides that "measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries" can in principle be adopted, by following a special legislative procedure (in which unanimity in the Council is however required).

It is noteworthy, however, to remark that this only concerns an EU act for, as far as national measures are concerned, it is necessary to refer to Article 65 TFEU. If a national measure meets the strict requirements as described above also with regard to portfolio investments, there would be no ground to ban it.

In conclusion, analyzing the difference between portfolio and direct investment does not have a merely descriptive objective. Indeed, this distinction underlines the importance of screening mechanisms for direct investment, in so far as it highlights its sensitivity.

In fact, both forms of investment are in principle extremely beneficial for the host economy because they allow for the entry of liquidity and capital in the European market which has often lacked thereof, notably in the phase of recovery from economic crisis, *e.g.* the financial crisis of 2008. However, direct investments are not only beneficial, in that they allow the entry of new capital in the economy but also confer a leading role to the (foreign) investor in a domestic company: such investor is thus entitled to take important business decisions, including deciding who to enter into contracts with, whether to pursue the commercialization or even the production of a specific good, *etc*. This is still not harmful *per se*, it is rather a phenomenon to facilitate and favor, but some issues may come up with regard to specific sectors or situations. For example, the presence of foreign investors in the defense or the energy sector can be risky, however their entry in the fashion industry through the acquisition of a small manufacturing company is in abstract to be welcomed. Hence, it turns out to be useful

to have an investment screening mechanism that allow the government (or any other designated competent authority) to review through a case-by-case analysis whether the investment concerned could be harmful or not to the national security of the host economy.

On the other hand, one could say that portfolio investments confine themselves to that and are only beneficial from that point of view: they allow the inflow of capital without having their investor acquiring a leading role in the domestic company whose financial assets constitute the object of the investment. These investments contribute to the capital funding of the company, but investors are not able to influence business decisions alone even if they acquire a share granting voting rights: they may as well be able to vote in the shareholders' annual general meeting but cannot have the power to determine the outcome of the vote directly and only through their vote.

3. The foreignness variable: an analysis of the potential source of risk to national security.

After defining the general category of investment and its subcategory of direct investment, the missing piece for the complete definition of FDI is identifying the origin of the entity performing such an operation.

In international investment law, foreign investors may be a legal or a natural person. Usually, with regard to natural persons, investment agreements solely base nationality on the law of the State of claimed nationality, while only rarely consider residency or domicile as well. On the other hand, regarding legal persons, the solutions offered by investment treaties are either the test of incorporation, that of the seat or that of control[56].

Moreover, when it comes to national security aspects of international investment, definitions are usually more comprehensive. In EU law, it is relevant to refer to the FDI Regulation, that will be further and more in-depth studied in the next chapter and analyze how the European legislator decided to regulate the subject.

According to Article 2 of the FDI Regulation, by foreign investor it is meant a "natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment". Furthermore, for the purposes of the FDI Regulation, "undertaking of a third country" means "an undertaking constituted or otherwise organised under the laws of a third country".

The definition of "third-country national" under EU law can be found in Article 20 (1) TFEU, governing the citizenship of the Union. Under the rules laid down thereto, every person holding the nationality of a Member State is a citizen of the Union. *A contrario*, it can be inferred that a third-country national is a citizen of a State that is not a Member States. Even though when it comes to natural persons the position of stateless persons is still debated and unclear under EU secondary legislation, for the

[56] OECD, *International Investment Law: Understanding Concepts and Tracking Innovations,* 2008.

purposes of the notion of FDI, if the operation completed at their hands, it may – to my reading – still be considered as a foreign investment.

In principle, an investment originating in the EU (be it the host country or a Member State different from the host economy) is not seen as foreign for the purposes of EU law and notably the FDI Regulation. However, there exist two exceptions to this general rule.

Firstly, Article 3 (6) of the FDI Regulation lays down an anticircumvention clause, by stating that "Member States which have a screening mechanism in place shall maintain, amend or adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions". In essence, a circumvention consists in all the arrangements that one natural or legal person may adopt in order to avoid the application of a certain legal provision, be it national or supranational, to which the performer of such act would be subject and that might be unfavorable to them; in other cases, a circumvention may also consist in the act of artificially invoking EU legal provisions, which fails to fulfil their legislative purpose.

As Advocate General Bobek has explained in 2017[57], the notion of circumvention is strictly related to the notion of "abuse of rights" (or, as the Advocate General prefers to call it, "abuse of law"), which belongs to private law, and is often interchanged with "wholly artificial arrangements". In other terms, in Bobek's view, a circumvention is the equivalent in public law of what an abuse of rights represents in private law.

Academia has also dwelled on this topic, and a definition of the general principle of "abuse of rights" has been synthetized as the case where a right is exercised in accordance with the formal conditions established by the act that grants such right, but where the legal outcome of the exercise of the right is contrary to the object of said act[58].

---

[57] CJEU, Opinion of Advocate General Bobek of 7 September 2017, *Edward Cussens, John Jennings, Vincent Kingston v T.G. Brosnan*, Case C-251/16, ECLI:EU:C:2017:648.
[58] LENAERTS A., *The general principle of the prohibition of abuse of rights: a critical position on its role in a codified European contract law* in *European Review of Private Law*, 18 (6), 2010,

The question of providing clear rules to avoid circumvention of certain EU or national rules has been an historical feature of the development of the EU internal market, especially within the freedom of establishment, as the case law of the Court of Justice[59] and academia[60] demonstrate, coming to the conclusion that restrictions on the freedom of establishment may be justified in case of an abuse established on the basis the circumstances of each specific case. In fact, in 2006[61], the Court confirmed that the specific objective of a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality (in the case at study, with the view of escaping tax law).

Therefore, with regard to the regime of FDI control, a third-country investor may not exploit an EU-based company to conduct an investment for the sake of avoiding the application of an FDI screening regime. In fact, a third country investor may establish in a Member State that still does not have a screening mechanism and conduct from there investments in other Member States, with the aim of not being subject to their screening mechanisms. Hence, the FDI Regulation solicitates national legislators to provide for the necessary measures to avoid the circumvention of their own screening mechanism.

Secondly, it is naturally excluded from the notion of EU investor the special-purpose entity, which is defined by the IMF[62] as a "formally registered and/or incorporated legal entity recognized as an institutional unit, with no or little employment up to maximum of five employees, no or little physical presence and no

pp. 1121-1154; ADINOLFI A., *La nozione di "abuso di diritto" nell'ordinamento dell'Unione Europea,* in *Rivista di diritto internazionale*, 95 (2), 2012, pp. 329-353.

[59] See *inter alia* CJEC, 10 July 1986, *Segers*, Case C-79/85, ECLI:EU:C:1986:308; CJEC, 9 March 1999, *Centros*, Case C-212/97, ECLI:EU:C:1999:126; CJEC, 30 September 2003, *Inspire Art*, Case C-167/01, ECLI:EU:C:2003:512.

[60] See *inter alia* E MAN P., WOUTERS J., *EC Law and Residence of Companies*, in MAISTO G., *Residence of Companies under Tax Treaties and EC Law*, in *EC and International Tax Law Series*, Vol. 5, 2009, pp. 61-94; EDWARDS V., FARMER P., *The Concept of Abuse in the Freedom of Establishment of Companies: a case of Double Standards?*, in ARNULL A., EECKHOUT P., TRIDIMAS T. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, 2008.

[61] CJEC, 12 September 2006, *Cadbury Schweppes*, Case C-196/04, ECLI:EU:C:2006:544.

[62] IMF Statistics Department, *Final Report of the Task Force on Special Purpose Entities*, 2018.

or little physical production in the host economy". As the IMF explains, they are established to "obtain specific advantages provided by the host jurisdiction with an objective to (*i*) grant its owner(s) access to capital markets or sophisticated financial services; and/or (*ii*) isolate owner(s) from financial risks; and/or (*iii*) reduce regulatory and tax burden; and/or (*iv*) safeguard confidentiality of their transactions and owner(s)". For example, special purpose entities (also known as special purpose vehicles) may be established to perform an M&A transaction, so that the principal investor is not liable, but liability can only be engaged to the extent of the registered capital of the special purpose entity.

It goes without saying that national security regulation looks at the economic reality of the operation. An investor would not be able to avoid the review of the investment only by establishing a special purpose entity in a Member State.

On the topic of the notion of *foreign* investor, a recent Opinion[63] by Advocate General Tamara Ćapeta clarified that FDI Regulation covers investments whereby a third-country investor indirectly gains control over an EU company, through acquisition of an EU company by another EU company, which is owned by that third country company.

[63] CJEU, Opinion of Advocate General Tamara Ćapeta,30 March 2023, *Xella Magyarország*, Case C-106/22, ECLI:EU:C:2023:267.

4. A conclusive definition of Foreign Direct Investment: the perspective of international organizations in comparison with that of Union law.

As a final remark, it is noteworthy that, before being a legal notion in EU law, FDI is primarily an economic operation. This has led to its conceptualization by various international organizations. It is therefore relevant to briefly dwell on the definitions that were provided by two of the most important international economic organizations: the OECD and the IMF.

The OECD in 2008 released its Benchmark Definition of FDI[64] aimed at setting the world standard for direct investment statistics. Under this analysis, FDI is defined as a category of cross-border investment made by a resident in one economy with the objective of establishing a lasting interest in an enterprise that is resident in an economy other than that of the direct investor.

This investment is motivated by a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprises.

If this definition aligns with the approach taken by EU law, the OECD sets forth a different standard with regard to the definition of the "lasting interest" motivating the investment, by introducing a fixed threshold of at least 10% of the voting power acquired by the foreign investor in the target enterprise. More precisely, the OECD distinguishes three figures: the target enterprise may be either a subsidiary in which over 50% of the voting power is held, or associates, in which the foreign investor holds between 10% and 50% of voting right, or quasi-corporations such as branches which are effectively 100% owned by their respective parents.

Despite these differences, it is however relevant to remark that the OECD has a significant, and so recognized, power to influence and shape the EU Investment Policy: it was the Commission itself that affirmed that the work of the OECD "[lays] the basis

[64] OECD, *Benchmark Definition of Foreign Direct Investment*, 2008.

for a common international investment policy"[65]. On top of that, the position of the European Parliament is in accordance with that of the Commission[66].

The IMF in 2006[67] refers the general definition of investment set forth in the OECD Benchmark definition by quoting it. Plus, it states that a direct investment relationship arises when an investor resident in one economy makes an investment that gives control or a significant degree of influence on the management of an enterprise that is resident in another economy. By investor, the IMF means an entity or group of related entities that is able to exercise control or a significant degree of influence over another entity that is resident of a different economy, whereas it considers a direct investment enterprise to be an entity subject to control or a significant degree of influence by a direct investor.

With regard to the notion of control, the IMF distinguishes two ways for identifying the acquisition of control or influence. An immediate direct investment relationship is established when the direct investor owns equity that entitles it to 10 percent or more of the voting power in the direct investment enterprise: control is set at a threshold of at least 50% of voting power, while for the significant degree of influence the voting power need to correspond to at least 10% percent up to a maximum of 50%. Conversely, an indirect direct investment relationship arises through the ownership of voting power in one direct investment enterprise that owns voting power in another enterprise or enterprises, that is, an entity is able to exercise indirect control or influence through a chain of direct investment relationships.

Therefore, the same conclusions need to be drawn because the IMF for the slight difference with the OECD Benchmark Definition essentially amount to wording issues. Moreover, the consideration that EU institutions have of the capacity of the IMF to

---

[65] European Commission, Communication from the Commisison to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, 2010 COM(2010)343 final.
[66]European Parliament, Briefing, *The role of the OECD in shaping EU trade policy*, DGEXPO/B/PolDep/Note/2016_282016, January 2016.
[67] IMF Multimedia Services Division, *Balance of Payments and International Investment Position Manual*, Washington, 2009.

influence its policies is also accordingly significant, as the Commission underlined in 2020[68].

In conclusion to this paragraph on the definition of FDI under EU law, it is worth mentioning the synthesis that the European legislator operated in drafting the FDI Regulation. Under Article 2 of the FDI Regulation, and for the purposes thereof, by FDI it is meant "an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity".

The conclusion that can be drawn is that the notion that the EU legislation adopted in the context of the FDI Regulation is consistent with the notion elaborated by previous secondary legislation and the case law of the Court of Justice. In addition, it is coherent with the indications offered by international organizations in a way that it appears clear for investors and coherent with the establishment of a cooperation mechanism among national investment screening authorities.

[68] European Commission, Press Release, *European Commission and International Monetary Fund strengthen cooperation to support sustainable development*, 28 January 2020.

II. The Rising Role of the European Union as a Global Economic Actor: The Potential of an Exclusive Competence in Foreign Direct Investment Constrained by the Sole Responsibility of Member States within National Security.

The Treaty of Lisbon came as a revolutionary moment of the European integration, affecting almost every field of EU law. It can be considered without hesitation to be a watershed in the division of competences between the EU and its Member States, that brought to a real, overall reevaluation of the role of the EU and its relations with the Member States and their legal systems. After the failure of the Treaty establishing a Constitution for Europe, this general reflection allowed the EU to acquire new competences and the European project to regain a fresh stimulus.

However, there is a field on which the Treaty of Lisbon had a monumental impact, and some even consider that this was "the largest (but still the least discussed)" change brough about by the Lisbon Treaty: foreign direct investment[69].

This paragraph aims at introducing the topic of this thesis by detailing the question of the competence framework resulting from the Lisbon Treaty with regard to foreign direct investment (1), with a particular focus on issues related national security (2). In fact, I believe that this approach is able to unveil many of the shortcomings of the said framework, for most of them significantly derive from the competence division between the EU and the Member States (3).

To this end, I will introduce the question of an atypical process of conferral generally on FDI, primarily with its implications treaty-making aspects of international investment policy. Even though the topic of this thesis does not concern the conclusion of investment agreements between the EU and third states, this passage on Article 207 (1) TFEU – that included FDI as part of the Common Commercial Policy – is essential. In fact, the provision on the basis of which the FDI Regulation establishing a framework for the screening of foreign direct investments into the Union was adopted – Article 207 (2) TFEU – refers generically to the implementation of the Common Commercial

[69] BUNGENBERG M., *Going Global? The EU Common Commercial Policy After Lisbon*, in C. HERRMANN and J.P. TERHECHTE (eds), *European Yearbook of International Economic Law*, 2010, pp. 123-151.

Policy. Furthermore, it is also with regard to foreign investments attracted into the EU internal market thanks to the conclusion of these agreements that national security risks arise.

Nonetheless, since investment agreements are not part of this study, this paragraph only concerns the acquisition of EU competences and does not cover any aspect relating to the elaboration and the implementation of EU policies (*e.g.* the balance between investment protection and the preservation of the host State's regulatory autonomy, the validity of pre-existing BITs *etc.*).

1. The fortuitus and undesired acquisition of an exclusive competence in the elaboration of the Treaty on the Functioning of the European Union.

As anticipated above, the Treaty of Lisbon has constituted an absolute watershed in the attribution of competences to the EU, insofar as it has entirely overturned the precedent division of competences between the Member States and the EU, that was characterized by a severe fragmentation and unclarity (1.1). In fact, as an outcome of a swift process of transferal of competence that we may define as fortuitus and undesired on the part of the Member States within the Treaty of Lisbon, the EU has acquired an exclusive competence over foreign direct investment (1.2.).

However, clear and straightforward though this may seem, doubts and questions were raised about the scope of such exclusive competence to which both the scholars and the European Court of Justice's case law have given some answers (1.3.).

1.1. The revolution in the attribution of competences introduced by the Treaty of Lisbon: the *status quo ante.*

According to UNCTAD data referred to the year of the entry into force of the Lisbon Treaty, Member States maintained a total of 1200 extra-EU BITs (a sum that reaches 2676 if intra-EU BITs are included)[70], this making the EU Member States

[70] UNCTAD, World Investment Report of the United Nations Conference on Trade and Development, 2009, p. 32.

together account for almost half of BITs into force around the globe[71]. European Member States were therefore at the forefront of those who believe that foreign investment should be welcomed as an unvaluable tool for economic development, capable of raising employment levels and competitive standards of national economies, ensuring a more solid supply of goods, and bringing liquidity to capital markets. With that firm conviction, they put the conclusion of investment agreements a priority in their agenda.

However, under the framework established by the existing treaties, such a considerable amount of investment agreements was all concluded by the Member States and was the outcome of their own policies. "European" in this context only meant a sum of national policies and treaties.

In fact, before the entry into force of the Lisbon Treaty, the division of competences between the EU and its Member States with regard to FDI was extremely complex and fragmented: as Meunier accurately described it, "disunity and cacophony" represented the hallmarks of the European approach to foreign investment[72]. This did not however imply that any European action – or attempt of action – was doomed to fail, and is therefore interesting to study what opportunities were left open by the Treaties and the evolution over the years.

By virtue of the previous treaties, the European competence over international investment was a shared one[73]: no explicit competence was established with regard to investment (unlike trade) treaty making. Hence, no supranational reach being expressly brought by EC primary law, the academic debate unanimously considered that there

[71] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010)343 final.
[72] MEUNIER S., *A Faustian bargain or just a good bargain? Chinese foreign direct investment and politics in Europe,* in *Asia Europe Journal*, 12 (1), 2014, pp. 143-158.
[73] SHAN W., ZHANG S., *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, in *The European Journal of International Law*, Vol. 21 (4), pp. 1049-1073.

was "little relevance for policies directed at investment in general" [74] within the hands of European institutions.

In fact, by virtue of Article 131 of the Treaty on the European Community, the Common Commercial Policy shall be based on uniform principles, notably with regard to the "conclusion of trade agreements" and "uniformity in measures of liberalization".

However, some read within this competence over the Common Commercial Policy – that the Court of Justice conceived as exclusive of the EU[75] - that it would not be unreasonable to infer that foreign investment was covered as an implicit and intrinsic aspect of trade[76]. As a matter of fact, the Luxembourg Court has given a large interpretation of Common Commercial Policy over the course of the decades. For example, in 1979[77] it declared that the enumeration of subjects in the abovementioned provision is non-exhaustive, meaning that it should not "close the door to the application (…) of any other process intended to regulate external trade for a restrictive interpretation" as this would result in a "risk [of] causing disturbances in intra-community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries".

Such judicial position ended up stimulating a debate that found its culmination in another opinion of the Court of 1994[78], whereby it declared that trade in services cannot be excluded from the scope of Article 133, whose definition that was provided in the GATS needed however to be taken into consideration. This decision was later confirmed by the Treaty of Amsterdam.

---

[74] CEYSSENS, J., *Towards a Common Foreign Investment Policy-Foreign Investment in the European Constitution,* in *Legal Issues of Economic Integration*, 2005, p. 259.

[75] CJEC, Opinion of the Court of 11 November 1975, *Low Cost Standard*, Op. 1/75; LECZYKIEWICZ D., *Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade*, in *German Law Journa*l, 08 (11), Special Issue – Unity of the European Constitution, pp. 1673-1685.

[76] KAZIMIREK K., *The New Competence over Foreign Direct Investment and its Impact on the EU's Role as a Global Player,* Jean Monnet Centre for Europeanisation and Transitional Regulation Oldenburg, 2012, pp. 14 *et seq.*

[77] CJEC, Opinion of the Court of 4 October 1979, *International Agreement on Natural Rubber,* Op. 1/78, par. 45, ECLI:EU:C:1979:224.

[78] CJEC, Opinion of the Court of 15 November 1994, *Re WTO Agreement,* Op. 1/94, ECLI:EU:C:1994:384, parr. 41-47.

Furthermore, the Court ruled in 1995[79] that the scope of the common commercial policy did not include the choice on whether to grant foreign investors with national treatment. Therefore, this meant that Article 113 TEC could not be held as a legal basis for an exclusive competence.

Then, on the occasion of the Treaty of Nice, while the Commission was able to introduce important innovation in Common Commercial Policy by explicitly including the notions of trade in services and the commercial aspects of intellectual property, it failed to do the same with FDI[80].

Moreover, during the elaboration of the European Constitution, no formal or exhaustive discussion was held on the possibility of including FDI within the scope of the Common Commercial Policy[81]. It was also noted[82] that the Working Group on External Action did not face this question, nor the issue was brought up within the first stage of the Constitution deliberations. Nonetheless, the European Constitution marked an unprecedented progress: the provision on Common Commercial Policy that ended up in its final draft confers, as we will see below, FDI as an exclusive competence of the EU[83].

As many authors point out[84], it would be utterly wrong to consider that the absence of an exclusive competence prevented the European Commission from taking steps in this field (*e.g.,* the negotiation with third States of investment chapters within comprehensive agreements granting full national treatment at the pre- and post-entry stage).

However, the absence of wide-ranging exclusive and explicit competence did prevent the EU from establishing a common European policy on FDI.

---

[79] CJEC, Opinion of the Court of 24 March 1995, *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment,* Op. 2/92, ECLI:EU:C:1995:83.
[80] LEAL-ARCAS R., *EU Trade Law*, Edward Elgar Publishing, 2019.
[81] SHAN W., ZHANG S., *Ibid.*
[82] KRAJEWIKI M., *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, in *Common Market Law Review*, 2005, 42, 91.
[83] Articles III-216 and III-217 of the Treaty Establishing a Constitution for Europe.
[84] SHAN W., ZHANG S., *Ibid.*

1.2. The revolution in the attribution of competences introduced by the Treaty of Lisbon: the swift and unnoticed conferral of a European exclusive competence on FDI.

Confronted to such a fragmented, unclear scenario, the Treaty of Lisbon made a revolutionary choice, by reviewing Articles 206 and 207 (1) TFEU. While the former declares the general objectives of the Common Commercial Policy by setting a liberal standard that *inter alia* includes "the progressive abolition of restrictions […] on foreign direct investment", the latter FDI explicitly includes FDI among the field covered by the Common Commercial Policy.

Thus, since under Article 3 (1) *litt. e*) TFEU the EU holds an exclusive competence over Common Commercial Policy, the immediate implication is that the EU is exclusively competent with regard to FDI.

What this actually entails is far from being clear and straightforward, but before dwelling on this point it is extremely interesting to understand how the EU acquired such an exclusive competence, for this will allow to lay the foundations for a wider reflection on the difficulties the EU has faced in the elaboration and implementation of a common policy under this newly acquired competence.

Indeed, the transfer of competence within FDI to the EU has been, to say the least, peculiar.

In fact, in general terms, the principle of conferral enshrined in Article 5 TEU, regulating the division of competence between the European Union and its Member States, was meticulously described by Advocate General Sharpston in an opinion she delivered on Common Commercial Policy: within this field this principle is - in essence - "about striking the desired balance between unifying (supranational) central authority set up under the Treaty and the European Union's constituent, still sovereign, Member States"[85].

[85] CJEU, Advocate General Sharpston, 21 December 2016, Opinion 2/15, *The Free Trade Agreement with Singapor*e, ECLI:EU:C:2016:992.

Therefore, the concept laying below the principle of conferral is that Member States voluntarily and consciously confer a specific competence on the EU, so as "to attain objectives they have in common"[86] and effectively find such a "desired balance".

Hence, as intergovernmentalism would expect, an inseparable component of the principle of conferral is the intentional willingness of the Member States to entitle European institutions to pursue a common European objective in a specific field based on the trust they have in the EU's ability to elaborate a policy and effectively implement it.

Coherently, this is what has usually happened in the history of the European integration and that essentially constituted the activity that ultimately led to the Treaty revisions: a conferral of competence usually only takes place after dense debates and discussions among Member States and EU Institutions and careful examinations of the reasonability of such choice.

Unlike what possible misconceptions may suggest, such cautiousness and attention is not necessarily always justified by some forms of jealousy of Member States over their sovereignty but is of vital importance in order to set out a clear competence division, allowing to effectively pursue valuable objectives, such as legal certainty, that eventually allow for the establishment of a clearly defined and precise policy framework.

Nonetheless, what strikingly defines the process of attribution of competences in the field of FDI within the elaboration of the Treaty of Lisbon is as an absolute lack of consciousness of, on the one hand, the actual attribution of an exclusive competence and, on the other, of its gigantic implications on the EU external economic action and the considerable reduction of the Member States' scope of action in international investment policy.

[86] Treaty on the European Union (Consolidated Version), [2012] OJ C 326/13, Article 1.

It is in light of the above that some severe qualifications among the scholars do not come as a surprise, such as that of a "coincidental competence"[87] or of an "unintended competence transfer"[88]. Some even say this is a case of "integration by stealth"[89].

Academic theories on regional integration process considerably allow for a deeper understanding of this rapid and misunderstood shift.

Liberal neo-intergovernmentalism[90], that is based on the acknowledgement of an increasing reduction of the capacity of supranational institutions to set the direction of the European integration process ever since the Treaty of Maastricht, would explain the competence attribution process on FDI as a result of a rational choice of the Member States, coming after intense – and documented - debates among Heads of State or government.

However, as much as this argument is interesting for other fields of European integration, it does not seem very convincing in this case, as many elements point out.

For instance, in this case, no transitional provision on the validity of pre-existing investment agreement (a very complex matter) was laid down, nor a statement concerning the extension of the scope of this competence or of the powers of the Commission was provided[91]. Moreover, insiders even reported that the choice on the attribution of competence was made "within five minutes"[92]. All these aspects point out to the fact that a rational choice was not at the origin of this competence shift.

According to a neo-functionalist approach, prescribing that additions of competences to the EU level derive from functional or institutional spillovers, the process with regard to FDI can be explained as "a result of Commission

---

[87] CRÄMER J., HERMANN C., *Foreign Direct Investment - A "Coincidental" Competence of the EU?,* Hitotsubashi Journal of Law and Politics, 2015, 43, pp. 85-109.
[88] BASEDOW R., *The EU's International Investment Policy ten years on: the Policy-Making Implications of Unintended Competence Transfers,* in *Journal of Common Market Studies*, 2021, 59 (3), pp. 643-660.
[89] MEUNIER S., *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, in *Journal of Common Market Studies*, 2017, 55 (3), pp. 593-610.
[90] See, *e.g.,* BICKERTON, C., HODSON, D. and PUETTER, U.*, The New Intergovernmentalism: European Integration in the Post-Maastricht Era,* in *Journal of Common Market Studies,* 2015, 53 (4), pp. 703–722.
[91] See also KRAJEWSKI M., *Ibid.*
[92] CRÄMER J., HERMANN C., *Ibid.*

entrepreneurship and historical serendipity"[93]. Several elements suggest that also this theory should be dismissed.

For instance, since current Articles 206 and 207 TFEU merely replicate what the Treaty Establishing a Constitution for Europe already provided for, it would be quite erroneous to believe that Member States were entirely caught by surprise and faced to a reform attempt furtively enacted by some eurocrat when they were confronted to the new provisions.

However, the most rational thesis to understand this unusual process is in all likelihood an intermediate solution, building on the theory that was elaborated by Meunier as an "historical institutionalist argument"[94]. Notably, the attribution of competences constitutes the outcome of a combination of historical serendipity, Commission entrepreneurship and procedural constraints.

In fact, as abovementioned, FDI was firstly included in the provision during the negotiations on the European Constitution upon the initiative of Commission representatives at the last rounds of review, without the Commission "broadcasting it", as former Commissioner Pascal Lamy explained to Meunier.

The actual truth is in all likelihood that, confronted to this move of the Commission, Member States, that were not supportive of such initiative, ended up approving of it as a matter of prioritization of other, more sensitive topics in the dense reform agenda also on the occasion of the negotiations of the Treaty of Lisbon[95].

On the contrary, they mistakenly underestimated the potentials of the attribution of an exclusive competence, together with the Commission ambitions to set a common European policy within foreign investment and to gain a wider bargaining power within negotiation frameworks (and, as abovementioned, there have been several hints over the years that were pointing out to such an ambition).

This approach is furthermore supported by other elements that show how Member States utterly misunderstood the impact of the newly adopted version of

[93] MEUNIER S., 2017, *Ibid.*
[94] MEUNIER S., 2017, *Ibid.*
[95] WITKOWSKA J., *The European Union's Position in Global Foreign Direct Investment Flows and Stocks: Institutional Attempts to Improve It*, in *Comparative Economic Research - Central and Eastern Europe*, 2021, 24 (1), pp. 27-43.

Article 207 TFEU. A striking example of this misjudgment is the Impact Assessment of Lisbon Treaty issued by the British Parliament after its entry into force[96]: an in-depth study of 300 pages barely mentions this historical innovation on FDI.

In conclusion, in the difficult attempt of explaining this unusual process of conferral of an exclusive competence in an extremely sensitive field of the international economic relations, it is difficult to lay the responsibility only on Commission representatives, even though a serious and pragmatic debate on the matter would have undoubtedly ensured a preferrable outcome. It could be thus inferred that it was the myopia of Member States, combined with a lack of transparency on the part of Commission representatives, that led to this outcome whose consequences we will further try to assess.

1.3. The revolution in the attribution of competences introduced by the Treaty of Lisbon: the scope and extent of the newly acquired exclusive competence over FDI.

Following the entry into force of the Lisbon Treaty, the EU found itself equipped with an exclusive competence on FDI. Its scope and extent, not being specified in any transitional document or annex nor discussed during the Treaty negotiations, were far from being clear on December 1st, 2009. That condition of obscurity concerned several aspects of this competence, such as the power to negotiate new investment treaties, the regulation of admission of foreign investment, post-establishment investment protection, the standards of treatment[97].

What is certain is that while in a pre-Lisbon context Article 133 TEC was strictly linked to trade-related issues, Article 207 TFEU, by explicitly including FDI,

[96] United Kingdom, House of Lords, European Union Committee, *The Treaty of Lisbon: an Impact Assessment*, 10th Report of Session 2007-08.
[97] BIAN C., *National Security Review of Foreign Investment. A Comparative Legal Analysis of China, the United States and the European Union*, Routledge, 2020, P. 152-154.

considerably widened the scope of Common Commercial Policy, which was undeniably a "tectonic shift of competence"[98].

The question on the extent and scope of such a competence has divided legal scholarship, that presented opposing views. The diverging doctrinal approaches can thus be summarized in five main trends[99], a brief review of which is useful to summarize the confusion left open following the entry into force of the Lisbon Treaty.

According to a restrictive view supported by Krajewiki[100], who argued on the mentioned lack of discussion on the enlargement of the scope of Common Commercial Policy, Article 207 TFEU only comprises the aspects of FDI that are strictly linked to trade.

A second, restrictive interpretation contended by Leczykiewicz[101] relates to Common Commercial Policy only those measures that are intended to foster "investment liberalization" or "market access". Therefore, in the author's view, by virtue of Article 206 TFEU, the new competence only allows measures restricting investment, thus excluding those aimed concerning investment protection.

A broader reading provided by Ceyssens[102] includes investment liberalization and regulation but excludes investment protection against expropriation and the standard on fair and equitable treatment, arguing that the principle of parallelism stated by the Court of Justice in its abovementioned Opinion 1/94 precludes the EU from acting externally under the Common Commercial Policy in a field where it does not have internal competences.

A fourth position, sustained by Mola[103], took into account the nature of the competence, rather than its extension. In fact, it considered that the EU was thus

[98] Verfassungsblog, Kleimann D., Kübek G., *The Singapore Opinion or the End of Mixity as We Know It,* , 2017, available at: https://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/.
[99] SHAN W., ZHANG S., *Ibid.*
[100] KRAJEWIKI M., *Ibid.*
[101] LECZYKIEWICZ D., *Common Commercial Policy: The expanding competence of the European Union in the area of international trade*, in *German Law Journal*, 2005, 6 (11), pp. 1673-1685.
[102] CEYSSENS, J., *Ibid.*
[103] MOLA L., *Which Role for the EU in the Development of International Investment Law?*, Society of International Economic Law, 2008.

conferred a procedural, rather than a substantive, competence, namely a competence enabling it to negotiate the agreement. However, according to the author, the Member States acting by unanimity maintain their competence over FDI: in lack of an agreement among them, the Commission is therefore obliged to start negotiations aimed at the establishment of a commitment allowing for national differentiation.

A final position expressed by Dimopoulos[104] argues that a comprehensive competence has been established by the Lisbon Treaty, that includes all major aspects of a typical bilateral investment treaty, namely admission, capital movement, post-admission treatment, expropriation, and investor–state dispute settlement.

This succinct recap thus summarizes the uncertainties that this atypical process of competence conferral determined.

Therefore, it was thanks to the intervention of the European Court of Justice that some light was finally shed over this obscure scenario. This is only one, though important, example of the fundamental role of the European Court of Justice in international investment: not only was it able to clarify the scope of the exclusive competence enshrined in Article 207 TFEU, but it will also be able to deeply influence the definition of a European international investment policy in the future[105], while cautiously supervising the respect of EU constitutional principles[106].

The Court thus took a chance to rule on the matter in its Opinion 2/15[107] on a case dealing with the Free Trade Agreement negotiated by the EU with Singapore. This treaty being a "new generation" free trade agreement, it is a broad text dealing with several, distinct aspects of the contracting parties' economic relations, also including IP protection, competition, sustainable development.

---

[104] DIMOPOULOS A., *The Common Commercial Policy After the Lisbon Treaty: Establishing Parallelism Between Internal and External Economic Relations?,* in *Croatian Yearbook of European Law and Policy*, 2008, 4, pp. 102-131.

[105] HERMANN C., *The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy*, in *The Journal of World Investment & Trade*, 2014, 15, pp. 570-584.

[106] SCHILL S., *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, in *Legal Issues of Economic Integration*, 2019, 46 (2), pp. 105-128.

[107] CJEU, Opinion of the Court of 16 May 2017, Free Trade Agreement with Singapore, Opinion 2/15, para. 81 ss. ECLI:EU:C: 2017:376; see also STOPPIONI E., *The Interactions Between EU Law and International Investment Law: The Five Act of a Kabuki Play*, in *Hitotsubashi Journal of Law and Politics*, 2020, 48, pp. 37-52.

This Opinion gave the European Court of Justice the chance to clarify the state of the art of the division of competences after the entry into force of the Lisbon Treaty in EU external economic action.

With regard to FDI, it confirmed the exclusive nature of this competence. Furthermore, the Court added that, no distinction being made in the treaty between investment admission and protection issues, both pre- and post-establishment issues fall within the scope of FDI. Thus, the Court rejected the observations of the Member States and the Council contending that the chapter of the Treaty into question did not fall within the scope of the Common Commercial Policy in so far as it only deals with the protection and not the admission of FDI.

In conclusion, under Article 207 TFEU, the EU is now enabled to conduct negotiations over international investment, be it in the form of a bilateral investment agreement or of an investment chapter of an FTA. EU investment agreements shall allow the liberalization of foreign markets for European investors and the protection of their investment abroad and the provision of dispute settlements, while harmonizing the rules on pre- and post-establishment of foreign investors in the European internal market. Moreover, the EU is now entitled to set a policy on this crucial field of global economic relations.

However, notwithstanding this great potential, passing from power to act came out as extremely problematic. The EU encountered indeed endless difficulties when elaborating a policy and resistance on the part of the Member States. It goes without saying that a major cause of this painful phenomenon is the absence of clarity from the very moment this provision was included in the draft of the European Constitution. The many questions left open such the validity of pre-existing BIT has hindered the power of the Commission as a negotiator and made its actions rather rusty and slow.

Inside this blurry scenario, what is probably the greatest question that the Treaty left open concerns the destiny of national security issues deriving from the investments that the EU was able to attract thanks to its newly acquired competence.

2. The Quest for a Ground of Competence for an EU Act on FDI Control: the opportunities offered by the Fundamental Freedoms and

Common Commercial Policy, as overshadowed by the structural constraints imposed by national security.

As analyzed above, the epilogue of a long debate and profound legal uncertainties related to the attribution of an exclusive competence in FDI within Article 207 TFEU have led to the recognition of significant power of the EU over this field. This led the EU to start elaborating its own policy on international investment, its core being the EU's "commitment to the open investment environment which has been so fundamental to its prosperity" and the promotion of investment[108].

Accordingly, a deeper reflection on the national security risks and threats by foreign investments, including those attracted to the EU Internal Market under this new policy, became more and more compelling. Eleven Member States by 2017 had already enacted legislation establishing a national FDI screening mechanism, be it sector-specific or of a broader scope, based on national security; and most of those that did not have a screening mechanism started equipping themselves with one[109]. And rightly so, considering that Article 4 (2) TEU relegates national security under a "sole responsibility of the Member States", which constitutes a major obstacle towards the establishment of a European Act on national security controls over FDI inflows (2.3.). Therefore, before starting to dwell on the design of a screening mechanism, it is necessary to understand the grounds upon which such mechanism could be founded, if any, and on how the EU can intervene in this field (2.2.). As we will see, in fact, competence-wise, this is the major issue that needs to be solved with a view to build a screening mechanism: the interplay between a "sole responsibility of the Member States" and an exclusive competence of the EU.

Nonetheless, none of such analyses would be relevant or useful in any way if two final provisions of the TFEU, namely Articles 345 and 346, were to apply.

---

[108] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010)343 final.

[109] European Commission, *Report from the Commission to the European Parliament and the Council: First Annual Report on the screening of foreign direct investment into the Union*, 11 November 2021, COM(2021) 714 final.

Therefore, a preliminary assessment on their applicability turns out to be unavoidable (2.1.).

The analysis of this complex scenario contributes to the argument according to which an obscure competence division has severe implications over the elaboration and implementation of a common European policy.

2.1. The inapplicability of Article 345 and 346 TFEU: a preliminary yet essential observation.

As part of the Part Seven of the TFEU, named "General and Final Provisions", the potential applicability of Articles 345 and 346 needs to be preliminarily addressed for their application would preclude any possibility for the EU to intervene in the field of FDI screening, regardless of the type of instrument adopted (*i.e.* a coordination mechanism or a one-stop-shop system). Indeed, if that was the case, European institutions would have no leeway whatsoever regarding this topic.

According to Article 345 TFEU, Member States exclusively maintain a competence on the system of rules concerning property ownership and nothing in the treaty should suggest an interpretation leading to a "competence creep" on the part of EU institutions over such rules.

However, the lack of applicability of this provision is widely recognized. As a matter of facts, this article only affects the allocation of property, while its scope does not include legal acts that follow such an allocation of property[110]. In other terms, EU institutions cannot have a role in the choice whether to privatize or nationalize a certain industrial sector, but the provision *per se* does not preclude their involvement in succeeding acts. Therefore, it is blatant that investment screening procedures fall outside the scope of this provision for a security control of cross-border mergers and acquisitions is a clearly different type of assessment.

[110] KORTE S., *Exploring the Possibilities and Limits of the EU and Member States to Set Up an Investment Screening Mechanism in the Light of Union Law,* in S. HILDELANG et al. (eds.), *YSEC Yearbook of Socio-Economic Constitutions*, 2020*,* 435–466.

What is more, under Article 346 (1) *litt.* b) TFEU, Member States are entitled to derogate from Treaty provisions if they doom it necessary for the protection of the essential interests of their security if the production of or trade in arms, munitions and war material is involved and as long as the measures they adopt do not adversely affect the conditions of competition in the internal market regarding dual-use products.
However, as authors[111] have clarified, this provision should not be seen as an "absolute reservation of European integration"[112], but rather as a provision applying in very rare cases. For instance, it may serve as a ground to exempt military goods from the Freedom of movement of goods. Nonetheless, if such stringent requirements were met, Member States would be able take advantage of this provision in order to adopt national legislation on the control of foreign investment.

Therefore, since Articles 345 and 346 TFEU do not constitute as such an obstacle towards the adoption of a European Act on screening mechanisms, it is necessary to understand if the EU is entitled to adopt an EU act in light of its competences and, if so, on what legal basis.

2.2. The quest for a ground of competence to adopt EU rules on the control of foreign investment: the opportunities offered by Fundamental Freedoms and Common Commercial Policy, as overshadowed by national security.

Since the EU enacted in 2019 a Regulation on the screening of FDI[113], the most appropriate way of analyzing the matter of its competence is to revisit the debate on this topic that led to the adoption of the act. In fact, merely stating that the EU has an exclusive competence on FDI as analyzed above is not sufficient, for it would ignore

[111] CALLIES C., KORTE S., *Dienstleistungsrecht in der EU*, Handbuch des Rechts der Europäischen Union zum freien Dienstleistungsverkehr, C.H. Beck, 2011.
[112] KORTE S., 2020, *Ibid.*
[113] 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 investments into the Union, OJ L 79I , 21.3.2019, p. 1–14.

the difference between the treaty-making aspects of international investment policies and the security issues related thereto. It is a further step that needs to be taken, and these reflections also need to be declined by having regard to the sensitivity of the subject of national security.

Thus, one could imagine grounding an EU competence either on the Common Commercial Policy or on the fundamental freedom of the EU Internal Market (*a*). Once established the ground for the competence, it is essential to understand the extension of such an EU competence in relation to national FDI screening mechanisms (*b*).

a) The arduous choice of a competence basis for an EU Act on the Screening of Foreign Direct Investment.

On the one hand, under Article 207 (2) TFEU, the EU is attributed a competence to adopt regulations providing for the "measures defining the framework for implementing the Common Commercial Policy", capable of being further detailed and implemented by other EU acts. The legislative procedure to be followed is the ordinary one.

The *ratio* of this provision is to allow the establishment of a proper common European Commercial Policy, that by now includes FDI. However, the mere fact of being *common* does not inevitably imply a generalized harmonization, but there should rather be a minimum ground for coordination of Member States' action with regard to third states, so as to reduce potential contradictions and the chances of placing individual interests above the common goals[114].

On the other hand, the relevant provision on fundamental freedoms is Article 64 (2) TFEU on the free movement of capital and payments. While Article 63 TFEU prohibits restrictions on the movement of capitals and payments between Member States and third countries, Article 64 TFEU details the procedural aspects of this principle.

[114] HINDELANG S., MOBERG A., *The Art of Casting Political Dissent in Law: the EU's Framework for the Screening of Foreign Direct Investment*, 2020, in *Common Market Law Review*, 57, pp. 1427-1460.

Notably, under its second paragraph, the adoption of measures that "[endeavor] to achieve the objective of free movement of capital" to and from third countries involving *inter alia* direct investment establishment, thus removing existing obstacles, follows an ordinary legislative procedure.

Conversely, according to the third paragraph, if a measure constitutes "a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries", such measure can still be adopted but (as evidence of the liberal approach of openness of the Treaties) following a special legislative procedure under which the Council acts by unanimity after a mere consultation of the European Parliament.

Therefore, it could also be conceivable to consider Article 64 (3) as a ground of competence, in so far as a screening act is seen as an external projection of a measure related to the internal market.

Nonetheless, as its incipit indicates, the competence for the FDI Regulation the EU adopted has been found in Article 207 (2) TFEU, and rightly so. The choice was not – however - as straightforward as it may seem and is the outcome of an interesting debate.

According to some authors[115], the competence is conferred by Article 207 (2) TFEU because this provision always prevails on Article 64 (2), based, firstly, on the fact that the latter establishes that the procedure for the liberalization of capital and payments movements applies "without prejudice to the other Chapters of the Treaties" and, secondly, on the case law of the Court of Justice on the relations between free movement of capital and freedom of establishment[116].

Hindelang and Mobers[117] refuse this reading of the provisions of the Treaty based on a persuasive argument that both these provisions may be valid legal bases, at least in abstract terms, even though a choice would later need to be made.

---

[115] NEERGAARD A., *The Adoption of the Regulation Establishing a Framework for Screening of Foreign Direct Investment into the European Union*, in BOURGEOIS H.J. (eds.), *EU Framework for Foreign Direct Investment Control*, Wolters Kluwer, 2020, pp. 151-168.

[116] See, *e.g.,* CJEU, 11 September 2014, Case C-47/12, *Kronos International Inc. v. Finanzamt Leverkusen*, EU:C:2014:2200.

[117] HINDELANG S., MOBERG A., *Ibid.*

In fact, in principle, the Court of Justice claims that, in presence of two valid legal bases, but in lack of a clear priority rule, the delimitation needs to be performed on the basis of the specific case: the adoption of an act may be grounded on both competences, as long as there is no procedural incompatibility or the recourse to both legal bases may undermine the prerogatives of the European Parliament[118].

The application of this principle to the case of the EU Act on FDI screening prevents the application of both legal bases. As a matter of facts, Article 207 (2) TFEU prescribes that parties follow an ordinary legislative procedure, while under Article 64 TFEU the ordinary legislative procedure is only to be followed where liberalization is the objective of the act and the special legislative procedure whenever a restriction is enacted (and the latter would need to be adopted).

In other terms, while Article 207 TFEU recognizes a role of co-legislator to the European Parliament, Article 64 (3) TFEU relegates it to a consulting role.

However, these authors also contend that it should be wrong to establish on this basis that a preference should be given to Article 207 TFEU. They observe that this conclusion would draw from a prevalence of the third paragraph of Article 64 TFEU on the restriction of capital movements over the second on their liberalization.

Rather arguably, the authors suggest that the choice of the second paragraph would not be unreasonable in light of the content of the adopted FDI Regulation for it would not actually restrict direct investment from third countries, considering that its Article 3 (1) leaves the choice as to whether to maintain or adopt a screening mechanism (only if they do so the minimum procedural standards it sets forth are applied). Moreover, the authors consider that the annual reporting activity that is required by Article 5 is sufficient to reach the considerable threshold set by the Article 62 (2) TFEU corresponding to a "step backwards in Union law as regards the liberalization of the movement of capital".

This argument is relevant and not unreasonable in light of the high threshold set by Article 64 (2) TFEU, and even more elements could be brought forward to support it

[118] CJEC, 10 January 2006, Case C-94/03, *Commission v. Council (Rotterdam Convention*), EU:C:2006:2.

(*e.g.* the non-binding nature of the Commission's opinions). Nonetheless, to my reading, it should be dismissed.

In fact, it would be extremely complicated, if not impossible, to assess with an evidence-based approach whether the FDI Regulation has a positive or negative impact on FDI inflows. To this end, it should also be considered that the FDI Regulation was adopted entered into force in October 2020, when the world was in the midst of a pandemic and the European continent was about to experience the outbreak of a war after decades of peace because of Russia's unprovoked and unjustified military aggression of Ukraine. The comparison of data on FDI inflow into the EU before and after the entry into force of the screening mechanism would thus not be able to say much about the impact of a significantly minor factor on investment movements.

What is more, as I mentioned above, following the entry into force of the FDI Regulation more Member States adopted national instruments[119]. One could argue that this is also unmeasurable and is probably the result of the rising importance of national security in the public debate in light of these two historical factors. Member States that already had a screening mechanism were indeed already expanding their scope inside and outside the EU in 2020[120] (the pandemic was a more influencing factor, because it showed new aspects of national security, public health, while military assets were structurally part of the identification provisions of screening mechanisms).

However, if a more attentive focus on national security in international economic relations is undeniably a global trend, the existence of a soft power exercised by the EU is undisputable. The EU has been actively raising the level of awareness over

[119] For instance, by Law no. 497/2022 of 23 December 2022, Slovakia adopted an investment screening mechanism entering into force on 1 March 2023, that constantly refers to the Regulation (EU) 2019/452 (*e.g.* adopts the assessment factors laid down in the Regulation in its Art. I § 9, and dedicates a section to the cooperation mechanism, Art. I § 54-55).

[120] For instance, Italy expanded the scope of *golden power* with Decree-Law N. 23 of 8 April 2020, as converted by Law No. 40 of 5 June 2020., temporarily including also the food and sanitary sectors (Decreto-legge 8 aprile 2020, n. 23, G.U. 06/06/2020); by the Decree N. 2020-892 of 22 July 2020, France lowered the threshold for prior governmental review from 25 % of shares owned in a listed company to 10% (Décret n°2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations); the U.S. Department of Treasury on 15 September 2020 adopted a Final Rule reviewing the criteria for mandatory declarations for transactions involving critical infrastructures (Federal Register, Vol.85, No.179, Final Rule, Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 15 September 2020).

national security issues in many sets and scenes, *e.g.* through the establishment of a group of experts on the screening of FDI into the EU, annual reports[121], the financing of external analysis conducted by the OECD[122]. As the history of European integration shows, European institutions do not need a binding instrument in order to exert a form of pressure over the Member States. Therefore, the argument deriving from Article 3 of the FDI Regulation is not entirely persuasive.

Furthermore, the EU is sending foreign investors an important signal, which European leaders have been long committed to firmly deliver. It is needless to quote anything else but the famous statement of former President Jean Claude Juncker: "we are not naïve traders. Europe must always defend its strategic interests" for "it is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed"[123].

Plus, academia[124] in commenting the Regulation that was eventually adopted considered the existence of a paradox that would resolve itself by further liberalizing external investment. More precisely, according to this paradox, in a first moment inward investment control would tighten the regulatory restrictiveness of FDI in the EU, even though this would eventually allow further liberalization eventually based on the fact that this way the EU would be equipped with a bargaining chip in trade and investment negotiations. However, even if this prediction ever comes true, there is no denying that the possibility of a reduction of FDI inflows could take place (even if it would eventually allow for more outbound investments).

---

[121] [121] European Commission, Report from the commission to the European parliament and the council - *First Annual Report on the screening of foreign direct investments into the Union*, 23 November 2011, COM(2021)714 final; European Commission, Report from the commission to the European parliament and the council - *Second Annual Report on the screening of foreign direct investments into the Union*, 1 September 2022, COM(2022)433.

[122] OECD (2022), *Framework for Screening Foreign Direct Investment into the EU. Assessing effectiveness and efficiency*.

[123] Jean Claude Juncker, State of the Union Address 2017, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165.

[124] SCHILL S., *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, in Legal Issues of Economic Integration, 46 (2), 2019.

Moreover, if all these mentioned points were not persuasive enough, it would still be undeniable that if this Regulation is not considered as a restrictive measure, it still cannot be considered as a liberalization measure either, thus falling under the ordinary legislative procedure prescribed by the second paragraph.

Therefore, it is in light of the above that – to my reading – the choice of the legal basis made by the Commission in its legislative proposal of 2017[125] is the most reasonable move.

It would not have been an understandable choice to ground the Regulation on two legal bases, the application of one of which is highly uncertain, and the outcome of the choice would not have been substantially divergent: the same legislative procedure would have applied, but the Regulation would have been exposed to a much greater risk of challenge in front of the Court of Justice. It is thus sensitive to consider FDI Regulation a mere "[measure] defining the framework for implementing the common commercial policy".

Nonetheless, it is in conclusion noteworthy that abovementioned Opinion 2/15 prescribes that sustainable development – that was already enshrined in Article 3 TEU as one of the objectives to which EU action needs to pursue – constitutes, jointly with the liberalization of capital flows, one of the objectives of the CCP. Hence, the choice of this legal basis needs to consider that this objective needs to be pursued as well by the intended act.

b) The extension of the competence for the adoption.

After establishing the existence of an EU competence on the adoption of an EU Act for Investment Screening, some[126] have questioned the extension of this competence. In fact, as already mentioned, several Member States were already screening FDI long before the adoption of the legislative proposal for Article 207 TFEU: the question was thus raised as to how this exclusive competence of the EU interplays with existing (and prospected) national measures.

---

[125] European Commission, Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union, 13 September 2017, COM(2017)487.
[126] BIAN C., *National Security Review of Foreign Investment. A Comparative Legal Analysis of China, the United States and the European Union*, Routledge, 2020, pp. 153-154.

In principle, under Article 2 (1) TFEU, when the Treaties establish an exclusive competence, Member States are prevented from acting as the competence belongs fully and definitely to the Union, with a view to hinder any form of disrespect of Union interests listed in Article 3 (1) TFEU (in this case, its letter *e)* on common commercial policy)[127].

Nonetheless, Article 2 (1) TFEU continues stating that whenever an exclusive competence is established by the Treaties, this principle may derogate, if Member States are "so empowered by the Union". Ruling on this point, the Court of Justice claimed that such empowerment must lay down content-related and at least objective limits[128], a mere authorization not being sufficient for the same above-mentioned reason of preserving coherence among the Member States' legal systems.

In light of this background, conflicting views have been advanced on the relationship to be established between EU and national law on this field, and notably on the destiny to which the Treaty of Lisbon had condemned national screening mechanisms[129].

One trend in legal scholarship, constituted by a rather limited circle of authors[130], supported a restrictive view according to which the exclusive competence under Article 207 TFEU should be regarded as comprehensive in terms of its substance. In other terms, the "unilateral control" referred to in Article 207 (2) TFEU should include the control of market access and the regulation of FDI: any national measure over this field would infringe the EU's exclusive competence.

According to the preponderant position[131], that eventually prevailed, national measures did not become unlawful *per se* following the entry into force of the Lisbon Treaty. They shall then be able to remain into force as long as they do not infringe substantive EU Law nor secondary law is enacted. To the extent that Member States

---

[127] KORTE S., 2020, *Ibid.*
[128] CJE, 18 February 1986, *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company*, Case C-174/84, ECLI:EU:C:1986:60.
[129] BIAN C., *Ibid*.
[130] BUNGENBERG M., *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, in M. BUNGENBERG, J. GRIEBEL and S. HINDELANG (eds.), *European Yearbook of International Economic Law (Special Issue),* 2011, pp. 29-42.
[131] VRANES E., *State Measures Protecting Against "Undesirable" Foreign Investment. Issues in EU and International Law,* 2012, in *Zeitschrift fur offentliches Recht*, 67 (4), pp. 639-677.

respect the strict conditions for the application of a legitimate derogation to the free movement of capital provided for by EU primary law, national screening mechanisms may still operate.

2.3. Conceptual and legal constraints on a European action on national security.

The core provision with regard to national security in EU primary law is Article 4 (2) TEU, that provides that the Union shall respect the Member States' "essential State functions, including (…) safeguarding national security". It then adds that, "in particular, national security remains the sole responsibility of each Member State".

Ever since the very beginning of the European integration process, and despite the principle of conferral, a question has been raised with regard to the scope of action of EU institutions in those fields that fall within the competences conferred upon the EU by the Treaties, but with regard to which the Member States maintain a constitutional guarantee under EU primary law that such competence will remain within their hands[132].

Therefore, this is clearly the context affecting the competence framework for the establishment of a European screening mechanism. In fact, as seen above, the Union has an exclusive competence to act under Article 207 (2) TFEU. However, this exclusive competence collides with the national security clause under Article 4 (2) TEU, the meaning of which has been long considered highly controversial[133].

In a slightly different field, namely the public morality, public policy and public security, which represent a ground for an exception to the free movement of goods (under current Article 36 TEU), the Court of Justice claimed in the famed *Simmenthal*

[132] SCHÜTZE R., *EU Competences: Existence and Exercise*, in ARNULL A., CHALMER D. (eds.), *The Oxford Handbook of European Union Law*, 2015, pp. 75-102.
[133] *Ibid.*

case law[134] that such provision did not establish an exclusive competence of the Member States and that it even prevented Member States from enacting stricter legislation where EU law already established a sufficient protection.

Starting from this important milestone, the approach of Union institutions has always been to avoid the creation and the safeguard of what President Lenaerts calls a "nucleus of sovereignty that the Member States can invoke, as such, against the [EU]"[135].

However, the scenario of Article 4 (2) TEU is quite different. Notably, the Treaty of Lisbon did not limit itself to a clause merely stating that EU institutions "shall not affect" national security (*e.g.*, Article 153 TFEU on social policy, or Article 168 TFEU on health policy). The Treaty is here stating that Member States maintain a "sole responsibility".

Moreover, an argument *a rubrica* supports this literal interpretation. In fact, such clause comes from a reaffirmation in Article 4 (1) TEU of the negative dimension of the principle of conferral: "competences not conferred upon the Union in the Treaties remain with the Member States".

Nonetheless, as analyzed in the previous sub-paragraph, EU law has evolved in a way that the competence of the Union in this field has been accepted and the relation with national screening mechanism been ascertained.

Therefore, the point that I am trying to make in this sub-paragraph is that this provision must not be forgotten as it represents the cornerstone of every analysis that I will make in the following two chapters and must thus always be kept in mind. In my opinion, it is in fact extremely relevant from a policy perspective, rather than competence-wise, for it signals a point of no return that the Member States wanted to make extremely clear within the Lisbon Treaty.

Thus, its severe impact on policy choices is extremely important. Once the Union has acquired the competence over FDI – and not in the most transparent way –

---

[134] CJEC, 15 December 1976, Case C-35/76, *Simmenthal v. Italian Minister of Finance*, EU:C:1976:180.

[135] LENAERTS K., *Constitutionalism and the Many Faces of Federalism*, 1990, in *American Journal of Comparative Law*, 38 (2), pp. 205-264.

the challenges it has faced in elaborating and implementing a policy regarding national security concerns find their roots in this provision. This major concern that the Member States decided to crystallize in Article 4 TEU contributes to explain the policy choices that shaped the design of the FDI Regulation, *e.g.* on type of powers attributed to the Commission on the decision-making processes. In fact, many shortcomings of the Union's approach to investment screening on national security grounds are rooted in this collision between Article 207 TFEU and Article 4 TEU. Therefore, as it is often the case when analyzing Union law, it is essential to assess not only what the EU *did*, but also what it *could* have done, given a specific competence framework.

3. A "hardware without a software": Actual and Potential Policy Implications of a Fragmented Competence Framework.

Most of the analysis conducted so far on the topic of the consequence of the atypical process of conferral of a competence in FDI focuses on treaty-related aspects of FDI [136]. Authors studied the impact of the swift, unnoticed, undebated and underestimated conferral of competences on the EU focusing closely to investment treaty-making. Some observed that, following the entry into force of the Lisbon Treaty, a blurry and uncertain scenario took shape where the Union had a hardware – the exclusive competence – that was not capable of processing the software – a European policy – which is what actually matters in political and economic terms: what ultimately constitutes the Union's objective according to this reading would be the exercise of the competence, without an actual intervention on existing national policies and international agreements[137].

This thesis dealing with the national security issues related to international investment, it is relevant to understand whether what this peremptory consideration applies to this specific aspect of international investment policy, as well.

A more in-depth analysis of the shortcomings of the system established by FDI Regulation will be carried out in the next chapters; however, at this stage it seems relevant to anticipate one possible cause of the flaws that ultimately ended up in the Regulation. Hence, building on the analysis conducted above, it is extremely enriching to assess whether both the process of competence conferral on FDI and the specific issues related to responsibility on national security have had an impact on the final design of the Regulation and, if that is the case, to what extent it may influence future developments. In other terms, is the European competence on the establishment of an EU Act on the screening of FDI based on national security concerns as enshrined in Article 207 (2) TFEU a hardware without a software?

---

[136] CRÄMER J., HERMANN C., BASEDOW R., MEUNIER S. *Ibid.*

[137] TORRENT R., *The EU's International Investment Policy: Hardware Without the Software*, Investment Treaty News, 2010.

As Chapter 2 further explains, in a few words, the software that the EU was able to process through the FDI Regulation is nothing more than a "demo version" of a *European* security policy in international investment.

Leaving aside at this stage any consideration on whether this was a commendable or a poor policy choice, as it will be delved on more attentively over the course of Chapter 2, it can however be anticipated that the DG Trade currently does not dictate a proper common policy over national security with regard to incoming FDI. For instance, the Commission does not have a decision-making role (it rather issues non-binding opinions)[138], Member States are not compelled to adopt a screening mechanism[139] and, if they do so, only minimum procedural standards apply[140]. The Member States then remained in full control of rules and procedures on both the identification and risk assessment phases when reviewing a transaction according to their investment screening mechanisms.

The existence of a severe lack of political appetite on behalf of the Member States regarding the adoption of a coordinate response to security risks that are generated by the inflow of FDI is tangible and its proof is the long-standing *impasse* that followed the entry into force of the Lisbon Treaty and preceded the adoption of the legislative proposal that culminated in FDI Regulation.

Remarkably, this skepticism can be observed not only on the Member States' side, but also on that of EU institutions: according to an interview with former Commission President Barroso, following a solicitation through a letter signed by then Commissioners Tajani (Industry and Entrepreneurship) and Barnier (Internal Market) to vet foreign investments, Trade Commissioner De Gucht claimed that "we need[ed] the money"[141] (it was actually on the impulse of the Member States that the Regulation was adopted[142]). However, to my understanding, there is more than a simple lack of political willingness.

---

[138] Articles 6, 7 and 8 of Regulation (EU) 2019/452.
[139] Articles 3 (1) and Recital 8 of Regulation (EU) 2019/452.
[140] Article 3 of Regulation (EU) 2019/452.
[141] MEUNIER S., 2017, *Ibid.*
[142] In February 2017 Italian Minister for Economic Development Carlo Calenda, French Minister of Economy and Finance Michel Sapin, and German Minister for Economy and Energy Brigitte

In fact, during the Lisbon Treaty negotiations, the potential creation of a European policy on FDI was never mentioned, just like every other aspect of the competence on FDI, but not with the objective of EU institutions of later enacting a "competence creep" and establishing a screening mechanism on some unstable legal ground (because as mentioned they were not even considering it).

On the one hand, the absence of a reasoned debate over this sensitive topic would have potentially had a concrete impact on the wording of Treaty provisions. In fact, given the immense symbolic power of Article 4 (2) TEU and of its assertive wording, currently the room for manoeuvre is quite limited. In fact, to my understanding, it would not even be admissible to establish a European FDI screening mechanism, with the Commission fully in charge thanks to a one-stop-shop system and a proper decision-making power, like it is the case in merger control. One should in fact always bear in mind the significantly higher sensitivity of the field of national security compared to antitrust, for it does not merely consider economic aspects but touches what is probably the most sensitive aspect of state sovereignty, *i.e.* the protection of citizens' security.

Therefore, it emerges that in order to allow the EU to develop a more sophisticated software – a European Committee on Foreign Investment[143] as some call it along the lines of the better known CFIUS – then, also the hardware should have been constructed in a more accurate manner.

Meunier[144] was also warning on this topic almost ten years ago, when the legislative proposal had not even been presented by the Commission: if we aspired to a European CFIUS, only two options would unfold. Either an institutional innovation is brought about, or merger control under competition law is extended to national security issues. Even though a deeper analysis of the relations between national security and merger control will be carried out in the third chapter, in consideration of the structural

---

Zypries jointly wrote a letter inviting Trade Commissioner Cecilia Malmström to open a discussion on this topic. The letter is available at: https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=4.

[143] DI BENEDETTO F., *A European Committee on Foreign Investment?*, 2017, in *Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues*, No. 214.

[144] MEUNIER S., 2014, *Ibid.*

differences between merger control and national security screening, the application of antitrust reasoning to national security control would be a wrong choice both from an institutional and a policy point of view.

On the other hand, apart from the actual existence of a competence for the adoption of an act of this type (so, even if the relevant provisions turned out to be by chance worded differently and in a way to allow the adoption of the Act), it would be extremely difficult to build consensus upon this within the Council. It is not only a matter of political appetite, but the fact that it would be unreasonable to consider such a sensitive question for the State's interests as a mere "measure defining the framework for implementing the common commercial policy"[145].

In order to set the condition to create a political appetite over this topic, the question should be raised in a context that is different from an ordinary legislative procedure. The topic of FDI screening based on national security concerns is undoubtedly interesting from an academic perspective and highly relevant for the daily practice of cross-border M&A, but remains a rather sectorial policy that should be dealt with at a European level only within a wider dimension. In fact, in order to profitably make use of the great European potential, Member States and EU institutions should approach a 360-degrees reflection on a common European security policy, that includes *inter alia* FDI screening. In this context, Member States would frankly outline their positions and limits and express their concerns. Whatever approach and vision is then chosen in the elaboration of a policy by the EU, this one shall then better accepted by its constituents for they would all be accountable for a deliberate choice.

As I will argue in the second chapter, in fact, within this framework the EU would not be able to effectively operate as an FDI enforcer because it would lack the essential instruments to conduct a proper FDI risk assessment.

Hence, once again, only through an update of the hardware, will a more sophisticated software be able to be processed. Thus, the answer to our question on whether the competence conferral process and ultimate framework influences the

[145] Article 207 (2) TFEU.

policy choices that were made is resolutely positive: as I will more properly explain further on, for a proper-functioning mechanism to work, the EU should be able to have a more active role in other fields on which now as a too limited competence (*e.g.,* energy, public health, defense).

CHAPTER 2 – Regulating the Inflow of Foreign Investment in the EU: the Joint Cooperative Effort to Address Growing Risks to Security and Public Order in the Union. A Promising Instrument Endowed with Unexploited Potential and the Conceivable Perspectives of a Rapidly Evolving Legal Field.

After analyzing the complex competence framework established by EU primary law in this field and comprehending the spectrum of possibilities offered to the EU legislator, it is necessary to focus on the core of this subject, namely understanding how the response to risks arising from foreign investment has been constructed at the European level.

Indeed, it has been observed that the Union could not assume vetting powers and take on the role of screening authority to address national security risks on a European scale. However, this does not mean that the Union cannot play a role in this sector in order to enhance the safeguard of its security, that of its Member States, and that of European citizens.

The construction of a joint approach at the European level has not been a trivial operation, as it took time and effort for the various institutional ranks – both at a national and a supranational level – to realize what was happening in the world and the risks that could arise from the absence of any form of control and coordination (I).

Notwithstanding, a Regulation has in the end been adopted, hence the interest to understand how the matter has actually been regulated at the European level, in the endeavor to comprehend the quality of European legislation (II).

Finally, after analyzing the proposals of some academics, it will be necessary to understand what developments are conceivable and desirable for this complex subject, taking into account both the competence framework and the ultimate objective, i.e., the safeguard of security without compromising the attractiveness of the European economy as a destination for foreign investment (III).

I. When liberalization calls for further and deeper regulation: the awakening of EU institutions to protect Europe's security in peril. The threats, the fears and the solutions envisaged.

The impetus towards the adoption of a European Act on the screening of FDI is inextricably bound to the regulatory, economic and geopolitical context that constitutes the historical framework in which the Act was eventually passed. Such an impulse was thus determined by a complex series of contributing factors each constituting a contextual element that, in its small, unveiled part of the risks related to national security resulting from potentially harmful FDI and associated with foreign ownership of strategic companies and assets in general.

Within this framework, it is therefore to be borne in mind that EU law moved in the same exact direction as its Member States and third countries that, over the course of the past decade, have increasingly equipped themselves with investment screening mechanisms.

With the aim of contextualizing the FDI Regulation, whose analysis constitutes the core of the present chapter, it is useful to lay down some introductory remarks on the causes as well as the global movements that laid the foundations for the emergence of a political will to pursue its adoption.

It would however be too ambitious to aspire to exhaustively describe all the contributing factors, whose in-depth analysis would require a much longer space than it is possible in this thesis, that rather focuses on the EU legal framework for FDI control, hence on the outcome of the acknowledgement by the EU legislator of the existence and the risks that such joint factors create with regard to national security of Member States.

Historically, as the dependency school of thought expressed, restrictions and specific requirements towards foreign investors were especially popular in developing countries, while developed countries and transition economies were equipped with such instruments but to a considerably minor extent: this resulted in the creation of policies

based on internal capital resources[146]. Successively, during the 1980s, while adopting an ever more liberal approach, developing countries increasingly adopted policies of outbound flows aimed at growth through exports rather than inward-oriented import substitution policies, one of the reasons being the need for hard currency to service the foreign debt of developing countries[147], and by the 1990s foreign capital started playing a fundamental role in their development strategies[148].

Therefore, a double approach was adopted in developing countries, that combined the parallel liberalization of FDI inflows with the persistence of FDI regulatory restrictions, with the aim of guaranteeing their independent political existence and economic development along with that of limiting potentially negative economic consequences from FDI inflows. From an economic perspective, the quest for capital and liquidity to foster economic development led both to a further liberalization of their economies and the introduction of generous packages of incentives[149].

Over the course of the 1990s, the process of opening to FDI occurred in transition economies too, notably in Central and Eastern Europe, thanks to further liberalization, privatization, deregulation, as part of the movement that brought several of these countries to join the OECD and the EU. Such countries (*e.g.* Poland) were thus confronted with discussions on the design of optimal policies, combining liberalism and control[150].

Finally, developed countries also joined this movement out of national security concerns in strategic sectors. For example, Canada, Australia, the USA and Japan

---

[146] WITKOWSKA J., *The European Union's Screening Framework for Foreign Direct Investment: Consequences for External Relations*, in *Comparative Economic Research – Central and Eastern Europe*, 23 (1), 2020, pp. 19-36.
[147] UNCTAD, *Formulation and Implementation of Foreign Investment Policies,* 1992.
[148] WITKOWSKA J., *Ibid.*
[149] WITKOWSKA J., *Ibid.*
[150] See e.g. WITKOWSKA J., *Polityka wobec bezpośrednich inwestycji zagranicznych*, in *Skutki napływu zagranicznych inwestycji bezpośrednich (Materiał z posiedzenia Rady Społeczno-Gospodarczej*), 2020; PACH, J. (2001), *Bezpośrednie inwestycje zagraniczne w świetle bezpieczeństwa ekonomicznego na przykładzie Polski w latach dziewięćdziesiątych XX wieku*, Wydawnictwo Naukowe Akademii Pedagogicznej im. Komisji Edukacji Narodowej, Prace Monograficzne, No. 309, 2001.

introduced legal rules in the form of screening mechanism and ownership restrictions in order to limit the presence of foreign capital in strategic sectors for the resilience of national and economic security, such as energy infrastructure[151]. Therefore, while it holds true that developed countries somehow followed a line that had already been drawn by developing countries and transition economies, it is noteworthy that developed countries equipped themselves with FDI regulatory restrictions based on national security concerns, which is thus a slightly different motive than the one that prompted developing and transition economies towards the same direction. This, of course, entailed a different design of the policy measures eventually adopted by them.

Another turning point in the history of the debate over national security policies in Europe and developed economies has been the financial crisis of 2008, following which European capital markets were facing a severe lack of liquidity[152]. Therefore, even though national security concerns had already been voiced, the first reaction to the crisis was to allow the inflow of as much capital as possible with the aim to speed the recovery. A blatant example is the already mentioned reaction of then Trade Commissioner De Gucht who, after a solicitation of then Industry and Entrepreneurship Commissioner Tajani and then Internal Market Commissioner Barnier to vet foreign investments, answered bluntly that "we need[ed] the money".

This position, seen through today's lenses, may seem myopic and probably superficial but the benefits that a high inflow of FDI generates for host economies are undoubtedly gigantic on many levels. As mentioned, they are capable of bringing liquidity into arid financial markets, but they are not limited to that. To name but one of the positive effects of keeping the EU internal market attractive for foreign investors, six per cent of the jobs in the EU are provided by companies owned by foreign

[151] European Commission, *Review of national rules for the protection of infrastructure relevant for security of supply*, Final Study, 2018.
[152] See *e.g.* BURNSIDE A., KIDANE A., *Merger control meets FDI: the multi-stop shops expands*, in Competition Law & Policy Debate, 7 (2), 2022, pp. 68-76.

investors[153]. Hence, by maintaining low FDI regulatory restrictiveness (if compared to that of most third countries), EU institutions, as arising out of the spirit of the founding Treaties, have always looked favorably on open investment policies aimed at making the EU a prime destination for FDI flows, and rightly so.

Nonetheless, this position was however, doomed to radically change when Europe found itself confronted with the actual risks that come along with the remarkable benefits of FDI and this was reflected on the official positions of EU institutions. In May 2017, a debate was triggered by the European Commission[154] on how to shape globalization in a way that it is beneficial to all, a topic that sees international investment law and policy at the forefront. Such a question is also deeply linked and perfectly aligned with the position of the Court of Justice in Opinion 2/15[155], where it gave the interpretation that sustainable development represents one of the objectives that the CCP needs to pursue, jointly with liberalization of capital flows[156]. Accordingly, the Commission restated[157] on the same year its support towards an "open, sustainable, fair and rules-based global trade order", while claiming the need for action in response to security or public order concerns.

This reflects the outcome of an intense debate that raised the awareness on risks and threats associated with national security concerns, that it is useful to succinctly recall here.

---

[153] MARTIN-PRAT M., *The European Commission Proposal on FDI Screening*, in BOURGEOIS J., *EU Framework for Foreign Direct Investment Control*, 2019, pp. 95-98.
[154] European Commission, *Reflection Paper on Harnessing Globalisation*, COM(2017) 240, 10 May 2017.
[155] CJEU, Opinion of the Court of 16 May 2017, Free Trade Agreement with Singapore, Opinion 2/15, para. 81 ss. ECLI:EU:C: 2017:376.
[156] See also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade for all. Towards a more responsible trade and investment policy*, Trade Policy Strategy, 14 October 2015, COM(2015) 497 final.
[157] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Welcoming Foreign Direct Investment while Protecting Essential Interests*, 13 September 2017, COM(2017)494 final.

First and foremost, what gives rise to fears with regard to certain FDI is the risk that in some cases foreign investors may seek to acquire control of - or influence in - European undertakings whose activities have repercussions on critical technologies, infrastructure, inputs or sensitive information. Such acquisitions may allow the States in question to use these assets to the detriment not only of the EU's technological edge but also its security and public order[158]. Notably, the EU Commission then recognized[159] that in this sense Computers & Electronics is the most targeted sector by third countries acquirers in terms of total value of the stock of M&As, whereas it observed that inward non-EU FDI in traditional manufacturing sectors slowed down recently again with respect to both components of FDI (M&A and Greenfield investment).

An important component that constitutes an additional risk factor[160] is the hypothesis where the investor in question is a state-owned or a state-controlled (be it directly or indirectly) enterprise. This becomes significantly even more sensitive when the economic model of the country of origin is not based on free market and the country controls or owns many of the companies based on the model of state capitalism (this is, as developed below, a case that especially concerns Chinese investors). The phenomenon of takeover of European companies by third countries' state-owned or -controlled enterprises has been dramatically increasing over the past years: as the Commission disclosed in 2019[161], consistent share acquisitions in European companies by such foreign investors in 2007 was in the number of 3, while it grew up to 18 in 2017. It is not by chance that the country of origin of these investments were China, Russia and the United Arab Emirates. The concerns to which state-owned and state-controlled enterprises give rise can be summarized in two axes.

---

[158] European Commission, *Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments in the European Union*, 13 September 2017, SWD(2017)297.
[159] European Commission, *Ibid.*
[160] European Commission, *Ibid.*
[161] European Commission, *Staff Working Document on Foreign Direct Investment in the EU Following up on the Commission Communication "Welcoming Foreign Direct Investment while protecting Essential Interests*, 2019, SWD (2019) 108 final.

On the one hand, from a competition law and policy perspective, they have a greater capacity than privately-held or privately-controlled companies to unbalance the level playing field[162]. Indeed, the fact that a third country finances with public funds a company carrying out business in the EU internal market easily determines distortions to the free market because such foreign company has a greater and visibly easier access to capital for it comes directly from state coffers. In turn, since the establishment of the internal market, EU competition law has evolved a strict policy and regulatory context with regard to State aids, which are, except for some limited exceptions, reasonably prohibited in the EU under the principle established by Article 107 TFEU. Therefore, by allowing that these companies operate just as any other privately held company, the outcome would be that the EU authorized for third country investors what it generally prohibits for EU companies.

This privileged position is of course persistent both before and after the completion of the investment: just as easily as the foreign subsidized company can win a takeover bid and offer a higher selling price in the context of an auction sale within an M&A procedure, it is then able to access to capital way more easily when carrying out its business than a European privately-held company. Hence, stakeholders were not long to denounce this questionable and problematic situation[163]. On the same note, the European Parliament in 2017 solicited the Commission to "pay more attention to the role of foreign-based state-owned enterprises that are supported and subsidized by their government in ways that EU single market rules prohibit for EU entities"[164].

The EU indeed reacted to paradoxical situation, by introducing the Regulation on foreign subsidies distorting the internal market[165]. In essence, this Regulation introduces both an *ex-ante* notification-based procedure to investigate concentrations and bids in public procurements fully or partially financed through foreign subsidies

---

[162] See *e.g.* KOWALSKI P., PEREPECHAY K., *International Trade and Investment by State Enterprises*, OECD Trade Policy Papers No. 184, 2015.

[163] IndustriAll, Policy Brief, *Screening Foreign Direct Investment. Another step towards a fairer global level playing field?,* 2018-1, 2018.

[164] European Parliament, *Resolution on building an ambitious EU industrial strategy as a strategic priority for growth, employment and innovation in Europe*, 2017/2732(RSP, Nr. 19.

[165] Regulation (EU) 2022/2560 of the European Parliament and the Council of 14 December 2022 on foreign subsidies distorting the internal market, Official Journal of the European Union, L 330/1; hereinafter "Foreign Subsidies Regulation".

and a tool enabling the Commission to investigate certain market situations, by initiating a review *ex officio* or requesting *ad-hoc* notifications[166].

On the other hand, the problems generated on the national security side are at least as harmful and sensitive as the issues regarding competition and free market. What defines the nature of these threats is a radical distortion of the basic notion of investment, as described in the first chapter. An investment has been generically defined as "the allocation of resources in the expectation of future benefits or returns". In this case, while the return is not what is expected, the benefits do exist, but they lack any economic connotation. The investment is accomplished for solely strategic purposes, and only apparently commercial. In fact, the aim of these investments is the acquisition of strategic assets and companies that concern vital aspects for security and public order, such as telecommunication, food security or health companies. Since these are not conducted on the basis of a profit analysis, they do not necessarily target the most profitable companies, but the most strategic. Therefore, foreign investors could be able to abuse their position through the acquired assets in order to damage the EU's interests[167].

This major threat to security and public order was translated into Article 4 (2) *litt.* a) of the FDI Regulation, as complemented by Recital 13. This provision describes the factors that Member States or the Commission may take into consideration when assessing the risks generated by a foreign investment falling within the scope of national screening mechanism. Thus, the provision reads: "in determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account, in particular whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces of a third country, including through ownership structure or significant funding".

---

[166] See, *e.g.*, RODRIGUES N.C., *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, in RODRIGUES N.C. (ed.), *Extraterritoriality of EU Economic Law*, pp. 197-227.
[167] WITKOWSKA J., *Ibid.*

Some authors[168] commenting this provision arguably consider that, according to its wording, this is to be seen as a stand-alone criterion: the involvement of a foreign government then automatically becomes a security or public order issue irrespective of the question in which economic sector the investment is going to be made, thus transforming the question of an economic level playing into a security and public order concern. If it is true that the notion of security and public order concern is undoubtedly blurry and exposed to very diverse interpretations, this conclusion for Article 4 is quite arguable. In fact, Article 4 on factors concerns the assessment of the risk, and not the identification of the investment, whose usually provide indications on the economic sector, and which constitutes a previous and yet unavoidable step in the screening procedure. In turn, this would be evident and straightforward if foreign ownership or control was included in the provisions on the identification for the screening. In other terms, if a screening mechanism contained in the provisions on the identification of the investments to be screened a clause on state-owned or state-controlled enterprises, such conclusion would then be entirely reasonable. However, this is not the case here and in light of the wording of the provision foreign ownership or control does not constitute a stand-alone criterion to determine the harmfulness of an investment, but rather a factor that can contribute to determine that an investment – that has already been identified as potentially harmful – can be banned.

Furthermore, another preoccupying aspect deriving from FDI inflows is that they allow technology transfers in so far as foreign investors aim by the nature of the very definition of FDI at establishing lasting and direct interests in an enterprise resident in another economy. This generates a fear of technology drain[169] on other markets, based on the potential that this practice has to determine the loss of market leadership in high-tech industry and even create dependencies on other countries.

[168] SIMON S., *Investment Screening: The Return of Protectionism? A Political Account*, in HINDELANG S., MOBERG A. (eds.), *YSEC Yearbook of Socio-Economic Constitutions*, 2020, pp. 43–52.
[169] SIMON S., *Ibid.*

This is even more important considering that once the investment is completed, it is often protected by an investment agreement (be it in the form of an investment chapter in an FTA or of a BIT) between the home country of the investor and the host country. It became thus important for the EU, while setting a new policy agenda in international investment thanks to its newly acquired exclusive competence over the conclusion of investment agreements, to protect the national security of its Member States from harmful investments protected under these agreements.

Nonetheless, on the one hand, the question whether a foreign investor has access to another market is usually not a subject of an international treaty but remains a national decision[170], even though if a party to an investment agreement has assumed obligations with respect to the admission of the investment, the screening mechanism needs to comply with it[171].

On the other hand, from the standpoint of general international law there is no obligation to admit FDI, while under international investment law States retain the power to protect their fundamental interests, even when this means infringing investors' rights because submitting certain investments to a screening upon the entry into a State could be qualified as an exercise of State's regulatory powers[172]. Thus, under international law, no limit surged against the enactment on the part of the EU of a screening act and in so doing the EU has not infringed any obligations it had subscribed while concluding investment treaties.

Similar considerations can be drawn with regard to other industries that then constitute the sectors upon which investment screening mechanisms increasingly focus on, such as defense, public health, food security, energy, critical raw materials *etc*. Accordingly, global scenarios like the COVID-19 pandemic[173] or Russia's unprovoked

---

[170] SIMON S., *Ibid.*
[171] LAMPO G., *Italy's Exercise of Foreign Investment Screening Power against Chinese Takeover. An Assessment under International Law*, in *The Italian Review of International and Comparative Law*, 2021 (1), pp. 433-442.
[172] LAMPO G., *Ibid.*
[173] European Commission, *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)*, 26 March 2020, 2020/C 99 I/01, C/2020/1981.

and unjustified military aggression against Ukraine contributed to shine a brighter light on the importance of autonomy and self-sufficiency, and the harms of severe dependencies, notably when it comes to third countries founded on different values.

Furthermore, another important factor that contributed to raising the European awareness that a major distortion in the global economic equilibrium was taking place lies within the fact that, as many stakeholders observed[174], a severe and persistent lack of reciprocity is found[175]. What these voices denounce is the fact that the openness and the favor with which the EU welcomes foreign investors has no correspondence in other jurisdictions. What this in practice means is that some of the dangerous takeovers from third countries' investors that we assisted to in the past few years could not *mutatis mutandis* have been carried out by EU investors in that same country. This does not *per se* entail security risks to the EU, but it constitutes one clear indicator of what lies behind these investments: the objective of taking over strategic companies and assets, instead of mere economic returns from which they would benefit from if they allowed foreign investors to invest more in their economies. These concerns were also raised in the European Parliament, where a Proposal claimed that national instruments already in place are not sufficient to guarantee reciprocity and fair competitiveness, hence the need to act on a European scale to tackle this important problem[176].

The calls for reciprocity are all linked by the complaint that these countries lack compliance with market rules, that their governments maintain a solid control over the economy, and that fair competitiveness is absent. A related topic that is also mentioned is that of public procurement: while EU market is open to non-EU competitors, it is

[174] See *e.g.* European Chamber of Commerce in China, *European Business in China. Position Paper 2016/2017*, 2016; Austrian Federal Economic Chamber, *Position of the Austrian Federal Economic Chamber*, 2020.
[175] See *e.g.* SIMON S., *Ibid.*
[176] European Parliament, *Proposal for a Union Act submitted under Rule 45 (2) of the Rules of Procedure on the Screening of Foreign Investment in Strategic Sectors,* B8-0302/2017, Recital F, 26 April 2017.

coherently considered unacceptable that EU companies are more than often facing difficulties in achieving a fair access and equitable treatment in several countries[177].

With regard to the topic of reciprocity, academia has shown to be overall content with the action that was eventually engaged by the EU, and that resulted in the adoption of the FDI Regulation[178]. In fact, this has been read as a paradox, that would firstly tighten inward investment control, while eventually allow further external investment liberalization. In other terms, by equipping itself with a tool to control the inflow of FDI, the EU has gained a bargaining chip in its trade and investment negotiations with economically powerful counterparts in so far as, on the basis of reciprocity, the EU is finally able to obtain better access of EU investors to foreign markets. Therefore, the paradox would be that, by rebalancing reciprocity, a measure that in principle brings restrictions to the inflow of FDI and shields the internal market from undesired influence ends up serving the EU's constitutional goal to attain further investment liberalization.

To conclude on the factors that contributed to raise the awareness of the public debate over the risks brought by FDI, it should always be kept in mind that one of the major challenges to which European policymakers in this field were confronted to was the rise of China as a new economic superpower, whose aggressive foreign commercial policy started to give rise to concerns both in the United States and Europe. In addition to all the geopolitical issues stemming from this leading role of China in international economic relations, that could not be extensively analyzed in the context of this thesis, it is important to borne in mind that this phenomenon has been a true trigger for a change in the attitude of policymakers. As a matter of facts, all the mentioned risk

[177] Joint letter by Italian Minister for Economic Development Carlo Calenda, French Minister of Economy and Finance Michel Sapin, and German Minister for Economy and Energy Brigitte Zypries to Trade Commissioner Cecilia Malmström, https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=4, 2017.

[178] SCHILL S., *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, in *Legal Issues of Economic Integration*, 46 (2), 2019; BIAN C., *National Security Review of Foreign Investment. A Comparative Legal Analysis of China, the United States and the European Union*, Routledge, 2020, p. 152-154.

factors apply to China in an even more accentuated way. This is why China's strategies were the trigger element towards an EU action.

Notably, some of the acquisitions led by Chinese companies worked as a warning signal. To name but a few, the acquisition of Kuka – a German champion in robotics manufacturing – by appliance making company Midea in 2016; the acquisition in the same year of the Greek Piraeus Port by Cosco, China's premier shipping firm; and the investment in Czech media Empresa Media by CEFC, a Chinese energy company. They alarmed the public debate and prompted it to dwell on the many implications of the new expansion Chinese companies in European and several other economies.

In brief, what is strikingly dangerous with regard to Chinese investors is the strategic nature of these investments that tackled extremely sensitive sectors, such as that of semiconductors, public health, telecommunications. What was found to be even more worrying is that the Chinese economic, social, industrial model is diametrically opposed to that of the European internal market, that under Article 3 TEU establishes a social market economy, aiming at sustainable development, social progress and high level of protection and improvement of the quality of the environment, while promoting social justice and gender equality. This is not (just) a matter of values, but it has deep implications on national security concerns as well.

Moreover, Chinese companies tend to maintain deep and profound ties with the government and the Communist parties, which cannot be underestimated especially with regard to strategic companies and assets. Whereas many companies are state-owned or state-controlled enterprises, even when they are privately-held the ties are still very strong. A clear example in this direction is the case of Huawei, that declares itself to be "an independent, privately-held company" that is "not owned or controlled by, nor affiliated with the government, or any other 3rd party corporation"[179]. Indeed, Huawei actually disposes of an ownership structure called "Employee Stock Ownership Program", that in essence only allows its employees to own the shares of the company.

[179] Huawei Facts, Q&A, *Who owns Huawei?*, https://www.huawei.com/my/facts/question-answer/who-owns-huawei.

However, the facts show that behind this façade its links with the government are quite consistent: Huawei received as much as $75 billion in state support since its foundation in 1987[180]. With regard to the ownership structure in general and even the ties with the government, it is undeniable that most of the states around the world, and notably Europe, own some key enterprises (*e.g.* the French state owns 84.5% of the shares in Électricité de France). However, for China this is a real economic model and state capitalism inspires its economic system.

The ties with the government in China are however not limited to ownership or financing: significant legal obligations hang over its companies as well. To name but one blatant example, a National Law on Intelligence was enacted in 2017[181], whose Article 7 that obliges companies registered or operating in China to "support, assist, and cooperate with national intelligence efforts (…) and shall keep the secrets of the national intelligence work known to the public". In other words, Chinese companies are compelled to hand over information to Chinese intelligence agencies. Under Article 10 of the Law, this obligation extends extraterritorially. Thus, as Western studies confirm, this law also applies to Chinese groups when making business outside the country and even operating through subsidiaries[182]. Consequently, a group like Huawei, that is not owned by the Chinese State (even though it is heavily subsidized by it), is still under a serious legal obligation towards the Chinese government.

Thus, one could even say that screening mechanisms were first designed to specifically tackle China's expansion and that the fear for a Chinese takeover of strategic European companies hovers above the wording of each legal provision

---

[180] Council on Foreign Relations Berman N., Maizland L., Chatzky A., *Is China's Huawei a Threat to U.S. National Security?,* Backgrounder, 8 February 2023, available at: https://www.cfr.org/backgrounder/chinas-huawei-threat-us-national-security.

[181] National Intelligence Law of the People's Republic of China (国家情报法), 12 National People's Congress, 27 June 2017.

[182] Mannheimer Swartling, Dackö C., Jonsson L., *Applicability of Chinese National Intelligence Law to Chinese and non-Chinese Entities*, January 2019, available at: https://www.mannheimerswartling.se/app/uploads/2021/04/msa_nyhetsbrev_national-intelligence-law_jan-19.pdf.

establishing screening mechanisms all over Europe and beyond. China was in fact declared a "systemic rival"[183] of the EU by the European Commission.

While this holds true, it is still remarkable that while screening mechanisms have been drafted to counteract Chinese aggressive international investment policy, they eventually were employed to serve different purposes and concern companies from different backgrounds. To name an example, in 2020 the French Ministry for Economy and Finance, that is the national competent screening authority, blocked the acquisition of Photonis, a French group active in the production of optical measuring and recording instruments employed *inter alia* for military purposes, by the U.S. conglomerate Teledyne Technologies. This reasonable decision of blocking the acquisition by a foreign investor of a company producing military equipment is however noteworthy because the foreign investor was not Chinese or from a non-allied country: it was an investor headquartered in the U.S., an historical partner of France and a member of the NATO.

Finally, when evaluating EU's counteraction with regard to Chinese investments and more generally the new geopolitical context, the adoption of FDI Regulation should be considered in the bigger picture. This bigger picture includes the Foreign Subsidies Regulation, described above. Furthermore, the Commission is planning to further reinforce its toolkit by adopting an anti-coercion instrument[184], whose purpose is to deter economic coercive action from third countries both through dialogue and engagement and through the adoption of response measures that may consist *inter alia* of restrictions of FDI.

Thus, in other terms, the Regulation establishing a framework for the screening of FDI into the EU is merely one of the instruments that the EU has equipped itself with to deal with the new geopolitical context that is reshaping global economic relations.

---

[183] European Commission, *European Commission and HR/VP contribution to the European Council. EU-China – A strategic outlook*, 12 March 2019, JOIN(2019) 5 final.
[184] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, 8 December 2021,COM(2021) 775.

In the face of this complex and turbulent scenario, some Member States eventually took action, by soliciting the adoption of a new investment screening mechanism. In fact, February 2017[185] Italian Minister for Economic Development Carlo Calenda, French Minister of Economy and Finance Michel Sapin, and German Minister for Economy and Energy Brigitte Zypries jointly wrote a letter inviting Trade Commissioner Cecilia Malmström to open a discussion on this topic. While restating the importance of the freedom of investment, the ministers underlined the abovementioned topic of the risk of a sell-out of European expertise, that could not be tackled with the existing instruments in place. The ministers then also focused on the concerns regarding public procurement and reciprocity, that I mentioned above.

Thus, notwithstanding the reluctance and the reticence of the Member States with regard to the conferral of competence over national security to the EU, it is however remarkable that the consistent boost towards the adoption of an EU act regulating the screening of FDI actually came from the Member States. It was not however a coincidence that the letter was signed by the competent ministers of three among the main recipient of FDI inflows in Europe[186].

This letter is generally recognized as the first practical – and notably political – step towards a coordinated action with regard to inward investment control, which was followed by a series of appeals from EU institutions. For instance, a few months later[187] the European Parliament called on the Commission, together with the Member States, to screen third country FDI in the EU in strategic industries, infrastructure and key future technologies, or other assets that are important in the interest of security and

[185] Joint letter by Italian Minister for Economic Development Carlo Calenda, French Minister of Economy and Finance Michel Sapin, and German Minister for Economy and Energy Brigitte Zypries to Trade Commissioner Cecilia Malmström, https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=4, 2017.

[186] According to Ernst & Young's Europe Attractiveness Survey 2022, among EU economies France was the first recipient of FDI projects in 2020 and 2021, followed by Germany, Spain, Belgium and Italy.

[187] European Parliament, *Resolution of 5 July 2017 on building an ambitious EU industrial strategy as a strategic priority for growth, employment and innovation in Europe* (2017/2732(RSP)), 5 July 2017.

protection of access to them, while bearing in mind that Europe depends to a large extent on FDI. It is to be noted on this aspect that it is established that the European Parliament is only entitled to solicitate an action on the part of the Commission: as analyzed in the first chapter, the EU act has its basis on Article 207 (2) TFEU or, as described, according to some, also on Article 64 (2) TFEU. In any case, an ordinary legislative procedure is prescribed by these provisions, hence the power of legislative initiative belongs, under Article 294 (2) TFEU, solely on the Commission. In fact, notwithstanding the political commitments undertook by President von der Leyen when taking office to responding with a legislative act to resolutions adopted by the Parliament acting by a majority of its members requesting the submission of a legislative proposal[188], the right of initiative in the ordinary legislative procedure belongs to the Commission.

This is why, on the following address on the State of the Union delivered by then President Jean-Claude Juncker on 13 September 2017[189] came the political declaration announcing that the EU was ready to take action in order to tackle the threats brought about by inward foreign investments in strategic sectors of the European industry. President Juncker unequivocally declared that "we are not naïve free traders" and that "Europe must always defend its strategic interests". Hence, "if a foreign, state-owned, company wants to purchase a European harbor, part of our energy infrastructure or a defense technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed".

On the same day, the Commission accordingly released its Proposal for a Regulation establishing a framework for screening of FDI into the EU[190].

[188] European Commission, *Political Guidelines for the next European Commission 2019-2024 – Opening Statement in the European Parliament Plenary Session by Ursula Von der Leyen*, 16 July 2019.
[189] European Commission, President Jean-Claude Juncker's State of the Union Address of 2017, 13 September 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165.
[190] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments in the European Union*, 13 September 2017, COM(2017)87 final.

Notwithstanding the skepticism of some Southern Member States fearing that this would result in a reduction of FDI inflow, such as Portugal, that is one of the main recipients *per capita* of FDI, and Greece[191], as well as that of Nordic countries, convinced that the Regulation would have harmed free trade[192], the Commission's proposal resulted in the adoption of the FDI Regulation.

The adoption of the Regulation, that will be further analyzed in the following paragraph, shows that EU learnt once and hopefully for all the lesson that "liberalization and regulation go hand in hand"[193]. As competition law and policy had already shown free market needs supervision, regulation and transparency in order to avoid undesired degenerations and failures. The same holds true for FDI: they are essential for the economic development of any economy, but those economies that impose low regulatory restrictiveness need to accept the paradox of hampering the cornerstone of economic development, if they want to protect the undesired outcomes of an investment policy that favors the entry of foreign investors.

At this stage, in light of the major security risks studied in this paragraph, it appears necessary to assess how such regulation was developed and whether it meets the high expectations hovering over this sensitive subject.

[191] SIMON S., *Ibid.*
[192] DI BENEDETTO F., *A European Committee on Foreign Investment?*, in Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues, No. 14, 2017.
[193] CREMONA M., *Regulating FDI in the EU Legal Framework*, in BOURGEOIS J., *EU Framework for Foreign Direct Investment Control*, 2019, pp. 31-55.

II. Regulation 2019/452: an analysis of the EU Framework for the cooperation in the safeguard of security and public order in the Union.

Over the course of the last fifteen years Member States have increasingly equipped themselves with investment screening mechanisms in the own legal systems. Nonetheless, before 2019 there was no comprehensive framework for the screening of FDI under EU law. Indeed, in addition to all the security risks that were described in the previous paragraph, that already prompted several Member States to take action, what unveiled the need for EU action in the form of this cooperation mechanism was the simple observation that if a Member State is recipient of an high flow of inbound investments, without having any screening mechanism in place, some of those investments potentially might have security implications for other Member States: as part of an integrated market, no Member State is isolated[194].

As the Head of Investment and Intellectual Property at DG Trade pointed out[195], beforehand we were facing an anomaly because "we do everything as a Union because we have an integrated trade and investment policy", but "when we are looking at security risks each one is doing it on its own", while several Member States do not even look at security risks at all.

Thus, a call for a European coordinated approach grew louder and louder and ended up in the adoption of the FDI Regulation, that entered into force on 10 April 2019 and became fully operational on 11 October 2020.

As described in the first sub-paragraph, the FDI Regulation thus tries to tackle the first of the issues raised by EU bureaucracy above – the absence of any coordination whatsoever in the field of national security in the context of FDI – since it would be competence-wise complicated to intervene on the second of these topics, *i.e.* the absence of a screening mechanism in the legal system of several Member States. It is

[194] PETTINATO C., *The new EU regulation on foreign direct investment screening: rationale and main elements*, in NAPOLITANO G. (ed.), *Foreign Direct Investment screening - Il controllo sugli investimenti esteri diretti,* 2020, pp. 57-62.
[195] *Ibid.*

thus necessary to start the study of the Regulation by analyzing closely the rules that it sets out and the mechanism it establishes (1).

However, behind an apparently clear and intelligible regime, hover many issues that determine several shortcomings for the FDI Regulation and its mechanism, that it will be relevant to unveil over the course of this paragraph. Indeed, when a multi-level mechanism is designed, it is unavoidable that some obstacles may stand in the way of a smooth and correct functioning of the mechanism itself, despite the best efforts and goodwill of the national and supranational institutions concerned acting in "sincere cooperation"[196].

Therefore, I will present the issues that I selected as the more pressing ones, starting with the relevant difficulties that the flow of information within the cooperation mechanism is facing (2). Furthermore, I will assess the question of whether the FDI Regulation has the potential to deter third country investors from investing in the EU, solely focusing on what the Regulation actually provides, namely by studying the alleged regulatory burden and the lengthening of the overall screening procedure, thus leaving aside redundant theoretical considerations (3). Then, it will be useful to describe the significant discrepancies deriving from the fact that the notion of security and public order in international investment as relevant for the cooperation mechanism is not set at an EU level but relies on the definitions provided for by each national legal system (4).
Finally, it will be useful to dedicate a paragraph to draw some conclusions and try to define a balance of both the regime of the Regulation itself and of its implementation two years and a half after it became fully operational (5).

Moreover, as it can be inferred from the above, I would like to precise from the very beginning that the approach I decided to follow slightly differs from the one that is quite popular in academic discussions on this topic, and consists in abstractly

[196] Article 4 (3) TFEU.

discussing the effects of the FDI Regulation (*e.g.* on investors, on the flow of inward investment *etc.*), for it does not consider a specific trait of this policy field.

In fact, even though studying, say, the potential effects is undoubtedly interesting and relevant (which is why I will try to touch upon the consequences of the introduction of this mechanism), there is one principle which should guide any public policy analysis and which would hardly be applicable to security policies within foreign investment. This principle can be summarized in a quote that is tentatively attributed to the British physicist Lord Kelvin: "you cannot improve what you cannot measure". Indeed, the only way to effectively analyze the effects of a policy measure, including its negative effects, in order to highlight its shortcomings and suggest further improvements is to apply an evidence-based method thus relying on accessible data. Notwithstanding the efforts to ensure transparency through periodical reporting that still includes important aggregated data, with regard to the policy field at issue – as it will be explained below – strict confidentiality rules apply because of the sensitivity of this topic and, unlike other policy fields, a considerable amount of data is thus not publicly available. For instance, the decisions of national screening authorities, as well the opinion of Member States and the Commission, are not publicly available, so it would be troublesome to assess in abstract if the Commission holds an effective moral suasion power through its non-binding opinions. It is a structural complication that should always be kept in mind.

Therefore, I shall firstly present the regime of the FDI Regulation and then underline which single *legal* aspect represents a flaw of the system and should be included in a future reform. Then, despite the structural hardship of this operation, I shall try to draw some general, though evidence-based, conclusions on the functioning of the mechanism.

1. Regulating Foreign Direct Investment control in the European Union: the Establishment of a Mandatory Information-Sharing Mechanism, Complemented by Procedural Rules and Substantial Guidance.

The FDI Regulation establishes a set of rules aimed at ensuring the coordination and the collaboration of the Commission and the Member States in order to ensure public order and security both of a national dimension and with regard to projects or programmes of Union interest.

In so doing, it can be anticipated that the mechanism has a significantly more important impact on procedural matters, rather than substantial ones. In fact, the core of the mechanism consists in the creation of an EU-wide cooperation framework to which participate the Member States and the Commission, and that seeks to assist and support national screening authorities in the identification of security risks deriving from inward foreign investment.

Within this framework, while Member States remain in charge of a leading role in the individual decision-making process (1.2.), the FDI Regulation establishes a mandatory information-sharing system based on a mechanism of cooperation and collaboration (1.3.) among European and national authorities (1.4.). Nonetheless, the FDI Regulation submits national investment to a few overarching principles (1.2.): among these, a major role is played by transparency, for whose enforcement reporting obligations are established (1.5). However, preliminarily, to effectively analyze the regime established by the FDI Regulation, it is useful to introduce its scope of application (1.1.)

1.1. A comprehensive and coherent scope of application.

With regard to the scope of application of the Regulation in general and its two distinct procedures, both the personal and material scope as provided for in Article 2[197] (respectively the notion of "foreign investor" and that of "FDI") were studied separately and more in-depth in the first chapter of the Regulation, hence the practical irrelevance to duplicate their analysis. As described above, in fact, the notions that the legislator enshrined in Article 2 are consistent with the developments of EU law, including the case law of the Court of Justice of the EU.

[197] Article 2 n.1 and n.2 of the FDI Regulation.

What is however worth noting is that the Regulation enlarges its material scope of application by always referring to foreign investment both planned and completed: if, say, it only mentioned the investments already entered into, this would imply that investments undergoing screening under a national mechanism that does not impose a standstill condition, which corresponds to what antitrust law would call a prohibition of gun jumping, these investments would be excluded by the scope of the Regulation, because when they are undergoing screening the investment is not yet completed. This is even more important considering the fact that nothing in the regulation limits the right of each Member State to decide whether or not to screen a particular investment[198].

1.2. The "sole responsibility" of the Member States over the performance of screening procedures, as orientated by a set of overarching principles.

In essence, although significant differences exist among jurisdictions in terms of legal design affecting both substantial and procedural aspects, an investment screening mechanism can be defined as an administrative procedure allowing States to assess, on the basis of statutory provisions, whether a foreign investment is harmful to their national security. For the purposes of the FDI Regulation, a screening is "a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments", while a screening mechanism is defined as "an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order"[199].

As an outcome of this assessment, screening authorities generally issue a decision either allowing the execution of the investment or blocking its completion. In most jurisdictions providing for an investment screening mechanism, the screening authority also has the possibility of issuing a decision laying down mitigation measures, which consist in the authorization of a transaction provided that the foreign investor

[198] Article 1 of the FDI Regulation.
[199] Article 2 n. 3 and n. 4.

respects certain conditions, *e.g.* the continuation of the line of business in the host country[200].

With this regard, it is important to precise from the very beginning of its analysis that the FDI Regulation does not establish an investment screening mechanism as defined above, nor anything similar to it: Member States still maintain their own investment screening mechanisms, designate the screening authorities that perform the procedures under national law and are responsible for the legal design of their own mechanism. Hence, in no way does the mechanism establish a one-stop-shop system comparable to that regulating merger control[201].

In fact, the mechanisms established by the FDI Regulation is without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4 (2) TFEU and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU[202].

Accordingly, the Regulation provides that none of its provision shall limit the right of each Member State to decide whether or not to screen a particular investment[203].

Coherently, the Regulation provides that Member States are explicitly entitled to maintain, amend or adopt mechanisms to screen investments in their territory on the grounds of security or public order[204].

In other words, Member States are under no obligation to adopt an investment screening mechanism, nor to fully harmonize existing screening mechanisms in light of the provisions laid down in the Regulation.

Nonetheless, the FDI Regulation introduces relevant obligations with regard to existing national investment screening, that primarily consist in procedural principles.

[200] See *e.g.* Article R. 153-9 of the French Financial and Monetary Code
[201] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.
[202] Article 1 of the FDI Regulation.
[203] Article 1 (3) of the FDI Regulation.
[204] Article 3 (1) of the FDI Regulation.

First and foremost, national investment screening mechanisms need to comply with the principle of transparency, namely concerning the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules[205], in order to allow investors, target companies, the Commission and other Member States to understand how such investments are likely to be screened[206]. Moreover, they must set out timeframes, which need to be transparent and be of a length that is sufficient to allow Member States to take into account the comments of other Member States or opinions of the Commission.

This aspect is not to be underestimated. In fact, the confidentiality that is intrinsic to this subject has a tendency to translate into obscure procedures and therefore into a mechanism that is hardly intelligible for foreign investors. The attempt of the EU legislator of shedding a light, by laying clear and transparent rules, both procedural and substantial, is thus remarkable.

Furthermore, with a view of banning all possible protectionist distortion of investment screenings, the FDI Regulation provides for a principle of non-discrimination among third countries[207]. Member States thus could not design an investment screening mechanism for the sake of excluding investors from a specific third country from their economy.

The FDI Regulation further establishes that confidential information, including commercially-sensitive information, made available to the Member State undertaking the screening is to be protected[208]. In fact, if confidentiality was not protected, Member States would find it difficult to share sensitive information, which is essential for ensuring meaningful cooperation. Therefore, neither the Commission, nor the Member State can publicly disclose any information on individual FDI transactions. Notably, this includes the obligation not to downgrade or declassify classified information

[205] Article 3 (2) of the FDI Regulation.
[206] Recital 15 of the FDI Regulation.
[207] Article 3 (1) of the FDI Regulation.
[208] Article 3 (4) of the FDI Regulation.

without the prior written consent of the originator[209], while any non-classified sensitive information or information which is provided on a confidential basis should be handled as such by the authorities.

Moreover, the FDI Regulation establishes that Member States must recognize foreign investors a right of recourse against screening decisions that are not in their favor by challenging them[210].

Another important feature that the FDI Regulation imposes on national screening mechanisms is the provision of an anticircumvention clause[211]. An analysis of this question was anticipated in the first chapter.

Therefore, the Regulation performs a two-ways operation with regard to existing investment screening mechanisms. In fact, on the one hand, it restates that they will continue to be operated at the national level, while on the other it imposes on them a few overarching principles that will enable them to respect, for instance, the principle of legal certainty[212].

1.3. The EU framework for the coordination through information sharing and pooling on foreign investment undergoing and not undergoing screening under national law.

[209] Recital 30 of the FDI Regulation; see also Article 4(1), *litt*. a), of the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union and Article 4(2) of Decision (EU, Euratom) 2015/444.
[210] Article 3 (5) of the FDI Regulation.
[211] Article 3 (6) of the FDI Regulation.
[212] Recital 7 of the FDI Regulation.

The mandatory information-sharing system is based on two distinct and separate mechanisms, that are triggered depending on whether the investments are undergoing screening or not. Notably, by FDI undergoing screening it is meant "a FDI undergoing a formal assessment or investigation pursuant to a screening mechanism"[213].

In general terms, the establishment of a system of sharing and pooling information, including also those Member States that still lack an investment screening mechanism, is built on the premise that greater awareness of security risks in certain incoming FDI will prompt Member States to react: in the short term, by blocking incoming FDI (for the Member States that have a screening mechanism in place), while on the long term by bolstering or introducing domestic screening legislation[214].

Firstly, within the framework of Article 6 of the FDI Regulation, whenever an investment is undergoing screening in its territory (according to the national investment screening procedures), the Member State concerned is under the obligation to notify both the European Commission and the other Member States as soon as possible[215] and without undue delay[216].

The content of the notification is laid down under Article 9 of the FDI Regulation that precises information requirements. The information notified shall include a description of the ownership structure of the foreign investor and the target undertaking, including information on the ultimate investor and participation in the capital, an explanation of the product, services and business operations of the foreign investor and those of the target undertaking and a list of the Member States in which the foreign investor and the target undertaking conduct relevant business operations. Furthermore, it defines the approximate value of the investment, its funding and source (on the basis of the best information available to the Member States), and the date when the investment is planned to be completed or has been completed[217]. To provide such

[213] Article 2 n. 5 of the FDI Regulation.
[214] REISMAN D.A.A., *The EU and FDI: What to Expect From the New Screening Regulation*, Institut de Recherche Stratégique de l'École Militaire, Research Paper No. 104, 2020.
[215] Article 6 (1) of the FDI Regulation
[216] Article 9 (1) of the FDI Regulation.
[217] Article 9 (4) of the FDI Regulation.

information, the Member State concerned may also request it to the foreign investor or the target undertaking, which are under an obligation to provide it without undue delay[218].

If available, the Member State shall also endeavor to provide any information additional to this, to requesting Member States or the Commission without delay[219].

In addition to the information indicated under Article 9, the notification drafted by the Member State needs to include a list of Member States whose security or public order is deemed likely to be affected and also whether it considers that the FDI undergoing screening is likely to fall within the scope of the Merger Regulation[220].

To this end, the Member State concerned may ask the foreign investor or the target undertaking to provide the information requested under Article 9[221]. If the Member State concerned is unable to obtain such information despite its best efforts, the Member State must inform the Commission and the other Member States without undue delay about it, while duly justifying the reasons and explaining the best efforts it has undertaken to obtain the information requested[222].

In a daily activity of cooperation and collaboration like this one between national competent authorities and the European Commission, the efficiency of a mechanism like this one is also strengthened by apparently minor interventions, that nonetheless strengthen the daily functioning of the mechanism. For instance, DG-Trade released, as required by the FDI Regulation[223], a standard-form template that Member States are encouraged to employ when notifying FDI transactions to the European Commission or other Member States. More precisely, two standard templates have been provided: a Form A and a Form B. The former establishes a template for the notification by the Member States undertaking the screening to the Commission and the other Member

[218] Article 9 (4) of the FDI Regulation.
[219] Article 9 (3) of the FDI Regulation.
[220] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22; hereinafter "Merger Regulation".
[221] Article 6 (2) of the FDI Regulation.
[222] Article 9 (5) of the FDI Regulation.
[223] Recital 22 of the FDI Regulation.

States for the notifications under Article 6 of the FDI Regulation while the latter is a notification form template that is filled out by the investors notifying their planned or completed transaction to the national screening investment authorities. Of little relevance though this may appear, it is actually of paramount importance in consideration of the large number of transaction that every day are notified among the Member States and the European Commission, and it is crucial to allow a faster and easier evaluation by the other Member States and the Commission of the likeliness of an investment to affect the security or the public order in at least another Member State, thanks to the standardized information received.

The transmission of this notification triggers the beginning of the Phase 1 of the procedure.

If, after analyzing the information submitted, the Commission or the Member States wish to make some considerations, they may do so[224].

On the one hand, a Member State may send comments to the Member State undertaking the screening (and simultaneously to the Commission, which informs the other Member States) not only if it considers that the investment concerned is likely to affect its security or public order, but also if it holds information relevant for such screening[225]. In any case, such comments need to be duly justified[226]. What is more, if a Member State duly considers that the investment is likely to affect its security or public order, it is entitled to request the Commission to issue an opinion or other Member States to provide comments[227].

On the other hand, if the Commission considers that the investment in question is likely to affect security or public order in more than one Member States, but also if it has relevant information in relation to it, it may issue an opinion addressed to the Member State concerned, irrespective of whether Member States have provided comments and also following the comments of the Member States. The Commission

[224] Article 1 (1) of the FDI Regulation.
[225] Article 6 (2) of the FDI Regulation.
[226] Article 6 (5) of the FDI Regulation.
[227] Article 6 (4) of the FDI Regulation.

may issue such opinion where justified, after one third of the Member States consider that the investment is likely to affect their security or public order. In any case, the Commission shall notify the other Member States that an opinion was issued. Its opinion needs – in any case – to be duly justified[228].

If the Member State concerned does not provide the information required under Article 9, any comment issued by another Member State or any opinion issued by the Commission may be based on the information available to them[229].

The question may arise as to whether a failure to notify an investment or to provide the additional information required can constitute the ground for the initiation of an infringement proceedings under Article 258 TFEU. While – to my reading – the answer to this question might with all probability be positive and the Commission may actually initiate such a procedure, I believe that the issue would need to be analyzed on the point of usefulness and added-value of the enactment of the procedure.

As mentioned, the design of investment screening mechanisms is the result of the effort of national legislators seeking to find an even balance between the safeguard of security and that of the attractiveness of their economy as a destination of foreign investment. To do so, they often introduce quite rigid timelines.

Thus, not to mention the difficulty in even discovering that an investment is undergoing screening for the case of the failure to notify an investment, in consideration of the timeframes necessary for the completion of the infringement procedure, in my opinion this would not be an effective solution with regard to this specific transaction because, by the time the infringement procedure is concluded, it may not be possible to intervene on the investment because of the expiration of delays set forth in the national investment screening mechanism.

One may even say that this would be a way to correct a persistently non-compliant attitude of one or more Member States in view of future situation, though uselessly for the specific transaction. However, I believe that if the issue represented a

[228] Article 6 (5) of the FDI Regulation
[229] Article 9 (5) of the FDI Regulation.

systematic failure to comply with the provisions of the FDI Regulation, this could be the object of a discussion in the group of experts, rather than tackled through infringement procedures related to a specific transaction.

Phase 1 has a maximum duration of 15 calendar days after the receipt of the information notified. At this stage, however, it is not necessary that the Member States or the Commission issue respectively their comment or opinion, for they only need to inform the notifying Member State of their intention to provide them, but they may also include the abovementioned request for additional information as long as they duly justify the request and that such request is limited to information necessary to provide the comment or the opinion, proportionate to the purpose of the request and not unduly burdensome for the Member State undertaking the screening requests for information by the Member States and the related replies must be sent to the Commission simultaneously[230].

If neither the Commission nor the Member States notify the intention to issue an opinion or a comment, be it with or without the request for information, the procedure terminates on the fifteenth day following the receipt of the initial notification by the Member State undertaking the screening.

If, instead, the other Member States or the Commission decide to intervene, they must notify the opinion or the comment within a reasonable period of time and no later than 35 calendar days following the receipt of the initial notification by the Member State undertaking the screening or 20 days after the receipt of the additional information, if requested[231]. Nonetheless, the Commission has the additional possibility of issuing an opinion following the comments from other Member States within the

[230] Article 6 (6) of the Regulation.
[231] Article 6 (7) of the Regulation.

deadlines referred to above, and in any case no later than five calendar days after those deadlines have expired[232].

In addition to these timeframes, the FDI Regulation[233] established however an exception for the case where the Member State undertaking the screening considers that its security or public order require immediate action. In this case, the Member State shall notify the other Member States and the Commission of its intention to issue a screening decision before such timeframes but must duly justify the need for immediate action, while either Member States and the Commission shall endeavor, if they wish to do so, to provide comments or to issue an opinion expeditiously.

Once the Member State has received the opinion of Commission or the comment of another Member State, it shall give it due consideration through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of sincere cooperation laid down in Article 4 (3) TFEU[234].

What is more, the screening Member State must give due consideration to the comments of the other Member States, but the final decision is taken solely by it[235].

Secondly, as mentioned, the FDI Regulation covers also the case where an investment is not under undergoing a screening and devotes to it a different procedure under its Article 7. This is the case where either a Member State does not have a screening mechanism in place (*e.g.,* Croatia), or the investment does not fall within the scope of its screening mechanism, for example where such national screening mechanism is only sectorial and the investment in question does operate in that sector.

For example, Denmark operates sector-specific mechanisms related to the production of arms and defense material under the Act on the War Material[236] and to critical telecom infrastructure under the Act on supplier security in the critical telecom

[232] *Ibid.*
[233] Article 6 (8) of the Regulation.
[234] Recital 17 of the FDI Regulation.
[235] Article 6 (9) of the FDI Regulation.
[236] Act on War Material, Consolidated Act No. 1004 of 22 October 2012.

infrastructure[237], as well as a multi-sector mechanism relating to "particularly sensitive sectors and activities" (namely defense industry, IT security services or processing classified information, dual-use products, other critical technology, critical infrastructure) under the Investment Screening Act[238]. With regard to the analysis of the Regulation, this is a clear example where a Member State is equipped with an investment screening mechanism, but the investment may as well fall outside its scope: this is the case if the investment does not fall within the scope of any of these sectors but is still deemed to raise concerns related to security and public order. On the other hand, this situation would be rarer in a case like the German screening mechanism: Germany operates two screening mechanisms, one of which is an economy-wide screening mechanism for non-EEA acquirers[239]. While it is still possible that an investment does not within the scope of the investment mechanism, it is rarer that an investment giving rise to concerns with regard to national security falls outside an economy-wide screening mechanism.

In these situations, then, the trigger of the coordination procedure can be either a comment of another Member State or an opinion of the Commission.

In the case of a comment of a Member State, this can be issued if a Member State concerned considers that the investment in question is likely to affect its own security or public order, and also if it has relevant information in relation to it[240]. It shall also send the comment to the European Commission simultaneously[241]. As in the proceeding described above, Member States may also ask the Commission to issue an opinion or prompt other Member States to provide comments.

Regardless of whether such comments have been issued, the Commission, in turn, releases an opinion if it considers that the investment is likely to affect security or

[237] Act on Supplier Security in the Critical Telecom Infrastructure, Act. No. 1156 of 8 June 2021.
[238] Act on Screening certain foreign direct investment in Denmark, Act No. 842 of 10 May 2021.
[239] Foreign Trade and Payments Act (Außenwirtschaftsgesetz) and Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung).
[240] Article 7 (1) of the Regulation.
[241] *Ibid.*

public order in more than one Member State; it may also do so if it holds information that it deems relevant for the performance of the screening[242]. The opinion can also be issued following the comments of other Member States and, as it is the case for the procedure of the first cooperation mechanism, the Commission shall issue an opinion where justified and if at least one third of the Member States consider that an investment is likely to affect their security or public order[243].

Moreover, the Member States and the Commission may decide to request the Member State concerned by the investment the same information as described above and listed under Article 9, that under the first proceeding described need to be notified spontaneously by the Member State in question[244]. Such request – that when it is issued by a Member State needs to be simultaneously sent to the Commission - however needs to be duly justified, limited to the information necessary to provide the comments or the opinion, proportionate to the purpose of the request and not unduly burdensome for the Member State concerned by the investment[245].

In any case, the comments by the Member States and the opinion of the Commission must be addressed to the Member State concerned and sent to it within a reasonable period of time, and in any case no later than 35 calendar days from the receipt of the information requested[246]. If the Commission decides to issue an opinion, following the comments of a Member State, the Commission shall do so within 15 calendar days[247]. Due consideration shall be given by the Member State to the opinion of the Commission and the comments of the Member States, that are not binding on the national screening authority but are supposed to guide in its autonomous decision making: "due consideration" does not – in any case – mean that the national screening authority is asked to follow it (in other terms, it would not be imaginable to initiate an

[242] Article 7 (2) of the Regulation.
[243] *Ibid*.
[244] Article 7 (5) of the Regulation.
[245] *Ibid*.
[246] Article 7 (6) of the Regulation.
[247] *Ibid.*

infringement procedure based on the fact that the national screening authority did not follow the indications of the Commission or those of other Member States).

A group of practitioners noticed that Article 7 is silent as to how Member States that have chosen not to screen FDI should take into account comments from other Member States or an opinion from the Commission, but it is assumed that those Member States should also give "due consideration" to any comment and opinion[248].

In conclusion, some specific provisions apply to the procedures laid down for investments undergoing screening and those not undergoing screening when the investment in question is likely to affect projects or programmes of Union interests[249]. The notion of "projects or programmes of Union interest" include those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructures, critical technologies or critical inputs which are essential for security or public order[250]. The Annex to the FDI Regulation provides the list of the projects and programmes, while the Commission is entitled to amend it through the adoption of delegated acts[251], for an indeterminate period from the entry into force of the Regulation, and with the possibility of the European Parliament or the Council to revoke the delegation of power at any time[252].

Also in this case the Commission is entitled to give an opinion within the meaning of Article 288 TFEU[253] to address to the Member States on whose territory the investment is planned or has been completed[254].

The differences with the other procedures are however limited[255]. In the notification that a Member State files when it is screening an FDI, or in the comments

[248] BARRIO D., FOUNTOUKAKOS K., VOWDEN D., *European Union: Foreign Direct Investment Regulations*, Global Competition Review, 6 December 2022, available at: https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/second-edition/article/european-union.
[249] Article 8 of the FDI Regulation.
[250] Article 8 (3) of the FDI Regulation.
[251] Article 8 (4) of the FDI Regulation.
[252] Article 16 of the FDI Regulation.
[253] Recital 19 of the FDI Regulation.
[254] Article 8 (1) of the FDI Regulation.
[255] Article 2 of the FDI Regulation.

that Member States may issue, they must indicate whether they consider that the investment is likely to affect projects or programs of Union interests[256]. What is more, the screening national authority must take *utmost account* of the Commission's opinion, unlike the *due consideration* that is to be given to the opinion when the investment is not likely to affect projects or programs of Union interest[257].

Interestingly, according to the legislative proposal[258], the initially proposed Regulation provided that the Commission could carry out the screening, in case an investment was likely to affect projects or programs of Union interest. However, as described, the role of the Commission to this end was considerably reduced. Indeed, its role with regard to projects and programs of Union interest is the same as any other transaction, thus the power of issuance of an opinion intended to guide the national screening authority, which is ultimately responsible for the adoption of the decision. Conversely, it is the national screening authority that, when making the decision, must give "utmost" consideration, instead of "due consideration" (as for any other transaction).

1.4. The EU legislator's substantial guidance in the assessment of the likeliness of a foreign investment to affect security or public order.

Interestingly, the FDI Regulation lists a series of factors that may be taken into consideration in the assessment of an investment: Member States or the Commission may rely on them, considering the potential effects of the foreign investment on them. Such factors may concern either the industrial sector targeted by the investment, under the obvious consideration that some sectors may be more sensitive than others to security, or some characteristics of the foreign investor that may raise some concerns highlighting a risk to security and public order[259].

[256] Article 2*, litt*. a) of the FDI Regulation.
[257] Article 2, *litt*. c), of the FDI Regulation.
[258] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*, COM(2017) 487 final.
[259] Article 4 of the FDI Regulation.

On the one hand, with regard to the factors that concern the industrial sectors, five sectors are mentioned[260]. They may focus on critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure. In addition, the effects of the investment may be evaluated on critical technologies and dual use items[261], including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies. Furthermore, Member States and the Commission may also consider the effect of the investment on the supply of critical inputs (including energy or raw materials, as well as food security), access to sensitive information (including personal data) or on the ability to control such information and on the freedom and pluralism of the media.

On the other hand, the FDI Regulation suggests some guidance also based on the foreign investor[262]. Member States and the Commission should consider – as already mentioned in the preceding paragraph – whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces of a third country, including through ownership structure or significant funding. Furthermore, a factor that may be taken into consideration is whether the foreign investor has already been involved in activities affecting security or public order in a Member State, and, finally, whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

This list serves primarily, as mentioned, the objective of guiding the Member States in their assessment of the likeliness for an investment to affect security or public order:

[260] Article 4 (1) of the FDI Regulation.
[261] As defined under Article 2, n. 1, of the Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134, 29.5.2009, p. 1).
[262] Article 4 (2) of the FDI Regulation.

as such, the list is not exhaustive[263]. In addition to this, an explicit objective of this list is the improvement of the transparency of Member States' screening mechanisms for investors considering making or having completed FDI into the Union[264].

It is important to recall that these are factors that *may* be taken into account in the framework of an assessment of the risk of an investment: in no way do they delimit the scope of application of the cooperation mechanism, nor that of national investment screening, they just shine a light on the fact that if the investment targets a specific sector or is conducted by a foreign investor that is equipped with certain characteristics, that may be taken in consideration in the assessment of whether they have the potential to harm security and public order. However, including certain sectors as sensitive in this list does not mean that all the other industrial sectors fall outside the mechanism. For example, Finland enforces two screening mechanisms, one of which is solely focused on the acquisition of real estate by foreigners[265], which reflects the consideration made by the Finnish legal system that foreign acquisition real estate, which is not mentioned in the list in Article 4 of the FDI Regulation, may be harmful to security and public order. This aligns with a principle established in the Recitals, according to which it is necessary to maintain the necessary flexibility for Member States to screen foreign direct investments on grounds of security and public order taking into account their individual situations and national specificities[266].

Notwithstanding, some Member States have started including them within the scope of application of their national screening mechanisms. For instance, this was the case of Italy that in 2020 extended the scope of its national investment screening mechanism to include the sectors laid down under Article 4 (1) of the FDI Regulation, by reference to it[267]. Hence, in this way Article 4 contributed to set the scope of application of the Italian investment screening mechanism.

---

[263] Recital 12 of the FDI Regulation.
[264] *Ibid*.
[265] Act on transfers of real estate property requiring permission, N. 470/2019, available on Finlex at: https://www.finlex.fi/fi/laki/alkup/2019/20190470, recently amended by Act N. 1098/2022, available on Finlex at: https://www.finlex.fi/fi/laki/alkup/2022/20221098.
[266] Recital 8 of the FDI Regulation.
[267] Decree-Law 8 April 2020 N.23, as converted by Law 5 June 2020 N. 40.

In conclusion, other than being a guidance to the Member States and the Commission when making their assessments of an investment, these factors are extremely useful to conceptualize the notions of security and public order in the FDI Regulation, insofar as they contribute to show what the European legislator considers as potentially harmful for them. They show that – for instance – EU law deems that food security is a cornerstone for the protection of security and public order, as well as the fact that the presence of foreign investors directly or indirectly controlled by the government might be suspicious.

This is particularly interesting both from a theoretical and practical perspective because, as it will be further analyzed, the notion of security and public order is far from being clear within the framework established by the Regulation.

1.5. The institutional actors involved in the European framework for the cooperation in the screening of FDI.

In the preceding sub-paragraphs, I described the two mechanisms that the Regulation has established in order to tackle the rising risks to security and public order generated by inbound foreign investment. It is useful to precise which are the actors that take part in the mechanism and are responsible to daily contribute to its correct functioning.

On behalf of the European Commission, the office responsible is Unit Trade-F-4 of Directorate-General Trade, which is in charge of screening individual FDI files, receiving and analyzing the notifications sent by the Member States, and all of the tasks abovementioned.

With regard to the Member States, the Regulation lays down that each Member State needs to establish a national contact point on all the issues relating to the implementation of the Regulation, whose direct cooperation and exchange of

information (between them and the Commission) is supported by a secure and encrypted system[268].

While it is the responsibility of the Member State to designate the national authority that is supposed to serve as a national contact point, the FDI Regulation still requires that contact points established should be appropriately placed within the national administration and should have the qualified staff and the powers necessary to perform their functions under the coordination mechanism and to ensure a proper handling of confidential information[269].

Another interesting institutional actor is also required by the Regulation. Notably, under Article 12, the group of experts on the screening of FDI into the EU, set up by the Commission in 2017[270] with the role of providing advice to the Commission.

The expert group, which is composed of representatives of Member States and is chaired by the Commission, shall continue to discuss issues relating to the screening of FDI, to share best practices and lessons learned, and to exchange views on trends and issues of common concern relating to FDI. The expert group thus does not advice the Commission nor the Member States on specific and individual FDI notifications, but rather – under the solicitation of the Commission – on systemic issues relating to the implementation of the FDI Regulation. Importantly, its discussion must be kept confidential.

Therefore, the expert group does not partake directly in the daily enforcement of cooperation mechanism, but rather advices on systemic issues.

In addition, it is important to notice that foreign investors do not engage directly in the mechanism, insofar as they do not interact with the European Commission or other Member States in case they request additional information as mentioned above. Indeed, they rather intervene under the solicitation of the Member State involved, and through its intermediation, notably of the national contact point.

---

[268] Article 11 of the FDI Regulation.
[269] Recital 28 of the FDI Regulation.
[270] European Commission, *Commission Decision setting up the group of experts on the screening of foreign direct investment into the European Union*, 29 November 2017, C(2017)7866.

1.6. A further implementation of the principles of transparency and legal certainty: the provision of annual reporting obligation on the Commission and the Member States.

Another innovation brought about by the FDI Regulation concerns the reporting obligations imposed on Member States, with the purpose of further developing and implementing the principles of transparency and legal certainty referred to above.

In fact, Member States were under an obligation to notify their existing screening mechanisms to the Commission by 10 May 2019, and under a permanent obligation to notify the Commission of any newly adopted screening mechanism or any amendment to an existing mechanism within 30 days of the entry into force of the newly adopted screening mechanism or of any amendment to an existing screening mechanism[271].

On the basis of such notifications the Commission is due to make publicly available a list of screening mechanisms in force in the Member States and keep the list up to date[272].

Additionally, by 31 March of each year, Member States submit to the Commission an annual report regarding the application of their investment screening mechanisms over the course of the preceding calendar year[273]. This annual report needs to comprise aggregated information about FDI inflow that took place in their territories on the basis of the information available to the reporting Member State, including information on the application of the screening mechanism (*e.g.* the decisions adopted)[274].

To that end, they need to include aggregate detail on the transactions screened[275] and aggregated information on the requests received from other Member States[276].

[271] Article 3 (7) of the FDI Regulation.
[272] Article 3 (8) of the FDI Regulation.
[273] Article 5 (1) of the FDI Regulation.
[274] *Ibid.*
[275] Article 5 (2) of the FDI Regulation.
[276] Article 5 (3) of the FDI Regulation.

Thus, on the basis of this information, the Commission is due to produce two annual reports on the implementation of the FDI Regulation addressed to the European Parliament and the European Commission and that is then made public[277]. To date, the Commission has issued two Annual Reports[278], both accompanied by a staff working document[279].

In conclusion, the FDI Regulation – that is equipped with 17 articles accompanied by 38 Recitals – seems to establish an apparently simple and clear regime. However, behind this clarity and concision, hide many questions that have important implications on the functioning of the cooperation mechanism, that it is relevant to analyze at this stage, starting from the shortcomings related to the obligation to notify any investment undergoing screening to the Commission and the Member States.

[277] Article 5 (4) of the FDI Regulation.

[278] European Commission, *Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investment into the Union*, 23 November 2021, COM(2021) 714 final; European Commission, *Report from the Commission to the European Parliament and the Council – Second Annual Report on the screening of foreign direct investment into the Union*, 1 September 2022, COM(2022) 433 final.

[279] European Commission, *Commission Staff Working Document, Screening of FDI into the Union and its Member States Accompanying the document "Report from the Commission to the European Parliament and the Council – First Annual Report on the screening of foreign direct investment into the Union"*, 23 November 2021, SWD(2021) 334 final; European Commission, *Commission Staff Working Document, Screening of FDI into the Union and its Member States Accompanying the document "Report from the Commission to the European Parliament and the Council – Second Annual Report on the screening of foreign direct investment into the Union"*, 1 September 2022, SWD(2022) 2019 final; see also ESPLUGUES C., *The (complex and polyhedral) end of the age of naiveness of the EU: The First Annual Report on the screening of foreign direct investments into the European Union as an example*, in Bitacora Millennium DIPr. 15 (1), 2019, pp. 1-25.

2. A multi-directional flow of information to better tackle security threats, whose potential is undermined by a lack of enforceability.

As already described, the main aspect of the FDI Regulation is the pooling of information among Member States and with the Commission. This flow of information is multi-directional, insofar as senders and recipient are different depending on the situation. Indeed, it was analyzed above that Member States are under an obligation to inform other Member States and the Commission on the initiation of a screening proceeding and may in return receive information that the recipients of the notification have and is useful for the assessment of the investment's likeliness to harm security or public order; plus, any Member State or the Commission are entitled to provide inputs to a Member State on whose territory an investment is planned or completed that is deemed likely to affect its security or public order, and even to ask information about it. This generates a flow of information that can be visually represented by an *icosioctagon*, a polygon with twenty-eight angles. This form of cooperation within security is globally unique in the area of international investment.

Information is not, however, limited to this. In fact, the mechanism provides for an important information sharing system that imposes to make publicly available important information, as abovementioned, as a mean to implement the principle of transparency, that is a prominent component of the regime laid down in the FDI Regulation.

For the purposes of this sub-paragraph, it is relevant to focus on the improvements, as well as the weakness, of the regime introduced by the FDI Regulation, relating to the cooperation mechanism rather than to reporting obligations.

2.1. An enhanced access to information thanks to the mechanism, whose effective benefit is uneasy to assess.

In principle, the cooperation mechanism is an important and indisputable achievement of this aspect of the FDI Regulation in terms of access to information.

On the one hand, it is true the European Commission is finally enabled to see the bigger picture when it comes to problematic transactions, by receiving the information either through the notification or through the response to the request, as academia also concludes[280]. This gives the European Commission the chance to intervene and potentially influence the outcome of a screening decision issued by a national screening authority.

However, if it is certain that the Commission has become an actor in the screening procedures, it is far from certain whether it can be defined as a *key* actor, thus if it decisively influences the outcome of a proceeding. In fact, as much as it would be useful to carry out an exhaustive analysis thereof, the opinions of the Commission remain confidential, and so do most of the screening decisions adopted by the screening authority. It is thus not possible to compare the positions of the Commission and the outcome of the proceeding within the national screening decision, which is what would be necessary to answer the question of how the obligation of Member States to give the Commission opinion due consideration (or utmost account, when it comes to opinions given on investments likely to affect projects or programmes of Union interest) actually translates in the daily implementation practice of the FDI Regulation. Therefore, even though it is still important that Commission finally has gained a say with regard to security policies within international investment, yet the effectiveness of its action is not assessable. It is likely that its recognized authority finds some in final decisions, but an assessment thereof cannot be performed.

On the other hand, the position of the Member States seems to be clearer with regard to the benefits brought about by the mechanism, even though some questions still exist. In fact, the Member State concerned by the investment is – as said – under an obligation to share some precise and detailed information on such investment, but it may receive comments and opinions from the other Member States and the Commission. What is more, if its counterparts hold useful information on some investment, they may share it with the others.

[280] DUCHÂTEL M., *The Landscape of Investment Screening in Europe,* Institut Montaigne Analyses, 2021.

This implies that the Member State concerned by the investment is thanks to the cooperation mechanism enabled to adopt a more documented, reasoned and informed decision that it would have done if the mechanism did not exist. Once again, however, the absence of data limits the possibility of stating that this actually happens and that Member States are really able to do so, by receiving useful and relevant information from their peers and the Commission simply because we do not know the content of such inputs and whether they are sufficiently significant as to enable the Member State to make use of them.

In addition, the OECD's Investment Division[281] has observed that the criterion identified by the FDI Regulation to determine whether a transaction needs to be notified or not (*i.e.,* the fact that the investment is undergoing screening in the Member State concerned by it) is not well chosen because it entails the result of withholding some relevant information, while sharing some useless transaction-specific information.

According to the report, both issues of under-sharing and over-sharing require an amendment to Article 6(1) of the FDI Regulation: concerning over-sharing, a reduction thereof can be reached by giving the possibility to not notify a transaction that has no implications beyond the borders and where Member States cannot reasonably expect useful information from other Member States, whereas with regard to undersharing, the Regulation may require that transactions must be notified if they are, in the assessment of that Member State, likely or potentially affecting the security or public order of other Member States or projects or programmes of Union interest, regardless of whether they fall within the scope of application of the national screening mechanism.

[281] OECD*, Framework for Screening Foreign Direct Investment into the EU. Assessing effectiveness and efficiency*, 2022.

2.2. The structural weaknesses of the cooperation mechanism: the impossibility to intervene on national legislation, resulting in an uneven contribution by the Member States and in problematic differences among existing screening mechanisms.

As already reported above, the FDI Regulation does not create an obligation on those Member States that do not have an investment screening mechanism to adopt one. Accordingly, Member States may decide whether they want to maintain, amend or adopt mechanisms to screen FDI in their territory on the grounds of security and public order[282]. In other terms, the FDI Regulation and national measures are on two completely different layers and in no way – except for the principles detailed above – do these two layers interfere by imposing amendments or even introduction of new legislation.

If this aligns with all the competence-related considerations laid down in the first chapter, and it would probably not have been possible to operate much differently, it is still problematic for the proper functioning of the cooperation mechanism that some Member States do not look at FDI planned or completed in their own territory at all. In addition to this, another strictly related issue arises, that concerns the differences in existing legislation. Once again, except for limited and overarching principles, the FDI Regulation cannot impose a harmonization of national legislations. As much as they are justified on the competence level, these two issues – united by the common feature of the impossibility of intervening on national legislation designing investment screening mechanisms – tend to raise complex difficulties towards the correct functioning of the cooperation mechanism and determine structural shortages thereto.

On the one hand, the absence of an investment screening mechanism under domestic law has the potential to determine a perverse consequence consisting in the fact that a foreign investor may be allowed to settle in those Member States that are not equipped with a screening mechanism and manage their business operations from those

[282] Article 3 (1) of the Regulation.

countries relying on the fundamental freedoms of EU internal market. For example, an investor may decide to establish a subsidiary in such Member States, and through that subsidiary operate cross-(EU)border M&A deals or simply conducting business more easily in the entire internal market. As it will be further analyzed below, gathering reliable and public-sourced information with regard to investment planned or completed on the territory of Member States not undertaking screening is a complex operation, and such operation may not even be discovered before its completion.

This issue is considerably important because it threatens the stability of the entire cooperation mechanism and beyond. Notably, this would also have the capacity of generating a perverse competition among the different Member States: the most skeptical ones with regard to security policies in the context of international investment may want to keep being devoid of instruments of security and public order control, in order to attract more investments than fellow European Member States from third countries for they would be able to provide access to the EU internal market, without the need to stop by investment screening mechanisms.

Nonetheless, other than the considerations that were laid down in the first chapter with regard to the abuse of right and the anticircumvention rule provided for in the FDI Regulation and those that aim at avoiding the exploitation of the fundamental freedoms of the internal market, it is still important to notice that more and more Member States have, over the years, equipped themselves with investment screening mechanisms, as an outcome of many contributing factors, one of which is undeniably the soft pression exercised by EU institutions in this direction[283]. For instance, the European Economic and Social Committee[284] considered as well that, even though the proposal went in the right direction, the fact that it did not compel Member States to

[283] See European Commission's Annual Reports on the screening of foreign direct investment into the Union, *supra.*

[284] European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union'*, 25 July 2018, Official Journal C 262/94.

adopt a screening mechanism was problematic, which is an example of the spread of the necessity for Member States to adopt investment screening mechanisms.

The awareness of the risks of foreign investment for national security among the Member States is raising and therefore the number of Member States that still lacks thereof is – consequently – decreasing. Some of those that still do not screen foreign investments are now planning to do so, like Belgium[285] and Sweden[286].

Accordingly, some countries that were dismissing any political threat deriving from foreign investment ended up equipping with an investment screening. This was the case of Hungary, that in 2010 launched an "Eastern Opening Strategy" designed to reduce Hungary's dependency on EU funds by substituting them with unvetted FDIs from China[287]; in the end, Hungary ended up setting two investment screening mechanisms[288].

This does not solve the problem *per se*, because the simple fact of having an investment screening mechanism does not automatically mean that security is protected in a given jurisdiction for it may be designed in a way that the scope of application is very limited, that it is badly implemented, or that the overall legal design of the measure is not satisfying. Nonetheless, it is a first step that signals that an enhanced awareness of the necessity of these instruments is actually spreading around EU jurisdictions. It is however a potential threat that needs to be taken into account in consideration of the current framework that was designed under the constraints deriving from the division of competences between the EU and its Member States, but that has the potential to endanger not only the EU internal market, but also the security of the Union.

---

[285] Cooperation Agreement of 30 November 2022 between the Federal State, the Flemish Region, the Walloon Region, the Region of Brussels-Capital, the Flemish Community, the French Community, the Germanophone Community, the French Communitarian Commission and Common Communitarian Commission.

[286] Legislative Proposal – A screening system for foreign direct investments for the protection of Swedish security interests, released by the Department of Justice on 16 March 2023.

[287] SIMON S., *Investment Screening: The Return of Protectionism? A Political Account*, in HINDELANG S., MOBERG A. (eds.)., YSEC Yearbook of Socio-Economic Constitutions 2020, pp. 43–52; MEUNIER S., VACHUDOVA M.A., *Liberal intergovernmentalism, illiberalism and the potential superpower of the European Union*, in *Journal of Common Market Studies*, 2018, 56(7), pp. 1631-1647.

[288] Act LVII of 2018 on the Control of the Foreign Investments that Violate the National Security of Hungary; Act LVIII of 2020 on the transitional rules related to the end of the state of emergency and epidemic preparedness.

On the other hand, since national screening mechanisms still constitute the core of public policies aimed at national security protection around the EU, the existence of differences in their legislations are still very important for they directly impact the efficiency and effectiveness of the cooperation mechanism.

For instance, as already mentioned, it is the national investment screening mechanisms that define their own scope of application. To that end, they lay down provisions on the sectors concerned, for there can be sectoral, multi-sectoral, cross-sectoral screening mechanisms; the thresholds, because some screening mechanisms fix a threshold of voting rights that, once reached, triggers the notification obligations, *etc*. These differences in national legislation are extremely important with regard to the cooperation mechanism because they constitute the criterion that allows to determine whether an investment is screened or not and thus whether it falls with the scope of Article 6 on the mandatory notification of investments undergoing screening or that of Article 7 on investments not undergoing screening. Therefore, the definition of the scope of application of the FDI Regulation which is only one of the many differences existing among the various screening mechanisms, defines *inter alia* what investments automatically become part of the information pooling, and which do not.

An example of this issue can be found, for instance, by considering the case of Netherlands. Until a recent intervention of the legislator[289], the Netherlands operated sector specific mechanisms to protect essential security interests[290], notably in the field of electricity[291], gas[292], and telecommunications[293]. Within that framework, if a potentially risky investment took place in the Netherlands falling outside the scope these acts, it would not have been mandatory for the Netherlands to notify it. On the

[289] Investments, Mergers and Acquisitions Screening Act (VIFO Act) of 18 May 2022.
[290] See, *e.g.*, OECD, Research Note by the Secretariat, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies*, 2020.
[291] Electricity Act of 1998, Art. 86 f.
[292] Gas Act of 2020, Article 66e.
[293] Act amending the Telecommunication Act against undesired control in the telecom sector of 2020.

contrary, other Member States included other sectors, not necessarily overlapping with those of the Netherlands, and they may have welcomed warmly information on foreign acquisitions on other sectors, such as freedom and plurality of the media. This point becomes an even more difficult issue whenever the national screening mechanism is designed in such a way that its scope of application is so narrow that many transactions that would fall within the mechanism of many other Member States eventually fall outside of it.

With regard to the differences in definitions of specific sectors, it is interesting to remark also on the side of legal practitioners it has been claimed that a harmonization would be necessary in order to ensure that all Member States review the same kinds of transactions[294].

The choice of the sectors to submit to investment review reflects in part a different sensitivity with regard to the notion of national security, that is indeed reflected in the sectors identified under national legislation; however, a specific sub-paragraph will be dedicated to the elaboration of the notion of security and public order in the EU framework further below.

These are some of the most blatant differences in national legislations and their related consequences, but other discrepancies may also materialize with regard to many more aspects of the legal design of investment screening mechanisms, both on a procedural and substantial level.

An important issue deriving from differences in national legislation was underlined by the OECD[295] in the mentioned report with regard to the processing of multi-jurisdiction FDI transactions, which is considered inefficient. A multi-jurisdiction transaction in the context of FDI is defined as a foreign investment that undergoes screening in more than one Member States. The OECD observed that the

[294] RÖHLING F., SALASCHEK U., T*he Foreign Investment Regulation Review: EU Overview*, The Law Reviews - Freshfields Bruckhaus Deringer, 2021, available at: https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/eu-overview.
[295] OECD, 2022, *Ibid.*

inefficient treatment of multi-jurisdiction transactions, whose screening is deemed time-consuming and unpredictable for the investor and the target companies, is rooted in the differences in how screening procedures in individual Member States are designed and conducted, which timelines the various national screening mechanisms apply for each individual procedural step, the sequence of this procedure and the timeline regarding the notification of the transactions.

However, the report explains that the situation results from the absence of norms and common principles for the design of screening mechanisms in Member States. According to the OECD Secretariat, two possible options may open up to solve the issue. Even though the harmonization of procedural aspects of investment screening allowing a synchronization of the procedural steps would be a viable solution in principle, they consider that in practice a general change of screening regimes does not appear realistic. Thus, the OECD suggests the adoption of a specific procedure only applicable to multi-jurisdiction transactions, that would be defined as such on the basis of a self-declaration of the investor: Member States concerned would then need to manifest themselves and plurilateral meetings could be set up. Plus, contrary to the genera1 rule, opinions and comments by the Commission and the Member States would be shared simultaneously with the Member States involved, following which Member States could coordinate over, if necessary, the application of mitigation measures.

Thus, the impossibility to intervene on national legislation, as much as it is justified, thus constitutes the structural hardship of the EU cooperation framework. It also has consequences on many other aspects, both procedural and substantial, that were underlined in the OECD report.

2.3. The undefined reaction to a comment of a Member State or an opinion of the Commission on an investment not undergoing screening raising concerns for the recipient of input.

An interesting consideration with regard to the benefit of the Member States from the pooling of information is understanding what happens whether with regard to an investment not undergoing screening the Commission or other Member States issue

a decision that suggests that the investment is potentially harmful to security or public order.

In accordance with the principle under which nothing in the FDI Regulation can limit the right of each Member State to decide whether or not to screen a particular investment, it would not be possible to compel a Member State to do so. However, the issue still stands that consists in defining how a Member State can effectively tackle an investment whose likeliness to affect security or public order emerges from a comment of a Member State or an opinion of the Commission. In fact, if after discovering on the basis of such opinion or comments that the investment is potentially dangerous, it can be observed that there exists an important gap in the system that would have the result of making it useless in substance an important part of the mechanisms.

To my understanding, the only viable solution is to intervene on national legislation, in a way that it is allowed for national screening authorities to open a screening proceeding *ex officio* based on an opinion of the Commission or comments from the Member States.

In this direction, a virtuous example is the newly entered into force mechanism adopted by the Slovak Republic[296]. In fact, this mechanism provides that the screening procedure can be triggered either through notification or *ex officio*. With regard to the latter case, one of the basis upon which the Slovak Ministry for Economy can open *ex officio* the proceeding, on its own initiative or on that of other national bodies involved in the decision, is if *inter alia* "reasonable comments from another Member State or an opinion of the European Commission on a foreign investment" is issued.

Therefore, if all national legislators adopted a similar provision, the benefit that the protection of their national security would take from it would be incredibly significant. Notably, the Member States would in this way be able to take the most out of the mandatory information pooling system introduced by the FDI Regulation, insofar as they might even end up blocking an investment on the basis of an observation raised

[296] Act on screening foreign investments and amending certain laws, Law no. 497/2022 of 23 December 2022, Art. I §12.

by their peers or the Commission. It is thus desirable that all Member States that screen foreign investment include in their national legislation a similar provision.

2.4. The lack of transmission of an opinion of the Commission or a comment of a Member State: a limitation of the potential of the Regulation that would uncostly be avoided.

Under the FDI Regulation, it is provided that whenever the Commission issues an opinion with regard to a specific transaction, this opinion is notified to the Member State concerned, while the other Member States are notified that an opinion was issued. Accordingly, whenever a Member State issues a comment, the Commission only notifies the other Member States about the fact that the comment was released. Once again, this is related to the confidentiality that lies within the elaboration and the enforcement of security policies.

As much as this is reasonable in principle and coherent with the sensitivity of the subject, it is nonetheless fundamental to remark that the institution of a framework of cooperation between the Member States and the Commission is implicitly nothing but an implementation of the principle of mutual trust in EU law. In order for that to be effectively implemented, the pooling of information needs to extensively align to it as well. Indeed, in a context that is built on the premise of mutual trust and on the willingness of the Member States to ensure the respect of their security interests through mutual cooperation, it is not very coherent on their part to limit the access to information in this way.

In fact, when discussing the functioning of the mechanism with the OECD[297], Member States authorities express the same feeling about this aspect of the mechanism. In fact, some national authorities have claimed that access to comments or opinions addressed to other Member States would allow them to better understand how a case was solved or how a risk brought about by the investment has been mitigated. Furthermore, several of them stated that sharing such information would enhance their

[297] OECD, 2022, *Ibid.*

capability to understand the operation of other Member States' frameworks and eventually allow for an acceleration of the establishment of a "community of practice and a common culture on investment screening in Europe"[298].

What increases the problematic character of this issue is the fact that some information of this sort is occasionally and informally shared among a reduced set of national authorities, thus *de facto* excluding others from the chance of acquiring such information and also best practices. Moreover, this potentially raises the risks of confidentiality breach based on the channel used to convey such informal information. In fact, if these exchanges happened within the framework of the FDI Regulation, they would be protected by the secure and encrypted system provided by the Commission to support direct cooperation and exchange of information among national contact points and the Commission.

Considering the minimal administrative burden for the Commission to include the text of the comments or the opinion within the notification referred to, and the confidentiality issues referred to above, what is certain is that the cost-benefit ratio of sharing this information is totally unbalanced towards the benefit component, and it is hopeful that an improvement to this end will be put into place.

2.5. The complexity of supervising the mandatory notification of investments undergoing screening.

In addition to this, however, an important potential important flaw of the system underlined by academia[299] is represented by the *de facto* impossibility to supervision the compliance on the part of the Member States with the obligation to notify that the investment is undergoing screening. In other terms, due to the confidentiality behind the mechanism, it is factually impossible in many cases to know if a national screening authority has received a notification by a foreign investor with regard to a planned or completed transaction. This observation would transform into a serious, potential threat to the smooth and correct functioning of the cooperation mechanism in case Member

[298] *Ibid.*
[299] DUCHATEL M., *Ibid.*

States failed to comply with the principle of sincere cooperation, established by Article 4 (3) TEU, by notifying other Member States.

Considering the high confidentiality that surrounds both cross-border M&A deals (all people involved in the operation are usually under non-disclosure agreements), and the notification of the investment to the national screening authority, it may be possible that the investment is never notified, and that the deal is not made publicly known until the completion of the investment.

2.6. The widespread incapacity of Member States to comply with the information obligations set forth with regard to investments not undergoing screening.

Another important issue that concerns the actual capacity of Member States to comply with the obligations set out in Article 7 of the FDI Regulation to share information with regard to investments not undergoing screening following an opinion of the Commission, a comment of a Member State or a request for information. Indeed, as the OECD Investment Division pointed out[300], not all Member States possess the means to effectively gather information on transactions that are not undergoing screening.

Notably, Article 9 (2) of the FDI Regulation does not condition the obligation to share such information to the availability of the information from public authorities and sources: what is observed is the lack of effective means to gather information to meet the obligations under the Regulation.

What is more, the issue becomes even more problematic when it comes to Member States that do not dispose of a screening mechanism, that are even less equipped with the instruments allowing them to gather information, and merely rely on Article 9 (4) allowing Member States to request foreign investors and target undertakings to deliver the information that they are under an obligation to provide the other Member States with. It is observed that most national legislations do not establish

[300] OECD, 2022, *Ibid.*

which are the competent authorities to collect such information, which should be the source to be relied upon in lack of available public authorities, which are the legal provisions implying that the person required to provide information has a true obligation to provide truthful information within a defined timeframe.

For that obligation to be effectively fulfilled, the OECD suggests that Member States confer within their domestic legal systems the powers on a designated national authority to gather information independent of an ongoing screening process together with the necessary mechanisms to enforce the provision of timely and truthful information. To that end, inspiration can be taken from the provisions in some legal systems that provide such elements[301].

2.7. A call for transparency that could hardly be voiced.

With regard to the correspondence between the Member States and the Commission at study, legal practitioners grouped and observed a lack of transparency that impedes their involvement and participation in the mechanism[302].

Notably, they contend that if the correspondence among the institutional actors involved in the cooperation mechanism in the context of mandatory notifications, comments of the Member States, opinions of the Commission, requests for information and related responses was not subject to such strict transparency rules, they would be able to contribute by providing comments to resolve open questions and advance in the study of specific transactions.

While this position is completely understandable on the side of a counsel of a foreign investor that follows the operation since its very beginning and fears losing control of the process, some caution still needs to be taken. In fact, as already repeatedly underlined, it is important to borne in mind that within security policies confidentiality

[301] Austrian Investment Control Act, Federal Law No.87 of 2020, Section 13 (1); Latvian Regulation N. 606 of 2017, as amended, Article 14.
[302] RÖHLING F., SALASCHEK U., *Ibid.*.

is not a synonym of lack of transparency, but rather the latter is a consequence of the former.

Therefore, the aspiration of the legal counsels of third country investors or of target undertakings to have their say within the process would difficulty find a positive answer. The correspondence under the cooperation framework is a discussion among peers on a decision that will eventually be taken only by one national screening authority. It is therefore not so uncoherent to see that the investors or the target undertakings interact with the one that is deciding on their case: this is one what should by all means be necessary for a correct functioning of the mechanism. What is more, the FDI Regulation expressly provides for the possibility of one of the screening authorities to enter into contact with the investor or the target company where necessary.

Plus, the fact that the content of the correspondence is kept strictly confidential is beneficial in some ways for them as well because the information made available to Member States and protected under the FDI Regulation includes commercially-sensitive information.

Hence, even though it is understandable that stakeholders wish to have the relevant correspondence disclosed for it directly concerns their own business activity and may have a significant impact on an important decision to that end, it still holds true that the system seems to be correctly designed and evenly balanced.

3. The risk of deterrence for third country investors: a concern that has no roots in the legal scheme of the Regulation.

A recurrent question that has gripped commentators even before the very introduction of the cooperation framework is whether foreign investors – that are so important for economic development and growth – would react negatively to the introduction of the European cooperation mechanism, and eventually be deterred from investing in the EU.

As much as it is a vital aspect to take into account when giving an overall judgement of the achievements of the mechanism, it is an extremely complex mystery to solve. Indeed, solely basing on aggregate data is not a reliable solution: as already mentioned multiple times above, the cooperation mechanism entered into force amidst great turbulences, on 11 October 2020, a moment where global investment flows were already tremendously impacted by an unprecedented pandemic, while a consistent inflation spread globally shortly before the outbreak of the first military aggression on European soil in decades. Thus, while naming but a few of its contributing factors, the instability that characterized the last few years does not allow to merely compare the aggregated data from before and after the entry into force of the FDI Regulation to see if investors were scared away from the European market as a consequence (and even in calmer times this approach would probably be questionable), with the ultimate implication of reducing access to capital.

Nonetheless, this question remains of vital importance for the overall stability of the system. In fact, this concern was also raised by some Member States at the time of the adoption of the Commission proposal. To name but one interesting position, the United Kingdom voiced its skepticism with regard to the proposal: regardless of the fact that the UK is not part of the EU anymore, the position it expressed is an interesting starting point for this analysis because of the two points that constitute the ground of its fear of a negative impact on foreign investors of the proposed Regulation.

On the one hand, the UK argued that the Commission proposal would place an additional burden and uncertainty on prospective investors, and, on the other, that it

would lengthen the screening procedure: this was considered to be "at odds with the UK's stance as an open and liberal investment destination"[303].

From my perspective, the argument that the FDI Regulation causes uncertainty for foreign investors is to be rejected as unreasonable and factually unfounded. In fact, as repeatedly seen above, the final decision remains within the hands of the Member States also in the Commission proposal (only with regards to investments likely to affect projects or programmes of Union interest the proposal aimed at giving the decision-making power to the Commission). In no way does the Regulation aim at integrating or replacing the existing national investment screening procedures or even establish a pan-European screening mechanism with its own set of substantial and procedural rules. Therefore, it is highly questionable to consider that the FDI Regulation would make the outcome of the decision more uncertain: it would only become so if Member States failed to provide for a clear and intelligible legal framework at the national level.

What is more interesting are the two related arguments suggested by the UK government fearing a reduction of inbound foreign investment: the risk of generating an additional administrative burden on foreign investor and that of lengthening the screening procedure. Indeed, as anticipated in the premises to this paragraph, and considering the many advantages of investing in the EU, a positive answer to these questions does not automatically entail that investors are automatically deterred but this can – undoubtedly – be an indicator in that sense.

On the one hand, with regard to the administrative burden on foreign investor generated by the FDI Regulation, it is first and foremost necessary to consider what the text provides and the nature of those obligations.

According to the FDI Regulation, foreign investors do not interact directly with the other Member States or the Commission. They may only be called upon to provide

[303] UK Department for International Trade, Explanatory Memorandum for European Union Legislation and Documents, 5 October 2017, available at https://www.parliament.uk/documents/lords-committees/eu-external-affairs-subcommittee/foreign-direct-investment/EM-foreign-direct-investment.pdf.

additional information in the framework of the mandatory notification or in case a Member State or the Commission issue a request for information, but they only interact with the Member State on whose territory the investment is planned or completed. As European bureaucracy confirms, the proposal was never meant to establish significant changes for the investor because the FDI Regulation does not imply any direct relationship between the European authorities and the company concerned, which only has contacts with the national authorities as with any national screening[304].

It is noteworthy that the information that needs to be provided in this context is quite aligned with the information that is normally contained in the notification that foreign investors need to file to the national screening authority. What is more, the European Commission has also made available, as abovementioned, a notification template that is available for foreign investors and target companies to use for their notifications in order to allow the investors to file the useful information once and for all and thus having the implication of considerably simplifying the procedure.

To my reading, therefore, it is not coherent to consider that under the regime of the FDI Regulation foreign investors undergo administrative obligations that are so burdensome that they are scared away from an investment destination that is as attractive as the European internal market. At most, they are asked to provide some information, but the discovery of such information, that may be necessary to assess whether the investment is harmful or not, is not rocket science for it concerns some details of the business activity or of the investment that they most certainly detain and can easily release.

Hence, in my opinion, talking about an unbearable administrative burden imposed on foreign investors is not a reasonable argument to oppose the FDI Regulation or have a negative judgement on its regime.

[304] PETTINATO C., *Ibid.*

On the other hand, the other argument can be – at least preliminarily – considered a more sophisticated option to detect a flaw in the regime established by the FDI Regulation, with the potential to harm the position of foreign investors. In fact, the insertion of this consultation phase to which partake fellow EU Member States and the Commission, may indeed have the result of generating an additional procedural delay in the whole screening process because of the potential intervention of an enlarged number of EU regulators[305]. If this turned out to be true, screening proceedings would become lengthier, while timing is an essential matter both in the execution of M&A proceedings in the context of brownfield investments and in the context of greenfield investments, hence the need for EU institutions to closely analyze and, if necessary, amend the mechanism.

The risk of exceedingly stretching the timelines is unsurprisingly very sensitive for foreign investors, hence why some practitioners commenting on the FDI Regulation one year after its entry into force, while recognizing that the cooperation mechanism is well-performing, still suggest the introduction of some rules aimed at ensuring that the overall FDI review does not become overly burdensome time-wise for investors. In order to do so, they suggest the introduction of stricter rules on timing for Member States' cooperation[306].

In other terms, from a legal perspective, the question of whether the introduction of the European cooperation mechanism has the consequence of lengthening the duration of the initial screening procedure at a national level consists in understanding how the Member States have approached the question of the timeframes to be set, therefore whether the deadlines for the decisions of the national screening authority are suspended while the timelines established under the FDI Regulation are running (*i.e.* if the fifteen days during which – under the Phase I described above – Member States or the Commission may manifest their intention to issue respectively a comment or an

[305] See *e.g.* BIAN C., *National Security Review of Foreign Investment. A Comparative Legal Analysis of China, the United States and the European Union*, Routledge, 2020; SCHRÖDER O., *Germany* in GOLDMAN C., KOCH M. (eds.), *The Foreign Investment Regulation Review,* pp. 79-90.
[306] RÖHLING F., SALASCHEK U., *Ibid.*

opinion). However, in addition, it is necessary to recall at this stage that Article 6 (8) of the FDI Regulation allows – in exceptional circumstances where immediate action is necessary to preserve security or public order – national screening authorities to take such immediate action.

For instance, Italy[307] made the choice to suspend the deadlines of national investment screening procedure following the notification of the intention of one of the Member States or that of the Commission to issue respectively a comment or an opinion; however, the Italian screening mechanism (in line with the FDI Regulation) restates that the decision can be adopted before the reception of such comment or opinion as long as that is necessary to preserve security or public order. While the same approach has been followed in Lithuania[308], yet the Netherlands[309] and Estonia[310] chose not to provide for a suspension of the terms but to provide for a statutory extension of the ordinary timeframe (respectively of up to three months and up to 90 days). This second approach can be considered to provide more legal certainty on the timeline that needs to be devoted to the regulatory assessment. Notwithstanding, many other national screening mechanisms are silent on this point, which of course gives rise to much more confusion on the side of foreign investors which are thus unable to fully comprehend the process.

Hence, suspending or extending the timeframe obviously entails the dangerous consequence of lengthening the overall process, even though the methods adopted by the four Member States mentioned have the undisputable merit of making that clear by introducing a specific provision under statutory national law.

However, even if the Member State adopted a suspension, this would not automatically mean that *de facto* the timeframes will be longer: a national screening

[307] Decree-Law No. 105 of 21 September 2019, as converted by Law No. 133 of 18 November 2019, Article 2-ter.
[308] Law on the Protection of Objects Important to Ensuring National Security of the Republic of Lithuania of 10 October 2002, No. IX-1132, Article 12.12(2).
[309] Investments, Mergers and Acquisitions Screening Act (VIFO Act) of 18 May 2022, Article 12.
[310] Law on Assessing the Reliability of Foreign Investment of 25 of January 2023, Article 9.

authority may have the deadline extended, but still be able to eventually adopt the decision within the same time limits initially expected by advancing on its internal investigations, while waiting for the input from fellow national screening authorities or the Commission.

Thus, even though there still is the potential to extend the overall duration of the procedure, it is useful to refer to the direct testimony of stakeholders involved. Notably, the OECD Investment Division[311] discussed about this with legal counsels from the major law firms around the EU, daily advising foreign investors and target companies in cross-border M&A or greenfield investment projects. While holding a positive view on the FDI Regulation in general and on the cooperation mechanism in particular, the stakeholders consider that the entry into force of the EU framework has not changed the process or the outcome of investment screening procedures in Member States. Indeed, they observed that *at most* this had the consequence of creating *insignificantly* longer processes or slight changes in the implementation practice. However, they attribute this only tentatively to the cooperation mechanism, without considering that as a definitive reason.

Therefore, also with regard to this issue, it would have been useful to compare, through an evidence-based approach, for each Member State the duration of all the proceedings that were only dealt with internally, those with regard to which a Member State or the Commission informed the national screening authority of their intention to submit their own input. However, this not being possible for the repeatedly mentioned reasons related to confidentiality in the implementation of security policies, we can conclude on the basis of the elements considered that the FDI Regulation did not generate *per se* an extension of the duration of the proceedings and that, even within its framework, it is still possible to avoid unnecessary extensions of the overall duration.

[311] OECD, 2022, *Ibid*.

With regard to the question of timelines, the OECD[312] points out another related issue. Indeed, in order not to encumber international investment with regulatory limits, the Member States have set ambitious timelines for final decisions on individual transactions. The fact that some Member States, contrarily to the mentioned examples set by Estonia, Italy, Lithuania and the Netherlands, do not tackle the question of the interaction of national timelines with the provision of the FDI Regulation implies that national timelines often elapse before the comments, the opinions and other information have arrived. Notably, with regard to the timelines for the screening procedure under national law, the FDI Regulation does not – and cannot – modify much: it merely states that national screening mechanisms need to take into account inputs received under the cooperation mechanism[313]. This has the perverse consequence that the ambitiously set timelines for screening decisions in some Member States are too short to effectively incorporate input from the cooperation mechanism.

As a consequence, while in this sub-paragraph it was considered that the Regulation does not *per se* determine an unduly long extension of the proceeding, it is still necessary to consider that the design of a legislation of good quality in this field always consists in striking an even balance between the avoidance of an excessively burdensome procedure for investors and the safeguard of security through the adoption of informed decisions. Thus, merely reducing the timelines in order to speed up the process would most certainly facilitate the achievement of the former objective, but it would endanger that of the latter. Therefore, following the example set by the mentioned countries would be a reasonable solution to find a compromise between these two issues.

In conclusion, in light of the above, it would not be correct to state that the FDI Regulation imposes an excessive burden on the shoulders of investors, and *per se* reduce the investment flow because of that. Even though it contributed to raise the awareness with regard to security risks, it is not because of a regulatory burden that the

[312] OECD, 2022, *Ibid.*
[313] Article 3 (3) of the Regulation.

FDI Regulation alone established that, for example, the legal counsels of Chinese investors have started warning their clients and urged them to introduce closing conditions in their SPAs[314] in order to exit without damage, harm and indemnity should the deal be blocked by the screening authority.

The burden does not come from the FDI Regulation, or not from the Regulation alone: it would be a simplistic juxtaposition of considerations that in principle hold true for FDI review in general but does not fit the nature of the Regulation. As repeatedly stated, the Regulation does not impose major administrative constraints on investors, nor does it lengthen significantly the timelines.

[314] ZHANG S., ZHANG Y., *EU FDI screening and its impact on Chinese investments*, Dentons, 2018; available at: https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2019/february/4/eu-fdi-screening-and-its-impact-on-chinese-investments.

4. The lack of a EU notion of security and public order: the challenges for the European cooperation mechanism of a notion dictated at a national level.

The notion of security and public order was already referred to multiple times over the course of this thesis, *firstly* in the first chapter as one grounds based on which a restriction to the freedom of movement of capitals can be implemented under Article 65 TFEU, and *secondly* over the course of this chapter as the policy objective whose achievement in the field on international investment constitutes the goal of the FDI Regulation at study.

It is nonetheless very interesting to dwell on this notion, that is so pivotal for the analysis of the European policy in this field, yet so little studied by the doctrine. Indeed, one cannot ignore the potential friction that may exist between the fact that the objective of this policy is to protect *national* security, while establishing a *European* cooperation mechanism. As it is by its own definition related to *national* sensitivity of what may affect the security of a given Member State, it is interesting to question whether a different sensitivity and apprehension of the notion is capable of becoming a spanner in the works of the mechanism which has such a noble purpose.

In order to effectively study this issue, it is useful to note that the difficulties in the defining the notion are intrinsic and not a specific characteristic of the European framework (*a*), but they become even more problematic when it comes to ensuring the safeguard of security and public order in the EU (*b*).

3.1. A globally spread difficulty in defining the notion of security.

In general terms, it is useful to consider that the notion of security is – also on a theoretical level – not easily defined[315]. Indeed, the leading textbook on key theories and concepts in security studies[316] refuses to provide a unique definition of security, but tries to describe the contours and the content of the notion by providing several key elements.

[315] DE JONG B., ZWARTKRUIS W., *The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?*, in *European Business Law Review*, 31 (3), 2020, pp. 447-474.
[316] COLLINS A., *Contemporary Security Studies,* Oxford University Press, 2022.

In essence, the core aspect of the approach adopted consists in pointing out that the notion of security in general terms implies a "referent object", *i.e.* a thing to be secured and that the means for securing such reference object depend on its very nature. If traditionally the referent object was the state, the mean to protect it was military power. In consideration of recent evolutions of the role of the state and, above all, of the referent objects, the approaches to security have evolved accordingly. Ultimately, this has transformed into an increased interest in how referent objects are threatened: national security policies have then shifted to focus more and more on the threats.

An example that was suggested[317] to support this is the case of the Netherlands, whose National Security Strategy[318] of 2013 focused on risk assessment. The Strategy distinguishes five forms of security that perfectly reflect five referent objects: territorial security, physical security, economic security, ecological security, and social and political stability. As discussed in the first paragraph of the present chapter, these forms of security are all potentially and consistently impacted by the inflow of FDI.

It is therefore interesting, when analyzing an investment screening mechanism, to identify how these referent objects translate in legal provisions of national legislations. The most effective way to do so, in my reading, is that they are reflected in the choice of the industrial sectors that are subject to investment screening. In fact, by including a certain sector within the scope of application of an investment screening mechanism, a legislator signals that it considers a certain referent object, such as a telecommunication network, worthy of a certain attention.

Accordingly, still on general terms (thus not specifically to the European framework), it is interesting to that end to consider the relevant outcomes of a study conducted on a coded dataset on investment screening mechanisms in OECD countries

[317] DE JONG B., ZWARTKRUIS W., *Ibid.*
[318] Ministerie van Veiligheid en Justitie Werken met scenario's, risicobeoordeling en capaciteiten in de Strategie Nationale Veiligheid, 2013.

from 2007-2021, examining the evolution of investment screenings[319], that shows a constant expansion of the notion of security.

Based on what I suggested above, thus on the consideration that to understand the overall notion of national security it is necessary to consider the sectors falling within the specific investment screening mechanisms, this study confirms the general tendency that was repeatedly underlined over the chapters of this thesis: national security is an increasingly more important concern and it can be added at this stage that the notion is relentlessly expanding. The study suggests indeed that there has been a consistent broadening of the scope of sector coverage. Moreover, a tendency has been observed in OECD-countries that States are increasingly adopting cross-sectoral screening mechanisms, which provide governments with review authority over foreign investment regardless of the sector. In consideration of the expansion of the number of referent objects, which cannot often be identified *ex ante* or that are likely to change over time, they are defended as they are considered more adequate for confronting national security risks that change over time, without the need to constantly update sectoral lists. In fact, the authors that conducted the research have explained that national security-related concerns over FDI were initially narrowly focused on foreign influence in defense contracts, then governments' beliefs about what kinds of investment could impair national security expanded and included critical infrastructures, data security *etc.* However, it goes without saying that the introduction of cross-sectoral investment screening mechanisms entails the consequence of establishing quite a vague definition of national security for the legislator stops using referent objects explicitly.

In conclusion, it can be inferred from these two sources that the operation of defining the notion of national security is extremely complex by nature and it is even more complex to synthesize it in a legal provision that is capable of summarizing all the threats and risks to the referent object that a legislator may aim at protecting.

[319] DANZMAN S. B., MEUNIER S., *The Big Screen: Mapping the Diffusion of Foreign Investment Screening Mechanisms,* 2021.

Moreover, a pattern can be observed by enlarging the study to OECD jurisdictions, including both some EU Member States and third countries: this notion is constantly enlarging by including more and more referent objects, as reflected in the enlargement of sectors that are subject to investment screening, as well as in the adoption of cross-sector investment mechanisms.

Nonetheless, this is even more true and potentially problematic with the EU Framework for FDI control.

3.2. The enhanced risks of inconsistency for public policies within the EU deriving from the blurriness of the notion of security.

An option to better understand this notion under EU law would be to consider how and if the exception laid down under Article 65 TFEU is developed in the FDI Regulation and transpose it to the notion of national security. Indeed, Article 65 TFEU, which focuses on *public* and not *national* security, is the legal basis for the adoption of national investment screening mechanisms.

While the FDI Regulation acknowledges Member States' national policy space as a constitutional right in EU primary law under Article 65 (1) *litt.* b) TFEU, which lays down a derogation from the principle of free movement of capital established in Article 63 (1) TFEU[320], the FDI Regulation has not however elaborated on the interpretation of the provision in the extra-EU content, as deriving from the case law of the Court of Justice (which only focuses on the intra-EU context and explicitly excludes its application to extra-EU economic activities)[321]. Therefore, as much as it would have been appropriate for it to shed a light on the interpretation of the notion of public policy or security in the extra-EU context, it is unfortunate to observe that the FDI Regulation failed to do so[322]. Therefore, the attempt to understand the contours of the notion of

[320] KONTAK M., *The Application of Public Policy and Public Security Reasons for Justifying Restrictions on Free Movement of Capital in the EU*, in Zagrebačka pravna revija 10 (2), 2021, pp. 150-166.
[321] BIAN C., *Ibid.*
[322] *Ibid.*

security and public order by relying on the derogation to the free movement of capital is not a viable option.

As an author observed[323], the concepts of security and public order are inherently dynamic and indeterminate, which is the reason why the operation of defining them is so challenging and, commenting on the FDI Regulation, implicitly confirm the abovementioned position according to which the attempts to give the said concepts shape turn - through an empirical approach - to the instances where risks are deemed intolerable. What aggravates under the situation is the lack of case law, published decisions or communicated past practice both at national and supranational level.

However, it was not only academia that deemed the blurriness of the notion quite problematic. As the European Economic and Social Committee[324] observed when delivering its opinion on the Regulation proposal, the meaning of security and public order is not sufficiently clear in the Commission draft.

To my reading, the risks that can be ascertained in the EU framework are essentially two, both having dangerous consequences for it: a diversification of the notion around EU jurisdictions and a risk of politicization, respectively having an impact on the functioning of the cooperation mechanism, and on the capacity of the EU to establish a policy in security and public order within international investment.

Without any definition at an EU level, the implied consequence is that the description of the content and the contours of this notion is left to the Member States, which is something that may seem coherent with the "sole responsibility" that Member States have under the TEU with regard to the safeguard of national security, but which

---

[323] POHL J.H., *The Right to Be Heard in Composite Investment Screening Procedures Under Regulation 2019/452,* in BARRETT G. et al. (eds.), *The Future of Legal Europe: Will We Trust in It?,* 2021, pp. 647-661.

[324] European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union'*, 25 July 2018, Official Journal C 262/94.

has the great potential of leaving a high degree of uncertainty as regards the content of the new EU policy for the safeguard of security and public order within foreign investment. In other terms, it is difficult to understand how security and public order can be dealt with at an EU level, while each Member State sets its own definition of *national* security.

Consequently, Member States set a notion that corresponds to their own sensitivity. As abovementioned, I believe that the best way to understand what is considered sensitive for national security, *i.e.* the various referent objects, is to analyze the sectors falling within the scope of application of the investment screening mechanisms. Over the course of this chapter, I analyzed the shortcomings of the cooperation mechanism that derive from the differences in legislations and mentioned the case of the material scope of application by sectors as a blatant example of this complexity and quoted the Netherlands that until recently only had sector-specific mechanisms as opposed to many Member States that now are equipped with cross-sector mechanisms.

Therefore, if the conceptualization of the notion of national security by national legislators is indeed at least in part reflected in the material scope of application of investment reviews, the issue of the diversification of the notion can thus entail perilous consequences to cooperation mechanisms because of the gigantic obstacles generated by the differences existing in national legislation that were underlined above.

For instance, this may imply that a Member State that believes that food security is not a sensitive sector for national security may not subject food security to investment review. As a consequence, its national contact point is not going to notify a foreign acquisition of an important producer of a specific good holding a significant market share and exporting that good consistently to several other Member States, that is planned or completed by a third country SOE. This would preclude other Member States and the Commission the possibility of shedding some light on the important risks to the security of Europe on that investment, as a consequence of the choice of the Member State on whose territory the investment is planned or completed of excluding food security from its material scope of application.

One could argue that Member States and the Commission would be able to give their inputs through Article 7 of the FDI Regulation, but on the one hand the investment may become publicly known way too late, and on the other hand if the investment does not fall within the scope of application of the national screening mechanism there is not much to do even after such inputs, especially if the national investment screening procedure fails to allow the opening *ex officio* of a review on the basis of a comment or an opinion.

In addition, importantly, it is to be noted, in fact, that since the TEU reserves to the Member States the "sole responsibility" with regard to national security, the FDI Regulation could not be grounded on that notion. Indeed, this is grounded on the notion of "security and public order". This means that the Member States are entitled to consider that some transactions only fall within the *national* security and therefore they may not inform about them the Commission or the other Member States.

Moreover, in addition to the risk of inconsistency of EU policies in the field, there is another important threat that is common to every national policy, but that is even more accentuated in the European framework also in light of the potential diversification in the notion: the politicization of the notion of security[325].

If this is inevitable in any jurisdiction, it is problematic in the EU framework because the direction to which the policy is headed significantly depends on the definition of the notion. In other terms, a broad understanding can open the way for far-reaching protective measures, whereas a narrow interpretation limits restrictive measures to exceptional circumstances[326]. This is by no means a trivial and of little consequence decision: the overall approach the policymakers want to adopt to deal with national security issues in international investment depends on it. It is a political choice, that may entail a politicization of international economic policy, with an aim of using

[325] VIG Z., *The Regulation of Screening of Foreign Direct Investments in the European Union*, in *Pro Futuro*, 9, 2020.
[326] SVEN S., *Ibid.*

national security to introduce a more protectionist approach to international economic relations.

For instance, a blatant example of politicization of the notion can be found in the Hungarian legal system, and notably in Act LVIII of 2020[327] establishing a provisional investment screening mechanism aimed at facing the consequences of the pandemic. This text introduces the term "state interest", defined as public interest related to the security and operability of networks and equipment and the continuity of supply.

What is more, this risk of politicization of security has the potential to enter into conflict with the principles expressed by the golden share case law of the Court of justice, that, as already assessed above, had the objective of making foreign investment control a more and more legal rather than political proceeding, through the establishment of principles such as legal certainty, judicial review *etc*.

An interesting consideration was suggested by the doctrine[328], that has underlined the impact of this ambiguity on general principles of law and fundamental rights, namely the right to be heard in a composite screening procedure. The author suggests that the reliance on abstract standards that are not meant to be concretized over time and given general content in administrative or judicial practice (for this ensures that investment screening authorities preserve their discretion) may imply that those subject to and affected by an investment screening measure face an uphill struggle in influencing the screening process.

Due to the unclarity of the notion, it is extremely difficult for an affected investor to question the assessments of a screening authority, by demonstrating that the investment in question does not generate risks to national security. The author concludes that there is an unavoidable tension between the preservation of the autonomy of Member States to define their need for security and the safeguard of legal certainty.

---

[327] LVIII of 2020 law on the transitional rules related to the end of the state of emergency and on epidemic preparedness, Section 276 (1); see also VIG Z., *Ibid.*
[328] POHL J.H., *Ibid.*

Plus, in light of the *de facto* impossibility of laying down a generally applicable definition of security at an EU level, the doctrine suggests that its application should be crystallized through the disclosure by the Commission of the specific facts and of the legal analysis on which it relies to deliver opinions in the cooperation mechanism. This would allow more legal certainty for investors and target companies.

In addition, on the contrary, some are also convinced that the flexibility of the notion must be welcomed[329] as a mean to accommodate a broader range of security and public order concerns (as regards the FDI Regulation, not investment screening mechanisms). In the context of the EU Framework, the advantage of an information-sharing regime is that Member States can discuss and deliberate on evolving threats and on this basis national legislation adopts specific measures to quickly and effectively respond to the evolving security context. Furthermore, the Commission can at any time amend the Annex to the FDI Regulation to include other projects and programs of Union concern. Hence, this flexibility in the European framework can be considered to be tolerable insofar as it establishes a cooperation mechanism and not a proper screening.

In conclusion, in my view, in the face of the complexity that can be inferred from the above, the FDI Regulation could not help but imply an open, dynamic and flexible notion of security and public order, as aligned both with the constant augmentation of the threats thereof, and thus the referent objects to protect, and with the competence division between the EU and its Member States.

The suggested amendment with regard to the choice of the investment to be notified is also applicable here: as mentioned above, the OECD[330] found that the choice of the criterion based on which an investment needs to be notified to other Member States or the Commission needs to be amended. Since within the current framework Member States decide to submit an investment to the screening mechanism based on their own perception of national security, some investments are left out of the mechanism because

[329] REISMAN, *Ibid.*
[330] OECD, 2022, *Ibid.*

of that. Therefore, the suggested modification of the criterion to notify a transaction could be beneficial also on this level, in order to mitigate the consequences of the complexity to establish a European notion of security.

It is also worth noting that Article 4 on the factors to be taken in consideration in the assessment of the harmfulness of a transaction provides some guidance, and if taken into account by screening authorities, it is likely to contribute to raising the awareness with regard to the risk factors it mentions, namely both on the sensitivity of certain sectors, as well as on some of the qualities of investors may give rise to suspicion.

5. General Conclusions: a Sophisticated and Beneficial Cooperation Framework, whose Potential is Hindered by Remediable Shortcomings.

In light of the analysis conducted, it is highly relevant in order to draw some general conclusions with regard to the actual usefulness of such information flow to refer to the work of the Investment Division (Directorate of Financial and Enterprise Affairs) of the OECD, a study on the efficiency and the effectiveness of this mechanism[331], that was repeatedly mentioned above for more detailed aspects. This study has opened the discussion with *inter alia* national screening authorities to deeper and further understand their perception of the usefulness of this instrument.

Thus, the OECD found that national authorities have a generally positive view of the information and feedback that they receive through comments and opinions. Interestingly, national authorities have reported that in some instances the input from their counterparts has shed a brighter light on the potentially negative implications of a given transaction, and actually impacted on the outcome of the screening proceeding, as well as on the adoption of mitigation measures to be imposed on the individual transactions eventually adopted on the basis of such inputs. In other terms, based on the considerations of the authorities engaged in the daily enforcement of the FDI Regulation, it emerges that the mechanism is correctly working and has the potential to even better develop in the next few years.

In addition, the Member States seem to hold a positive judgment of the FDI Regulation at the level of their national screening authorities that have claimed their overall satisfaction. Moreover, this appreciation is also generally observed at a political level[332]. What is appreciated by government actors according to the OECD is a plethora of different benefits, including the possibility to adopt better informed decisions thanks to the exchange of information on specific transactions under the cooperation

[331] OECD, 2022, *Ibid.*
[332] See *e.g.* Austrian Ministry for Digital and Economic Affairs (Bundesministerium fur Digitalisierung und Wirtschaftsstandort), Erster Tatigkeitsbericht der Investitionskontrolle, 2022.

mechanism, the closer cooperation and peer learning among national authorities of Member States in an emerging policy field and a better understanding of investment trends in Europe. In addition to this, government actors agree that the FDI Regulation has allowed for a broader recognition at the political level of the benefits of reviewing certain FDI for their potential implications for security and public order. Accordingly, academia agrees and adds that the Regulation encourages the adoption of investment screening mechanisms or a better use of existing ones[333].

The FDI Regulation was undoubtedly a necessary and expected intervention of the EU in a field in which a great cooperation among the Member States was long awaited. This text introduced an important innovation, establishing a reinforced cooperation mechanism in a field so sensitive as security and public order that has no equal in any other geographic region in the world. Moreover, it has brought a greater awareness for the Member States of the risks that inbound FDI may present, while it did not generate an unsustainably burdensome system for foreign investors thus visibly reducing the attractiveness of the European internal market as an investment destination.

Nonetheless, the Regulation in general and the cooperation mechanism in particular have lost part of their potential on the way. I believe that most of the shortcomings of the mechanism that I tried to analyze above can be perfectly overcome by the EU.

Notably, Article 15 of the FDI Regulation provides that by 12 October 2023 and every five years thereafter the Commission shall evaluate the functioning and the effectiveness of the Regulation, presenting a report to the European Parliament and to the Council, that, where it recommends the adoption of amendments, may be accompanied by legislative proposals.

What is more, the Commission has recently announced[334] its preparedness to propose some amendments to the Regulation. This will be the perfect occasion for the

[333] See *e.g.* ZIG V., *Ibid.*

[334] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2023: A Union standing firm and united*, 18 October 2022, COM(2022) 548 final.

Commission to improve the efficiency of a mechanism that has a great potential which is hindered – as demonstrated – not only by a rigid competence framework, but also by some technical aspects that could be well dealt with just by amending some provisions of the Regulation, without the need to intervene on EU primary law.

If the Regulation thus established a perfectible – yet still remarkable and useful – cooperation mechanism, some would have preferred to see a different outcome to the described path that the EU has followed towards the safeguard of security and public order. Indeed, some had rather see the Commission playing a more significant role in screening procedures. Against the background of the analysis conducted in this paragraph, it is interesting at this stage to comment on the role of the Commission, whether it was appropriate or not to relegate it to the consulting role it has today, deprived of any decision-making power.

III. A European investment screening authority: an unrealistic myth built on shaky foundations or a wasted opportunity for a more effective safeguard of European security.

In the paragraph above, an analysis was conducted on the current framework for FDI control in the EU, in view of which it was concluded that the Regulation adopted represented a positive – yet perfectible – step ahead towards the safeguard of security and public order in the European Union. However, the framework enacted by the Regulation was not what many were aspiring to.

In fact, the calls for the establishment of a European screening authority have raised over the years, in the hope that – as an outcome of the process that started with a rise of the awareness in the European public debate on the importance of controlling the inflow of FDI at an EU level – the European Commission or another EU institution would be granted a decision-making power.

In practice, by comparing this regulatory field to competition policy, and notably with the system provided for by the Merger Regulation[335], thus a one-stop-shop system under which if a transaction reaches a European dimension, this is submitted to the review of the European Commission, whereas if it only has a national dimension, national competition authorities maintain their competence. Some would have appreciated the establishment of an ever more far-reaching system replacing national screening authority with a supranational body.

The inappropriateness of the comparison between national security review and merger control constitutes a prelude to the third chapter, that focuses on the difficulties deriving from the attempts to coherently enforce these policies in parallel.

Therefore, after analyzing the current state of art in the previous paragraph, I believe it useful in a *de iure condendo* perspective to assess whether it would be a viable

[335] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

– and possible – solution to confer on a pan-European authority, potentially the Commission, a more active role.

An analysis of these aspirations should carry out on the first place an overview of the most relevant positions in literature suggesting the conferral of such power on EU institutions, some of which even evoke the aspiration of taking as an example CFIUS, the US screening (1). Then, a remind of the competence structure focusing on this specific aspect of national security policies, as well as the drawbacks of the current institutional framework of the EU, shall be useful to bring some realism back in the debate, before drawing some personal conclusions on this issue (2).

1. The aspirations for a more sophisticated institutional framework and the far-fetched reference to the US model.

Since the very beginning of the European integration process, the EU has often been compared – on the most various policies – to its key ally, the Unites States. While in some cases this juxtaposition is useful to understand some crucial points and highlight some perspectives for the European integration, this comparison is more than often inappropriate, first and foremost because of the structural differences between the EU and US, the former being a "new legal order of international law"[336] that is "under international law precluded by its very nature from being considered a state"[337], while the latter is a federal State.

This is not just a formal difference in the theoretical definition of their legal nature, because it entails substantial differences in the way they work, namely and mainly the division of roles and competences between them and their constituencies, the Member States and the EU institutions on the one hand, the States and the federal institutions (the Federal Government, the Congress, the Supreme Court *etc*.) on the other. Without having the possibility to enter in much broader detail, it is still useful to briefly recall the US institutional framework, in order to put the debate into its context.

When it comes to the protection of national security, the competent authority for the assessment of national security implications of transactions that could result in the control of a business by a foreign person is the Committee on Foreign Investment in the United States ("CFIUS")[338]. This is an interagency committee chaired by the Secretary of Treasury whose members are the respective heads of the major government agencies that concur to the adoption of decisions which are normally taken by consensus, while the Director of National Intelligence and the Secretary of Labor are

[336] CJEC, 5 February 1963, *Van Gend and Loos,* Case 26-62, ECLI:EU:C:1963:1.
[337] CJEU, Opinion of the Court of 18 December 2014, Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/13, ECLI:EU:C:2014:2454.
[338] See MENDENHALL J., TERNEY R., *CFIUS Overview*, in BOURGEOIS J.H., *EU Framework for Foreign Direct Investment Control*, 2019, pp. 135-148.

non-voting *ex officio* members of CFIUS. In essence, CFIUS aids the President in the assessment of national security implications of inbound FDI.

The similarities between the control of foreign investment performed by CFIUS and the regime of the FDI Regulation are essentially in the number of three[339]. Firstly, the applicable statutes provide for a broad and non-exhaustive list of factors to guide the assessment of security threats; secondly, there is a significant similarity in the information that needs to be disclosed by the foreign investor and the target company in order to allow the performance of the investment review; finally, an information sharing mechanism is provided both under the Regulation as described above (between the Commission and the Member States) and under FIRRMA[340] (information might be shared with allies and third parties).

Apart from these – limited – similarities, there are however numerous divergences between the two systems[341].

First and foremost, CFIUS, contrarily to the Commission's DG Trade whose opinion are non-binding, has the power to block or suspend a foreign investment.

Secondly, while the FDI Regulation subjects the decisions adopted by national screening authorities to the principle of judicial review (without explicit limitations as regards the ground for review), determinations by the US president are generally binding in their substance (for procedural issues leading to a supposed violation of constitutional rights in the process by which a disposition of a transaction is determined may be judicially reviewed).

Thirdly, the FDI Regulation, when laying down the general principles with which national screening mechanisms must comply, bans every form of discrimination between third countries, while FIRRMA allows discrimination with regard to countries "of special concern" that have a "demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US leadership in areas related to national security".

---

[339] REISMAN D.A.A., *The EU and FDI: What to Expect From the New Screening Regulation*, Institut de Recherche Stratégique de l'École Militaire, Research Paper No. 104, 2020
[340] Foreign Investment Risk Review Modernization Act of 2018.
[341] REISMAN D.A.A., *Ibid.*

Fourthly, it is advanced that CFIUS provides a "safe harbor" option, which grants foreign investors that voluntarily submit the investor for review and receive a clearance with a safe harbor from challenge after the completion of the transaction (unless it is proved that a fraud was involved in the application submitted to CFIUS). By contrast, with regard to foreign investments not undergoing screening the FDI Regulation allows the Commission or a Member State to issue an opinion or a comment for up to 15 months following the completion of the investment. The decision whether to order the divestment depends however on the Member States, and they may establish to grant a safe harbor as well.

Moreover, the main difference between these two systems is simply the fact that legislation on CFIUS establishes a proper investment screening mechanism, while the FDI Regulation a cooperation framework among screening authorities[342].

If, after this brief overview and comparison, we were, however, to consider what the Commission may envy to CFIUS, this is probably only the decision-making power of the latter.

In fact, with regard to the principle of non-discrimination, its explicit establishment is perfectly coherent and aligned with the willingness that the Commission repeatedly expressed in many of the communications mentioned above to not establish a protectionist instrument or an instrument likely to deter certain foreign investors, but an instrument limited to the safeguard of security and public order; and – in my opinion – rightly so, because if such an instrument is correctly designed it shall be able to vanquish security threats, without the need to reduce inbound FDI flows.

Accordingly, the affirmation of the principle of judicial review in the FDI Regulation is – as already underlined – the consequence of a clear indication of the Court of Justice, according to which foreign investment control policies need to comply with a series of legal principles such as legal certainty and judicial review so as to avoid any form of politicization. By contrast, this politicization is undeniably present in the

[342] See also BLANQUART J., WHITTEN R., *CFIUS for Europe? New Screening of Foreign Direct Investment in Europe,* Global Trade Law Blog, 2017, available at: https://www.globaltradelawblog.com/2017/12/12/new-screening-fdi/.

US system: this is not necessarily a flaw, but a deliberate political choice of targeting more than just the threats to national security of a specific transaction; it is a respectable choice, but not necessarily enviable.

Moreover, the inferiority complex towards the US system for FDI screening does not concern its substantial and procedural norms, but rather the desire to replicate its institutional framework, under which a federal authority supports the federal executive to adopt decisions with regard to national security implications of inbound foreign investment. Under the charm of the US system, some even talked of a "European Committee on Foreign Investment"[343].

In the face of the many divergent views among Member States, and the challenges or obstacles that this can generate for the overall functioning of the management of national security policies within the EU, a part of the literature has considered that a viable solution to effectively protect security and public order in the EU would be a proper supranational screening system. It is therefore useful at this stage to mention some of the voices that have been raised to this end, keeping in mind that these proposals do not differ much from one another and that they are not necessarily all clear on the feasibility or exhaustive with regard to the details.

Hungarian scholar Zoltan Vig[344], considers that the FDI Regulation brings "beyond question" some benefits for the EU, while encouraging Member States to better utilize their screening mechanisms or to put one in place and to take into consideration not only the interests of the Member State on whose territory the investment is planned or completed, also by those Member States that still do not enforce any investment screening mechanism. However, Vig deems the Regulation unhelpful insofar as the Commission is only entitled to a power of political influence. In consideration of the importance of foreign capitals and the issues affecting overall

[343] DI BENEDETTO F., *A European Committee on Foreign Investment?*, *Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues*, No. 14, 2017.
[344] VIG Z., *The Regulation of Screening of Foreign Direct Investments in the European Union*, in Pro Futuro, 9, 2020.

European Union security and public order, the author considers that the real solution could be a supranational screening system and that the process towards that direction could be accelerated by growing competition and protectionism among global powers.

In addition, Italian scholar Di Benedetto[345] observes that in the face of the opposition of several Member States, a possible alternative solution would have been to avoid conferring on the Commission the consultative power that it currently holds, but imposing on those Member States that are still lacking an investment screening mechanism the adoption of one, through an act that was giving clear guidance to Member States with regard to the adoption or the amendment of their national measures of investment control or protection of EU security and public order.

Notwithstanding, between the initial proposal and this alternative, Di Benedetto suggests that the most ambitious proposal would have been to establish a European Committee on Foreign Investment replacing existing national investment screening mechanisms. This would be possible arguing over the acquisition of an exclusive competence within restrictions adopted on public interest grounds to limit non-EU inward FDI, as descending from Article 207 TFEU and Opinion 2/15[346], that was studied above.

The author then goes on to suggest that such Committee could be modeled on the US and Canadian homologues, respectively for the broadness of the notion of security (also covering sectors linked to defense and critical technologies and resources) and for the "net benefit test" established under the Investment Canada Act[347] (on the basis of which the government must consider the effects of the inward investment on national economy).

In order to take into account the specificities of the EU legal order, namely the responsibility of Member States in the protection of their essential interests regarding defense as enshrined in Article 346 (1) TFEU, the author suggests that such European Committee could be provided with the power to screen non-EU foreign investment at

[345] DI BENEDETTO F., *Ibid.*
[346] CJEU, Opinion of the Court of 16 May 2017, Free Trade Agreement with Singapore, Opinion 2/15, para. 81 ss. ECLI:EU:C: 2017:376.
[347] Investment Canada Act of 1985 as amended.

least in non-military strategic sectors, such as energy, telecommunications, transports, hi-tech industries, banking, critical infrastructure. The Committee would be conferred the power to block or condition inward FDI affecting security and critical economic concerns, without violating EU's international obligations.

Other major advantages of the Committee are presented as the projected reduction of a number of FDI limitations, as well as the number of competent authorities; the provision of a simple, transparent and predictable framework of FDI control for foreign investment; the establishment of a better mean to serve the European general interest. Di Benedetto is not the only author that comes to this conclusion[348].

[348] See *e.g.* VIDAL PUIG R., *The scope of the new exclusive competence of the European Union with regard to 'foreign direct investment*, in *Legal Issues of Economics Integration*, 40, 2013, p. 161.

2. The Desirable Future Developments of the European Framework for the Control of Inward Foreign Direct Investment: a Normative Statement

As much as it may appear didactic and punctilious, it is worthwhile to restate a fundamental principle when it comes to evaluating EU legislation: the EU is founded on the principle of conferral and as such it is bound to what the treaties enables it to do and to what they limit its action. The EU cannot – as the United States – be considered a state yet and thus must face the reality of being constrained in many fields to what its Member States have decided to give it power to act. This in a way also holds true for the competences exercised in the United States at a federal level, but the safeguard of national security and the establishment of a common foreign policy is by its own nature a subject dealt with at a federal level, and has always been so.

Therefore, also – and especially – in this field, one cannot disregard the spirit of EU primary law, that explicitly leaves to the Member States "a sole responsibility" with regard to national security. Nonetheless, it is still true that, as I tried to express over the course of this paragraph, national security in international investment is not only an issue affecting the individual Member States concerned by the transaction because of the far-reaching level of integration that the EU internal market has reached, hence the need for an EU action.

Accordingly, EU legislation on the control of inward foreign investment needs to be studied, and consequently applauded or criticized, by always keeping in mind the complex competence framework that was analyzed in the first chapter.

Consequently, it must first and foremost be recognized that the EU was not in a position to adopt a FDI Regulation establishing a framework even remotely similar to that of CFIUS or a screening mechanism *per se*. Considering that, as academia suggested, the EU could have adopted a mechanism that aims at screening investments completed or planned even just in a non-military field is simply unrealistic.

Even if, as I concluded in the previous paragraph, the FDI Regulation is a perfectible instrument on many levels, it would be erroneous to believe that it could have provided for more than an information sharing system because of the legal

framework of the division of competences in this field described in the first chapter (not to mention the political oppositions from the Member St*f*ates). In order for this to happen, a structural reform of the Treaties would need to be enacted, which means that the Commission's proposal cannot be accused of lack of ambitiousness.

Moreover, these propositions of academia, as much as they are unrealistic under the current treaties, can still be used as a starting point for a brief reflection on a *de iure condendo* perspective, and thus for questioning whether it would be positive to review the Treaties so that the EU is enabled to adopt an investment screening mechanism, only by intervening on the relevant provisions that currently limit such possibility, namely on Article 4 (2) TEU.

In principle, it would be difficult to evaluate in abstract terms if that would be effective to attain the ultimate policy objective, *i.e.* the safeguard of European security, for it would be necessary to consider how secondary legislation would decide to regulate the field.

In general terms I agree that giving this power to EU institutions (be it to DG Trade, to this proposed European Committee on Foreign Investment or to another institution) would bring many benefits towards the goal of finding the right balance between the openness of the European market and the safeguard of security. To name an example, a European screening authority adopting decisions on transactions having a European dimension would be able to limit administrative burden through the exclusion of multi-jurisdiction filings.

What I find more questionable is the suppression of national screening authorities and devolving all the competences to the European level. Given the specificities of the European institutional framework, in its relations to the national level, I believe that it would not be a smart choice to exclude national authorities from any role in the decision making by completely replacing them.

In my view, it would be by far more appropriate to leave the competence on investments having a national dimension to national screening authorities as it is the case in merger control. However, contrarily to what happens in the merger review, I believe that national authority should have an active role in the decisions adopted at an EU level, as well. One could imagine, for instance, that the supranational screening body could be structured in a way that its composition shall vary on the basis of the Member States concerned by the investment so that national authorities, jointly with the Commission, issue a single decision on the transaction, that is binding on the entire Union.

To my reading, this would be the only viable solution to make a competence shift with regard to the assessment of foreign investment, while adopting a system that is coherent with the current institutional framework of the EU.

The reason why Member States should be involved in this decision is not simply linked to their ideological attachment to the safeguard of national security. In fact, one should always bear in mind the absolute distinction and the irreducible difference between national security and competition review: national security is not only about numbers and thresholds, but for an assessment to be correctly performed it is necessary that relevant information is in the first place acquired. The screening authority needs to access information that is for its most part sensitive, confidential or even classified. This is the reason why national security agencies, intelligence services, police forces *etc.* are often involved in screening procedures, but it is needless to say that the EU does not have any of those systems under the current institutional framework, while there is nothing similar to European intelligence services, nor polices forces *etc.*

Moreover, in many sectors that are increasingly more subject to national security review, the EU has only a competence of support and coordination. A clear example is the human health sector under Articles 6 and 168 TFEU, which after the pandemic has been included in most of sector and multi-sector investment screening procedures. An expansion of the competences of the EU in these sectors seems the necessary and most coherent logical assumption before it would be able to adopt – without any indication

from the Member States – any informed national security decision on foreign investment, but this reform would go much beyond national security policy, and it is not conceivable in the foreseeable future. Even though the Union has recently made progresses to act jointly to address some of these issues, *e.g.* with regard to the decision to jointly purchase weapons[349] (in the wake of the joint procurement of vaccines to tackle the pandemic[350]), the Union still does not have the institutional framework and the necessary competences to adopt comprehensive health or defense strategies, which are both essential with regard to the security risks stemming from foreign investment.

A complex, radical and structural reform of the EU would be necessary, in my view, for the EU to take informed decisions on national security on its own and without any support from the Member States.

In addition, another positive aspect of the implementation of this proposal would be the alleviation of the administrative burden for national screening authorities that – to date – handle entirely all FDI notifications, regardless of the dimension of the transaction. As it will be further discussed in the third chapter, this threatens to become even more problematic in consideration of the widening of the scope of screening mechanisms and of the fact that national screening authorities in EU Member States are generally placed within ministries or other governmental structures, which have many more duties other than the screening of foreign investment.

In conclusion, while I contend that within the current state of the division of competences under the EU treaties the adoption of a cooperation mechanism was the only feasible and realistic solution, I strongly support the idea of expanding the role of EU institutions through a revision of Article 4 TEU because of the many benefits that

[349] European Parliament, *Reinforcing European defence: buying weapons together*, 1 June 2023, available at: https://www.europarl.europa.eu/news/en/headlines/security/20230504STO84701/reinforcing-european-defence-buying-weapons-together,

[350] European Commission, *Commission Decision approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures*, 18 June 2020, C(2020) 4192 final; European Commission, *Annex to the Commission Decision on approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures*, 18 June 2020, C(2020) 4192 final ANNEX.

this would bring in terms of *e.g.* protection of the overall European security in the face of transnational transactions, the reduction of administrative burdens for foreign investors, the acquisition of bargaining tools for the EU within investment treaty negotiations.

Nonetheless, pragmatically, in order to preserve the ultimate policy objective, which is the safeguard of the European security and public order, I believe that the active involvement of national screening authorities would still be necessary even for decisions on investments having a pan-European dimension, through their support and coordination of the transmission of the necessary information that other national authorities hold to the European level, as well as the participation in the decision making process.

CHAPTER 3 - The pursuit of Policy Coherence between Security, Investment and Competition: Regulatory Challenges for the EU within Unprecedented Evolutions of Global Economic Relations.

The previous chapters attempted to analyze policies aimed at safeguarding national security and public order within the field of international investment in the context of the complex EU institutional and regulatory framework. Unsurprisingly, because of its impact on global business and economic relations, inward FDI control enforcement intersects with several other policies enforced both at a national and a European level, and such intersections give rise to complex policy questions of greater width and eventually end up questioning the EU of its overall vision on the future of its social market economy, in relation to its economic allies, partners and counterparts and the changing relationships with them.

The framework established by FDI Regulation could thus be juxtaposed to other instruments that the EU is equipped with or sets of rules originating from other legal systems, such as WTO law and the GATS or even with EU Capital Markets law. Such operation is particularly useful in order to take a step back from the analysis that was developed in the previous chapter and grasp the bigger picture of the current movements and evolutions in this policy field in particular and the economic regulatory framework in general.

Within this thesis, that mostly focuses on regulatory aspects of international investment within the EU legal system, the policy with which such juxtaposition may be carried out is competition, for such attempt would be the most coherent with the approach adopted so far that aimed at placing an attentive focus on regulatory aspects of business operations.

Moreover, the quest for balance when it comes to investment policies, including security and public order issues, is very far from being a straightforward operation to perform.

In fact, on the one hand, the attraction of FDI in the European Internal Market serves the purpose of fostering and stimulating our social market economy through the enhancement of fair competition. Indeed, as Executive Vice-President Vestager claimed at the OECD Global Forum in December 2022[351], "we want foreign investment on our Single Market, because that is pro-competitive" and "because it helps to achieve all our complementary policy objectives". In other terms, the attraction of foreign investment is extremely beneficial to the EU internal market insofar as it can be considered as a multiplying factor of competition, capable of raising the competitive levels of the European economy with all the benefits deriving from this for, say, consumers. As the Commission itself upheld within the context of the proposal of the FDI Regulation[352], FDI boosts productivity and makes EU companies more competitive by improving resource allocation, bringing in capital, technologies and expertise, increasing competition, stimulating innovation, and opening new markets for EU's exports.

Against this firm conviction, a question – however – was arisen by EVP Vestager: "what changes are needed in order to keep our markets as open and fair as possible?". As it emerges from the sense of the speech of EVP Vestager, some of the national security concerns addressed above share the same origin as the distortions in the level playing field that competition policy has observed recently, namely inbound FDI at the hands of third country SOEs.

Accordingly, the OECD Competition and Investment Divisions observed in a joint study[353] that competition and investment policies contribute to the same long-term goals (*i.e.* economic growth, efficiency, provision of incentives for firms aimed at fostering productivity), whereas in some instances there can be some trade-offs between investment and competition policies when they are employed to pursue diverging

[351] European Commission, EVP Vestager remarks at the OECD 21st meeting of the Global Forum on Competition "Competition in the wider policy context", 1 December 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_7351.
[352] European Commission, *Commission Staff Working Document Accompanying the document "Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*", 13 September 2017, SWD (2017)297 final.
[353] OECD, *The Relationship Between FDI Screening and Merger Control Reviews*, OECD Competition Policy Roundtable Background Note, 2022.

policy objectives in individual cases (*e.g.* investment screening distorting M&A markets where they exclude or disadvantage individuals towards firms subject to lesser review or the use of essential security concerns for mere protectionist purposes or decisions hindering the efficiencies generated by a merger through non-proportionate and excessive remedies imposed under essential security arguments).

On the other hand, major policy questions raise when it comes to the enforcement of competition law and policy having significant consequences on the safeguard of security and public order in the EU. Indeed, some coherent antitrust decisions having blocked the merger of European companies intended to create "European champions" or strictly enforcing State aid law have been heavily criticized for a lack of vision, based on the argument that this would end up generating situations where European companies are surmounted by U.S. and Chinese giants holding consistent market shares, against which such EU companies are unable to compete alone, leaving European security extremely exposed.

In addition to these major policy questions, the points of contacts between national security and antitrust are not limited to this. On top of all the procedural aspects deriving from the parallel enforcement of competition law (and merger control in particular) and FDI screening, some even argued that the European Commission is empowered by virtue of the Merger Regulation to adopt decisions based on security concerns, which sounds quite enigmatical in consideration of what was repeatedly analyzed above.

It is thus in light of the above, and of many more intersections that it is extremely enriching to examine in order to obtain a wider understanding on the possibilities to safeguard national security in Europe, while preserving the EU's security and public order, that I chose to conduct a compared analysis of these two policies and their convergence in the final chapter of this thesis. Moreover, in consideration of the vastity of competition policy instruments under EU law, this study will mostly focus on the control of concentrations.

However, over the course of this chapter, that aims at placing investment screening mechanisms in the bigger picture of the European economic regulatory framework for business transactions, the focus shall not shift from that of the thesis itself, *i.e.* the control of foreign investment on grounds of security and public order. Therefore, the discussion of the relationship of this topic with competition law and policies is intended to shed a light on the perspectives of the safeguard of national security in light of concerns rising thereto associated with foreign investment within the competition enforcement.

In order to analyze the various questions arising from the policy objective of safeguard of national security in a free market economy, it is necessary to consider first the intersections between merger review and foreign investment control, from an institutional, substantial and procedural point of view (1). Then, it will be necessary to consider whether the enhanced awareness over national security in the European public debate has led to the consequence of readjusting antitrust enforcement, distinguishing between the intra-EU concentrations and those where one of the parties is a foreign investor (2).

I. The intersections between FDI screening and merger control. Procedural and substantial proximity and antagony.

As it has already been mentioned above, the important expansion of FDI screening mechanisms is a recent phenomenon, in particular when it comes to advanced economies where a constant trend of expansion, widening and strengthening of investment screening mechanisms with an aim to tackle risks associated with national security that may derive from inbound foreign investment[354] is shown.

Therefore, at first, regulatory obligations to which foreign investors completing a cross-border M&A in EU Member States were essentially limited to merger control under antitrust considerations. With the introduction of investment screening mechanisms, however, such regulatory obligations have increased. However, it is worth noting that, even though the context within which merger control and investment screening are often undergone in similar settings, *i.e.* cross-border M&A, these procedures are generally distinct and independent from one another from a substantial, procedural and institutional standpoint, but – above all – from the point of view of their policy objective. Moreover, this is due to the fact that more than often competition issues and national security concerns arise independently from each other, while in some limited cases operations raise concerns both from a national security and a competition standpoint.

Nonetheless, even though such major divergences exist, the expansion of FDI screening mechanisms resulted in the emergence of more and more intersections between the two policies. These intersections may however at times symbolize a convergence and occasionally represent a collision. This holds true both for procedural and substantial aspects of their regulatory framework, but especially for the policy objectives that may in some cases overlap in the attempt to achieve aligned objectives.

It is noteworthy that the cases where merger control and FDI screening interact carve out an important share of the transactions that may fall within their respective

[354] OECD, Acquisition- and ownership-related policies to safeguard essential security interests, 2020.

scope of application. In fact, on the one hand, even though some investment screening mechanisms also submit greenfield investment to their review (even though in extremely limited cases), these transactions are not concerned by merger control for it only concerns concentrations between existing companies. On the other hand, merger control is not limited, as investment screening mechanisms are by their own nature, to cross-border situations, but all the operations in which a foreign investor does not partake are naturally excluded from their scope.

Indeed, as the Commission pointed out in the context of the Proposal, the overlap with regard to the operations concerned by both regimes exists because EU merger control may in certain situations allow a review of FDI, in cases where they take the form of concentrations falling within the scope of EU Merger Regulation, but exclusively based on the effect on competition in the EU market[355].

Therefore, the number of operations involved by the interaction of these mechanisms is restricted for both regulatory procedures.

Hence, it is worth analyzing the procedural and substantial aspects that define the greatest differences and convergences between merger control and investment screening mechanisms, having regard to both the national and European levels. Because the policy objectives (1) deeply influence the institutional framework (2) that is responsible for the implementation, it shall be coherent to analyze the former, before focusing on the latter. In consideration of the limited role of the EU with regard to national security policies, these two sub-paragraphs will mostly focus on the complex relations between the national and supranational levels, both from a substantial and institutional point of view. However, a coordination between the FDI Regulation and the Merger Regulation is set forth by the former, which is useful to examine in order to understand the relationship between these instruments of EU law (3).

[355] European Commission, *Commission Staff Working Document Accompanying the document "Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*", 13 September 2017, SWD (2017)297 final.

1. The variable distance in the policy objectives of foreign investment control and antitrust: an intertwining of independence, proximity and convergence.

Within the complex comparison between merger control and foreign investment screening, the most salient aspect to tackle is most probably the differences in the policy objectives. Indeed, it is these discrepancies that further explain the other elements of comparison and contact between these frameworks.

In the words of former Chief Executive of the Competition and Markets Authority (UK competition authority)[356], merger control and foreign investment control are "uneasy bad fellows" insofar as "their prime motivations are different and potentially conflicting": while competition law is motivated by the desire to promote consumer welfare by subjecting producers to effective rivalry, foreign investment controls are typically motivated by the desire to protect domestic producers from competitors based outside the territory.

On the one hand, the objective of FDI screening policies have been widely described over the course of this thesis. In essence, while attempting not to reduce the attractiveness of the economy as a destination for foreign investment, they aim at tackling the concerns for national security stemming from investment projects led by foreign-controlled investors for the host economy. To name but a few examples, these concerns may derive from the risk of espionage or sabotage when such investment allows the investor to access sensitive information through physical proximity to sensitive sites or on the basis of the collection of sensitive data as part of the business operations in the host country; from the foreign control of supply chains or providers of critical goods or services creating dependencies so that the foreign investor is enabled to exert pression on the host government's authorities; or from the acquisition

[356] UK Government, Department for Business and Industry, *Alex Chisholm speaks about public interest and competition-based merger control*, Speech given by CMA Chief Executive, Alex Chisholm, at the Fordham Competition Law Institute Annual Conference, 11 September 2014, available at: https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control.

of technological assets and capabilities that may for example be employed in defense applications[357].

On the other hand, the aim and objective of competition policy in general tends to vary depending on the jurisdiction in question. With regard to the EU, it has a longstanding tradition in antitrust implementation to privilege the pursuit of consumer welfare[358]. Indeed, the goal of merger control is the avoidance of the creation of monopolies or oligopolies that would ultimately be detrimental for consumers insofar as they would determine a further reduction of future competition eventually resulting, *inter alia,* in a significant raise of prices or unfair resources allocation.

In general terms, in order to protect its goal of consumer welfare protection, the European Commission and national competition authorities are required, on the basis of their expertise in merger control, to follow the Substantial Lessening of Competition test, without reference to public interests others than the maintenance of effective competition on the market[359].

In principle, these policy objectives are not *per se* conflicting, for they are undeniably divergent and move – at least apparently – on parallel lanes.

In fact, in most cases, especially since merger control is an assessment that has an economy-wide applicability, many transactions that fall within its scope of application do not raise any sort of concern associated with national security. Accordingly, it is frequent that transactions that do not fall within the scope of merger control because of the low revenues of the target company, resulting in the fact that the thresholds provided for in the Merger Regulation or national legislation are not met, are still rising concerns associated with the implications on national security of a certain investment; this might

[357] OECD, 2022, *Ibid.*
[358] See *e.g.* European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31/5, 5 February 2004.
[359] PITRUZZELLA G., *Foreign direct investment screening in EU*, in NAPOLITANO G., *Foreign Direct Investment screening - Il controllo sugli investimenti esteri diretti,* 2020, pp. 63-70.

be the case of a small-sized company that is deemed strategic in light of the goods produced.

Therefore, in this vast majority of cases their parallel movement does not result in a conflict between them.

Moreover, it has been observed[360] that more than often the enforcement of these policies results in the issuance of mutually sustaining remedies. For example, both procedures focus on concerns regarding single-supplier risks, which ends up aligning the decisions that may be extremely consistent and coherent with each other: a transaction that, say, envisages the acquisition of a company that is a supplier of goods or services relevant on national security grounds may be also blocked for antitrust reasons in a decision adopted under the merger control regime.

Nonetheless, a potential clash between the two review mechanisms, and therefore a significant inconsistency as regards the achievement of their respective policy objectives, is likely to descend from decisions adopted in the two settings.

On the one hand, as much as they may be justified and necessary to achieve the policy objective, several decisions adopted in the enforcement of investment screening mechanisms entail inevitably a risk of reduction of the levels of effective competition in the relevant market, when that presupposes the hinderance of pro-competitive transactions and the enhancement of efficiency.

On the other hand, some decisions that are adopted on antitrust grounds may generate a potentially detrimental outcome for the safeguard of national security insofar as they may block the creation of so-called "European champions", European companies of a big size that may be able to compete with similar industrial giants based in China or in the United States, or more generally on the global stage. This being an interesting topic to discuss for the future of the safeguard of security and public order in the Union, it will be further discussed in the final paragraph of this chapter.

Furthermore, an important difference that must be underlined between these policy fields lies in the capacity of the EU to set these policies. When it comes to merger control in particular, and competition policy in general, the EU has a full capacity to

[360] OECD, 2022, *Ibid.*

dictate the direction towards which the enforcing authorities need to be headed, whereas, as repeatedly mentioned above, when it comes to national security the room for maneuver within the hands of EU institutions is, by virtue of the treaties, very limited. It is indeed national legislation that lays down the rules governing FDI screening mechanisms and guiding national screening authorities in the adoption of transaction-specific decisions. Therefore, when it comes to policy objectives, it is not only their content that may diverge but also the authority that provides for them.

Notwithstanding these important differences, that should always be borne in mind because of their capacity to shape the entire policy design and implementation of the two frameworks, it is useful to consider that if the bigger picture is looked at it is easily understandable that similar challenges are faced by these procedures. To name the most blatant case, it is remarkable that the threats to the achievement of the policy objective that they both aim to preserve is threatened by similar global phenomena. Notably, the action of state backed enterprises within the European internal market has the capacity to negatively affect both frameworks.

On the national security side, the many potentially harmful consequences of the acquisitions of European companies by foreign investors that are backed by foreign governments were highlighted in the second chapter. Indeed, such acquisitions are often prompted by motivations going beyond the objective of a financial return and rather have a political and strategic aim, with all the consequences for national security purposes.

As regards competition policies, however, they are also potentially badly impacted by these foreign acquisitions. Indeed, the highly subsidized companies have a capacity to distort the effective competition within the internal market insofar as they unbalance the level playing field. In fact, by directly receiving funding from the state coffers they have an easier access to capital compared to privately-held European and non-European companies operating in the internal market. Indeed, the fact that high subsidization from a state can determine a distortion for fair competition within the EU is the rationale of the regime of State aid law established by Article 107 TFEU.

Therefore, notwithstanding the different policy objectives, similar challenges have corroborated the need to intervene tackling the same phenomenon to protect competition and national security, respectively the Foreign Subsidies Regulation establishing an additional regulatory framework (as briefly described in the second chapter) because of the insufficiency of the Merger Regulation[361] or other existing instruments of competition law to address those issues and the FDI Regulation.

In conclusion, in addition to the instruments adopted within the implementation of these policies, the important differences concerning their policy objectives should always be kept in mind. In fact, it is against this observation that it is possible to understand the design of the institutional framework identifying the authorities entitled to set the policy direction and to pursue it. Hence, the juxtaposition with merger control policy is – in my view – extremely useful to explain some institutional peculiarities related to foreign investment control.

[361] See *e.g.* SVETLICINII A., *The Acquisitions of the Chinese State-Owned Enterprises under the EU Merger Control Regime: Time for Reflection?*, in Revue Lamy de la concurrence, 67, 2017, pp.30-36; SVETLICINII A., *The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach*, in Market and Competition Law Review, 11 (1), 2018, pp. 99-120.

2. A differentiated institutional framework across EU Member States and the quest for a balanced coordination between generally independent proceedings.

The distinct objectives that these policies pursue are inevitably reflected in the institutional framework and the authority that is entrusted with the responsibility to enforce it.

Notably, in a study whose scope was not limited to EU Member States[362], the OECD has observed that there exist in principle three main institutional models across jurisdictions.

Firstly, several jurisdictions, including some EU Member States, have a single authority model to address both national security and competition concerns within the context of a holistic review. Notably, this is the case of Polish UOKiK (that stands for "Office of Competition and Consumer Protection") and Romanian Competition Council. These authorities conduct assessments on the basis of both national security and competition concerns within a unique proceeding (if of course the transaction falls within the scope of the legislation on both national security and competition).

At the EU level, in principle the competences for the adoption of decision on merger control for concentrations having a European dimension under the Merger Regulation and for the issuance of the opinions related to the framework of the FDI Regulation, are both placed under the responsibility of the Commission and both the competition decisions and the opinions on foreign investment screening are adopted in the name of the College of Commissioners.

However, a distinction should be made that underlines the difference between the model adopted for instance in Romania and Poland at the national level and the EU institutional framework on the basis of two main considerations.

On the one hand, the decisions and the opinions are handled in different institutions of the Commission, *i.e.* respectively DG Competition and DG Trade, under the responsibility of two different Commissioners. Thus, even though the final decisions

[362] OECD, 2022, *Ibid.*

and opinions are adopted in the name of the College of Commissioners, the cases are handled by two distinct and autonomous Directorate Generals.

On the other hand, it is important to restate a fundamental difference between the framework that is adopted by some Member States following this model: DG Trade does not adopt transaction-specific decisions binding on the foreign investor and the target company, the EU not having been conferred on a competence with regard to national security. Hence, at the EU level the situation is thus very different from what happens in Poland and Romania, that established a monolithic institutional framework under which, respectively, UOKiK and the Competition Council are fully in charge of decision-making powers on both competition and national security assessments.

Therefore, in light of these two considerations, it would probably not be appropriate to consider that the EU adopted the single authority model. Considering the peculiarities of the EU institutional framework and the division of competences with the Member States as regards security, it is – to my reading – more reasonable to believe that the EU is a *sui generis* case.

Secondly, the OECD[363] has identified a "dual responsibility model", within the context of which the assessment on both competition and national security is carried under a single procedure led by distinct bodies. A typical example was the United Kingdom that followed this model until the adoption of a dedicated act[364] for national security review in 2021. In the preceding situation, the Competition and Markets Authority conducted an assessment on both competition and national security grounds, which was reported to the sole authority responsible for the adoption of the decision, *i.e.* the Secretary of State. Under this regime, the UK had a relatively limited margin of action against harmful foreign investments insofar as it could only act on grounds of national security in acquisitions falling within the scope of its merger control regime[365].

[363] OECD, 2022, *Ibid.*
[364] National Security and Investment Act 2021.
[365] DE UGARTE S., PEREZ M., PICO I., *A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape*, in European Competition and Regulatory Law Review, 6 (1), 2022, pp. 17-23.

With regard to the EU, one might also believe that, since the Merger Regulation lays the ground for admitting public interest considerations in the context of merger reviews, the EU framework could be considered to follow this model. The next paragraph of the current chapter addresses more closely the room for maneuver that the Commission is entitled to leave for national security concerns when enforcing competition law and policy within merger reviews.

Thirdly, a parallel review model can be observed with regard to the institutional framework for merger control and foreign investment reviews on grounds of national security. This is by far the most common model among the EU countries that have investment screening mechanisms in place. Within this framework, merger control is performed, whenever the thresholds are not met for the review by the European Commission, by a distinct authority from the one that carries out the screening of foreign investment.

On the basis of an empirical approach, it may be ascertained that generally merger control is performed by independent competition authorities, while FDI screening authorities are usually of governmental nature. With regard to the latter, then, the review is carried out under the responsibility of a designated governmental authority (*e.g.* a Ministry), with the support of other ministries or other public authorities that have a specialized competence (*e.g.* in defense).

With this regard, the cases of the three most important economies among EU Member States, *i.e.* Germany, France and Italy, represent a blatant example.

In fact, in Germany, merger control is performed by *Bundeskartellam* (Federal Cartel Office), an independent federal authority, while foreign investment screening is carried out by the Ministry for Economic Affairs and Climate Action.

Accordingly, under the French national framework, the authority that is responsible for competition assessments is the *Autorité de la concurrence* (Competition Authority), an administrative independent authority, while foreign investment review is performed by the Ministry of Economy, Finance and Industrial and Digital Sovereignty.

Finally, in Italy, national reviews of merger control are conducted by the *Autorità Garante della Concorrenza e del Mercato* (Authority Guarantor of Competition and of

the Market), while FDI screening is placed under the responsibility of the Presidency of the Council and the material case handling is conducted by its Department for Administrative Coordination. These examples further show that this institutional framework was adopted by many investment screening authorities, but these are just some of the many implementations of this model in the EU (*e.g.,* Slovakia, Austria) and beyond (*e.g.* United Kingdom and United States).

Indeed, this distinction has a specific rationale and serves a specific purpose. The intervention in the field of merger control has historically been considered a regular assessment which transactions need to undergo, hence the establishment of dedicated authorities which have the obligation to handle these cases.

Contrarily, the intervention of the State on grounds of national security concerns has always been conceived as an exceptional circumstance, limited to extremely circumscribed cases (the Italian regime is called *special* powers).

In addition, in many jurisdictions across the EU, and Italy at the forefront, the *golden powers* regime is the result of a change in the perspective of the role of the State in the economy, and notably of the government, that clashed with the spirit of the EU Treaties that prescribe the enhancement of market liberalization and the resignment of the State from its *entrepreneurial* activities[366].

Firstly, several Member States accompanied the process of liberalization with the introduction of the system of *golden shares*[367], that implied a shift in the role of the State from entrepreneur to regulator. In fact, before the introduction of this regime, the states were actively managing strategic companies, the golden share being a type of share that gives its shareholder (a governmental authority) a special veto power over

[366] DI VIA L., PASQUALE L., *Controllo degli investimenti stranieri e antitrust. Un matrimonio che s'ha da fare*, in *Mercato Concorrenza Regole*, 22 (1), 2020, pp.99-118.
[367] See *e.g.* Italian Decree-Law N. 322 of 31 May 1994, as converted by Law N. 474 of 30 July 1994).

changes to the company's charter, as well as over a takeover or acquisition by other companies[368].

Furthermore, through the *golden share* case law[369] that was discussed in the first chapter, the European Court of Justice considered that some of these regimes were not compliant with several provisions of the Treaties insofar as they were not limited to the prerogative of controlling the ownership and the management of privatized enterprises, and as long as the exercise of these prerogatives is non-discriminatory, appropriate and proportionate to imperative reasons of general interest. It was against this background that many European Member States, and notably Italy, adopted foreign investment screening mechanisms, that were conceived by their very nature to relegate the intervention of the government to exceptional cases where strategic sectors were concerned and in a way that impacted as little as possible on investment flows. However, at the same time, they left this power to the government itself.

Against this background, investment screening mechanisms being in several Member States a descendant of state-controlled enterprises in strategic sectors, it is understandable why screening authorities were often initially located within governmental structures. This was however a time where investment screening mechanisms were much more limited in scope and the number of transactions notified to national screening authorities was considerably lower.

In consideration of the rising number of transactions notified as a consequence of the widening scope of application of investment screening mechanisms (not to consider the significant obligations imposed by the FDI Regulation, it will be interesting to monitor if this solution will still be viable in the next few years or if the administrative burden for governmental authorities will become unbearable as a consequence thereof. Moreover, contrary to the functioning of merger control where a one-stop-shop system regulates the division of competences between national competition authorities and the European Commission, the EU framework for the control of inward FDI is, as

[368] ARNAUDO L., *On foreign investment and merger controls: a law and geoeconomics view*, in *Opinio Juris in Comparatione*, 1, 2017, pp. 1-11.
[369] See e.g. CJEC, 26 March 2009, Case C-326/07, *Commission v Italy,* ECLI:EU:C:2009:193; CJEC, 23 May 2000, Case C-58/99, *Commission v Italy*, ECLI:EU:C:2008:611.

abovementioned, structured in a way that decision-making responsibilities all fall under the attributions of national screening authorities, regardless of the national or European dimension of the decision. Therefore, while national competition authorities only intervene on transactions having a national dimension, national screening authorities intervene on all transactions, with all due consequences on their daily workload.

In addition, because of the vast nature of the information needed for the assessment of the likeliness of a transaction to affect national security, many public administrations play an active role in the provision of such information in preparation of the adoption of such decision.

For instance, in the case of Italy, in 2014[370] a Coordination Group was established with the administrative responsibility and guidance of the Presidency of the Council of Ministers. The Group works under the guidance of the Department for Administrative Coordination comprises members from relevant ministries, *i.e.* the Ministry for Foreign Affairs, the Ministry for Interior Affairs, the Ministry of Defense, the Ministry of Economy and Finance, the Ministry for Economic Development and the Ministry for Infrastructures and Transports, as well as other Departments such as the Department for European Affairs. It will thus be important to consider, in line with the important augmentation of the number of transactions filed[371], if the specialized structures and offices (therefore not only the Department for Administrative Cooperation) within these offices will be able to bear this significant burden.

Therefore, the widespread diffusion of this dichotomic model is duly justified by the significant differences in the objectives that are pursued by the policies that they respectively enforce, hence why – in my opinion – this model is by far the most preferrable solution.

[370] Decree of the President of the Council of Ministers of 6 August 2014.
[371] See *e.g.* Presidenza del Consiglio dei Ministri - Sistema di Informazione per la Sicurezza della Repubblica, *Relazione annuale 2022 sulla Politica dell'Informazione per la Sicurezza*, 28 February 2023.

Nonetheless, some questions were raised[372] when it comes to adopting decisions in need of striking a balance between competition and national security concerns, notably with regard to the institution that should be responsible to address this issue. A typical problem is the necessity to design mitigation measures and remedies that should be structured and implemented coherently.

Many paths may be walked to this end. It may be envisaged to confer on independent competition authorities the power to rule on these notifications, including when it comes to defining some aspects that are linked to national security concerns. Another solution would be to entitle governmental structures to have a say on the enforcement of competition law without inputs from independent competition authorities, regardless of the outcome of the parallel proceedings.

All of these possible institutional designs come however with their respective shortcomings.

With regard to the first solution attributing the competence to conduct the assessment of transactions on both national security concerns and competition issues to national competition authorities is extremely problematic, which is why I expressed my preference for the parallel review model, as more effective than the single review one.

In fact, national competition authorities do not have the specific competences required to assess national security concerns and access to relevant information to conduct such assessment without the support and cooperation of political and non-political authorities (*e.g.* with regard to defense) that are more than often subject to strict confidentiality rules because of their sensitive nature. Therefore, they would lack the capacity to effectively achieve the objective of national security policies.

By contrast, with regard to the conduct of parallel proceedings, the question would be to understand whether the governmental body carrying out the assessment on national security would need to be granted with the power to overrule the decisions adopted on competition-related matters by such independent competition authorities after the completion of respective assessments. In fact, the issue resolves in the question

[372] OECD, 2022, *Ibid.*

to which authority precedence needs to be given by virtue of abstract rules not specific to a given transaction. Indeed, if precedence is given to screening authorities, there is a risk of politicization of competition decisions, which is extremely problematic and contrary to the rationale of establishing independent administrative authorities as national competition authorities in EU Member States.

Therefore, even though the parallel review model is the preferrable one, the only viable solution for it to allow a correct, consistent and coherent enforcement of both competition and national security policy is the establishment of some form of coordination between the institutions that are called upon to enforce it. This is essential in those cases where both reviews need to be conducted and there is a risk of inconsistency deriving from the autonomous adoption of decisions for a coordinated review that may, for instance, translate into the adoption of decisions that impose coherent conditions on the proposed investment, as well as in a reduction of the growing regulatory burden for the authorities involved in the review.

The cooperation suggested by the OECD includes several aspects of the review mechanism.

Among these aspects, I believe the most pressing question is that of remedies. In fact, both procedures are based on the principle of blocking the smallest number of transactions possible and, in essence, applying conditions or mitigations measures on the transactions in order for it to eventually take place, while at the same time preventing the threats to competition or national security concerns from actually taking place. In lack of coordination between national investment screening authorities and competition authorities (be it the national competition authorities or the European Commission), these measures may as well – in extreme scenarios – be divergent or even conflicting.

For instance, one of the most common types of mitigation measure imposed by screening authorities to reduce the risks associated with national security risen by a given investment is the obligation of continuation of the line of business in the territory of the state in accordance with the introduction of systems of protection of the know-

how and intellectual property rights. On the contrary, as a typical measure to reduce the dominant position on the relevant market of a given undertaking, a condition issued by a competition authority may be the disposal of part of the business complex acquired by the investor, namely assets, know-how, licenses or the introduction of specific remedies with the governance of the target company. Therefore, this is a blatant example of remedies adopted on the basis of a competition assessment that may end up conflicting with the mitigation measures adopted by the screening authority insofar as they intervene on the structure of the target company in a way that is incompatible with the need to preserve the strategic nature of the target company.

In addition, this coordination on remedies would be necessary not only at the moment of their adoption but also within the monitoring of their implementation. In fact, if the measures respectively prescribed by each authority juxtapose, the scenario may give rise to doubts as to the best modality for their execution with a significant impact on the capacity of the undertaking concerned to effectively comply with the measures prescribed and, eventually, ensure the correct achievement of the policy objective of the two frameworks.

Moreover, not only a coordination between competition and national security with regards to the remedies would be beneficial with regard to substantial coherence, but it would also generate a consistent set of benefits on procedural matters, namely as regards the timelines: an alignment thereof is extremely useful when both authorities are designing remedies in order for them to be simultaneously adopted.

The positive externalities of this institutional interaction and namely of the inputs that screening authorities may provide competition authorities with would be, for instance, the allowance of a more effective and informed market definition, assessment of the existence of barriers to entry and analysis of anticompetitive risks and efficiencies.

To this end, some authors have tried to suggest an institutional framework that may be satisfying this purpose. Notably, in a study conducted on the Italian institutional

framework[373], that may however be extended to all EU Member States having adopted the parallel review model, a proposal was advanced in order to allow the functioning of this cooperation.

In brief, the authors suggest that a representative of the national competition authority seats within the abovementioned Coordination Group established under the Presidency of the Council. The role of the antitrust authority would be of significant importance in the investigative phase, thanks to the transmission of legal and factual elements. In addition, and through the participation of the antitrust authority to these meetings, such authority would be provided with a consulting role that would grant the screening authority eventually adopting the decision with solid competition considerations to be taken into accounting when considering national security concerns. A similar institutional spillover could be envisaged in other Member States.

As helpful as this would be to enable national screening authorities to take into competition-related issues within national security reviews, it is to be noted that a similar cooperation would need to be established also to allow merger control to take into consideration national security concerns, both at a national and EU level.

Since the transmission of sensitive information is essential for the performance of these proceedings, notably when it comes to national security review, this enhanced institutional cooperation at both a national and European scale needs however to pay important attention to the confidentiality issues that are so important in FDI screenings, as described in the second chapter of this thesis. This could be achieved, for instance, by providing secure and encrypted systems, as the FDI Regulation has bound the Commission to establish for the cooperation mechanism[374], in addition to the introduction of a set of rules aimed at the protection of sensitive information, whose transmission is nonetheless necessary.

[373] DI VIA L., PASQUALE L., *Ibid.*
[374] Article 11 (2) of the FDI Regulation.

In conclusion, merger control and foreign investment screening are very different regulatory procedures, that have extremely different policy objectives and implementation practices.

While this is reflected in the institutional framework that most EU Member States designed in order to allow their enforcement, a coordination turns out to be necessary in order to prevent these policies from undertaking conflicting directions, that may – though in limited cases – be detrimental to the achievement of each other's objectives. This may be done through a more advanced cooperation that needs to take into account the peculiarities of these subjects.

The contact points between merger control and national security mentioned in this paragraph being significant, their relationship is not however limited to them under EU law. Notably, the Merger Regulation reserves a role to "public interest" within the context merger reviews, hence the interest to further analyze whether under such clause national security (or security and public order) may be considered as playing a role in EU or national competition law, and notably within merger control.

3. The requirement of consistent interpretation between the Merger Regulation and the FDI Regulation: various possibilities hiding significantly different approaches to economic regulation.

Over the course of this thesis, and notably in the first and second chapters, it was noted multiple times that within the EU Framework the leading role in the control of foreign investment is played by the Member States.

This holds true at all stage of the process, *e.g.* at the legislative moment, when national legislators lay down the provisions establishing their respective investment screening mechanisms, at the stage of the case handling and at that of the adoption of the decision, or the monitoring of the compliance on the part of the foreign investor and the target company with the mitigation measures that may be issued by the national screening authority.

Hence, when it comes to analyzing how in practice merger control and foreign investment screening interact, it is inevitable to focus on the national legislation adopted by EU Member States' legislators and the implementation practice of national screening authorities, hence the reason why the previous sub-paragraph inevitably focused more on the relationship between national investment screening mechanisms and merger review.

Nonetheless, this is not the only case where foreign investment review and merger control interact because the FDI Regulation, though not establishing a specific procedure for the screening of foreign investment, is still likely to generate some sort of intersection at an EU level between foreign investment control and the Merger Regulation. In fact, in the Recitals of the FDI Regulation an explicit reference to Article 21 (4) of the Merger Regulation is provided.

According to Article 21 (4) of the Merger Regulation, Member States are entitled to take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation itself and compatible with the general principles and other provisions of EU law. Public security, plurality of the media and prudential rules shall be, according to this provision, regarded as legitimate interests within the meaning of the Merger Regulation. However, further public interests may be identified by the Member States, but they must be communicated to the Commission,

which needs to recognize it after an assessment of their compatibility with the general principles and other provisions of EU law before these measures may be taken.

This possibility embodied in Article 21 (4) to consider legitimate interests within merger control is objectively important insofar as, even if the European Commission approves a takeover by a foreign investor of a European company, individual Member States could still be able to block this acquisition if they consider that their national security is endangered[375]. Furthermore, this is also important in consideration of the fact that reference to the rules on competition may often be considered as a previous step before the use of any national system specifically designed to control foreign investment.

The interpretation of this provision by DG Comp has been over the years very narrow, for it ended up including under the notion of public security concerns only the "vital or essential interest for the protection of the population"[376], while objectives of industrial or economic nature and the protection of the national economic system are excluded from the scope of the provision[377].

An inevitable question surges as to how and whether this provision and its narrow interpretation is affected by the entry into force of the FDI Regulation, and as a consequence of the rethinking and the enhanced awareness that Member States have with regard the safeguard of national security in the EU, which consistently shifted since the adoption of the Merger Regulation so as to conquer a more vital role within EU regulatory policies.

---

[375] ESPLUGUES C., *Towards a common screening system of foreign direct investment on national interests grounds in the European Union*, in *Culture, Media and Entertainment Law*, 11(2), 2018; see also DE MEESTER B., *International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State*, Leuven Centre for Global Governance Studies – Institute for International Law, Working Paper No. 20, 2009.

[376] MÄKELÄ T., The Court of Justice rules for the first time on Article 21(3) of the Merger Regulation in case C-42/01 Portuguese Republic v. Commission, Competition Policy Newsletter, 1, 2005.

[377] PITRUZZELLA G., *Ibid.*

In fact, with regard to the role of Article 21 (4) of the Merger Regulation and its relations with the FDI Regulation, Recital 28 of the latter contributes to this discussion. Notably, this provision states that when an FDI constitutes a concentration falling within the scope of Merger Regulation, the application of the FDI Regulation should be without prejudice to the application of Article 21(4) of the Merger Regulation. In such cases, the FDI Regulation and Article 21(4) of the Merger Regulation should be applied in a consistent manner.

To the extent that the respective scope of application of those two regulations overlap, the grounds for screening set out in Article 1 of the FDI Regulation and the notion of legitimate interests within the meaning of the third paragraph of Article 21(4) of the Merger Regulation should be interpreted in a coherent manner, without prejudice to the assessment of the compatibility of the national measures aimed at protecting those interests with the general principles and other provisions of Union law.

Therefore, it is more than legitimate to question the legal meaning and implications of this Recital, imposing for all those cases where an overlap[378] between the scope of application of the two Regulation exists an obligation of coherent interpretation and consistent application of the provisions.

Advocate General Pitruzzella[379] suggested three possible interpretations that would be able to give a coherent asset to the interactions between the Merger Regulation and the FDI Regulation.

Under a first interpretation, the Recital described above should be construed in accordance with the theory and practice of competition law: in other terms, the screening of FDI could only cease or intervene in terms of a concentration on grounds of public interest, narrowly interpreted as aligned with the well-established practice of merger control. It can be opposed to this interpretation that it weakens the capacity to control FDI, by limiting the innovations and the potential introduced by the FDI

[378] DE JONG B., ZWARTKRUIS W., *The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?*, in *European Business Law Review*, 31 (3), 2020, pp. 447-474.
[379] PITRUZZELLA G., *Ibid.*

Regulation whenever the transaction concerned is a concentration, which is the most significant kind of foreign investment.

Secondly, the Recital can be interpreted in a way that gives more value to the innovations introduced by the FDI Regulation, which is then in a capacity to modify the standards used in merger reviews whenever a risk to security or public order is given rise to. The consistent interpretation prescribed by Recital 36 can be achieved by allowing the concerns associated with security risks under the FDI Regulation to give substance to the notion of public interest within the meaning of Article 21 of the Merger Regulation. This would also have the consequence of further adapting the standards of competition law within merger reviews to the pursuit of industrial policy objectives, as it will be further considered in the next paragraph, when considering the debate on the adaptation of merger review parameters to merger control to allow the development of a European industrial policy so as to allow a further protection of the security of the Union.

This interpretation would have however the consequence of significantly expanding the power of the authority conducting the assessment, be it the national competition authority or the Commission. What would be problematic under this interpretation is the fact that such authorities would be granted a power that would be extremely discretionary, for whose exercise it would be necessary to evaluate elements that have nothing to do with their mandate, which is limited to the enforcement of competition law.

The third and most convincing interpretation presupposes the acknowledgement of the diverging policy objectives of competition in general and merger control in particular and those of FDI screening. According to this reading, the competition authority conducting merger reviews would be called upon to follow its established practice on the subject, while the institution in charge of foreign investment screening could be entitled to adopt a broader appreciation with a view to assess the risks and threats of the concentration for the safeguard of national security and public order.

In addition, the consistent interpretation required by the FDI Regulation has mainly procedural implications, which is why proposals aimed at amending competition-based

assessments of mergers are not unforeseeable in the near future, so as to adapt, *e.g.*, timelines. With this regard, according to Advocate General Pitruzzella, the major shortcoming in the Regulation concerns the failure to observe the balance between the investment screening and competition law insofar as it allows the review of closed transactions under an investment screening procedure up to, as described in the second chapter of this thesis, 15 months after the completion of the transaction[380].

In conclusion, the objective of achieving a consistent interpretation between these Regulations passes, once again, by the recognition of their differences. Therefore, as distinct and parallel as these regulatory frameworks may appear at first sight, it is still relevant to establish a coordination between them, and not only under EU and national competition law and national investment mechanisms, but also at an EU level with regard to the FDI Regulation. A failure to do so may contribute to the rising of a fragmented and unintelligible regulatory framework, hence the need for the efforts to align these policies in the rare cases where they overlap.

[380] Article 7 (8) of the FDI Regulation.

II. The spillover effect of the increasing awareness of national security concerns in the implementation of antitrust law: the need for enhancement of coordination, in the face of protectionist calls to disrupt EU competition policies.

Competition has had a long-lasting history in EU law, for it has accompanied the entire European integration process. On the contrary, foreign investment control is a field where the EU's attention has only raised in the last couple of years and within which the scope of EU action is very limited, by virtue of the competence division established by the Treaties and the political unwillingness on the part of the Member States to lose control over a topic as sensitive as national security.

Nonetheless, the close relations within these two regulatory policies have more than often questioned the European Commission, within the context of the enforcement of competition law, of the appropriateness of considering the variable of security implications of the decision adopted on competition grounds, which should – at least in principle – be limited to competition considerations.

On the one hand, as seen in the previous paragraph, there is a range of transactions with regard to which an overlap between foreign investment control and merger review exists insofar as such transactions undergo both procedures. In these cases some sort of coordination as outlined above between the decision adopted on competition grounds at the EU or at the national level (depending on the dimension of the merger) and the decision adopted by the national screening authority is needed.

On the other hand, however, it is intriguing to examine whether there is room for a spillover of national security concerns within merger control where, the acquirer of the target company not always being a foreign investor, only antitrust issues are subject to regulatory assessment. Furthermore, it is worth exploring whether such spillover is desirable.

In fact, the FDI Regulation and screening mechanisms represent but one policy field aiming at tackling the rising concerns with regard to foreign investment. They undoubtedly address these concerns and are the outcome of a rising awareness with their regard, but the question rises as to whether such concerns have spread horizontally

in a way that influences other relevant fields of the EU legal system. Remarkably, this question becomes evidently more pressing when it comes to analyzing a merger on competition grounds. In these cases, national security questions are of course present, but the question to be asked is whether they should be considered in this specific setting.

In more practical terms, merger control is aimed at supervising the safeguard of a highly competitive social market economy within the internal market and therefore preventing the surge of an oligopoly or a monopoly through the merger of companies having high revenues and considerable market shares, to avoid the negative effects on the relevant market that this would entail. However, in some cases, the creation of a "European champion" is said to be likely to better preserve the Union's security insofar as it would, for instance, ensure that in strategic sectors the continuation of a line of business is guaranteed by a big European company. Therefore, a loosening of the rules on merger control in order to allow wider security considerations could at least in principle potentially be advocated in order to ensure the safeguard of the Union's security.

This discussion brings about *inter alia* the significant debate that has been heated in different moments of the European integration process, as to the necessity to establish a European industrial strategy, which would require an adjustment of antitrust enforcement.

This topic has however often been dealt with from a competition or industrial point of view, and namely with regard to the role of the European economy in the face of the surge of a multipolar global economy. It is however stimulating to consider it from the point of view of national security, in consideration of the rising concerns thereto, in order to assess whether a loosening of such rules would be beneficial for the Union's overall security.

It is important to remark that the question of this close interaction between these two sets of policies can have both an internal and external dimension. In fact, the answer to this complex issue, which is far from having a straightforward outcome, varies depending on whether the operation having a European dimension that is under the

scrutiny of the Commission within merger control is an intra-EU concentration, or rather one of the parties to the merger is a third-country investor.

In the first case, in fact, the question to be asked to correctly understand the issue is not probably whether security concerns should allow a loosening of the rules on merger control, but whether such loosening would have the capacity to effectively ensure the safeguard of security and public order. In other terms, it is to be understood whether the fact of not blocking a transaction for the sake of allowing the rise of a European champion would be effective and desirable in order to preserve the Union's security. Indeed, as with every policy analysis, it is important to always remember the importance to look at the bigger picture and try to abstract from the single policy measure.

Therefore, I will consider the case where one of the parties to the concentration is a foreign investor (1), before considering the complex scenario of extra-EU mergers (2).

1. The external dimension of the questionable introduction of considerations relating to national security within antitrust assessment: a systemic risk for the EU investment climate.

With regard to foreign investors, the issue coming from the potential need for the introduction of national security considerations descends from the lack of competence of the EU to establish an EU screening authority, as described in the first chapter. However, commentators have suggested that those supporting the enhancement of the EU capacity to act on this field could still cling on EU law current in force in a way that would not require any institutional reform or even the introduction of secondary law.

Indeed, for instance, Meunier[381], even before the adoption of a proposal for the FDI Regulation by the Commission, while commenting the fragmentation of the division of competences with regard to the safeguard of national security in international investment, considered that the EU being precluded from the establishment of an EU-wide body to vet foreign investment, a complementary avenue can be followed in addition to institutional innovation. Indeed, according to Meunier, the EU could strengthen the monitoring of foreign investment on grounds of competition policy, in a way that would reinforce the actorness of the EU in global economic policy.

Furthermore, it was noted by some authors[382] that the use of competition rules to control foreign investment expected to be realized through the implementation of M&A projects by way of reference to non-competition factors such as public interest or public policy is quite common in the EU Member States' practice, in accordance with the provisions laid down in Article 21 (4) of the Merger Regulation. In addition, they noted that there are some cases where the rules on competition achieve an objective

[381] MEUNIER S., *A Faustian bargain or just a good bargain? Chinese foreign direct investment and politics in Europe,* in *Asia Europe Journal*, 12 (1), 2014, pp. 143-158.
[382] ESPLUGUES C, *Ibid.*; JONES A., DAVIES J., *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debat*e, in *European Competition Journal*, 10 (3), 2014, pp. 453-497.

other than that for which they were in principle conceived and designed, through the additional task of assessing the foreign control or ownership of national firms in general or in some specific areas of the economy with a public policy or national security focus.

Plus, the introduction of public interest considerations in domestic merger control is not a characteristic of EU and EU Member States' merger control regimes: in a recent study[383] that enlarges its scope beyond the EU and its Member States' jurisdictions to comprise 75 merger control regimes, it is noted that while four out of five jurisdictions adopt a predominantly competition-based approach, 88% of domestic merger regimes incorporate at least one public interest criterion although these are rarely used in practice.

In OECD Member States, public interest may take various forms: some jurisdictions only provide a general statement in the preamble to competition laws, whereas others explicitly include them in the merger assessment criteria. Accordingly, the notion of public interest may be general (*e.g.,* legitimate interest), or narrower and sector-specific (*e.g.,* plurality of the media)[384].

The EU merger control regime and its enforcement are a clear example of this feature.

Some specific examples may be quoted in cases (however before not only the entry into force of the FDI Regulation, but also of the issuance of the proposal of the Commission) where EU competition law was implemented in a way to evaluate FDI proposals with a legal reasoning that goes in this direction. A major example is the decision adopted by the Commission in 2016 with regard to proposed joint venture between a Chinese SOE (General Nuclear Power Group) and French EDF[385]. In this decision, the Commission considered that all Chinese SOEs in the energy sector should be treated as one single entity because of substantial control of the Chinese government

[383] READER D., *Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights*, Centre for Competition Policy – University of East Anglia, CCP Working Paper 16-3, 2016.
[384] OECD, 2022, *Ibid.*
[385] Case No COMP/M.7850 - EDF / CGN / NNB GROUP OF COMPANIES, Commission Decision of 10.03.2016 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004.

in this field. Therefore, in order to assess whether the transaction had a European dimension, and therefore needed to be revied by the Commission, the combined revenue of all Chinese SOEs was taken into account. Even though the Commission finally declared the concentration to be compatible with the common market, this decision is still a remarkable example of the importance of the rapprochement between the national security and the competition reasonings and notably of the fact that a competition assessment may be the prelude, within the same decision, of a position taking greater consideration of the threats to national security that an operation may generate.

In this case, the decision remained firmly within the boundaries of competition law, but the Commission may as well (at least in principle) have considered that by virtue of the risks to national security generated by a joint venture between Chinese SOEs and French EDF needed to be blocked. But it did not adopt such an approach and limited itself to a competition-based conclusion.

In general terms, State control and subsidies are not usually a matter to be considered in merger cases: issues about government support received by a company is usually treated as a problem of State aid control. Since EU law only supervised (at the time of the decision) aids from Member States, the question of state ownership or the grant of state subsidies was regarded as an international trade law issue to be settled within the WTO framework[386].

However, the threats hovering above all these points of view – looking hopefully to the introduction of considerations relating to national security within the significant powers in antitrust enforcement within the hands of the European Commission – consist, once again, in a risk of politicization of decisions that should in principle have nothing to do with politics. This holds true especially for the proposal enshrined in the Franco-German manifesto (further described below) that advocates for the introduction of veto power within the hands of the Council, a political institution composed of the competent ministers of each Member States. In other terms, the protectionist menace is

[386] PANG L., *The Siemens/Alstom Merger Case: How European Merger Policy Respond to Global Competition*, in *Dublin Law and Politics Review*, 1 (1), 2020, pp. 33-40.

therefore at risk of putting the credibility of the EU economic regulatory framework in general and of EU competition law in particular at stake, potentially damaging business confidence in investing in the EU.

As former UK Secretary for Trade and Industry Peter Mandelson claimed in 2010, the reintroduction of public interest in merger control consideration would present the significant risk of exposing antitrust reasoning to short-term populist reasoning and political lobbying, with a loss of transparency and predictability, which is something that benefits considerably investment regimes that are open to foreign investors[387].

Moreover, the introduction of public interest considerations, and *a fortiori* national security concerns within merger control has the potential to weaken the ability of a jurisdiction to object to other jurisdictions politicizing merger control: it is difficult for any country to be credible in advocating more open markets overseas while they are within their own legal system reducing the openness of their own markets through the introduction of political considerations within merger control[388].

Therefore, from the perspective of foreign investment (rather than intra-EU mergers), if the EU and notably the Commission were to follow this shaky path, it would be likely to endanger that gain on reciprocity that the FDI Regulation allowed and that I described in the previous chapters. The EU would be likely to put at risk this useful instrument, that enriched its toolkit for its newly acquired role as negotiator of international investment agreements with third country investors.

Once again, in evaluating the policy measure, it is necessary to look at the bigger picture. Therefore, it is important to consider that provisions on security are part of a wider legal system, in which many considerations need to be taken into account.

---

[387] Rt Hon Lord Mandelson, *Business, Innovation and Skills Committee - Minutes of Evidence: The work of the Department for Business, Innovation and Skill*s, House of Commons, 19 January 2010, available at: https://publications.parliament.uk/pa/cm200910/cmselect/cmbis/299/10011901.htm.

[388] UK Government, Department for Business and Industry, *Alex Chisholm speaks about public interest and competition-based merger control*, Speech given by CMA Chief Executive, Alex Chisholm, at the Fordham Competition Law Institute Annual Conference, 11 September 2014, available at: https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control.

Competition and foreign investment are vital for the economic and social development of Europe because of the benefits that they present. This means that security needs to be preserved and safeguarded, but in a manner that is not utterly detrimental to other EU policies, which are still very important and rather essential for the resilience and the competitiveness of the European social market economy.

In addition, the shortcomings relating to the introduction of security concerns within antitrust decisions may be detrimental not only to the overall investment climate in the EU, but also to the safeguard of security itself for reasons that are inherent to this policy objective.

In fact, as it was mentioned several times within this thesis and especially over the course of the previous chapter, the decision-making process when it comes to antitrust and national security decisions is extremely unalike because of the different specificities of these policies.

In fact, the assessment of a foreign investment from a national security standpoint inevitably requires the acquisition of information that is almost always sensitive, confidential and sometimes classified. Without proper institutional innovation, regardless of the diverging opinions that one may hold as it concerns its desirability, the EU does not within the current framework have access to this information. Not to mention the potential circumvention of Article 4 TEU, case handlers in DG Comp would thus not able to adopt well informed opinions to preserve security and public order in the Union: stretching the interpretation of the Merger Regulation and its Guidelines would thus not solve the real problem, which consists in being able to block those – very limited in terms of numbers – transactions where security and public order concerns arise, while favoring the establishment of foreign investors in the European internal market.

Therefore, in my view, a shift in the approach by DG Comp is not desirable, and the direction set by the introduction of the FDI Regulation is by all means preferrable insofar as it more clearly establishes that security and public order concerns are to be addressed in their appropriate *forum*, without undue overstepping on the part of antitrust law. A risk of confusion would emerge that is potentially detrimental to the

achievement of all policy objectives, be it international investment, competition or security.

In an ever more global business context, clarity, transparency and intelligibility are key to preserve the Union as an extremely attractive investment destination, which can only be achieved by establishing policies that fulfil those characteristics.

Nonetheless, a decision adopted by the European Commission in 2019 heated the discussion also with regard to the internal dimension of antitrust, therefore the decisions adopted having regard to intra-EU mergers. This debate brings the discussion beyond the mere regulatory relationship between merger control and foreign investment screening, for it questions the desirability of the establishment of a European industrial strategic policy, that it is now urgent to discuss.

2. The internal dimension of the relationship between national security and competition: the desired emergence of a European industrial policy, that is likely to cause the disruption of EU Competition law without safeguarding the Union's security.

In order to analyze this complex issue, I believe that it is particularly useful to examine a case that reignited the public debate on the topic because of the political and mediatic attention that was given to the planning of the operation and the decision of the Commission on the topic.

On 26th September 2017, the German conglomerate corporation Siemens AG and the French rolling stock manufacturer Alstom announced in a joint press release that they would "join forces to create a European Champion in Mobility"[389]. By virtue of a Memorandum of Understanding signed by the two biggest railway manufacturers in Germany and France, the two parties would grant each other exclusivity to combine mobility business in a merger of equals. As the President and CEO of Siemens AG claimed, the Franco-German merger was aimed at "creating a European champion in the rail industry for the long term", a super player in the high-speed railway market capable to stand out in the global scene.

Since security is the point of view through which I wish to present this question, it is noteworthy at this initial stage that the sector of transports, and notably that of railways, is more than often included as one of the sectors of the economy included in the material scope of application of the review in those national screening mechanisms that are structured as sector or multi-sector investment screening mechanisms.

Moreover, at the European level, the FDI Regulation considers transport as a critical infrastructure representing one of those factors the potential effects on which need to be considered by national screening authorities and the Commission in determining whether a transaction is likely to affect security or public order[390].

---

[389] Siemens and Alstom, *S Siemens and Alstom join forces to create a European Champion in Mobility,* 26 September 2017, available at: https://press.siemens.com/global/en/pressrelease/siemens-and-alstom-join-forces-create-european-champion-mobility.

[390] Article 4 of the FDI Regulation.

Hence, this transaction was intended to take place in a field that is widely considered both by national and EU legislators as a very sensitive sector for security and public order. In principle, then, the idea of building a European giant in these field that would be capable of competing with other important global actors would sound quite appealing to those who have been aspiring to a European industrial policy able to preserve national security as well. Notably, this merger of equals was conceived as a solution to confront the emerging competitive threats from the China Railway Rolling Stock Corporation[391], which justified the strong political support on both the French and German governments[392].

Nonetheless, because of its significant dimension, the merger had to undergo the merger control review under the Merger Regulation by European Commission, and this is where the problems emerged.

In fact, based on an orthodox application of competition rules, the European Commission blocked the proposed acquisition of Alstom in its decision adopted in 2019[393] considering that the merger would have harmed competition in markets for railway signaling systems and very high-speed trains. Furthermore, the remedies offered were not deemed sufficient to address these concerns: as EVP Vestager claimed, "without sufficient remedies, this merger would have resulted in higher prices" in the relevant market, thus the "Commission prohibited the merger because the companies were not willing to address [its] serious competition concerns"[394]. An in-depth analysis of this decision not being relevant in this discussion, it can be however stated without hesitation that the Commission adopted a decision that is fully coherent

[391] BURNSIDE A., KIDANE A., *Merger control meets FDI: the multi-stop shop expands*, in *Competition Law & Policy Debate*, 7 (2), pp. 68-76.
[392] CHASSANY A.S., KEOHANE D., *France backs Alstom-Siemens train merge*r, Financial Times, 26 September 2017, available at: https://www.ft.com/content/0ee2336c-64f8-3935-ab92-ada64851b8e1; RINKE A., *Merkel says German government would support Siemens-Alstom tie-up*, Reuters, 10 May 2014, available at: https://www. reuters.com/article/us-france-germany-alstom-idUKBREA4902N20140510.
[393] Case No COMP/M.8677 – SIEMENS/ALSTOM, Commission Decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement.
[394] European Commission, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom, Press Release of 6 February 2019, available at:
https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

with regard to antitrust reasoning, and that the correct application of the rules in force is not in question.

Criticisms were voiced all over Europe towards this decision, and the European Commission was blamed for "sacrificing Europe's industrial base on the altar of competition orthodoxy"[395]. In other terms, the Commission was held responsible for prioritizing the strict application of EU competition law over the facilitation of the surge of an industrial giant in Europe, that would be able to compete against the important Chinese and U.S. competitors in the field.

Indeed, as it was observed, the correct implementation of antitrust law was not one of the issues voiced, which represented more of a manifestation of longstanding frustration with certain underlying asymmetries within the Merger Regulation that were held responsible for impeding the ascendency of European industry on the world stage than with the decision itself[396]. In fact, I believe it would have been very difficult to argue that the decision itself was not coherent with the Merger Regulation or competition law in general: accordingly, this decision was nothing but the perfect occasion to voice the unsatisfaction or even the intolerance with regard to competition rules – and to introduce the topic within this paragraph.

This dissatisfaction ended up in the adoption of a series of texts aimed at prompting the EU to adopt a different approach. An attempt to go towards this direction so as to influence the decision of DG Comp on this topic took place a few months before the adoption of the decision by the Commission within the context of the 6th Ministerial Meeting of the Friends of Industry, where eighteen Member States led by the Franco-German axis signed a Joint Statement[397] calling for a new political impetus in favor of

---

[395] BURNSIDE A., KIDANE A., *Ibid.*; see *e.g.* Reuters Staff, *Germany presses for changes in EU competition rules after Siemens/Alstom deal blocked*, Reuters, 6 February 2019, available at: https://www.reuters.com/article/us-alstom-m-a-siemens-eu-germany-idUSKCN1PV1BO;
AGNEW H., *EU blocks Siemens-Alstom rail merger, Le Maire says*, Financial Times, 6 February 2019, https://www.ft.com/content/cd35e760-29f5-11e9- a5ab-ff8ef2b976c7.

[396] NOURRY A., RABINOWITZ D., *European champions: what now for EU merger control after Siemens/Alstom?*, in *European Competition Law Review*, 41 (3), 2020, pp. 116-124.

[397] Friends of Industry, *Joint Statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland,*

industry at European level to face new challenges. Among the proposals, the ministers suggest the identification of possible evolutions to the antitrust rules to better take into account international markets and competition in merger analysis.

This statement was not, as anticipated, followed by the Commission in its decisions and was followed by another important declaration: the Franco-German Manifesto for a European industrial policy fit for the 21st Century[398].

Even though national security is not its explicit main focus, this manifesto contains extremely interesting data and input to this debate because it suggests an adaptation of the European economic regulatory framework with a view to make European companies capable of competition on the global stage.

While recognizing the importance of competition rules, in the absence of a regulatory global playing field (which is not deemed foreseeable in the near future), the manifesto suggests that the adequation of competition rules takes into account industrial policy considerations.

Interestingly, one of the suggested amendments consists in the establishment of a right of appeal of the Council which could ultimately override Commission decisions, subject to strict conditions: in other terms, the Franco-German manifesto envisages the conferral of a veto power on the Council over merger decisions adopted by the Commission. Therefore, this would substantially change the current appeals system in EU merger control: within the current framework, a merger decision can be appealed to the General Court, whose judgement can eventually be appealed to the European Court of Justice[399].

The Guidelines on merger control[400] and the Merger Regulation would also need to be updated with a view to take greater account of competition at the global level,

---

Romania, Slovakia, Spain, 6th Ministerial Meeting, 26 September 2017, available at: https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929_-_declaration_finale_-_6eme_reunion_des_amis_de_lindustrie-en.pdf.

[398] Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie et des Finances, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019, available at: : https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2.

[399] Article 21 of the Merger Regulation.

[400] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal C 31/5, 5 February 2004.

potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets. The expansion of the geographical market definition to include not only EEA Member States but also the global market would loosen the restrictions on big firms in the EU[401].

In essence, the manifesto brought about the idea that the European industry needs reinforcement in order to allow companies to effectively compete with non-EU companies, by introducing more flexibility within the application of competition rules, namely State aid law and merger control, so as to allow the emergence and the development of European champions.

Even though at both a political and bureaucratic level a certain degree of disagreement with these positions was expressed, namely by EVP Vestager and the then Director General of DG Comp Johannes Laitenberger that described the proposals as "voluntaristic interventions into a rule-based system"[402], EU institutions were obviously not deaf in the face of these calls for a rethinking of the European regulatory framework. For instance, in 2020 the Commission adopted a White Paper[403] to respond to the proposals included in the Manifesto concerning the need for action to take "into greater consideration the state-control of and subsidies for undertakings within the framework of merger control".

Within this White Paper, the Commission recognized the necessity to introduce new instruments to protect the competitive strength of EU companies within the new global market, which paved the way for the adoption of the Foreign Subsidies Regulation.

However, from a security standpoint, it is to be noted that the implicit concept underlying these statements of the manifesto is that of a need for a conciliation between competition policy and the safeguard of security and public order, which would thus cease to be antagonists and start becoming complementary instruments in a way to fulfil the European public interest.

---

[401] PANG L., *Ibid.*
[402] PANG L., *Ibid.*
[403] European Commission, *White paper on levelling the playing field as regards foreign subsidies*, 17 June 2020, COM (2020) 253 final.

While the Manifesto does not suggest – other than the highly questionable proposals that were presented thereof – how this issue should be tackled under the current framework, a possible solution would be to adopt the second interpretation of Recital 28 of the FDI Regulation suggested by Advocate General Pitruzzella[404] and outlined in the previous paragraph. Under this interpretation, the concerns which fuel the screening of foreign investments give substance to the notion of public interest of Article 21 of the Merger Regulation. An acceptance of this interpretation would have, as mentioned, the consequence of broadening the discretionary power of screening authorities. As problematic as this would be, it would be – under the current framework – the most viable solution to achieve such an objective.

However, as convincingly underlined by the Advocate General, this approach would end up endangering the correct functioning and balance of powers in the EU and national regulatory framework. The competition authorities would be granted a discretionary power that would expose competition law enforcement to short-term political considerations, which would be extremely detrimental for the stability and intelligibility of the economic regulation.

It is undeniable that the EU as a whole is facing unprecedented global challenges raising important risks for security of Union, in the face of which its structure may present some shortcomings. Notwithstanding, favoring the emergence of European industrial giants with the risk of depriving competition policies of their substance is not – in my opinion – the most valuable solution to tackle such challenges, especially when it comes to national security. The erosion of EU competition law is not an effective way to safeguard national security, for the Union's social market economy is founded on competition and free market.

In fact, as it has been noted[405], if the creation of massive-sized companies can in principle provide advantages in the short term, this short cut entails the incapacity of firms to optimize their performances (*e.g.,* causing a potential reduction in the offer of critical supplies by oligopolistic or monopolistic firms in order to raise prices) and make

[404] PITRUZZELLA G., *Ibid.*
[405] PANG L. *Ibid.*

the necessary efforts to innovate. With specific regard to the security of the Union, restoring a new form of protectionism would not make the EU more secure. Loosening the rules of EU State aid law as the Franco-German Manifesto suggests and politicizing merger control would determine the diffusion of state subsidies and the breakout of a tariff war, that would potentially determine the disruption of the internal market and make more space for the creation of monopolies, with all the negative impacts on *e.g.* the allocation of resources and the consumer welfare that the EU internal market and competition policies have ensured over the decades of the European integration process.

Remarkable achievements, in particular the FDI Regulation and the Foreign Subsidies Regulation, have been accomplished by the EU to tackle these complex issues, which convince me that the Union is going in the right direction.

In spite of the shortcomings of the current regulatory system that I tried showing over the course of this thesis, I believe that the European social market economy is getting more and more ready to face with resilience the global challenges that it will be confronted to. State capitalism and threatful foreign takeovers justify the fear, but it is fundamental that Union does not get distracted by protectionist talks wanting to disrupt the grounds of its economic model, for the realization of which antitrust enforcement has been essential, and the protection of our national security does not demand its abandonment, indeed this would be detrimental to it.

Regardless of all the challenges that still exist, the path towards the protection of our national security needs to be paved with an intelligible and transparent legal framework, with loyal and sincere cooperation between national and European institutions and the recognition of the importance of the maintenance of solid global economic relations. In other words, if the Union wants to safeguard its security, it needs to keep on doing it the European way.

Conclusions

In the foreword to this thesis, it was anticipated that its aim was to conduct a global analysis of the European framework for the control of foreign direct investment, in order to assess whether the current framework can be deemed satisfactory in its goal of ensuring the safeguard of security and public order within the Union through the enablement of national screening authorities to perform a better informed assessment of the risks thereto.

The achievement of this objective, however, would not be sufficient to deem the current framework satisfactory, unless the enforcement of this policy was consistent and coherent both from a substantial and procedural or institutional standpoint with the European economic regulatory framework as a whole.

The answer to these major policy issues in any case lies in the response to several smaller questions that have arisen throughout this thesis and which, when considered as a whole, allow to answer the main questions.

First of all, the first chapter aimed at depicting a systematic definition of the notion of foreign direct investment in EU law, starting from the largest category (*i.e.* investment), then going on to consider the distinction between direct and indirect investment, and finally adding a description of the foreignness variable, that completes the definition. This paragraph showed the applicable legal regime under EU law, principally the freedom of movement of capitals and its exceptions: with this regard, as far as investment screening mechanisms are concerned, it was concluded that its *golden share* case law Court of Justice conducted an operation of de-politicization of foreign investment control, which the Court firmly grounded on legal criteria.

Furthermore, it was necessary to examine – over the course of the first chapter – what the marge of maneuver the European Union actually had in this very delicate sector. This was an indispensable step to be taken because, before considering if the Union should have done more or differently, it was essential to evaluate what it was entitled to do under the treaties.

As observed, the “unorthodox” acquisition of an exclusive competence in the field of foreign direct investments through the incorporation of such notion within Article 207 TFEU on the common commercial policy clashes with the "sole responsibility" that Member States hold regarding the protection of national security under Article 4 TEU.

In light of this complicated scenario, it is to be concluded that the European Union did not have the capacity to establish an investment screening mechanism that would allow it to conduct itself the relevant assessment for the protection of national security, while setting its own policy in the field. In order to do so, a thorough institutional innovation would be necessary. However, as it stands, the European Union was only able to adopt a cooperation mechanism, with a reduced impact on the autonomy of Member States to establish their own rules on national investment screening mechanisms.

At this stage, however, the question remains as to whether this cooperation mechanism, which has been introduced despite conflicting political opinions both at the national and European levels following a rise of the awareness within the public debate of the potential risks arising from the entry of foreign investors who may not be solely interested in financial returns[406], is a satisfactory instrument. By satisfactory, it is meant that it would be capable of enabling national screening authorities to make better decisions and, ultimately, protect the security and public order within the Union more efficiently.

Accordingly, the analysis of Regulation (EU) 2019/452 aimed, in essence, at assessing whether the advantages stemming from its enforcement are able to overcome the shortcomings that may be observed.

Indeed, such an analysis has shown that, while the current framework positively impacts the assessment conducted by national screening authorities, it is nonetheless flawed on several aspects.

[406] Chapter 2, Paragraph 1.

The core of the framework being the cooperation mechanism, the first part of the analysis is dedicated to it[407].

With regard to the mandatory information sharing and pooling mechanism[408], the research carried out demonstrates that it facilitates the access to pieces of information in a way to allow the national screening authorities, as the Member States themselves confirmed, to adopt better-informed decisions with regard to many aspects of the transaction, thanks to the fact that the Commission and other Member States are now entitled to provide the Member State concerned by the transaction with an additional input, be it in the form of an opinion or of a comment. This also allows the Commission to see the bigger picture with regard to transactions taking place in the EU Internal Market.

Notwithstanding, it is arduous to acknowledge the extent to which such inputs are actually taken into account by the national screening authorities on an evidence-based method. The reasonable, though strict, confidentiality rules surrounding this field ensure that both inputs from the Commission and fellow Member States and the final decisions adopted by the screening authority are not made public. Therefore, it is not possible to compare final decisions with inputs coming from a national and supranational level to evaluate the impact of the latter on the former.

Moreover, also with regard to the mandatory system of information sharing and pooling, it is agreed[409] with independent studies conducted on this topic that the criterion laid down in the Regulation to determine which transactions need to be notified and which do not is not the most suitable and effective one, for it generates a problematic two-way phenomenon: on the one hand, there is a risk of over-sharing, based on which a consistent share of the information injected in the mechanism might be irrelevant, and a risk of under-sharing, by which potentially relevant transactions are not notified.

[407] Chapter 2, Paragraph 2.
[408] Chapter 2, Paragraph 2, Sub-paragraph 1.
[409] Chapter 2, Paragraph 2, Sub-paragraph 1.

What is more, in this regard it was underlined the extreme complexity for the European Commission to effectively supervise the mandatory notification of investments undergoing screening[410].

In addition, another significant issue stemming from the mandatory information sharing and pooling system concerns the reaction that one Member State should undertake whenever, following a comment of a Member State or an opinion of the Commission, it becomes aware of the potential risks for its security and public order that may be associated with that transaction[411]. It is suggested that, as some national legislators have already provided for in their national screening mechanisms, national legislation is adapted in a way to allow the initiation of the proceeding *ex officio* by the national screening authority.

In addition, another shortcoming of the current framework concerns the fact that whenever the Commission issues an opinion with regard to a specific transaction, this opinion is notified to the Member State concerned, while the other Member States are notified that an opinion was issued. Accordingly, whenever a Member State issues a comment, the Commission only notifies the other Member States about the fact that the comment was released[412]. While this is consistent with the principle of strict confidentiality, it is nonetheless suggested that such input is shared with all the participants of the mechanisms in order to foster the development of a common approach to investment screening within the EU.

Furthermore, it was concluded that one of the major flaws stemming from the current structure of the European framework for the control of inward investment is the impossibility to intervene on national legislation[413]. Although in line with the division of competences enshrined in the Treaties, the fact that Member States cannot be legally compelled to adopt an investment screening mechanism or to modify their existing ones

[410] Chapter 2, Paragraph 2, Sub-paragraph 5.
[411] Chapter 2, Paragraph 2, Sub-paragraph 3.
[412] Chapter 2, Paragraph 2, Sub-paragraph 4.
[413] Chapter 2, Paragraph 2, Sub-paragraph 2.

(except for very limited general principles) is as such extremely problematic. Indeed, the absence of an investment screening mechanism in a Member State considerably weakens its capacity to contribute to the cooperation mechanism and to consistently undermine its potential.

Moreover, the maladroit design of a national investment screening mechanism, and the impossibility to correct the shortcomings, for instance a narrow scope of application, is also likely to jeopardize the functioning of the cooperation mechanism as a whole.

In the daily practice of the mechanism, it was ascertained that there is a generalized difficulty, but especially within Member States that are not equipped with an investment screening mechanism, in complying with the obligation to share information with regard to investments not undergoing screening because of the lack of effective means to gather such information[414].

To conclude on the information sharing and pooling system, in response to some calls for more transparency in the content of the opinions of the Commission and comments of the Member States coming from legal practitioners, the conclusion that needs to be drawn is that the choice of the current framework to stick to a strict confidentiality system is to be supported in light of the sensitivity of this correspondence.

Furthermore, the analysis of the quality of the EU Framework for the control of inward foreign investment needed to reflect on one question that is more than often raised by commentators, which regards the risk of a deterrence for third country investors[415]. Following the approach of the thesis, this issue was not dealt with studying the theoretical implications of an allegedly protectionist approach, but on the basis of the major concerns raised by national policymakers in response to the Commission proposal mentioning two potential causes for the deterrence, namely the risk of

[414] Chapter 2, Paragraph 2, Sub-paragraph 6.
[415] Chapter 2, Paragraph 3.

generating an unbearable administrative burden for foreign investors and spread of legal uncertainty.

After analyzing these two issues, that do have in principle the potential to deter foreign investors, in relation to the European framework eventually established, I came to the conclusion that these criticisms need to be rejected because of their absolute inapplicability to this framework. The alleged risk of deterrence is therefore to be deemed avoided.

Then, a great shortcoming of the Regulation derives from the concept of security and public order itself[416]. While it is undeniable that the identification of this notion and its crystallization in a legal provision is a widespread difficulty, especially in light of the rapid changes thereto, it can be inferred from the analysis carried out that this issue is even more pressing with regard to the European framework, where a risk of inconsistency can be ascertained as deriving from the blurriness of this notion. Many implications stem from this question, *e.g.* significant differences in the design of national investment screening mechanisms, a politicization of the notion and a risk of infringing fundamental rights.

This chapter is concluded by a study of several proposals upheld by the doctrine having regard to the desirable developments of this policy field. While observing that many of them would be with all probability materially unfeasible because of both the competence structure and the effective means that would be needed to confer vetting powers on the Union, I suggested a personal normative statement on the preferable solutions that could be adopted: the core aspect of my proposal is the recognition of the role that national screening authorities would need to keep playing, even if the Union were to be granted with the power to screen transactions.

[416] Chapter 2, Paragraph 4.

The last chapter is devoted to the study of the intersections between security, investment and competition in order to highlight the regulatory challenges that national and supranational policymakers are facing in the pursuit of policy coherence.

Focusing mainly on the control of concentrations, this chapter studies firstly whether, because of their different policy objectives, the implementation of these policies enters necessarily into conflict in light of the pursuit of incompatible solutions to achieve such objectives[417].

In light of the study of the proximity of these policies from an institutional, procedural and substantial standpoint, it can be inferred that in most cases they do not overlap, whereas – when they do – they are not necessarily conflicting. In the reduced cases where such a conflict may exist, it is suggested that some arrangements are put into place so as to produce more coherent and consistent outcomes. Nonetheless, as it stand, the situation is far from irredeemable.

Furthermore, it is questionable whether the fast-paced rise in the awareness of the public debate with regard to security and public order concerns has had in the last few years the effect of generating a spillover of such concerns within antitrust decisions. While it is observed that, despite the possibilities that Union law opens, there has not been an immediate translation of these concerns in the implementation practice of antitrust law, the question on its desirability has been analyzed distinguishing extra-EU and intra-EU mergers.

With regard to extra-EU mergers, it is evident that this would not be a viable solution if the Union wanted to remain attractive for foreign investors because legal certainty, intelligibility and transparency would be utterly undermined. It is therefore commendable that the approach of the Commission, which has not undergone a shift in this regard, remains stable.

As far as intra-EU mergers are concerned, the introduction of security considerations within antitrust reasoning would have had the result and objective of favoring the surge of European champions that would be able to compete with industrial

[417] Chapter 3, Paragraph 1.

giants from third countries on a global stage. This would – supposedly – ensure a better safeguard of national security. However, while contradicting significant political pressures coming from the Member States, the European Commission has ultimately refused to follow this option, and rightly so, in the belief that the safeguard of security and public order does need to entail a disruption of antitrust practices.

In conclusion, based on the arguments and analysis presented throughout this thesis, a predominantly favorable stance is taken towards the cooperation mechanism introduced by the Union.

In fact, based on the conducted analysis, it is evident that the framework still possesses room for improvement and exhibits flaws in certain aspects, it can be concluded that the mechanism remains a remarkable and valuable tool, as it enables the national screening authority to access a significantly broader range of pertinent information for their assessments.

Despite the proposed adjustments put forth throughout this thesis to facilitate the operational effectiveness of investment screening in Europe, it is important to acknowledge that the perfectibility of the European framework is primarily due to its unique nature, which has – in addition – been in force for a relatively short period of time.

It therefore seems that the European Union has undertaken the correct path to ensure its own security and public order in a manner that is coherent and consistent, except for corrigible aspects, with its regulatory framework.

In other terms, it seems that the introduction of the framework represents a blatant example of the gain of “shared sovereignty” in exchange for the transfer of “national sovereignty” referred to in the foreword, that in the words of President Draghi represents the *leitmotiv* of the European integration process. In fact, despite the significant sensitivity of this topic, the Member States found themselves better positioned to tackle the growing challenges raised by foreign investment and jointly act for the safeguard of security and public order in the Union, towards which the new Framework undeniably constitutes a significant and commendable development.

Bibliography

ADINOLFI A., *La nozione di "abuso di diritto" nell'ordinamento dell'Unione Europea,* in *Rivista di diritto internazionale*, 95 (2), 2012, pp. 329-353.

ALI A., *The intersection of EU and its member states' security in light of the foreign direct investments screening regulation*, in *La Comunità internazionale*, 3, 2020, pp. 439-453.

ARNAUDO L., *On foreign investment and merger controls: a law and geoeconomics view*, in *Opinio Juris in Comparatione*, 1, 2017, pp. 1-11.

BASEDOW R., *The EU's International Investment Policy ten years on: the Policy-Making Implications of Unintended Competence Transfers,* in *Journal of Common Market Studies,* 2021, 59 (3), pp. 643-660.

BARIATTI S., *Current trends in foreign direct investment: open issues of national screening systems*, in NAPOLITANO G. (ed.), *Foreign Direct Investment. Il controllo sugli investimenti esteri diretti,* Il Mulino, 2020.

BESSA-VILELA N., JESUS-SILVA N., OPLOTNIK Z., *EU Foreign Investment Policy: FDI Screening Mechanism to Advert Genuine Threats or Introducing Hidden Protectionism*, in *Contemporary Issues in International Economics*, 2021.

BIAN C., *National Security Review of Foreign Investment. A Comparative Legal Analysis of China, the United States and the European Union*, Routledge, 2020.

BIAN C., *Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity*, in *Journal of World Investment & Trade*, 22, 2021, pp. 561-595.

BICKERTON, C., HODSON, D. and PUETTER, U.*, The New Intergovernmentalism: European Integration in the Post-Maastricht Era,* in *Journal of Common Market Studies,* 2015, 53 (4), pp. 703–722.

BIGLAISER G., JENSEN N., LI Q., MALESKY E., PINTO P., STAATS J., *Politics and foreign investment*, University of Michigan Press, 2012.

BORROWICZ A., *The Shift of the Policy Towards FDI in European Union: Determinants and Challenges*, in *European Integration Studies*, 14, 2020, pp. 117-124.

BOURGEOIS J.H (ed.), *EU Framework for Foreign Direct Investment Control*, Kluwer Law International BV, 2019.

BUNGENBERG M., *Going Global? The EU Common Commercial Policy After Lisbon*, in C. HERRMANN and J.P. TERHECHTE (eds), *European Yearbook of International Economic Law*, 2010, pp. 123-151.

BUNGENBERG M., *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, in M. BUNGENBERG, J. GRIEBEL and S. HINDELANG (eds.), *European Yearbook of International Economic Law (Special Issue),* 2011, pp. 29-42.

BURNSIDE A., KIDANE A., *Merger control meets FDI: the multi-stop shops expands*, in *Competition Law & Policy Debate*, 7 (2), 2022, pp. 68-76.

CALAMITA N.J., *The Making of Europes International Investment Policy: Uncertain First Steps*, in *Legal Issues of Economic Integration*, 39 (3), 2012, pp. 301-329.

CALLIES C., KORTE S., *Dienstleistungsrecht in der EU*, in Handbuch des Rechts der Europäischen Union zum freien Dienstleistungsverkehr, C.H. Beck, 2011.

CEYSSENS, J., *Towards a Common Foreign Investment Policy-Foreign Investment in the European Constitution,* in *Legal Issues of Economic Integration*, 2005, p. 259.

CHAISSE J., *Promises and Pitfalls of the European Union Policy on Foreign Investment - How will the New EU Competence on FDI Affect the Emerging Global Regime?*, in *Journal of International Economic Law*, 15 (1), 2012, pp. 51-84.

CHAISSE J., GÓRSKI J., SEJKO D., *Confronting the Challenges of State Capitalism: Trends, Rules, and Debates*, in *Regulation of State-Controlled Enterprises: An Interdisciplinary and Comparative Examination*, Springer Nature Singapore, 2022, pp. 1-26.

CHAN Z.T., MEUNIER S., *Behind the screen: Understanding national support for a foreign investment screening mechanism in the European Union*, in *The Review of International Organizations*, 17 (3), 2022, 513-541.

COLANGELO M., *Regole comunitarie e golden share italiana*, in Mercato concorrenza regole, 11 (3), pp. 595-602.

COLLINS A., *Contemporary Security Studies,* Oxford University Press, 2022.

CRÄMER J., HERMANN C., *Foreign Direct Investment - A "Coincidental" Competence of the EU?,* Hitotsubashi Journal of Law and Politics, 2015, 43, pp. 85-109.

CREMONA M., *Regulating FDI in the EU Legal Framework*, in BOURGEOIS J., *EU Framework for Foreign Direct Investment Control*, 2019, pp. 31-55.

DANZMAN S. B., MEUNIER S., *The Big Screen: Mapping the Diffusion of Foreign Investment Screening Mechanisms,* 2021.

DE JONG B., ZWARTKRUIS W., *The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?*, in *European Business Law Review*, 31 (3), 2020, pp. 447-474.

DE JONG B., *The EU Foreign Direct Investment Screening Regulation: in Search of a Clear Concept of FDI*, in *Radboud Economic Law Conference Book: The Rise of Public Security Interests in Corporate Mergers and Acquisitions*, 2021.

DE MAN P., WOUTERS J., *EC Law and Residence of Companies*, in MAISTO G., *Residence of Companies under Tax Treaties and EC Law*, in *EC and International Tax Law Series*, Vol. 5, 2009, pp. 61-94.

DE MEESTER B., *International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State*, Leuven Centre for Global Governance Studies – Institute for International Law, Working Paper No. 20, 2009.

DE UGARTE S., PEREZ M., PICO I., *A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape*, in *European Competition and Regulatory Law Review*, 6 (1), 2022, pp. 17-23.

DESSIE A., *Scrutiny of Foreign Direct Investment Regulation in Light of Evolving National Security Concerns in International Investment Law*, in *Jimma University Journal of Law*, 13, 2021, pp. 19-46.

DIMOPOULOS A., *The Common Commercial Policy After the Lisbon Treaty: Establishing Parallelism Between Internal and External Economic Relations?,* in *Croatian Yearbook of European Law and Policy*, 2008, 4, pp. 102-131.

DI BENEDETTO F., *A European Committee on Foreign Investment?*, in *Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues*, No. 214, 2017.

DI VIA L., PASQUALE L., *Controllo degli investimenti stranieri e antitrust. Un matrimonio che s'ha da fare*, in *Mercato Concorrenza Regole*, 22 (1), 2020, pp.99-118.

DOLZNER R., KRIEBAUM U., SCHREURER C., *Principles of International Investment Law*, Oxford University Press, 2022.

DUCHÂTEL M., *The Landscape of Investment Screening in Europe,* Institut Montaigne Analyses, 2021.

EDWARDS V., FARMER P., *The Concept of Abuse in the Freedom of Establishment of Companies: a case of Double Standards?*, in ARNULL A., EECKHOUT P., TRIDIMAS T. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, 2008.

Ernst & Young's, Europe Attractiveness Survey 2022.

ESPLUGUES C., *A More Targeted Approach to Foreign Direct Investment: The Establishment of Screening Systems on National Security Grounds*, in *Brazilian Journal of International Law*, 15 (2), 2018, pp. 440-468.

ESPLUGUES C., *Towards a Common Screening System of Foreign Direct Investment on National Interest Grounds in the European Union*, in *Culture, Media and Entertainment Law*, 11 (2), 2018.

ESPLUGUES C., *A future European FDI screening system: solution or problem?*, in Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues, No. 245, 2019.

ESPLUGUES C., *The (Complex and Polyhedral) End of the Age of Naiveness of the EU: The First Annual Report on the Screening of Foreign Direct Investments into the European Union as an Example*, in *Bitacora Millennium DIPr*. 1, 2019, pp. 1-25.

European Chamber of Commerce in China, *European Business in China. Position Paper 2016/2017*, 2016.

GÁSPAR-SZILÁGYI S., *Quo Vadis EU Investment Law and Policy? The Shaky Path Towards the International Promotion of EU Rules*, in European Foreign Affairs Review, 23 (2), pp. 167-186.

GHEORGHISAN A. *Practical Perspectives on Qualifying an Investment as Foreign Direct Investment*, in *Romanian Arbitration Journal*, 16 (3), 2022, pp. 43-58.

GIANMATTEO S., *The 'Golden Power'on Foreign Investments in EU Law in the Light of Covid Crisis*, in European Company Law, 18 (6), 2021, pp. 189-195.

GLOBERMAN S., *A New Era for Foreign Direct Investment?*, in *Multinational Business Review*, 25 (1), 2017, pp. 5-10.

GREGORI W.D., NARDO M., *The effect of restrictive measures on cross-border investment in the European Union*, in *The World Economy,* 44 (7), 2021, pp. 1914-1943.

HEINEMANN A., *Government control of cross-border M&A: legitimate regulation or protectionism*, in *Journal of International Economic Law*, 15 (3), 2012, pp.843-870.

HERMANN C., *The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy*, in *The Journal of World Investment & Trade*, 2014, 15, pp. 570-584.

HERVÉ A., *The European Trade Policy in the time of Covid-19: Adaptation or change of paradigm*, in *European issues - Fondation Robert Schuman*, n°581, 2021.

HINDELANG S., *The Free Movement of Capital and Foreign Direct Investment*, Oxford University Press, 2009.

HINDELANG S., MOBERG A., *The Art of Casting Political Dissent in Law: the EU's Framework for the Screening of Foreign Direct Investment*, 2020, in *Common Market Law Review*, 57, pp. 1427-1460.

HINOJOSA-MARTÍNEZ L., *The Scope of the EU Treaty-Making Power on Foreign Investment: Between Wishful Thinking and Pragmatism*, in *The Journal of World Investment & Trade*, 17, 2016, pp. 86-115.

IndustriAll, Policy Brief, *Screening Foreign Direct Investment. Another step towards a fairer global level playing field?,* 2018-1, 2018.

JASON J., *Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union*, in International Journal of Legal Information, 47 (2), 2019, pp. 105–117.

JONES A., DAVIES J., *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debat*e, in *European Competition Journal*, 10 (3), 2014, pp. 453-497.

KABLE E., *Buying-up Europe No More? How the European Union has Responded to the Challenges of Chinese Foreign Direct Investment*, in *Claremont-UC Undergraduate Research Conference on the European Union*, 2021 (7), pp. 37-48.

KAZIMIREK K., *The New Competence over Foreign Direct Investment and its Impact on the EU's Role as a Global Player*, Jean Monnet Centre for Europeanisation and Transitional Regulation Oldenburg, 2012.

KIRWITZKE S., SCHONING F., *The Rise of Foreign Investment Control in Europe and beyond under the Impact of Covid-19*, in *Competition Law International*, 16 (1), pp. 2020.

KONTAK M., *The Application of Public Policy and Public Security Reasons for Justifying Restrictions on Free Movement of Capital in the EU*, in *Zagrebačka pravna revija*, 10 (2), 2021, pp. 150-166.

KORTE S., *Exploring the Possibilities and Limits of the EU and Member States to Set Up an Investment Screening Mechanism in the Light of Union Law,* in S. HILDELANG et al. (eds.), *YSEC Yearbook of Socio-Economic Constitutions*, 2020*,* pp. 435–466.

KRAJEWSKI M., *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, in *Common Market Law Review*, 2005, 42, 91.

KRAJEWSKI M., HOFFMANN R.T. (eds.), *Research Handbook on Foreign Direct Investment*, Edward Elgar Publishing, 2019.

KÜBEK G., *The European Union's External Trade and Investment Policy Post-Lisbon: Competence, Procedure and Scope of Action*, in ANDENAS M., PANTALEO L., HAPPOLD M., CONTARTESE C. (eds.) *EU External Action in International Economic Law*, Springer, 2020.

LAÏDI Z., *Can Europe learn to play power politics?*, Center for European Reform, 2019.

LAMPO G., *Italy's Exercise of Foreign Investment Screening Power against Chinese Takeover. An Assessment under International Law*, in *The Italian Review of International and Comparative Law*, 2021 (1), pp. 433-442.

LEAL-ARCAS R., *EU Trade Law*, Edward Elgar Publishing, 2019.

LECZYKIEWICZ D., *Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade*, in *German Law Journal*, 08 (11), Special Issue – Unity of the European Constitution, pp. 1673-1685.

LENAERTS A., *The general principle of the prohibition of abuse of rights: a critical position on its role in a codified European contract law* in *European Review of Private Law*, 18 (6), 2010, pp. 1121-1154.

LENAERTS K., *Constitutionalism and the Many Faces of Federalism*, 1990, in *American Journal of Comparative Law*, 38 (2), pp. 205-264.

MAILLO J., *New Screening of foreign direct Investment (FDI) in Europe: a first step towards a new paradigm?,* in *Spanish Yearbook of International Law*, 24, 2020, pp. 180-209.

MÄKELÄ T., The Court of Justice rules for the first time on Article 21(3) of the Merger Regulation in case C-42/01 Portuguese Republic v. Commission, Competition Policy Newsletter, 1, 2005.

MARTIN E., *L'Union européenne va-t-elle se laisser acheter? Le filtrage des investissements étrangers en Europe*, in Études de l'Ifri, 2019.

MARTIN-PRAT M., *The European Commission Proposal on FDI Screening*, in BOURGEOIS J., *EU Framework for Foreign Direct Investment Control*, 2019, pp. 95-98.

MEUNIER S., *A Faustian bargain or just a good bargain? Chinese foreign direct investment and politics in Europe,* in *Asia Europe Journal*, 12 (1), 2014, pp. 143-158.

MEUNIER S., *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, in *Journal of Common Market Studies*, 2017, 55 (3), pp. 593-610.

MEUNIER S., VACHUDOVA M.A., *Liberal intergovernmentalism, illiberalism and the potential superpower of the European Union*, in *Journal of Common Market Studies*, 2018, 56(7), pp. 1631-1647.

MÄKELÄ T., The Court of Justice rules for the first time on Article 21(3) of the Merger Regulation in case C-42/01 Portuguese Republic v. Commission, Competition Policy Newsletter, 1, 2005.

MENDENHALL J., TERNEY R., *CFIUS Overview*, in BOURGEOIS J.H., *EU Framework for Foreign Direct Investment Control*, 2019, pp. 135-148.

MICOSSI S., *A new drive for the Capital Markets Union*, Policy Brief – Luiss School of European Political Economy, 2019.

MOHAMED S., *European Community Law on the Movement of Capital and the EMU*, Stockholm Studies in Law, Kluwer Law International, 1999.

MOLA L., *Which Role for the EU in the Development of International Investment Law?*, Society of International Economic Law, 2008.

NAPOLITANO G. (ed.), *Foreign Direct Investment. Il controllo sugli investimenti esteri diretti,* Il Mulino, 2020.

NEERGAARD A., *The Adoption of the Regulation Establishing a Framework for Screening of Foreign Direct Investment into the European Union*, in BOURGEOIS H.J. (eds.), *EU Framework for Foreign Direct Investment Control*, Wolters Kluwer, 2020 pp. 151-168.

NOURRY A., RABINOWITZ D., *European champions: what now for EU merger control after Siemens/Alstom?*, in *European Competition Law Review*, 41 (3), 2020, pp. 116-124.

PACH, J. (2001), *Bezpośrednie inwestycje zagraniczne w świetle bezpieczeństwa ekonomicznego na przykładzie Polski w latach dziewięćdziesiątych XX wieku*, in

Wydawnictwo Naukowe Akademii Pedagogicznej im. Komisji Edukacji Narodowej, Prace Monograficzne, No. 309, 2001.

PANG L., *The Siemens/Alstom Merger Case: How European Merger Policy Respond to Global Competition*, in *Dublin Law and Politics Review*, 1 (1), 2020, pp. 33-40.

PETTINATO C., *The new EU regulation on foreign direct investment screening: rationale and main elements*, in NAPOLITANO G. (ed.), *Foreign Direct Investment screening - Il controllo sugli investimenti esteri diretti,* 2020, pp. 57-62.

PITRUZZELLA G., *Foreign direct investment screening in EU*, in NAPOLITANO G. (ed.), *Foreign Direct Investment screening - Il controllo sugli investimenti esteri diretti,* 2020, pp. 63-70.

POHL J.H., *Emergency, security and strategic autonomy in EU economic regulation*, in *ERA Forum*, 21 (2), 2020, pp. 143-154.

POHL J.H., *The Right to Be Heard in Composite Investment Screening Procedures Under Regulation 2019/452,* in BARRETT G. et al. (eds.), *The Future of Legal Europe: Will We Trust in It?,* 2021, pp. 647-661.

PUIG V., *The Scope of the New Exclusive Competence of the European Union with Regard to 'Foreign Direct Investment'*, in *Legal Issues of Economic Integration*, 40 (2), 2013, pp. 133–162.

READER D., *Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights*, Centre for Competition Policy – University of East Anglia, CCP Working Paper 16-3, 2016.

REINS L., *The European Union's framework for FDI screening: Towards an ever more growing competence over energy policy?,* in *Energy Policy*, 128, 2019, pp. 665-672.

REISMAN D.A.A., *The EU and FDI: What to Expect From the New Screening Regulation*, Institut de Recherche Stratégique de l'École Militaire, Research Paper No. 104, 2020.

RODRIGUES N.C., *Filling the Regulatory Gap to Address Foreign Subsidies: The EC's Search for a Level Playing Field Within the Internal Market*, in RODRIGUES N.C. (ed.), *Extraterritoriality of EU Economic Law*, pp. 197-227.

RUSSU C., *Investment Policy of the European Union. Empirical Evidence of the Effects of Foreign Direct Investment on The European Union Economy*, in *Economic Insights-Trends & Challenges*, 1, 2021.

SCHILL S., *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, in *Legal Issues of Economic Integration*, 2019, 46 (2), pp. 105-128.

SCHRÖDER O., *Germany* in GOLDMAN C., KOCH M. (eds.), *The Foreign Investment Regulation Review,* pp. 79-90.

SCHÜTZE R., *EU Competences: Existence and Exercise*, in ARNULL A., CHALMER D. (eds.), *The Oxford Handbook of European Union Law*, 2015, pp. 75-102.

SHAN W., ZHANG S., *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, in *The European Journal of International Law*, Vol. 21 (4), pp. 1049-1073.

SIMON S., *Investment Screening: The Return of Protectionism? A Political Account*, in HINDELANG S., MOBERG A. (eds.), *YSEC Yearbook of Socio-Economic Constitutions*, 2020, pp. 43–52.

STOPPIONI E., *The Interactions Between EU Law and International Investment Law: The Five Act of a Kabuki Play*, in *Hitotsubashi Journal of Law and Politics*, 2020, 48, pp. 37-52.

SVETLICINII A., *The Acquisitions of the Chinese State-Owned Enterprises under the EU Merger Control Regime: Time for Reflection?*, in *Revue Lamy de la concurrence*, 67, 2017, pp.30-36

SVETLICINII A., *The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach*, in *Market and Competition Law Review*, 11 (1), 2018, pp. 99-120.

VAN BEKKUM J., *Golden shares: a new approach*, in *European Company Law*, 7(1), 2010, pp. 13-19.

VELTEN J., *FDI screening regulation and the recent EU guidance: What options do member states have?,* in Columbia FDI Perspectives. Perspectives on topical foreign direct investment issues, No. 284 August 10, 2020.

VELTEN J., *The Investment Screening Regulation and its screening ground" security or public order: how the WTO law understanding undermines the Regulation's objectives*, Graduate Institute of International and Development Studies, Centre for Trade and Economic Integration, 2020.

VIDAL PUIG R., *The scope of the new exclusive competence of the European Union with regard to 'foreign direct investment*, in *Legal Issues of Economics Integration*, 40, 2013, p. 161.

VIG Z., *The Regulation of Screening of Foreign Direct Investments in the European Union*, in *Pro Futuro*, 9, 2020.

VRANES E., *State Measures Protecting Against "Undesirable" Foreign Investment. Issues in EU and International Law,* 2012, in *Zeitschrift fur offentliches Recht*, 67 (4), pp. 639-677.

WITKOWSKA J., *Polityka wobec bezpośrednich inwestycji zagranicznych*, in *Skutki napływu zagranicznych inwestycji bezpośrednich - Materiał z posiedzenia Rady Społeczno-Gospodarczej*, 2020.

WITKOWSKA J., *The European Union's Screening Framework for Foreign Direct Investment: Consequences for External Relations*, in *Comparative Economic Research – Central and Eastern Europe*, 23 (1), 2020.

WITKOWSKA J., *The European Union's Position in Global Foreign Direct Investment Flows and Stocks: Institutional Attempts to Improve It*, in *Comparative Economic Research – Central and Eastern Europe*, 2021, 24 (1), pp.27-43.

Acts and Documents from national, European and international institutions.

European legislation

Council of the European Union, Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal of the European Communities, L 178/5, 8 July 1988, pp. 5-18.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.1.2004, p. 1–22.

Council of the European Union and European Parliament, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, Official Journal L 142, 30 April 2004, p. 12-23.

Council of the European Union and European Parliament, Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, Official Journal L 390, 31 December 2004, pp. 38-57.

Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal, L 134, 29 May 2009, p. 1.

Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, Official Journal C 202, 8 July 2011, pp. 13-23.

Treaty on the European Union (Consolidated Version), 26 October 2012, OJ C 326/13.

Treaty on the Functioning of the European Union (Consolidated Version), 26 October 2012, OJ C 326/47.

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 investments into the Union, OJ L 79I , 21.3.2019, p. 1–14.

Regulation (EU) 2022/2560 of the European Parliament and the Council of 14 December 2022 on foreign subsidies distorting the internal market, Official Journal of the European Union, L 330/1.

European documentation

European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal C 31/5, 5 February 2004.

Commission of the European Community, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common European Approach to Sovereign Wealth Funds*, 27 February 2008, COM/2008/115 final.

European Commission, Communication from the Commisison to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010)343 final.

European Commission, Commission Staff Working Document, *On the Movement of Capital and the Freedom of Payments*, 5 March 2015, SWD (2015) 58 final.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade for all. Towards a more responsible trade and investment policy*, Trade Policy Strategy, 14 October 2015, COM(2015) 497 final.

European Commission, *Reflection Paper on Harnessing Globalisation*, COM(2017) 240, 10 May 2017.

European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union*, 13 September 2017, COM (2017) 487 final.

European Commission, *Commission Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments in the European Union*, 13 September 2017, SWD(2017)297.

European Commission, *Commission Decision setting up the group of experts on the screening of foreign direct investment into the European Union*, 29 November 2017, C(2017)7866.

European Commission, *Review of national rules for the protection of infrastructure relevant for security of supply*, Final Study, 2018.

European Commission, *European Commission and HR/VP contribution to the European Council. EU-China – A strategic outlook*, 12 March 2019, JOIN(2019) 5 final.

European Commission, *Staff Working Document on Foreign Direct Investment in the EU Following up on the Commission Communication "Welcoming Foreign Direct Investment while protecting Essential Interests*, 13 March 2019, SWD (2019) 108 final.

European Commission, *Political Guidelines for the next European Commission 2019-2024 – Opening Statement in the European Parliament Plenary Session by Ursula Von der Leyen*, 16 July 2019.

European Commission, Press Release, *European Commission and International Monetary Fund strengthen cooperation to support sustainable development*, 28 January 2020.

European Commission, *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)*, 26 March 2020, 2020/C 99 I/01, C/2020/1981.

European Commission, *Commission Decision approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedure*s, 18 June 2020, C(2020) 4192 final.

European Commission, *Annex to the Commission Decision on approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures,* 18 June 2020, C(2020) 4192 final ANNEX.

European Commission, *White paper on levelling the playing field as regards foreign subsidies*, 17 June 2020, COM (2020) 253 final.

European Commission, *Report from the Commission to the European Parliament and the Council: First Annual Report on the screening of foreign direct investment into the Union*, 23 November 2021, COM(2021) 714 final.

European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries*, 8 December 2021,COM(2021) 775.

European Commission, *Report from the Commission to the European Parliament and the Council - Second Annual Report on the screening of foreign direct investments into the Union*, 1 September 2022, COM(2022)433.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2023: A Union standing firm and united*, 18 October 2022, COM(2022) 548 final.

European Parliament, Briefing, *The role of the OECD in shaping EU trade policy*, DGEXPO/B/PolDep/Note/2016_282016, January 2016.

European Parliament, *Resolution on building an ambitious EU industrial strategy as a strategic priority for growth, employment and innovation in Europe*, (2017/2732(RSP)), 5 July 2017.

European Parliament, *Proposal for a Union Act submitted under Rule 45 (2) of the Rules of Procedure on the Screening of Foreign Investment in Strategic Sectors,* B8-0302/2017, Recital F, 26 April 2017.

European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union'*, 25 July 2018, Official Journal C 262/94.

National legislation

Austria, Investment Control Act, Federal Law No.87 of 2020,

Belgium, Cooperation Agreement of 30 November 2022 between the Federal State, the Flemish Region, the Walloon Region, the Region of Brussels-Capital, the Flemish Community, the French Community, the Germanophone Community, the French Communitarian Commission and Common Communitarian Commission.

Canada, Investment Canada Act of 1985.

China, National Intelligence Law of the People's Republic of China (国家情报法), 12 National People's Congress, 27 June 2017.

Denmark, Act on War Material, Consolidated Act No. 1004 of 22 October 2012.

Denmark, Act on Screening certain foreign direct investment in Denmark, Act No. 842 of 10 May 2021.

Denmark, Act on Supplier Security in the Critical Telecom Infrastructure, Act. No. 1156 of 8 June 2021.

Estonia, Law on Assessing the Reliability of Foreign Investment of 25 of January 2023.

Finland, Act on transfers of real estate property requiring permission, N. 470/2019, as amended by Act N. 1098/2022.

Finland, Government proposal HE 222 /2022 vp, 21 October 2022.

France, Article R. 153-9 of the French Financial and Monetary Code.

France, Decree N. 2020-892 of 22 July 2020 on the temporary lowering of thresholds of control of foreign investments in French companies whose actions are admitted to trading.

Germany, Wertpapiererwerbs und Übernahmegesetz, 20 December 2001.

Germany, Foreign Trade and Payments Act (Außenwirtschaftsgesetz) of 6 June 2013.

Germany, Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung) of 2 August 2013.

Hungary, Act LVII of 2018 on the Control of the Foreign Investments that Violate the National Security of Hungary.

Hungary, Act LVIII of 2020 law on the transitional rules related to the end of the state of emergency and on epidemic preparedness.

Italy, Decree-Law N. 322 of 31 May 1994, as converted by Law N. 474 of 30 July 1994).

Italy, Decree of the President of the Council of Ministers of 6 August 2014.

Italy, Decree-Law No. 105 of 21 September 2019, as converted by Law No. 133 of 18 November 2019.

Italy, Decree-Law N. 23 of 8 April 2020, as converted by Law No. 40 of 5 June 2020.

Latvia, Regulation N. 606 of 2017.

Lithuania, Law on the Protection of Objects Important to Ensuring National Security of the Republic of Lithuania of 10 October 2002, No. IX-1132, Article 12.12(2).

Netherlands, Electricity Act of 1998.

Netherlands, Gas Act of 2020.

Netherlands, Act amending the Telecommunication Act against undesired control in the telecom sector of 2020.

Netherlands, Investments, Mergers and Acquisitions Screening Act (VIFO Act) of 18 May 2022.

Slovakia, Act. No. 497/2022 Coll. on Screening of Foreign Direct Investment for the protection of the security or public order.

Sweden, Legislative Proposal, A screening system for foreign direct investments for the protection of Swedish security interests, Department of Justice, 16 March 2023.

United Kingdom, National Security and Investment Act 2021.

U.S., Federal Register, Vol.85, No.179, Final Rule, Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 15 September 2020.

U.S., Foreign Investment Risk Review Modernization Act of 2018.

Acts, Documents and Reports of National Institutions and International Organizations.

Austria, Ministry for Digital and Economic Affairs (Bundesministerium fur Digitalisierung und Wirtschaftsstandort), Erster Tatigkeitsbericht der Investitionskontrolle, 2022.

IMF Multimedia Services Division, *Balance of Payments and International Investment Position Manual*, Washington, 2009.

IMF Statistics Department, *Final Report of the Task Force on Special Purpose Entities*, 2018.

Italy, Presidenza del Consiglio dei Ministri - Sistema di Informazione per la Sicurezza della Repubblica, *Relazione annuale 2022 sulla Politica dell'Informazione per la Sicurezza*, 28 February 2023.

Netherlands, Ministerie van Veiligheid en Justitie Werken met scenario's, risicobeoordeling en capaciteiten in de Strategie Nationale Veiligheid, 2013.

OECD, *Benchmark Definition of Foreign Direct Investment*, 2008.

OECD, *International Investment Law: Understanding Concepts and Tracking Innovations,* 2008.

OECD, Kowalski P., Perepechay K., *International Trade and Investment by State Enterprises*, OECD Trade Policy Papers No. 184, 2015.

OECD, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies,* 2020.

OECD, *Framework for Screening Foreign Direct Investment into the EU. Assessing effectiveness and efficiency*, 2022.

OECD, *The Relationship Between FDI Screening and Merger Control Reviews*, OECD Competition Policy Roundtable Background Note, 2022.

UNCTAD, *Formulation and Implementation of Foreign Investment Policies,* 1992.

UNCTAD, World Investment Report of the United Nations Conference on Trade and Development, 2009.

United Kingdom, House of Lords, European Union Committee, *The Treaty of Lisbon: an Impact Assessment*, 10th Report of Session 2007-08.

United Kingdom, House of Commons, Rt Hon Lord Mandelson, *Business, Innovation and Skills Committee - Minutes of Evidence: The work of the Department for Business, Innovation and Skill*s, 19 January 2010.

United Kingdom, Department for International Trade, Explanatory Memorandum for European Union Legislation and Documents, 5 October 2017.

Case law of the Court of Justice, Opinions of Advocates General and Decisions of the Commission

CJEC, 5 February 1963, *Van Gend and Loos,* Case 26-62, ECLI:EU:C:1963:1.

CJEC, 28 October 1975, *Rutili v Minister of Interior Affairs*, Case C-36/75, ECLI:EU:C:1975:137.

CJEC, Opinion of the Court of 11 November 1975, *Low Cost Standard*, Op. 1/75.

CJEC, 15 December 1976, Case C-35/76, *Simmenthal v. Italian Minister of Finance*, EU:C:1976:180.

CJEC, Opinion of the Court of 4 October 1979, *International Agreement on Natural Rubber,* Op. 1/78, par. 45, ECLI:EU:C:1979:224.

CJEC, 18 February 1986, *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company*, Case C-174/84, ECLI:EU:C:1986:60.

CJEC, 24 June 1986, *Luigi Brugnoni and Roberto Ruffinengo v Cassa di Risparmio di Genova e Imperia*, Case C-157/85, ECLI:EU:C:1986:258.

CJEC, 10 July 1986, *Segers*, Case C-79/85, ECLI:EU:C:1986:308.

CJEC, 5 May 1991, *Roux v Belgian State*, Case C-363/89, ECLI:EU:C:1991:41.

CJEC, 24 November 1993, *Bernard Keck and Daniel Mithouard*, Case C-267/91 and C-298/91, ECLI:EU:C:1993:905.

CJEC, Opinion of the Court of 24 March 1995, *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment,* Op. 2/92, ECLI:EU:C:1995:83.

CJEC, Opinion of the Court of 15 November 1994, *Re WTO Agreement,* Op. 1/94, ECLI:EU:C:1994:384.

CJEC, 14 November 1995, *Svensson and Gustavsson v Ministre du Logement and de l'Urbanisme*, Case C-484/93, ECLI:EU:C:1995:379.

CJEC, 30 November 1995, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Mcilano*, Case C-55/94, ECLI:EU:C:1995:411.

CJEC, 9 December 1997, *Commission v France,* Case C-265/95, ECLI:EU:C:1997:595.

CJEC, 19 January 1999, *Calfa*, Case C- 348/96, ECLI:EU:C:1999:6.

CJEC, 9 March 1999, *Centros*, Case C-212/97, ECLI:EU:C:1999:126.

CJEC, 16 March 1999, *Manfred Trummer and Peter Mayer*, Case C-222/97.

CJEC, Opinion of Advocate General Alber, 14 October 1999, *Baars*, C-251/98, ECLI:EU:C:1999:502.

CJEC, 14 March 2000, *Association Église de Scientologie de Paris Scientology International Reserves Trust v The Prime Minister*, Case C-54/99, ECLI:EU:C:2000:124.

CJEC, 13 April 2000, *Baars*, Case C-251/98, ECLI:EU:C:2000:205.

CJEC, 23 May 2000, Case C-58/99, *Commission v Italy*, ECLI:EU:C:2008:611.

CJEC, 26 September 2000, *Commission v Kingdom od Belgium*, Case C-478/98, ECLI: EU:C:2000:497.

CJEC, 4 June 2002, *Commission v Kingdom of Belgium*, Case C-503/99, ECLI:EU:C:2002:328.

CJEC, 4 July 2002, *Commission v Portugal*, Case C-367/98, ECLI:EU:C:2002:326.

CJEC, 13 May 2003, *Commission v Kingdom of Spain*, Case C-463/00, ECLI:EU:C:2003:272.

CJEC, 30 September 2003, *Inspire Art*, Case C-167/01, ECLI:EU:C:2003:512.

CJEC, 2 June 2005, *Commission v Italy*, Case C-174/04, ECLI:EU:C:2005:350.

CJEC, 10 January 2006, Case C-94/03, *Commission v. Council (Rotterdam Convention*), EU:C:2006:2.

CJEC, 12 September 2006, *Cadbury Schweppes*, Case C-196/04, ECLI:EU:C:2006:544.

CJEC, 12 December 2006, *Test Claimants in the FII Group Litigation*, Case C-446/04, ECLI:EU:C:2006:774.

CJEC, 23 October 2007, *Commission v Germany,* C-112/05, ECLI:EU:C:2007:623.

CJEC, 18 December 2007, *Skatteverket v A*, Case C-101/05, ECLI:EU:C:2007:804.

CJEC, 26 March 2009, *Commission v Italian Republic*, Case C-326/07, ECLI:EU:C:2009:193.

CJEU, 8 July 2010, *Commission v Portugal,* Case C-171/08, ECLI:EU:C:2010:412.

CJEU, 11 November 2010, *Commission v Portugal*, Case C-543/08, ECLI:EU:C:2010:669.

CJEU, 11 September 2014, Case C-47/12, *Kronos International Inc. v. Finanzamt Leverkusen*, EU:C:2014:2200.

CJEU, Opinion of the Court of 18 December 2014, *Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/13, ECLI:EU:C:2014:2454.

Commission Decision (EU, Euratom) 2015/444 on the security rules for protecting EU classified information, 13 March 2015, Official Journal L 17 March 2017, pp. 53-88.

Case No COMP/M.7850 - EDF / CGN / NNB GROUP OF COMPANIES, Commission Decision of 10.03.2016 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004.

CJEU, Advocate General Sharpston, 21 December 2016, Opinion 2/15, *The Free Trade Agreement with Singapore*, ECLI:EU:C:2016:992.

CJEU, Opinion of the Court of 16 May 2017, *Free Trade Agreement with Singapore*, Opinion 2/15, ECLI:EU:C: 2017:376.

CJEU, Opinion of Advocate General Bobek of 7 September 2017, *Edward Cussens, John Jennings, Vincent Kingston v T.G. Brosnan*, Case C-251/16, ECLI:EU:C:2017:648.

European Commission, Case No COMP/M.8677 – SIEMENS/ALSTOM, Commission Decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement.

CJEU, Opinion of Advocate General Tamara Ćapeta, 30 March 2023, *Xella Magyarország*, Case C-106/22, ECLI:EU:C:2023:267.

Webography

Bundesministerium für Wirtschaft und Energie, Letter addressed to Trade Commissioner Cecilia Malmström by Italian Minister for Economic Development Carlo Calenda, French Minister of Economy and Finance Michel Sapin, and German Minister for Economy and Energy Brigitte Zypries, February 2017, available at: https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=4.

Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie et des Finances, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019, available at: : https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2.

Concurrences, Xueref-Poviac E., *Foreign Direct Investment: an Overview of the EU and National Case Law*, 16 september 2021, available at: https://www.concurrences.com/en/bulletin/special-issues/foreign-investment/foreword.

Council on Foreign Relations Berman N., Maizland L., Chatzky A., *Is China's Huawei a Threat to U.S. National Security?,* Backgrounder, 8 February 2023, available at: https://www.cfr.org/backgrounder/chinas-huawei-threat-us-national-security.

Dentons, Zhang S., Zhang Y., *EU FDI screening and its impact on Chinese investments*, 2018; available at: https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2019/february/4/eu-fdi-screening-and-its-impact-on-chinese-investments.

European Commission, State of the Union Address 2017, 13 September 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165.

European Commission, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom, Press Release of 6 February 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

European Commission, EVP Vestager remarks at the OECD 21st meeting of the Global Forum on Competition "Competition in the wider policy context", 1 December 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_7351

European Parliament, *Reinforcing European defence: buying weapons together*, 1 June 2023, available at: https://www.europarl.europa.eu/news/en/headlines/security/20230504STO84701/reinforcing-european-defence-buying-weapons-together,

Financial Times, Chassany A.S., Keohane D., *France backs Alstom-Siemens train merge*r, 26 September 2017, available at: https://www.ft.com/content/0ee2336c-64f8-3935-ab92-ada64851b8e1.

Financial Times, Agnew H., *EU blocks Siemens-Alstom rail merger, Le Maire says*, 6 February 2019, https://www.ft.com/content/cd35e760-29f5-11e9- a5ab-ff8ef2b976c7.

Politico, Moens B., Free traders fear EU risks going over to the dark side with new superpower, 9 February 2022, available at: https://www.politico.eu/article/free-traders-fear-eu-dark-side-new-superpower/.

Freshfields Bruckhaus Deringer, Röhling F., Salaschek U., T*he Foreign Investment Regulation Review: EU Overview*, The Law Reviews, 2021, available at: https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/eu-overview.

Friends of Industry, *Joint Statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain*, 6th Ministerial Meeting, 26 September 2017, available at: https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929_-_declaration_finale_-_6eme_reunion_des_amis_de_lindustrie-en.pdf

Global Competition Review, Barrio D., Fountoukakos K., Vowden D., *European Union: Foreign Direct Investment Regulations*, 6 December 2022, available at: https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/second-edition/article/european-union.

Global Trade Law Blog, Blanquart J., Whitten R., *CFIUS for Europe? New Screening of Foreign Direct Investment in Europe,* 2017, available at: https://www.globaltradelawblog.com/2017/12/12/new-screening-fdi/.

Huawei Facts, Q&A, *Who owns Huawei?*, https://www.huawei.com/my/facts/question-answer/who-owns-huawei.

Investment Treaty News, Torrent R., *The EU's International Investment Policy: Hardware Without the Software*, Investment Treaty News, 23 September 2010, available at: https://www.iisd.org/itn/en/2010/09/23/the-eu-s-international-investment-policy-hardware-without-the-software/.

Mannheimer Swartling, Dackö C., Jonsson L., *Applicability of Chinese National Intelligence Law to Chinese and non-Chinese Entities*, January 2019, available at: https://www.mannheimerswartling.se/app/uploads/2021/04/msa_nyhetsbrev_national-intelligence-law_jan-19.pdf.

Reuters, Rinke A., *Merkel says German government would support Siemens-Alstom tie-up*, Reuters, 10 May 2014, available at: https://www. reuters.com/article/us-france-germany-alstom-idUKBREA4902N20140510.

Reuters, Reuters Staff, *Germany presses for changes in EU competition rules after Siemens/Alstom deal blocked*, 6 February 2019, available at: https://www.reuters.com/article/us-alstom-m-a-siemens-eu-germany-idUSKCN1PV1BO.

Siemens and Alstom, *S Siemens and Alstom join forces to create a European Champion in Mobility,* 26 September 2017, available at: https://press.siemens.com/global/en/pressrelease/siemens-and-alstom-join-forces-create-european-champion-mobility.

UK Government, Department for Business and Industry, *Alex Chisholm speaks about public interest and competition-based merger control*, Speech given by CMA Chief Executive, Alex Chisholm, at the Fordham Competition Law Institute Annual Conference, 11 September 2014, available at: https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control.

Verfassungsblog, Kleimann D., Kübek G., *The Singapore Opinion or the End of Mixity as We Know It,* , 2017, available at: https://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/.