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ISSUES ON FINANCIAL MARKET REGULATION, BUSINESS DEVELOPMENT AND GOVERNMENT'S POLICIES ON GLOBALIZATION

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Mission

The "Law and Economics Yearly Review" is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione Onlus (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government's policies, business development constraints and the "sovereign debt crisis" are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism's turbulences and to promote a sustainable retrieval.

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TRENDS AND PERSPECTIVES

OF

FOREIGN DIRECT INVESTMENTS SCREENING

MECHANISMS

THE GOLDEN POWERS EVOLUTION*

SPECIAL ISSUE OF LAW & ECONOMICS YEARLY REVIEW

COORDINATED BY PROF. ANDREA SACCO GINEVRI

* PRIN 2020 titled "An analysis of the Italian financial legal framework vis-a-vis the Capital Markets Union action plan: the perspective of regulatory fragmentation and sustainability" (Prot. 2020SMP7A7)

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PRESENTATION

Andrea Sacco Ginevri *

This special issue of the Law and Economics Yearly Review is dedicated to the analysis of certain aspects of the evolution that has characterized Foreign Direct Investment (FDI) screening mechanisms at the international level in recent years.

Indeed, a number of factors – including, among others, the spread of the Covid-19 pandemic and the outbreak of the Russia-Ukraine conflict, with the related effects on international markets' stability – prompted the European and local authorities to rely heavily on FDI control mechanisms as a useful tool to protect companies deemed "strategic" for each State's vital interests from their potential buy-out by speculative investors and thus avoid the possible loss of critical assets and technologies.

As a result, we assist worldwide to a trend towards the attribution to local authorities of significant powers which are capable to affect the business conduct of private market operators in critical sectors of the economy, and therefore to restrict the free circulation of capitals and the freedom of establishment by potential investors.

The issue opens with a paper by Maria Rosaria Mauro, who focuses on the evolving notion of "national security" in the energy sector, and observes that security and economic issues tend to converge. This may lead to an extensive

* Full Professor of Economic Law at the International Telematic University "UNINETTUNO" of Rome, Vice Dean of the Law faculty at the International Telematic University "UNINETTUNO" of Rome, Director of the PhD course on "*Law and economics of the digital society*" at the International Telematic University "UNINETTUNO" of Rome, scientific coordinator for the International Telematic University "UNINETTUNO" of the European project "*Digileap: digitally shifting EU's law & legal studies' content in higher education*", and Country Reporter for Italy 2021-2023 of the CELIS Institute.

interpretation of the notion of “national security”, which could trigger an abusive use of FDI screening mechanisms with the result of creating new investment barriers and reducing legal certainty for foreign investors.

Under a similar perspective, Roland Stein analyzes FDI screening in the area of security transportation networks, and notes in particular how the Ukraine war raised serious concerns by the German Federal Government about the security of transport infrastructures to ensure protection of critical supply chains.

The following paper by Yao Yuan provides a comparative overview of FDI screening mechanisms in place in the United States, the European Union and China, by focusing on their different approach towards the inclusion of economic security concerns in the FDI screening process, as well as on the evolution of their response to changing global investment environment and preferences.

With specific reference to the enforcement of FDI screening mechanisms, Andrea Gemmi highlights how FDI scrutiny implies a wide discretion by the competent authorities, which – together with the vagueness of the concept of national security and the other screening criteria – results in a lack of effective judicial review over the exercise of such special powers and the prescriptions and conditions imposed through them.

Ferruccio Maria Sbarbaro and Ilaria Grimaldi specifically focus on FDI mechanisms in place in the United States, and analyse the role and powers of the Committee on Foreign Investment in the United States (CFIUS) in light of the evolving national security landscape. The paper also analyzes the landmark case of “TikTok” as an example of the reaction to Chinese investments in American critical infrastructures.

Going back to Europe, the work by Alessandra Moroni provides an overview of the concepts of “national security” and “public order” for FDI screening purposes, and highlights the close interplay between FDI scrutiny and the areas of export controls and sanctions.

The notion of "national security" has been then further investigated by Jonas Fechter. In particular, the Author notes that the traditional interpretation of "national security" – which used to embrace only serious threats to States and the society – has been replaced by a broader meaning which nowadays intercepts also purely economic realms as a result of the recent geopolitical and geo-economics tensions.

"The State's Role in Strategic Economic Sectors" by Lorenzo Locci and Caterina Pistocchi provides a general overview of the evolution of the Italian legal framework on Golden Powers by highlighting the new role of the Italian State in strategic economic sectors, as well as the compatibility of the legal framework currently in force in Italy with the principles set forth by the European treaties also in light of the most recent trends at European level.

Consistently with such approach, which shows the influence in this field produced by the European framework, the analysis on "State aid after two crisis" by Diego Rossano, Anna Maria Pancallo and Claudia Marasco highlights how European State aid rules impact on the financial sector, also considering the effect of the most recent financial crises.

Federico Riganti and Linda Lorenzon then analyze more in detail a specific aspect of the Italian FDI screening regime, and namely the extension of the Italian golden powers to the banking and financial sector as a result of the amendments introduced by the Italian legislator.

The issue closes with a paper by Anne-Marie Weber and Weronika Herbet-Homenda, who examine the main characteristics and objectives of the new FDI screening mechanism introduced currently in place in Poland, as subsequently strengthened as a reaction to the spread of the Covid-19 pandemic.

I would like to thank the Editor in Chief Prof. Francesco Capriglione for the special issue reserved to this subject in Law & Economics Yearly Review as well as the Authors involved in this project for their insightful contributions.

ENERGY CONCERNS IN THE CONTEXT OF NATIONAL SECURITY AND FOREIGN INVESTMENT SCREENING MECHANISMS

Maria Rosaria Mauro*

ABSTRACT: *In the present context, States strongly perceive a need to protect their national security by limiting foreign investments. Nowadays, economic considerations are increasingly taken into account by governments when assessing their national security. The pandemic has favoured a spread of foreign direct investment (FDI) control regimes globally, phenomenon further encouraged by the Russian aggression against Ukraine. The Russia-Ukraine conflict has also brought energy security back at the center of global political debate, due to the "weaponization" of Russian fossil fuels and gas pipelines, determining renewed national security concerns. This article aims at examining the evolving concept of national security and its repercussions on domestic policies towards foreign investments, focusing particularly on the energy sector. The author postulates the idea that while, in the international post-Cold War order, there was a clear distinction between security and economy, in the current world order the relationship between the sphere of economy and that of security would appear to have changed, with a greater convergence between security and economic issues. An overly expansive interpretation of national security and the abuse of screening mechanisms could become an instrument for the protection of the domestic economy and have a negative effect on the foreign investment legal framework, creating new barriers and reducing legal certainty for foreign investors. In the energy sector, this could cause a "chilling effect", leading to a reduction in foreign*

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investments which could hinder the energy transition or the achievement of other energy goals. Therefore, it is pivotal to find a balance between FDI protection and the sovereign right of each State to strive for public general objectives, including energy security

SUMMARY: 1. Preliminary Remarks: International FDI Flows and the Energy Sector. – 2. The Concept of National Security and Its Evolution. – 3. The Concept of Energy Security. - 4. Foreign Investment Screening Mechanisms and Their Modification. – 5. FDI Screening Systems in Key Jurisdictions. - 6. FDI Screening Rules in the Energy Sector. – 7. Concluding Remarks.

1. Energy has traditionally been a very attractive sector for foreign investors, consequently this field has been normally covered by domestic FDI control systems. The forms of FDI in the energy sector and their regulation have changed over time[1]. Originally, energy FDI involved mainly the exploration and production of hydrocarbon natural resources such as oil, hard coal, and natural gas and these were located principally in developing countries. In those years, FDI laws approved by host States aimed at guaranteeing their participation in the financial profits coming from the foreign investment rather than protecting national security. Since the 1970's, FDI flows have had a substantial growth due to the liberalization and protection measures gradually introduced by States. In many countries, especially those in Europe, FDI in the energy sector was strongly encouraged particularly in the 1990's due to the liberalisation of energy markets and the partial privatisation of national State-owned enterprises (SOEs). At that time, governments gave a prominent role to FDI for the liberalisation of the markets and the achievement of energy supply security. However, simultaneously, the so-called "Golden Share" and/or "Golden Power" laws were enacted, since host States wanted to keep a certain degree of control in the energy sector, even

[1]See M. RAJAVUORI, K. HUHTA, *Investment Screening: Implications for the Energy Sector and Energy Security*, in *Energy Policy*, September 2020, 144.

though for reasons of industrial policy rather than of national security.

The financial and economic crisis of 2007-2010 caused a slowdown of international FDI flows, resulting also from new restrictive measures adopted by governments to protect national economies. The global crisis questioned neo-liberal economic policies that inspired the international law on foreign investments since the second mid-80's of the 20th century. In this context, many States have begun to take a more stringent attitude towards foreign investments, introducing new domestic restrictions on national security and on foreign ownership of land and natural resources, intensifying control over foreign acquisitions, in particular of strategic assets and IT companies, prohibiting investments made by sovereign wealth funds (SWFs), establishing the Golden Share or Golden Power regime in sensitive sectors; and, finally, foreseeing screening procedures[2].

COVID-19 has further impacted FDI flows since many governments have made health decisions to contain the diffusion of the pandemic and economic measures to limit its negative consequences on domestic economy. According to the United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2021*, in 2020, FDI flows fell by one third to $1 trillion, coming back to the level seen in 2005, affecting especially the developed countries (mainly in Europe).[3] However, global FDI flows in 2021 were $1.58 trillion, up 64 per cent

[2]This closed-door approach has characterized, in recent years, also new International Investment Agreements (IIAs), which are now not only focused on investment protection but also include exceptions relating to the safeguard of both "national security" and other public interests such as environment and human rights. Security exceptions enclosed in IIAs are finalised to derogate from substantive standards established by the treaty at issue, allowing the contracting State to pursue security objectives also violating IIA clauses without any obligation to compensate the foreign investor. Even though these exceptions have been interpreted in an inconsistent way by arbitral tribunals, recent decisions seem to have a propensity toward a high level of discretion for the State, see, for instance, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award (December 13, 2017), para. 238; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits (July 25, 2016), para. 245.

[3]UNCTAD, *World Investment Report 2021. Investing in Sustainable Recovery*, United Nations, Geneva, 2021, available at *https://investmentpolicy.unctad.org/publications/1249/world-investment*

compared to the 2020 level. Unfortunately, the war in Ukraine has made the environment for international business and cross-border investment more critical, determining a food, fuel, and finance crisis in many countries around the world. Russia's invasion of Ukraine has turned the geopolitical climate upside down while limiting the international community's participation in an open global economic system. As a result, a more fragmented international trade and investment framework is emerging. The majority of governments have adopted economic sanctions against Russia and investments made by individuals and entities linked with or closed to the Russian government. Several companies operating in different sectors have started divesting in Russia due to ethical reasons as well as to volatile market conditions, and to difficulties of doing business caused by sanctions. At the same time, Russia responded by adopting measures against sanctions, among which more stringent capital controls and limitations of capital outflows, also threatening with nationalisation of foreign companies. The overall global climate of uncertainty could have further negative repercussions on companies which want to invest abroad; at the same time, this unstable and changing context could persuade States to protect their national security by limiting foreign investments. These elements will probably cause a decline in global FDI[4].

Energy represents a key element for economic development of each State. This sector appears to be currently characterised by two phenomena that could play a relevant role in connection with international FDI flows. First, the transition from hydrocarbon to renewable sources requires huge investment in new infrastructure to produce "green" electricity, hydrogen, or biofuels and to transport the energy to the areas of consumption. Simultaneously, important

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-report-2021---investing-in-sustainable-recovery, p. 1 ff.

[4]UNCTAD, *World Investment Report 2022. International Tax Reforms and Sustainable Investment*, United Nations, Geneva, 2022, available at *https://unctad.org/webflyer/world-investment-report-2022*, p. 2 ff.

investments are necessary for the digitalization of existing energy generation, transportation, and consumption infrastructure. Foreign investments could give a fundamental contribution to the achievement of these goals. The second aspect which must be taken into account is the increasing use of FDI for strategic objectives by several States, among which China and Middle Eastern countries. This frequently occurs in infrastructure and technology assets relating to the energy sector. The rising demand for energy worldwide and the heavy reliance of some countries on energy from imported sources have rendered the security of supply a core problem in the international context. The acquisition by foreign entities of strategic energy infrastructure is now considered a risk for the security of energy supply of countries. As a result, in recent years, Western countries have strengthened their FDI screening systems to evaluate the potential FDI impact on security of supply and infrastructure operation as well as, in general, on national security.

National security is a dynamic and evolving concept which has gradually prompted the adoption of stricter domestic FDI regimes. Originally, this notion was associated with defence and military concerns but, lately, a new concept of security emerged, linked to a more expansive understanding of *national* or *public interests*[5]. The pandemic has favoured a spread of FDI control regimes globally, a trend further encouraged by the Russian aggression against Ukraine. New restrictions have also touched the energy sector, in which renewed national security concerns emerged following the Russia-Ukraine conflict.

This article aims at examining the evolving concept of *national security* and its repercussions on domestic policies towards foreign investments, focusing particularly on the energy sector. The author postulates the idea that while, in the

[5]On the concept of *national security interests*, see P. ACCAOUI LORFING, *Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines*, in *Public Actors in International Investment Law. European Yearbook of International Economic Law*, edited by C. Titi, Springer, Cham, 2021, pp. 179-199.

international post-Cold War order, there was a clear distinction between security and economy, in the current world order the relationship between the sphere of economy and that of security would appear to have changed, with a greater convergence between security and economic issues. An overly expansive interpretation of national security and the abuse of screening mechanisms could become an instrument for the protection of the domestic economy and have a negative effect on the foreign investment legal framework, creating new barriers and reducing legal certainty for foreign investors. This means that recent developments could delete the progress achieved in the investment regime in the last decades. In the energy sector, this could have a "chilling effect", determining a reduction in FDI and, as a result, hindering the energy transition or the achievement of other energy goals. Therefore, also in the energy sector it is pivotal to find a balance between foreign investment protection and the sovereign right of each State to strive for public general objectives, including energy security.

2. The concept of national security is strictly linked with the reciprocal relationships between States. The modern system of international relations was born with the creation of the modern sovereign State, approximately at the end of the Thirty Years' War (1618-1648) and the Peace of Westphalia. These events also marked the origins of the modern international law system. At that time, a first concept of national security appeared, focused on the *State* and its prerogatives, such as the territory, the sovereignty, and foreign policy interests, which had to be protected against armed attempts to compromise its integrity from the outside or from within.

In the international order born after World War II, States usually distinguished national security interests from economic issues. This was evident in trade and investment treaties, where often broad and flexible exceptions were included to exempt national security measures from the applicable regime,

drawing a line between ordinary economic activity and security[6]. Therefore, in the two-pole system, the concept of national security was essentially linked to the idea of a military conflict between the United States and the Soviet Union[7].

However, whilst focusing on potential military dangers coming from the outside, unexpected issues of different nature (such as natural disasters, epidemics, technical and technological accidents …) arose, together with other internal threats (such as crime, nationalism, religious extremism, separatism, poverty, social conflicts …). Therefore, after the Cold War, States have begun to consider new possible risks for national security, such as terrorism, transnational crime, infectious diseases, environmental degradation, climate change, and economic crises. This has gradually modified the concept of national security, which has gone beyond the previous adversarial paradigm of a military conflict between the two superpowers, becoming more and more ample. Over the years, the scope of this concept has extended, covering not only the idea of a military protection but also that of the safeguard of other public goals that are crucial for State safety or domestic welfare. For instance, economic considerations are increasingly taken into account by States when assessing their national security. In addition, the health emergency situation caused by the pandemic has highlighted that the concept of national security obliges each State not to consider only traditional strategic assets. COVID-19 has reintroduced the notion of *scarcity* into the inter-States relations, that can be present in personal protective medical equipment, food, delivery of essential goods or services. Accordingly,

the pandemic has compelled governments to re-evaluate the companies of *essential interest* for the national community, such as enterprises operating in the health sector. The present Russia-Ukraine conflict is further exacerbating the idea

[6]See J.B. HEATH, *The New National Security Challenge to the Economic Order*, in *The Yale Law Journal*, 2020, 129, p. 1025.
[7]See L.K. DONOHUE, *The Limits of National Security*, in *American Criminal Law Review*, 2011, 48, pp. 1576-1577, 1657-1658.

of scarcity, destabilising the international economic relations.

Therefore, nowadays, States treat a wide range of risks as security issues and the concept of national security is no longer focused only on the *State* but also on its *society*. This concept has lost the simplicity of the meaning that it had during the Cold War, when it implied only military and defence aspects, and it started gradually including new elements, as human rights, environmental protection, public health, and especially economic considerations, incorporating the safeguard of societal fundamental interests and key values, such as the quality of life of the people, social welfare, economic wealth, access to information resources, healthy environment, as well as public order, stable political climate, national integrity, and finally adequate energy supply[8]. In short, currently, the expression *national security* indicates what a State needs at a particular time or in a particular situation and its conceptual meaning is solid only when looking at the big picture[9]. This

[8]Recent States' practice corroborates the thesis of the existence of a wider concept of national security. It is well known, for instance, that various investment cases in which Argentina participated in the 2000's increased the likelihood that such non-military threats would imply security interests under economic agreements. At that time, investors challenged in arbitral tribunals under Bilateral Investment Treaties (BITs) a series of emergency economic measures that Argentina took in response to the severe financial crisis in 2001 and 2002. Argentina has claimed on several occasions that even if those measures violated its obligations regarding the treatment of foreign investment, this was exempt from breach of international commitments and no compensation was due because all those measures fell under the clause "necessary for . . . the protection of its own essential security interests". See *El Paso Energy Int'l Corp. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (October 31, 2011), paras. 563-573; *Cont'l Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (September 5, 2008), paras. 84-89; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (September 28, 2007), para. 367; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007), paras. 324-326; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006), paras. 217-219; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), paras. 344-352. Even though Argentina's defence was rarely accepted, almost all arbitral tribunals agreed that the economic crisis represented a State's "essential security interest" notwithstanding the threat presented no military aspect. On this topic, see J.B. HEATH, op. cit., p. 1038; J. KURTZ, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, in *International and Comparative Law Quarterly*, 2010, 59(02), pp. 330-333; W.W. BURKE-WHITE, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in *Asian Journal of WTO & International Health Law and Policy*, 2008, 3(1), pp. 202-204.

[9]See, *The Palgrave Handbook of National Security*, edited by M. Clarke, A. Henschke, M. Sussex, T. Legrand, Palgrave Macmillan Cham, 2022; OECD, *Security-Related Terms in International*

ample concept of national security has an impact on the relationship and the balance between the sphere of *economy* and that of *security*, which seems to have changed[10]. In fact, there is now greater convergence between security and economic issues, more attention to related economic benefits, by virtue of their security implications, and one greater focus on security risks deriving from interdependence, which could weaken State control, as well as its self-sufficiency and resilience.

The transformation of security threats, the rise of new possible actors responsible for menaces to national security, an expanding list of economic sectors and products that are considered to be security sensitive, as well as a new shape of the relationship between geopolitics and economic globalization make more likely a collision between economic rules and the new national security concept. National security concerns have been widely spreading in global economic relations[11] and this circumstance could put at risk the legal framework for

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Investment Law and in National Security Strategies, May 2009, available at *https://www.oecd.org/investment/investment-policy-national-security.htm*, p. 11 ff.

[10]See J.B. HEATH, *op. cit.*, p. 1020 ff.; J.B. HEATH, *National Security and Economic Globalization: Toward Collision or Reconciliation*, in *Fordham International Law Journal*, 2019, 42(5), p. 1431 ff.; J. MA, *International Investment and National Security Review*, in *Vanderbilt Journal of Transnational Law*, 2019, 52(4), p. 899 ff.; A. ROBERT, H. CHOER MORAES, V. FERGUSON, *Toward a Geoeconomic Order in International Trade and Investment*, in *Journal of International Economic Law*, 2019, 22(4), p. 655 ff.; R.D BLACKWILL, J.M. HARRIS, *War by Other Means: Geoeconomics and Statecraft*, Harvard University Press, Cambridge (MA), 2016.

[11]For instance, national security claims were used by the Trump Administration to justify an aggressive economic approach towards foreign States. In the same breath, China is mixing economic and military goals in its trade and investment policy and this attitude is followed by other countries in Asia, Europe, and Africa. On this aspect, see D. DESIERTO, *Protean 'National Security' in Global Trade Wars, Investment Walls, and Regulatory Controls: Can 'National Security' Ever Be Unreviewable in International Economic Law?,* in *EJIL: TALK!*, April 2, 2018, available at *https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/*. Furthermore, in recent years, the World Trade Organization (WTO) has been increasingly called to settle disputes concerning measures adopted on the basis of security grounds. See, for instance, Request for Consultations by the Republic of Korea, *Japan—Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc.WT/DS590/1 (September 16, 2019), para. 7; Request for the Establishment of a Panel by the Bolivarian Republic of Venezuela, *United States—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS574/2 (March 15, 2019), p. 1; Request for the Establishment of a Panel by Switzerland, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/15 (November 8, 2018), p. 5; Request for the Establishment of a Panel by Qatar, *United Arab*

international trade and investment.

3. Energy has always played a key role for any country in economic, social, and political terms[12]. Therefore, governments have traditionally considered the issue of energy security as a primary concern which can represent a condition to guarantee national security. However, notwithstanding "energy security" is a crucial concept in international relations, a general consensus on its definition lacks[13].

There are two main schools of thought about the notion of energy security[14]. The first is more circumscribed, being focused on the technical issues regarding, *inter alia*, the energy infrastructure, demand and supply, energy mix, pricing and varying types of energy consumers and producers[15]. A second larger and less precise approach also takes into consideration the geo-political aspects concerning the impact of energy on national security[16].

In the past, this concept was mainly linked with the goals of decreasing

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Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WTO Doc. WT/DS526/2 (October 6, 2017), paras. 3.1-3.15; Request for Consultations by Ukraine, *Russia—Measures Concerning Traffic in Transit of Ukrainian Products*, WTO Doc.WT/DS512/1 (September 21, 2016), p. 2 and note 1. On this topic, see D. BOKLAN, A. BAHRI, *The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?*, in *World Trade Review*, 2020, 19(1), pp. 123–136.

[12]A.V. STAVYTSKYY, G. KHARLAMOVA, V. GIEDRAITIS, V. ŠUMSKIS, *Estimating the Interrelation between Energy Security and Macroeconomic Factors in European Countries*, in *J. Int. Stud.*, 2018, 11, pp. 217–238.

[13]On this aspect, see A. MARHOLD, *Energy in International Trade Law: Concepts, Regulation and Changing Markets*, Cambridge University Press, Cambridge, 2021, pp. 240-264; T. MORGANDI, J.E. VINUALES, *Energy Security in International Law*, in *The Oxford Handbook of the International Law of Global Security*, edited by R. Geiß, N. Melzer, Oxford University Press, Oxford, 2021, pp. 450-467; K. SZULECKI, *Energy Security in Europe. Divergent Perceptions and Policy Challenges*, Palgrave Macmillan, Cham, 2017; Energy Charter Secretariat, *International Energy Security – A Common Concept for Energy Producing, Consuming and Transit Countries*, Brussels, 2015, p. 10 ff.; A. GOLDTHAU, B.K. SOVACOOL, *The Uniqueness of the Energy Security, Justice, and Governance Problem*, in *Energy Policy*, February 2012, 41, pp. 232-240; D. YERGIN, *Ensuring Energy Security*, in *Foreign Affairs*, Mar./Apr. 2006, 85(2), pp. 69-82.

[14]On this topic, see A.A. MARHOLD, *Unpacking the Concept of 'Energy Security': Lessons from Recent WTO Case Law*, in *Legal Issues of Economic Integration*, 2021, 48(2), p. 149 ff.

[15]Energy Charter Secretariat, op. cit., p. 10.

[16]*Ibidem*.

dependence on other States and assuring the availability of primary energy sources. Now, even though the uninterrupted availability of affordable energy remains the key objective of energy security, there are new facets, new measures, and new challenges (such as diversification of energy suppliers and geostrategic threats) to be taken into account when considering the meaning of energy security. Therefore, this is a broad and complex concept which presents several practical and political implications. Furthermore, with reference to the timeframe, energy security can be regarded from two different perspectives. In case of a shorter period of time, the capacity of a certain system to react adequately to sudden changes in supply and demand appears to be pivotal; while, in case of a longer period of time, it is necessary to refer to investments considering sustainable development needs[17].

From a legal point of view, it must be stressed that until now there has yet to be a generally accepted definition of the concept in international law and not even in European Union (EU) law a specific definition exists[18]. A clear definition of energy security lacked, for instance, in the Agreement on an International Energy Programme[19], which is the founding treaty of the International Energy Agency (IEA), the international organisation established following the 1970's oil crises to balance the interests of energy importing and exporting countries. However, this Agreement underlines the importance of preventing "supply emergencies" and recalls the special responsibility of each government regarding energy supply[20]. Subsequently, the IEA has proposed a very large concept of "energy security", attributing the following meaning to this notion: "the uninterrupted availability of

[17]*Ibidem*. Also see IEA, *World Energy Outlook 2016*, IEA, Paris, 2016, available at *https://www.iea.org/reports/world-energy-outlook-2016*, p. 86.
[18]On this aspect, see European Commission, *Commission Staff Working Document*, *In-depth Study of European Energy Security*, SWD (2014) 330 final/3, July 2, 2014, p. 166, accompanying document Communication from the Commission to the European Parliament and the Council, *European Energy Security Strategy*, COM (2014) 330 final.
19The Agreement on an International Energy Programme was signed on 18 November 18, 1974 and entered into force on January 19, 1976.
20Preamble of the Agreement on an International Energy Programme.

energy sources at an affordable price"[21]. The United Nations Development Programme (UNDP) has tried to specify the concept, defining the "energy supply security" as "the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices"[22].

Summarising, energy security can be simply defined as "the availability of sufficient supplies at affordable prices"[23], which depends on: the physical dimension, linked to the necessity to protect energy assets, infrastructure, and supply routes; the accessibility to energy; the regulatory framework (i.e., to guarantee a system of governance of energy supply and demand on a national and global level); and, the promotion of investment for long-term energy security. Thus, the concept of energy security implies: a reliable supply that is accessible and affordable. In addition, according to a more recent orientation, the supply should be also *sustainable* on the long term[24].

In the energy sector the convergence between the sphere of security and that of economy is considerably accentuated, clearly affecting State attitude towards FDI, both inwards and outwards. The achievement of energy security has now become a key aspect of the foreign and defence policy of the State. At the same time, the globalization of energy as an industry and the increasing interdependence of several countries in this sector emphasis the difficulties to

[21]See IEA, *Energy Security. Ensuring the Uninterrupted Availability of Energy Sources at an Affordable Price*, available at *https://www.iea.org/areas-of-work/energy-security*.
[22]UNDP, *World Energy Assessment: Energy and the Challenge of Sustainability*, UNDP, New York, 2000, available at *https://www.undp.org/publications/world-energy-assessment-energy-and-challenge-sustainability*, p. 112.
[23]D. YERGIN, op. cit., pp. 70-71.
[24]In a nutshell, energy security is linked to a sustainable energy supply, at our disposal for the near and the distant future. This concept is also in agreement with Goal 7 of the United Nations Sustainable Development Goals which foresees accessibility to affordable, reliable, sustainable and modern energy for all (See Resolution adopted by the General Assembly on September 25, 2015, 70/1, *Transforming Our World: the 2030 Agenda for Sustainable Development* - UN Sustainable Development Goals – Goal 7: *Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All*). The expression "four As" of energy security is sometimes used by referring to the availability, accessibility, affordability, and acceptability of energy.

guarantee national energy security[25].

Energy security is strictly linked with the state of global energy markets, which are characterised by a strong competition among international companies therein operating[26]. For a long time, States were the primary actors in the energy markets, controlling investments in this field, also because they owned and operated the energy facilities once the investments had been made[27]. Notwithstanding the policies of market liberalisation and privatisation implemented by governments in the last decades, SOEs continue to play a key role in the energy sector. This is a further reason for the strict link between "energy security" and "national security", both considered as a condition for the protection of State sovereignty in a realist approach of international relations[28]. Moreover, liberalisation of energy markets has increased the need for evaluating the potential security risks connected with foreign investments[29].

Due to its implications for national security, energy has been traditionally

[25]On this topic, see H. DŹWIGOŁ, M. DŹWIGOŁ-BAROSZ, Z. ZHYVKO, R. MIŚKIEWICZ, H. PUSHAK, *Evaluation of the Energy Security as a Component of National Security of the Country*, in *J. Secur. Sustain. Issues*, 2019, 8, pp. 307–317.

[26]S. NATE, Y. BILAN, D. CHEREVATSKYI, G. KHARLAMOVA, O. LYAKH, A. WOSIAK, *The Impact of Energy Consumption on the Three Pillars of Sustainable Development*, in *Energies*, 2021, 14, p. 1372.

[27]On this aspect, see S. TORDO, B.S. TRACY, N. ARFAA, *National Oil Companies and Value Creation*, *World Bank Working Paper*, 2011, 218, available at *https://documents.worldbank.org /en/publication/documents-reports/documentdetail/650771468331276655/national-oil-companies-and-value-creation*; C. WOLF, *Does Ownership Matter? The Performance and Efficiency of State Oil vs. Private Oil (1987-2006)*, in *Energy Policy*, 2009, 37(7), pp. 2642-2652; P.A. TONINELLI, *The Rise and Fall of Public Enterprise: The Framework*, in *In the Rise and Fall of State-Owned Enterprise in the Western World*, edited by P.A. Toninelli, Cambridge University Press, Cambridge, 2000, pp. 3-24.

[28]On this aspect, see E. STODDARD, *Reconsidering the Ontological Foundations of International Energy Affairs: Realist Geopolitics, Market Liberalism and a Politico-economic Alternative*, in *European Security***,** 2013, 22(4), pp. 437-463.

[29]On the topic of energy security risks in the context of security policy, see P.E. CORNELL, *Energy and the Three Levels of National Security: Differentiating Energy Concerns within a National Security Context*, in *Connections*, 2009, 8(4), pp. 63–80.

regarded as a sector covered by domestic FDI screening systems[30]. At the same time, the national security concerns faced by these systems have gradually introduced additional components into the concept of energy security, modifying the original scope of this notion. This occurred, especially, for the development of new technologies and their application to the energy sector[31].

However, the security implications of investments screening in the energy sector could generate situations of conflict between diverging interests and goals[32]. Particularly, on the one hand, screening mechanisms can be employed to guarantee energy security by limiting risky transactions; on the other hand, in this sector, security concerns can be interpreted on a wider spectrum, including not only energy security, but also national or public security. This means that a State could ban a transaction due to national security reasons but, at the same time, this decision could reduce the accessibility to affordable energy. A similar situation occurred in the case concerning the dispute between Ralls Corporation and the United States, in which a Chinese investment into new generation capacity was prevented on the basis of national security concerns due to the vicinity of the project to military installations[33]. This means that the notion of security includes not only energy security in the strict sense, but also other security concerns connected with the energy sector in the context of investment screening. Each State must face these energy-related security concerns for having a well-functioning energy sector.

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[30]European Commission, *Review of National Rules for the Protection of Infrastructures Relevant for Security of Supply*, Final Report, February 18, 2018, available at *https://energy.ec.europa.eu/review-national-rules-protection-infrastructures-relevant-security-supply_en*, p. 13 ff.

[31]IEA, *World Energy Outlook 2019*, available at *https://www.iea.org/reports/world-energy-outlook-2019*, p. 68.

[32]On this aspect, see A. GOLDTHAU, N. SITTER, *A Liberal Actor in a Realist World? The Commission and the External Dimension of the Single Market for Energy*, in *Journal of European Public Policy*, 2014, 21(10), pp. 1452-1472.

[33]On this case, see J.B. ZUCKER, H.N. HARI, *Gone with the Wind Il: the Ralls Decision and Lessons for Foreign Investors*, in *Global Trade and Customs Journal*, 2014, 9(1), pp. 44-46.

4. Under customary international law, each State is free to decide on the admission of foreign investors in its territory. This means that host countries have the sovereign right to regulate the entry and establishment of foreign investments on their territory, restricting or excluding them from particular economic sectors, establishing performance requirements, and/or using screening mechanisms to protect national interests[34].

Foreign investment screening is one of the most important tools that States can use to impede foreign investments or lead them towards specific sectors of their economy. Screening mechanisms are different in nature and procedures, but they have a common goal: to evaluate if a foreign investment may negatively impact on national security or other essential public interests[35]. If this is established, inward investments may be blocked or may be allowed under specific conditions.

Screening systems have modified throughout the years, following the transformation of the national security concept. At the beginning, foreign investment screening procedures were used by States exclusively for defence and

[34]On this topic, see M. SORNARAJAH, *The International Law of Foreign Investment*, 5th edn. Cambridge University Press, Cambridge, 2021, pp. 134-137. See also the World Bank Guidelines on the Treatment of Foreign Direct Investment (issued in September 1992) which, despite their general approach recommending free admission, accepts that the host State may "as an exception" refuse admission to a proposed investment "which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security" (Guideline II(4)(i)) or which "belongs to sectors reserved by the law of the State to its nationals on account of the State 's economic development objectives or the strict exigencies of its national interest" (Guideline II(4)(ii)).

[35]On this topic, see G. DIMITROPOULOS, *National Security: the Role of Investment Screening Mechanisms*, in *Handbook of International Investment Law and Policy*, edited by J. Chaisse, L. Choukroune, S. Jusoh, vol I. Springer, Cham, 2020; S. BARIATTI, *Current Trends in Foreign Direct Investment: Open Issues on National Screening Systems*, in *Foreign Direct Investment Screening – Il controllo sugli investimenti esteri diretti*, edited by G. Napolitano, Il Mulino, Bologna, 2019, pp 39-43; L. FUMAGALLI, *The Global Rush Towards National Screening Systems on Foreign Direct Investment: a Movement Facing No Limits? Remarks from the Point of View of Public International Law*, ivi, pp 45-53; UNCTAD, *National Security-Related Screening Mechanisms for Foreign Investment. An Analysis of Recent Policy Developments*, *Investment Policy Monitor* (Special Issue), December 2019, available at *https://unctad.org/en/Publications Library/diaepcbinf2019d7_en.pdf*.

sectors strictly related to military security. Subsequently, technological progress affected the concept of *security* and governments have begun to consider dual-use products, cryptology systems, technologies, and communication equipment as covered items. In addition, some States began to use foreign investment screening in sensitive sectors for the purpose of counterweighting privatization of State-owned companies and infrastructure facilities.

The enlargement of screening scope was determined also by the increase of foreign SOEs and SWFs investments abroad, especially in critical infrastructure. Gradually, screening legislations have adopted a new concept of national security, including not only the need of hindering military threats but also the necessity of protecting strategic industries and critical infrastructure. Thus, the protection of key domestic assets has become essential to guarantee national security exactly as the absence of military menaces. Indeed, in recent years foreign investment screening has mainly involved foreign mergers and acquisitions (M&As) in critical infrastructure or domestic key technologies, which represent the core business for many States, in particular for developed ones.

Looking more closely at foreign investment screening mechanisms, three different categories of systems can be identified. Some national legislations provide for sector-specific screening, indicating fields or activities that are deemed sensitive to national interests[36]. Normally the covered sectors are military and dual-use manufacturing, utilities, energy, telecommunication, transportation, media, and financial industries. In this context, the expression *critical infrastructure* is often used[37], which is gaining an increasing relevance for M&A projects. Directive (EC) 2008/114 defines a *critical infrastructure* as "an asset,

[36]UNCTAD, *National Security-Related Screening Mechanisms for Foreign Investment*, cit., pp. 7-8.

[37]This expression is sometimes employed also in IIAs, see for instance Article 4.5(b)(iv) of the EU-Singapore Investment Protection Agreement (signed on October 15, 2018), which considers as an essential security interest "[…]to protect *critical infrastructure* (this relates to communications, power or water infrastructure providing essential goods or services to the general public) from deliberate attempts to disable or disrupt it (emphasis added)".

system or part thereof located in Member States which is essential for the maintenance of vital societal functions, health, safety, security, economic or social well-being of people, and the disruption or destruction of which would have a significant impact in a Member State as a result of the failure to maintain those functions"[38]. Recently, also data-intense emerging and foundational technologies in the IT sector (such as artificial intelligence, autonomous vehicles, robotics, and the *internet of things*) have become remarkable for foreign investment screenings. A second category of screening systems is based on risks that foreign investments could have on the entire economy, without considering particular sectors. In this case, risks are normally linked to the concept of *national security* (United States)[39], but also to other parameters, for example *fundamental interests of society* (Finland)[40], or *national steady economic growth and basic social living order* (China)[41]. Finally, from time-to-time screening systems are focused exclusively on specific domestic companies, normally operating in sensitive sectors, and they are aimed at checking possible foreign acquisitions in these entities. Some domestic

[38]See Article 2(a) of the Council Directive 2008/114/EC of December 8, 2008 on the Identification and Designation of European Critical Infrastructures and the Assessment of the Need to Improve Their Protection.

[39]According to Subsection 721(d)(1) and (4)(A) of the Defense Production Act, the review is triggered by a "credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the *national security* (emphasis added)". See Defense Production Act of 1950, 50 U.S.C. App. 2170. In the American system, national security is interpreted as an indefinite term that includes, but is not limited to, considerations related to "homeland security" and "critical infrastructure" (see Defence Production Act of 1950 Section 721, as amended by FIRMA of 2018 50 USC Section 4565(a)(1)); however, also these security-related terms are exploratory having no further definitions.

[40]On October 11, 2020, the Law No. 682/2020 entered into force, which amends the Act on the Screening of Foreign Corporate Acquisitions of 2012 (172/2012), clarifying that "*key national interest* means securing military national defence, functions vital to society, national security and foreign and security policy objectives, and safeguarding public order and security in accordance with Articles 52 and 65 of the Treaty on the Functioning of the European Union, if there is a genuine and sufficiently serious threat to a *fundamental interest of society* (emphasis added)".

[41]According to the Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors (issued on February 3, 2011), the "content of [the] security review" will include not only "the effect of [the transaction] on the national security," but also its "effect" on "*national steady economic growth*" and "*basic social living order* (emphasis added)". On this topic, see UNCTAD, *National Security-Related Screening Mechanisms for Foreign Investment*, cit., p. 8.

laws contemplate, parallelly, the first two kinds of screening[42]. When the objective of foreign investment screening is also the protection of strategic sectors and companies from investments by foreign SOEs, additional *ad hoc* screening requirements can be established[43].

From the second half of the 80's until the first decade of the 2000's, countries have taken a liberalized approach to FDI and adopted international investment protection rules that benefitted foreign investors. Nonetheless, in recent years, several governments have reassessed their approach toward foreign investment, introducing new measures aimed at safeguarding national economy and reinforcing FDI screening procedures[44]. The contemporary investment screening regimes have been marked by a clear enlargement of the review scope. This target has been pursued following three different paths: first, new sectors or activities subject to foreign investment screening have been included in the regulatory scope; second, required thresholds for investment screening have been lowered; third, definitions of foreign investment subject to screening have been broadened[45].

The pandemic accelerated the trend towards more regulatory or restrictive

[42]UNCTAD, *ibidem*.

[43]For example, according to the Australian legal order, foreign State-owned enterprises have to respect extended disclosure obligations; furthermore, these companies normally need a governmental approval for their investment. Also in the Russian legal order an approval is required for transactions involving foreign State-owned enterprises in minority stakes of domestic companies, being established also the ban of such transactions in case of majority participation. On this topic, see UNCTAD, *ibidem*, p. 11.

[44]According to UNCTAD, from January 2011 to March 2019, at least 11 countries (Austria, Belgium (the Flanders region), China, Hungary, Italy, Latvia, Norway, Poland, the Republic of Korea, the Russian Federation, and South Africa) introduced new screening regulatory frameworks. and at least 41 important amendments to regulatory frameworks were adopted in 15 jurisdictions, in particular in 2014 and 2018. At the same time, individual government decisions blocking foreign investments for national security reasons and other public concerns are rising (UNCTAD, *World Investment Report 2019. Special Economic Zones*, United Nations, Geneva, 2019, available at *https://investmentpolicy.unctad.org/publications/1204/world-investment-report-2019---special-economic-zones*, pp. 89-94).

[45]Furthermore, recent legislations have imposed new disclosure obligations to foreign investors during screening procedures and introduced civil, criminal, or administrative penalties for not complying with or eluding notification and screening obligations.

policy actions. To safeguard important domestic industries and to encourage new investments, many measures have been taken at a national level. In this context, numerous countries around the world are refining their investment policies to address the economic and social impacts of the COVID-19 pandemic, by further strengthening screening mechanisms or by introducing new screening systems[46]. In 2020, the world health emergency caused two major categories of revisions in the domestic screening mechanisms[47]. The first category includes reforms that enlarge the scope *ratione materiae* of FDI screening rules, allowing the inclusion of key assets essential for responding to the pandemic (health industry sector and related supply chains)[48]. Moreover, a second category of revisions was introduced which includes measures adopted to boost FDI screening and to impede acquisitions of assets suffering from financial disruptions and value distortions due to the given situation of emergency[49]. In addition to modifying the FDI review mechanism, the governments of various EU countries have approved other instruments to protect domestic companies from hostile takeovers by enlarging the golden share powers or by using *ad hoc* COVID-19 Funds to invest in these

[46]According to UNCTAD, in 2020, most of the investment policies measures of industrialized countries belonging to Europe, North America and other developed regions (35 out of 43, or 81%) have introduced brand-new or enhanced existing regulations. They are all directly or indirectly related to national security concerns about foreign ownership of key technologies, critical infrastructure, or other sensitive domestic assets. In 2020 and in the first quarter of 2021, 25 countries (mainly industrialised states) and the EU adopted or boosted screening regimes for foreign investment. Until 2020, countries conducting FDI screening for national security were 34, which accounted for 50% of world FDI flows and 69% of the world stock of FDI. The majority of recent amendments were introduced due to the pandemic. See UNCTAD, *World Investment Report 2021*, cit., p. 111.

[47]OECD, *Investment Screening in Times of COVID – and Beyond*, June 23, 2020, available at *//efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/investment/Investment-screening-in-times-of-COVID-19-and-beyond.pdf*, p. 4 ff.

[48]Since March 2020, investment policy reforms implemented by 20 OECD countries with screening mechanisms (among which, France, Italy, Germany, Spain, Japan, South Korea, Australia, Canada, New Zealand, and the United States), compared to 14 pre-pandemic, have extended their scope of regulation to include important health infrastructure. In the same 20 OECD countries, compared to 11 pre-pandemic, the process of acquisition of biotechnologies or medical devices companies is also supposed to undergo investment screening.

[49]For instance, measures adopted by Australia, France, Hungary, Italy, and New Zealand, as well as by the EU.

companies[50]. Subsequently, in 2021, many governments reinforced their screening regimes for investment or protracted the temporary rules introduced in response to the pandemic[51].

While the pandemic crisis was still raging against the world, the Russian invasion of Ukraine occurred. The Russian aggression and its consequences represent a profound shock for the world economy, with a serious impact on international FDI flows[52]. Several States, among which Italy, have decided to tighten domestic FDI screening regime, checking not only investors falling under sanctions or restrictive measures but also investments coming from Russia and its allied countries in general[53].

5. It should be highlighted that whether in the past essentially developing countries had screening procedures, now these control mechanisms are principally employed by developed countries, except for some of them. Industrialized States

[50]For instance, France, Germany, and Italy. Furthermore, in 2020, many other restrictions concerning foreign investments were adopted regardless of COVID-19. See, UNCTAD, *World Investment Report 2021*, cit., p. 116.

[51]According to UNCTAD "Two thirds of the policy measures less favourable to investment adopted in 2021 concerned the introduction or tightening of national security regulations affecting FDI. Nearly all of them were adopted by developed economies. In particular, at least four additional countries introduced FDI screening mechanisms, including three European countries (Czechia, Denmark, and Slovakia) and Saudi Arabia. This brought the total number of countries conducting FDI screening for national security to 36. In addition, at least eight countries and the EU reinforced existing screening regimes for foreign investment. Together, countries that conduct FDI screening account for 63 per cent of global FDI flows and 70 per cent of FDI stock (up from 52 and 67 per cent respectively in 2020)" (UNCTAD, *World Investment Report 2022*, cit., p. 58).

[52]Preliminary data already emphasise a fall of 22% in the number of M&As concluded in Russia during the first quarter of 2022 compared to the same period in 2021 and an analogous decline is expected for greenfield FDI projects. This forecast together with the continuous divestments by multinationals will probably speed up the decade-long downward trend of FDI in Russia. At the same time, outward FDI flows from Russia to industrialised economies will likely continue in a downward trend given international sanctions and economic crisis. See OECD, *International Investment Implications of Russia's War Against Ukraine*, OECD Publishing, Paris, 2022, available at *https://www.oecd-ilibrary.org/finance-and-investment/international-investment-implications-of-russia-s-war-against-ukraine_a24af3d7-en*, pp. 13-15.

[53]OECD-UNCTAD, *Twenty-seventh Report on G20 Investment Measures*, July 7, 2022, available at *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://unctad.org/system/files/official-document/unctad_oecd2022d27_en.pdf*, pp. 5-6.

that have screening systems are, normally, the main global destinations for foreign investment in key economic sectors, and therefore they are more vulnerable to *predatory* foreign acquisitions. Recently, the United States, Japan, the United Kingdom, the EU and several of its Member States, such as Germany, France, Italy, have all adopted stricter FDI rules and national security review regimes of FDI.

The most famous national screening system is the American one, modified over the years also to guarantee a more efficient control on foreign acquisitions. The power to suspend or prohibit any foreign acquisition, merger, or takeover of a US corporation, in presence of a risk for national security, is reserved to the American President. However, in 1988, this task was delegated to the Committee on Foreign Investment in the United States (CFIUS)[54], which is an inter-ministerial body[55]. CFIUS screens the so-called *covered transactions* evaluating their impact on national security. In 1993, new rules were approved concerning foreign States investments, requiring a specific investigation where the acquirer is controlled by or acting on behalf of a foreign government and the acquisition "could result in control of a person engaged in interstate commerce in the US that could affect the national security of the US"[56]. In July 2007, the Foreign Investment and National Security Act (FINSA)[57] strengthened control powers. Finally, the screening system was modified by the Foreign Investment Risk Review Modernization Act (FIRRMA), which was passed in 2018 by the US Congress and signed into law on August 13,

[54]See Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 amended Section 721 of the Defense Production Act of 1950. CFIUS operates pursuant to Section 721 of the Defense Production Act of 1950, as amended (Section 721), and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800, as amended, and 31 C.F.R. Part 801.
[55]CFIUS was established by President Gerald Ford in 1975 and operates under the auspices of the United States Treasury and the White House. CFIUS includes the heads of the departments of the Treasury, Justice, Homeland Security, Commerce, Defense, State and Energy, as well as the Office of the US Trade Representative and the Office of Science and Technology Policy, with the Director of National Intelligence and the Secretary of Labor as non-voting members.
[56]Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993, called the "Byrd amendment", encoding Section 721 of the Defense Production Act.
[57]Foreign Investment and National Security Act of 2007, Public Law 110–49—July 26, 2007.

2018 by President Trump[58]. FIRRMA codified previous CFIUS regulations and practices[59].

The EU has had a long liberal approach towards foreign investors. According to Article 63 of the Treaty on the Functioning of the European Union (TFEU), which establishes the principle of free movement of capital, there are no restrictions on the movement of capital not only between Member States but also between Member States and third countries. Member States may deviate from this treaty obligation in rare and exceptional cases. This may be justified, for example, because of the essential security interests under Article 346 TFEU, or the protection of public policy or public security under Article 65(1)(b) TFEU[60]. However, in recent years, EU Member States are relying more and more on FDI screening mechanisms to limit non-EU investors' access to strategically sensitive industries. To date, 18 out of the 27 EU Member States[61] have enacted rules to check and, if necessary, block inward investments in specific sectors, and reforms

[58]The revised CFIUS text is part of the National Defense Authorization Act for Fiscal Year 2019, Sections 1701 et seq.

[59]FIRRMA has extended the scope of CFIUS competences to include, for example, investments that have an impact on critical infrastructure and technology sectors (including activities related to the maintenance and collection of sensitive data relating to US citizens, whose dissemination or use could compromise national security), although control over the enterprise established in the United States by a foreign entity is lacking. Furthermore, the CFIUS control activity now also includes operations, transactions, contracts, or agreements that are believed to have been carried out for the purpose of circumventing the legislation on foreign investments. Finally, there is an obligation to notify for acquisitions by foreign subjects if there is a direct or indirect "substantial interest" of a foreign government and the transaction concerns critical infrastructures or technologies or sensitive data of US citizens. On the topic, see: A. GUACCERO, *Compliance e tutela degli investimenti esteri diretti. Spunti di comparazione tra Stati Uniti ed Europa*, in *Foreign Direct Investment Screening – Il controllo sugli investimenti esteri diretti*, cit., pp 141-151; C. MANN, ivi, pp. 15- 21; P. CONNELL, H. HUANG, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, in *The Yale Journal of International Law*, 2014, 39, pp. 131-163; G.S. GEORGIEV, *The Reformed CFIUS Regulatory Framework: Mediating between Continued Opennes to Foreign Investment and National Security*, in *Yale Journal on Regulation*, 2008, 25, pp. 125-134.

[60]According to Article 346(2) TFEU, any Member State may take measures that it considers necessary for the protection of the essential interests of its security. While, within the framework of the provisions concerning the movement of capital, Article 65(1)(b) TFEU recognizes the right of Member States to take measures which are justified on grounds of public policy or public security.

[61]Updated to May 10, 2022, available at://efaidnbmnnnibpcajpcglclefindmkaj/https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.

are ongoing also in other Member States. This protectionist approach is partly due to a general feeling that certain investments, especially by Chinese SOEs, could threaten national security and European industrial leadership[62].

Due to the variety of screening systems in the EU Members[63], the EU decided to adopt a specific Regulation on this topic, whose main aim is to introduce a cooperation mechanism at European level, even though the decision on whether to set up a screening regime remains a responsibility of each Member State. In 2019, a EU Regulation establishing a mechanism for screening all foreign investments into the EU was adopted[64]. This Regulation does not create a mandatory centralized review for approval or rejection, but it establishes for the first time a common system for the screening of foreign investments into the EU on grounds of security or public order, setting up common basic criteria for foreign investment screening that national mechanisms must comply with. Foreign investment screening remains within the competence of each Member State, but the European Commission and other EU Members can intervene in the screening proceedings carried out by a Member State. Therefore, the Regulation introduces a coordination mechanism among Member States and between them and the

[62]On this aspect, see M. BUNGENBERG, A. HAZARIKA, *Chinese Foreign Investments in the European Union Energy Sector: The Regulation of Security Concerns*, in *The Journal of World Investment & Trade*, 2019, 20(2-3), pp. 375-400.

[63]On this topic, see, in general, VELTEN, *Screening Foreign Direct Investment in the EU: Political Rationale, Legal Limitations, Legislative Options*, Springer, Cham, 2022; *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, edited by S. Hindelang, A. Moberg, Springer, Cham, 2021; T. PERAGOVICS, *Protection Without Protectionism? Foreign Investment Screening in Europe and the V4 Countries Today - a Comparative Analysis*, in *European Journal of Comparative Law*, 2019, 20(2), pp. 167-209.

[64]Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union. On this topic, see *EU Framework for Foreign Direct Investment Control*, edited by J.H.J. Bourgeois, Wolters Kluwer, Alphen aan den Rijn, 2020; G. NAPOLITANO, *Il regolamento sul controllo degli investimenti esteri diretti: alla ricerca di una sovranità europea nell'arena economica globale*, in *Rivista della regolazione dei mercati*, 2019, (1), pp. 2-20; S.W. SCHILL, *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.

European Commission, to facilitate the exchange of information concerning potential investments that might have an impact on other Member States' national security or other strategic or sensitive areas, or on projects and programmes of EU interest. This means that, before investing, non-EU investors should consider national security implications across all relevant EU Member States.

As a result of the COVID-19 pandemic and its heavy consequences for the EU economy, on March 25, 2020, the European Commission adopted a Communication in order to provide guidelines to the Member States on the control of FDI and the protection of strategic activities, pending the application of EU Regulation 2019/452[65]. The Commission has highlighted perils caused by the pandemic emergency, expressly asking Member States which already have FDI control procedures to make "full use […] of its FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors". Therefore, according to the European Commission, risks to critical health infrastructures and supply of critical inputs are factors to be considered when screening FDI on grounds of national security and public order. Furthermore, the Commission requires Member States that do not have similar instruments "to set up a full-fledged screening mechanism and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health

[65]C(2020) 1981 final, 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) of March 25, 2020. According to the Commission: "today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment. Vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens".

infrastructures and supply of critical inputs".

Finally, following the Russian aggression against Ukraine, the European Commission has adopted a Communication concerning the screening of investments from Russia and Belarus[66]. This Communication underlines the need for a stricter vigilance towards Russian and Belarusian investments into the EU, clarifying that FDI screening is not limited only to investments by persons or companies that are subject to sanctions[67].

As regards Italy, an *open-door* approach towards foreign investment has been long followed, the government placing minimal controls on transactions by foreign actors. This attitude underwent a partial change after the introduction of the Golden Power regime, according to which the government may exercise control over foreign investments in specific strategic sectors, which initially were defence, national security, energy, transport, and communications. The Golden Power regime has its origins in the so-called *Golden Share* system, which was introduced in the 1990's during the privatization process of the main Italian public companies. In that context, the Italian government kept control of strategic enterprises by means of special shareholder rights called *Golden Shares*[68]*.* This mechanism was considered in violation of the EU rules on the right of establishment and free movement of capital. In particular, the European Court of Justice ruled that the Italian Golden Share regime dissuaded other Member States

[66]Guidance to the Member States Concerning Foreign Direct Investment from Russia and Belarus in View of the Military Aggression Against Ukraine and the Restrictive Measures Laid Down in Recent Council Regulations on Sanctions, 2022/C 151 I/01, April 6, 2022.

[67]Even though the Communication was adopted as an immediate response to the Russian aggression against Ukraine, it also includes general principles regarding FDI screening in the EU. The Commission invites Member States to assess and prevent threats linked to Russian and Belarusian investments, asking Member States to guarantee a close cooperation both on the national and EU level as far as FDI screening activities, as well as for the enforcement of EU sanctions.

[68]See Decree-Law No. 332 of May 31, 1994, converted with modifications by Law No. 474 of July 30, 1994. On this topic, see C. SAN MAURO, *Golden shares, poteri speciali e tutela di interessi nazionali essenziali*, Luiss University Press, Roma, 2004.

from investing in relevant companies[69]. Following the observations of the Court, Italy introduced an *ex ante* assessment instrument for transactions concerning strategic enterprises. This innovation was set forth by Decree-Law No. 21[70], which attributes to the government special powers in respect of all companies, be they public or private, carrying out activities of strategic importance in defence and national security or in the energy, transport, and communications sectors[71]. As a consequence of Decree-Law No. 21, the government's special powers now find a foundation not in a statutory clause, but in a general regulation. In this way, intervention by the government is no longer dependent on maintaining certain rights as a former monopolist, but instead by the assumption, for the first time in the Italian legal order, of a new role for the government as a control board for foreign investments[72].

The Italian Golden Power regime was amended several times[73]. Lately, due to the health and economic crisis caused by the COVID-19 pandemic emergency, the Italian government has decided to resort to the Golden Power mechanism for

[69]See, *Commission v. Italy*, Case C-326/07 (March 26, 2009), ECJ I-02291, paras 50-55; *Commission v. Italian Republic*, Case C-58/99 (May 23, 2000), ECJ I-03811, para. 20. In the first-mentioned case, the Court of Justice affirmed that the special powers held by the Italian State in Telecom Italia, Eni, Enel, and Finmeccanica infringed EU rules, accepting the conclusions of the European Commission. On this topic, see A. DE LUCA, *The EU and Member States: FDI, Portfolio Investments, Golden Powers and SWFs*, in *Research Handbook on Sovereign Wealth Funds and International Investment Law*, edited by F. Bassan, Edward Elgar Publishing, Cheltenham, 2015, p. 190 ff.; D. GALLO, *Corte di giustizia UE, Golden Shares e investimenti sovrani*, in *Diritto del commercio Internazionale*, 2013, 27(4), p. 923 ff.

[70]Decree-Law No. 21 of March 15, 2012, converted with modifications by Law No. 56 of May 11, 2012. On this topic, see A. COMINO, Golden power *per dimenticare la* golden share*: le nuove forme di intervento pubblico sugli assetti societari nei settori della difesa, della sicurezza nazionale, dell'energia, dei trasporti e delle comunicazioni* in *Rivista italiana di diritto pubblico comunitario*, 2014, 24(5), pp. 1019-1053; C. SAN MAURO, *La disciplina della nuova* Golden share, in *Federalismi*, 2012, 21, *https://www.federalismi.it/nv14/articolo-documento.cfm?Artid =21104*, pp. 569-601.

[71]See, respectively, Article 1 and Article 2 of Decree-Law No. 21.

[72]On this aspect, see G. SCARCHILLO, Golden Powers *e settori strategici nella prospettiva europea: il caso Huawei. Un primo commento al regolamento UE 2019/452 sul controllo degli investimenti esteri diretti*, in *Diritto del commercio internazionale*, 2020, 34(2), pp. 575-578.

[73]On this topic, see M. CLARICH, *La disciplina del golden power in Italia e l'estensione dei poteri speciali alle reti 5G*, in *Foreign Direct Investments Screening. Il controllo sugli investimenti esteri diretti*, cit., pp. 116-120.

the protection of national strategic interests, also through its expansion to sectors other than those in which this is traditionally applied. On April 8, 2020, the government adopted Decree-Law No. 23 (the so-called *Liquidity Decree*)[74], which introduced new rules clearly devoted to stemming the risk of hostile takeovers even for companies operating in sectors other than those usually considered strategic, now judged pivotal due to the economic and health emergency. Therefore, the scope of the regime has been expanded, with the aim of protecting strategic assets which now appear financially vulnerable, but also of guaranteeing supplies of critical goods such as pharmaceuticals, medical devices, food, or other essential supply chains[75]. The Liquidity Decree established a more stringent legal framework, introducing remarkable innovations, concerning the covered sectors, the nationality of the purchaser; the covered resolutions, acts, and transactions; and the procedure. In order to avoid complaints by EU Institutions, Decree-Law No. 23 specified that some of the foreseen measures were extraordinary, stating that certain rules were supposed to apply only on a temporary basis until December 31, 2020. However, Law No. 176[76] imposed a six-month extension, until June 30, 2021, of the *special* Golden Power regime introduced by the Liquidity Decree. Subsequently, this date was postponed by Decree-Law No. 228[77], which indicated December 31, 2022, as a new deadline.

Finally, on March 21, 2022, to mitigate the effects of the ongoing Ukrainian crisis on the domestic economy, Decree-Law No. 21[78] (the so-called *Ukraine*

[74]See, in particular, Articles 15 and 16 of Decree-Law No. 23 of April 8, 2020, converted with modifications by Law No. 40 of June 5, 2020.
[75]On this topic, see V. DONATIVI, I *golden powers* nel "D.L. Liquidità", in *Crisi d'Impresa e Insolvenza*, April 23, 2020, available at *https://blog.ilcaso.it/libreriaFile/1213.pdf*; A. SCOGNAMIGLIO, *Lo Stato stratega (o lo Stato doganiere) affila le armi: le disposizioni emergenziali in materia di controllo sugli investimenti esteri*, in *Oltre la pandemia. Società, salute, economia e regole nell'era post Covid-19*, edited by G. Palmieri G, vol I. Editoriale scientifica, Napoli, 2020, pp. 159–178.
[76]Law No. 176 of December 18, 2020, converting Decree-Law No. 137 of October 28, 2020.
[77]Decree-Law No. 228 of December 30, 2021, converted with modifications by Law No. 15 of February 25, 2022.
[78]Decree-Law No. 21 of March 21, 2022, converted with modifications by Law No. 51 of May 20,

Decree bis) was approved, by which the government has also introduced important innovations in the Golden Power regulation. Unlike the Liquidity Decree, which provided for a provisional regime, the changes made by the Ukraine Decree bis directly affect the main regulatory source of the special powers, i.e., Decree-Law No. 21 of March 15, 2012. The innovations brought by the Ukraine Decree bis are both of a substantial nature, adding new sectors under the Golden Power regime, especially with reference to the defence and national security[79] as well as to communication networks sectors, and of a procedural nature, simplifying the notification procedure. It is worth underlining that the regime foreseen by Decree-Law No. 23, which had originally a temporary nature in the context of the COVID-19 pandemic and was supposed to expire on December 31, 2022, has now been rendered permanent (with some exceptions). Moreover, the regime will be applied regardless of investor's nationality.

The United Kingdom government also decided to expand its powers to protect national security in the event of risky foreign acquisitions for the national economy. On July 24, 2018, the Department of Business, Energy and Industrial Strategy published the National Security and Investment White Paper, proposing an expansion of the national foreign investment control mechanism. The document was submitted for public consultation which was followed by the government announcing its intention to introduce foreign investment screening rules applicable when national security issues arise. The National Security and

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2022. This Decree-Law has also introduced provisions concerning exports, establishing the duty of notification of the direct or indirect export of critical raw materials (including ferrous scraps), for Italian companies or companies established in Italy, at least ten days before completing the transaction at issue, to the Ministry of Economic Development and the Ministry of Foreign Affairs (until July 31, 2022). On this topic see, F. LIBERATORE, D. SABELLI, I. TULLY, *Update on the Italian National Security and Investment Control Regime – Golden Powers*, in *The National Law Review*, May 5, 2022, XII(125), available at *https://www.natlawreview.com/article/update-italian-national-security-and-investment-control-regime-golden-powers.*

[79]For the defence and national security sectors, a duty of notification requirement has been introduced also for internal resolutions, acts or restructurings and refinancing by strategic companies which imply a change of ownership, control, or availability of assets.

Investment Bill was introduced in Parliament on November 11, 2020 and became the National Security and Investment Act 2021, providing the UK government with new powers to intervene and check transactions that give rise to national security concerns. The more stringent national security regime came into force on January 4, 2022.

In recent years, more stringent FDI screening rules have been approved also by countries belonging to other geographical areas. For instance, China established a national security review system in 2011[80]. This follows the CFIUS review pattern in many respects, including the two-tiered review process and inter-ministerial review board[81]. On the basis of the 2011 Rules, a ministerial review panel was set by the National Development and Reform Commission (NDRC) and by the Ministry of Commerce (MOFCOM), in charge of national security reviews for acquisitions by foreign investors in sensitive sectors of the Chinese economy. The review is put in place for those acquisitions of Chinese companies by foreign investors which could compromise national security, economic stability, social order, or research and development capabilities relating to key technologies. However, these Rules leave a great amount of freedom to the hands of Chinese government agencies, for example, the specific sectors under review have not been well defined. Similarly, the concept of national security has not been clarified by the law. On April 8, 2015, China's State Council approved the Circular on Issuing the Provisional Measures for National Security Review of Foreign Investment in Pilot Free Trade Zones, expanding the national security review regime in several free trade zones in China (Shanghai, Guangdong, Tianjin and Fujian Pilot Free Trade Zones). In the same

[80]The national security review system checks foreign investment in domestic enterprises in the defence sector and other sectors linked to *national security*. This was first established under the Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors of February 3, 2011.

[81]On this topic, see Y. LI, C. BIAN, *A New Dimension of Foreign Investment Law in China – Evolution and Impacts of the National Security Review System*, in *Asia Pacific Law Review*, 2016, 24(2), p. 174.

year, the National Security Law also entered into force, foreseeing the adoption of rules and mechanisms to conduct national security review of foreign investments with a possible impact on national security[82]. Finally, on March 15, 2019, the National People's Congress of China adopted the new Foreign Investment Law, which confirms that China will adopt rules on a security review system for foreign investments[83].

In the same breath, Japan has recently applied restrictions to foreign investments, particularly through the amendments of the Foreign Exchange and Foreign Trade Act (FEFTA)[84]. From 1949 until 1991, when new rules were approved, the Japanese legislation required foreign investors to get an authorization before making their investments. On the contrary, now, FEFTA demands foreign investors to submit a post transaction report, as a rule; a prior notification is required only for specific industries or locations. In 2019, Japan introduced new rules on investment screening under FEFTA[85], adding an extra layer to the legal framework already modified in 2017[86]. The new amendments enlarged the scope of foreign investments subject to prior notification, expecting from foreign investors to submit prior notifications for both the acquisition of shares and the acquisition of voting rights, as well as expanding to other specified industries the duty of prior notification.

6. Energy sector constitutes a perfect test bench for many issues related to

[82]See National Security Law of the People's Republic of China (2015), adopted at the 15th session of the Standing Committee of the Twelfth National People's Congress of the People's Republic of China on July 1, 2015.

[83]On January 1, 2020, the Foreign Investment Law became effective. Finally, on December 19, 2020, NDRC and MOFCOM jointly adopted the Measures for the Security Review of Foreign Investments, which have expanded the scope of national security review, always leaving a great discretion in the hands of Chinese authorities, for example still defining targeted sectors in broad strokes.

[84]Act No. 228 of December 1, 1949.

[85]Amendment to the FEFTA was promulgated on November 29, 2019.

[86]See amendment of Act No. 38 of 2017.

the control of foreign investment by host States. Due to the relevance of FDI in this area, governments have traditionally imposed State ownership, other forms of ownership restrictions, and national security reviews to impede foreign investors from acquiring the control of energy production, storage, and distribution facilities (such as strategic oil refineries and energy grids).

Since the 1970's, energy sector has been a pillar in investment screening[87]. In the past, on the basis of national or public security concerns, mainly FDI into the exploration, production, transmission, and supply of energy was under the check of the host State; now, due to the expanding definitions of "critical infrastructures" (the digitalization of energy supply) and "critical technologies" (government control on the development of new energy technologies but also on the application of new technologies to the energy sector), as well as the increasing focus on data and data-driven technologies, investment screening mechanisms involve a more diversified group of companies and activities. Furthermore, energy investments have been either prohibited or subjected to mitigation measures.

The majority of States apply their own general FDI control regimes also to investments in the energy sector, even though, due to the relevance of FDI in this area, some States have enacted specific rules. For instance, national laws can prohibit or limit (in terms of percentage shareholding) FDI in natural gas or electricity infrastructure, reserve ownership or control of certain infrastructure to the State, or restrain the ability of private investors to hold shares in such infrastructure[88]. Furthermore, under the "golden share" or "golden power" regime some governments, as minority shareholders in energy infrastructure and supply companies, could veto certain measures pertaining to investment, such as share

[87]On this topic, see O. FLEISCHMANN, A. VALLERY, C. O'DALY, *FDI in the Energy Sector*, in *Global Competition Review*, December 6, 2022, available at *https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/second-edition/article/fdi-in-the-energy-sector#footnote-030-backlink.*

[88]On this topic, see European Commission, *Review of National Rules for the Protection of Infrastructure Relevant for Security of Supply*, cit., p. 27 ff.

acquisitions or asset disposals[89]. Moreover, States can nationalise companies and assets to guarantee the security of supply[90]. Finally, FDI control can be contemplated also by rules concerning, in general, energy supply and transportation markets[91].

Some differences can be individuated in domestic screening rules regarding FDI in the energy sector. A first difference concerns the systematic scheme of the review regime, since the presence of an energy-related investment may have an impact on either the country's jurisdiction to review the transaction at all or, simply, on the scope of the jurisdiction (what investments are included) or review, particularly on whether an investment requires a mandatory pre-closing notification and approval or is merely subject to a potential *ex officio* review. Moreover, screening regimes can be different in relation to the activities in the energy sector under domestic control. In this respect, national systems can be limited to FDI in energy-related infrastructure, such as generation and storage facilities, pipelines or refineries, or also extend to supply and retail activities; be focused only on traditional activities such as exploration and production, generation, storage, transportation or supply of energy or fuels or also include energy-related technologies and software; and be restricted to the areas of electricity and natural gas or also cover other hydrocarbon fuels, in particular crude oil or petroleum. In general, over the years, the category of energy transactions under domestic FDI screening has been enlarged considerably. For

[89] *Ibidem*, p. 31 ff.
[90] *Ibidem*, p. 32 f.
[91] For instance, the EU Electricity Directive (Directive 2009/72/EC of the European Parliament and of the Council of July 13, 2009 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC) and the EU Natural Gas Directive (Directive 2009/73/EC of the European Parliament and of the Council of July 13, 2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC) encompass rules regarding the certification of network operators that are controlled by persons from a third country outside the EU or the European Economic Area (EEA). In this context, national authorities also have to evaluate whether granting the certification can create risks for the security of energy supply of the Member State and the Community.

instance, some screening systems are applied both to the different phases of supply chain (i.e., exploration, production, transportation, storage, wholesale, and retail distribution) and to all key infrastructures or technologies, or activities which are crucial to these infrastructures (i.e., technologies and software utilised in this sector, as well as the processing of related personal data and real estate assets needed for energy-related activities). A clear example is represented by the EU FDI Screening Regulation No. 452 that lists critical infrastructure, critical technologies, and the supply of critical inputs among the factors which Member States and the European Commission must evaluate when assessing whether an investment may affect security or public order[92]. In particular, Article 4(1) of the Screening Regulation refers to the energy sector in three ways: covering "critical infrastructure, whether physical or virtual, *including energy*, . . . and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure"; being applied to "critical technologies . . . *including . . . energy storage . . . and nuclear technologies*"; and extending to the "supply of critical inputs, *including* energy"[93].

A similar approach is followed also by some EU Member States in domestic FDI screening systems, which sometimes have a very broad regime (for instance Italy, Spain, France, and Austria). As already mentioned, in Italy, the Golden Power regime allows the Italian government to check almost any transaction involving companies operating – or having assets linked to – the energy sector. Recently, two decrees have been approved relating to "strategic assets" in the energy,

[92]On this topic, see L. REINS, *The European Union's Framework for FDI Screening: Towards an Ever More Growing Competence Over Energy Policy?*, in *Energy Policy*, May 2019, 128, pp. 665-672.

[93]Emphasis added. Furthermore, Article 8 of EU Regulation No. 2019/452, attributes specific procedural rights to the Commission within the coordination mechanism foreseen by the FDI Regulation "where the Commission considers that a foreign direct investment is likely to affect projects or programmes of Union interest on grounds of security or public order". According to No. 5 of the Annex of the FDI Regulation, these programmes of Union interest include also Trans-European Networks for Energy (Ten-E).

transport, and telecommunications sectors and "strategic assets" in the sectors mentioned in Article 4(1) of the EU FDI Regulation. Particularly, Decree No.180 considers as "strategic assets" the national natural gas transmission network (including compression stations and dispatching centres), gas storage facilities, electricity and gas supply infrastructure from other countries, including onshore and offshore LNG regasification facilities, the national electricity transmission grid (including control and dispatching facilities) as well as management activities and essential properties relating to the use of these networks and infrastructures[94]. Furthermore, Decree No. 179 has further enlarged the scope including: (1) infrastructure used as deposits for fuels, nuclear materials or radioactive waste and the technologies and infrastructure involved in the treatment, management and transportation of such items; (2) real estate critical for the use of the critical infrastructure; (3) coastal deposits of crude oil and petroleum products above a certain capacity threshold, LNG storage facilities above a certain capacity threshold, foreign supply oil pipelines and supply oil pipelines for intercontinental airports; (4) critical technologies (including platforms) for managing wholesale markets for natural gas and electricity; and (5) strategic economic activities carried out within the energy sector by companies with revenues and numbers of employees above certain thresholds[95].

In the French legal order, a prior approval is required for foreign investments made in "sensitive" or "strategic" sectors, which encompass activities likely to jeopardise public order and public safety, when they concern essential infrastructure, goods or services to ensure integrity, security and continuity of supply of energy sources[96]. Therefore, activities relating to infrastructures, goods

[94]Article 1 of the Decree of the President of the Council of Ministers No. 180 of December 23, 2020.
[95]Article 3 of the Decree of the President of the Council of Ministers No. 179 of December 18, 2020.
[96]Article L151 and R151-3(II)(1) of the Monetary and Financial Code (*Code monétaire et financier*).

or services which are essential to guarantee the integrity, security, or continuity of energy supply fall under screening mechanism, without any materiality threshold. Moreover, R&D activities connected with energy storage also are under the purview of the Treasury.

The Spanish regime broadly covers critical infrastructure, whether physical or virtual, including energy, as well as land and real estate that are fundamental for the use of such infrastructure, critical technologies, inclusive of energy storage, and the supply of critical inputs, in particular energy[97]. Thus, if specific threshold requirements are met, foreign investments into both energy infrastructure and energy supply activities need a pre-closing notification and approval.

In Austria, a pre-closing notification and clearance for FDI is required if the target company is active in, *inter alia*, the operation of critical energy infrastructure, critical infrastructure (facilities, systems, assets, processes, networks, or portions thereof), including , but not limited to energy when the investment relates to land and real estate essential for the use of the infrastructures or to an area that could affect security of supply of critical resources, including energy supply[98].

While German FDI law follows a technical approach to individuating the energy-related activities for which a pre-closing authorisation is mandatory, by making a general reference to "operators of critical infrastructure"[99], even though an annex to a further ordinance[100] clarifies which kind of infrastructure must be

[97]Article 7 *bis* of Law 19/2003 (as updated).

[98]Section 2 of the Investment Control Act **(***Investitionskontrollgesetz*) in connection with the Annex to the Investment Control Act, Part. 1 No. 2 and Part 2 Nos. 1.1, 1.14 and 3.1. The Federal Act on the Control of Foreign Direct Investments ("Investment Control Act") came into force on 25 July 2020.

[99]Section 55a(1)(No. 1) of the German Foreign Investment Regulation (*Außenwirtschaftsverord nung*).

[100]Annex 1 to the Ordinance of Critical Infrastructure under the Act on the Federal Office for Information Security (*Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz*) of January 1, 2022.

considered "critical" in terms of infrastructure category and quantitative relevance[101]. Furthermore, a pre-closing approval is also necessary when the activity is connected with software for the operation of critical infrastructure or smart-meter-gateways for energy networks[102]. According to the German law, in presence of certain quantitative thresholds, a cross-sector investment review is required for operations which involve the supply of electricity, gas, fuel, oil, and district heating, or certain technologies employed to operate such infrastructures. In addition, since May 1, 2021, the manufacturing of smart meters and certain components of the list of sensitive activities are now under screening[103].

Similar rules have been adopted by other industrialised countries. For example, the British National Security and Investment Act 2021 includes energy among the 17 sectors subject to mandatory notification[104], by referring to "civil nuclear", which embodies nuclear power production and related activities, and "energy". The term "energy" covers infrastructure for the generation of electricity, the storage and reception of natural gas, incorporating LNG, as well as for the transmission and distribution of electricity and natural gas, while this is not extended to (retail) suppliers of electricity and natural gas. Furthermore, the regime is also applied to specific infrastructure for the production, transportation, and processing of fuel supplies.

The American CFIUS has jurisdiction over foreign investment in the United States when a foreign investor acquires "control" of a US business or if the non-

[101]Particularly, in terms of infrastructure category, assets relating to the generation, transmission and distribution and trading of electricity, the production, transmission and distribution, storage and trading of natural gas, the production, refining, transmission and distribution, storage and trading of oil, including petrol stations, as well as the production and distribution of heat are considered "critical". Furthermore, the annex provides for specific thresholds for each category of infrastructure.

[102]Section 55a(1) Nos. 2 and 23 of the *Außenwirtschaftsverordnung*.

[103]See the 17th amendment to the German Foreign Investment Regulation.

[104]See Guidance National Security and Investment Act: details of the 17 types of notifiable acquisitions, updated July 20, 2022.

controlling investment is linked with a "TID US business", i.e., a business regarding critical technologies, critical infrastructure, or sensitive personal data of US citizens. Therefore, investments into a TID US business may require a mandatory pre-closing procedure. In the energy sector, these rules are applied to numerous infrastructure (but not to supply activities) which are, according to CFIUS regulations, electric power generation, transmission, distribution, and storage facilities, interstate oil and natural gas pipelines, natural gas underground storage facilities, LNG import or export terminals as well as refineries and crude oil storage facilities. Moreover, investments in energy-related technologies may be included in the category of critical technologies when this technology can be defined as an "emerging and foundational technology". Finally, CFIUS can exercise its control over any operation resulting in a foreign person owning or otherwise controlling real estate in the U.S. located near sensitive government facilities and activities, which often regards sites used for renewable energy projects.

According to the Australian Foreign Acquisitions and Takeovers Act the energy sector is a "national security businesses" subject to FDI review. Guidance published by the Australian Foreign Investment Review Board (FIRB) specifies which investments in the areas of electricity, natural gas, liquid fuels (including crude oil and condensate, petrol, diesel, and jet fuels) and energy market operators are under the duty of notification or for which a voluntary notification is encouraged. Normally, transactions related to energy infrastructure require a mandatory notification, while a voluntary notification is foreseen for acquisitions of electricity and natural gas suppliers, which is encouraged if certain thresholds are surpassed[105].

In Canada, FDI in the energy sector is covered by under the general regime

[105]FIRB, Guidance: 8, National Security, Section F, p. 23 f.

established in the Investment Canada Act[106]. Furthermore, the government can control energy-related investments under the national security review mechanism, which is applied to any transaction (including minority investments) when there are "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security". According to the Guidelines on the National Security Review of Investments[107], these transactions encompass investments in critical infrastructure, meaning any "processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government," inclusive of those in the area of energy and utilities.

Also in Japan, investments in the energy sector can be under the duty of a pre-closing notification for national security reasons, since there is a list of core designated business sectors which embodies the nuclear facilities, electricity (generation, transmission, or distribution) and petroleum products (oil and natural gas)[108].-

It is worth highlighting that China is apparently following a different trend since the restrictions applied to foreign investments in the Chinese energy sector have been gradually reduced, particularly between 2017 and 2020, and the majority of these restrictions have been eliminated. Originally, foreign investment in coal, oil, gas, heat and power generation activities had been strongly limited, being mainly, if at all, only possible in the forms of joint ventures with a majority stake owned by the Chinese company. On the contrary, according to the list

[106]Specific guidelines clarify when the acquisition of oil and gas property interests represents a notifiable transaction under the general regime, available at *www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#*.

[107]Available at *www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html*.

[108]See Rules and Regulations of the Foreign Exchange and Foreign Trade Act of April 24, 2020.

effective from January 1, 2022[109], energy-related foreign investments in China must meet the requirement of controlling stake in a joint venture held by a Chinese party only when they touch the construction and operation of nuclear power plants.

Finally, it should be noted that, notwithstanding prohibitions of foreign investments are very rare now, in the last few years some cases have occurred precisely in the energy sector, involving particularly Chinese investors. This happened, for instance, in relation to the investment of Ralls Corporation. In March 2012, the Chinese-owned investor Ralls Corporation acquired interests in a wind farm project from Terna, an American company. On September 18, 2012, President Obama[110], following a recommendation of CFIUS, ordered Ralls Corporation to divest its interests on national security grounds, since the proposed wind farm was adjacent to a restricted American military zone, banning the acquisition and ownership in any form of the wind farm project by the Chinese connected parties, due to a "credible evidence" indicating that the parties through exercising control of the companies might take action that threatens to impair the national security of the United States[111]. Similarly, in 2016, the city of Antwerp

[109]See Special Administrative Measures (Negative List) for Foreign Investment Access (2021 Edition), available at *www.china-briefing.com/news/chinas-foreign-investment-negative-list-2021-edition-english-version/*.

[110]See Order Signed by the President regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, September 18, 2012. This was the second blocking order adopted by a president.

[111]This case is very interesting also because the company challenged the investment-screening decision, affirming that it had been denied its property without due process in violation of the Fifth Amendment (*See* Complaint in: *Ralls Corp. v. Barack H. Obama, et al.* (September 12, 2012) US D.D.C., Case No. 1-12-cv-01513). Following the order by President Obama, Ralls modified its complaint to include claims against the President (See Amended Complaint in: *Ralls Corp. v. Barack H. Obama, et al.* (October 1, 2012) US D.D.C., Case No. 1-12-cv-01513). The District Court of Columbia dismissed the complaint (*Ralls Corp. v. Comm. on Foreign Inv. in the United States* (October 9, 2013) 987 F. Supp. 2d 18, pp. 32–37, as amended on October 10, 2013). Then, Ralls appealed the decision and the US Court of Appeals for the District of Columbia Circuit, reversing the District Court decision, affirmed that Ralls had been deprived of its property without due process (*Ralls Corp. v. Committee on Foreign Investment in the United States* (2014) US D.C. Circ. 758 F.3d 294). On this topic, see C.M. FITZPATRICK, *Where Ralls Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, in *Cornell L. Rev.*, 2016, 101(4), pp. 1087–

prevented China's State Grid bid from the acquisition of a 14% stake in the Belgian electricity and gas distributor Eandis. In the same year, Australia contrasted bids from China's State Grid and Hong Kong-listed Cheung Kong Infrastructure Holdings for the acquisition of the biggest domestic energy grid, Ausgrid, in order to protect national security. Then, in 2018, this State impeded the acquisition of APA Group, an Australian gas pipeline company, by Cheung Kong Infrastructure Holdings. In the same year, Canada banned the acquisition of Aecon by China Communications Construction Co due to national security reasons.

In addition, even though a domestic legal order does not foresee a foreign investment screening mechanism, transactions in the energy sector can be subject to the review of the host State and this confirms the relevance of the sector at issue. For example, in 2014, when General Electric sought to acquire Alstom's nuclear energy operations, the French government quickly enlarged the list of sectors under screening. Analogously, the Slovakian government adopted an *ad hoc* energy-related foreign investment regime very rapidly due to the concerns over the ownership of Slovenské elektárne, an electricity provider, when Russian State-owned bank Sberbank came up with the idea of repaying its loan by using the shares of its major shareholders as guarantee.

Finally, it must be stressed that the security implications of investments screening in the energy sector can be reciprocally conflicting. On the one hand, investment screening mechanisms can limit or block at all the transfer of control of strategic energy assets to risky investors. On the other hand, security implications of investment screening in the energy sector could involve not only *energy security* in a specific sense but also national or public security and the screening policy could have a chilling effect on foreign investments needed to finance the energy transition and/or other energy goals.

1104, J. WANG, *Ralls Corp. v. CFIUS: A New Look at Foreign Direct Investments to the US*, in *Colum. J. Transnat'l L. Bull*, 2016, 54(3), pp. 30–55.

7. The new approach of stricter screening, followed at both domestic and international levels, reveals the desire of States to reassert their own regulatory powers towards FDI. Therefore, the understanding that the foreign investment regime is no longer dominated by a single goal (i.e., the protection of the foreign investment) is by now widely accepted.

The increased control over foreign investments was originally prompted by the necessity of addressing national security interests strictly linked to defense and military concerns. In the last few years, a new concept of security emerged, connected to a more expansive notion of *national interests* or *public concerns* and to the States' need to take economic considerations into account when assessing their national security. Furthermore, the health emergency situation caused by the pandemic has highlighted that the concept of national security obliges each State not to consider only traditional strategic assets. The emergency has compelled States to re-evaluate the companies of essential interest for the national community, such as enterprises operating in the health sector. Shortly after the start of the pandemic, the Russian aggression against Ukraine has determined a new instability on international level, which has again pushed States to address their national security concerns by limiting foreign investments.

As observed, the concept of national security has been widely embraced by many host governments in their legislation to justify interventionism in cross-border takeovers, however this has been proven to maintain its largely undefined or loosely defined status[112]. Due to the ambiguity that characterizes the notion of national security in FDI screening laws, it is highly likely that this can be invoked not only to protect national interest or public interest but also to maneuver geo-political and economic hidden targets[113]. Numerous host States could potentially

[112]See, C. BIAN, *Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity*, in *Journal of World Investment & Trade*, 2021, 22, p. 570.
[113]C. BIAN, *National Security Review of Foreign Investment: a Comparative Legal Analysis of*

blockade foreign investment on the grounds of national security in the absence of a clear explanation regarding the precise meaning of this expression, not specifying how, when and in relation to whom threats have to be assessed. Legal imprecision also means that the screening administration can afford a great deal of regulatory discretion. As a consequence, the review may result in an arbitrary decision-making process[114].

The current trend, strengthened by the COVID-19 pandemic, indicates that some States are using foreign investment screening policies on a larger scale to extend protection over economic and social interests. The Russian invasion of Ukraine has further complicated the present geopolitical context. This event will have a heavy impact on international foreign investments flows, since there is a good chance that governments make a greater use of screening laws with both the purpose of blocking transactions that are associated with the Russian State and to safeguarding national security.

However, the use or, more accurately, the abuse of screening mechanisms can turn into an instrument for the protection of the domestic economy, which could seriously affect the investment climate. The line between genuine protection of security interests and public order and disguised protectionism is very thin[115]. Indeed, the limit between the political sphere and the economic one is progressively less defined. However, an overly expansive interpretation of national/public interests could have a serious impact on the foreign investment legal framework, creating new barriers, reducing legal certainty for foreign investors, and, consequently, deleting the progress achieved in the investment regime in the last decades.

The Russian aggression against Ukraine has also brought energy security

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China, the United States and the European Union, Routledge, London, 2020, p. 231.

[114]C.A. ESPLUGUES, *Foreign Investment, Strategic Assets and National Security*, Intersentia, Cambridge – Antwerp – Portland, 2018, pp. 449-450.

[115]See *Reimagining the National Security State: Liberalism on the Brink*, edited by K.J. Greenberg, Cambridge University Press, Cambridge (UK), New York, 2020.

back at the center of global political debate, due to the *weaponization* of Russian fossil fuels and gas pipelines, while new concerns related to import and infrastructure dependencies in the clean energy transition are emerging. Energy sector is pivotal, at the same time, for FDI and national security. Energy-related foreign investments have traditionally been under the host State control, governments employing State ownership, ownership restrictions and national security screening to limit foreign investors acquisitions in energy production, storage, and distribution facilities[116]. Now, the majority of screening systems consider energy as a key sector[117] and this circumstance has had an impact on the traditional notion of energy security since critical infrastructures, critical energy technologies, and data-driven technologies are now included therein. Therefore, the recent modifications in investment screening law and policy could also determine constitutive changes in the concept of energy security and its relationship with the notion of national security.

The concept of energy security has been traditionally interpreted in relation to the necessity to guarantee the availability of primary energy sources or the energy independence. Subsequently, new forms of risks have acquired importance, particularly the geopolitics of the energy transition, which covers the protection of domestic R&D capabilities in wind and solar power, the access to critical raw materials, as well as the question of data protection[118]. Besides the geopolitical implications, the developing cross-sectoral investment screening mechanisms may modify the relationship between energy security and national

[116]See R.T. KUDRLE, *No Entry: Sectoral Controls on Incoming Direct Investment in the Developed Countries*, in *Multinationals in the Global Political Economy*, edited by L. Eden, E.H. Potter, Palgrave Macmillan, London, 1993, pp. 142—167.

[117]F. WEHRLÉ, J. POHL, *Investment Policies Related to National Security: a Survey of Country Practice*, *OECD Working Papers on International Investment*, No. 2016/02, OECD Publishing, Paris, 2016, available at *https://www.oecd-ilibrary.org/finance-and-investment/investment-policies-related-to-national-security_5jlwrrf038nx-en*.

[118]A. GOLDTHAU, K. WESTPHAL, M. BAZILIAN, M. BRADSHAW, *Model and Manage the Changing Geopolitics of Energy*, in *Nature*, May 2019, 569(7754), pp. 29-31.

security, since the more ample scope of investment screening could reinforce the relative significance of national security concerns in energy policy and in other areas previously under *ad hoc* regulation. In any case, the traditional key elements of energy security, i.e., the availability of primary energy sources and the pursuit of energy independence, are even more important today than ever because of the safeguard of energy technology development capabilities and of concerns linked to a wrongful use of big data.

This new domestic approach towards FDI could have practical implications for companies and governments. Now, companies operating in the energy sector must address a greater risk to be subject to a domestic national security review compared to the past due to the enlargement of the FDI screening laws scope. Previously, investments in the energy sector mainly regarded the exploration, production, transmission and supply of energy and there was a high probability of government intervention on the basis of national or public security; while, currently, the present investment screening mechanisms concern a more diversified group of companies and activities. For instance, following the entrance into force of the 2018 FIRRMA in the US and the 2019 EU FDI Regulation, a wider notion of critical infrastructure now covers new energy assets, operators, and functions. Furthermore, new activities in the energy value chain are now encompassed. Finally, recent screening rules contemplate more ample definitions of critical technologies and the inclusion of personal data, therefore, enterprises operating in the development of new energy technologies or pursuing data-driven business models could be more easily under national security review. Uncertainty about the standards applied in security reviews and the concerns over protectionism could compromise the propensity of companies to invest abroad. Therefore, the new stricter approaches in the investment screening legislation and policy could have repercussions on energy-related FDI which should not be underestimated.

Furthermore, the expanding definitions of "critical infrastructures" and "critical technologies", as well as the increasing relevance of data and data-driven technologies affect security implications taken into consideration by cross-sectoral investment screening. For instance, investments in the energy sector have been either prohibited or subjected to mitigation measures due to domestic screening mechanisms. As already noticed, even before the most recent legislative developments, numerous energy transactions have been blocked in several States. Therefore, the modifications recently introduced in investment screening law and policy could have an impact also on governments, better balancing the relationship between an international open investment climate and the protection of host State security interests. Notwithstanding in the past the host State control and restrictions towards FDI have been more stringent in the energy sector than in other economic sectors, the recent *securitization* of economic policy in investment screening mechanisms modifies the conditions in which the energy sector operates. For instance, the greater strategic competition between the US, the EU and China may have unpredicted implications on energy and climate policy. The ever-changing investment screening landscape may have a chilling effect on energy-related FDI, hindering the energy transition due to the lack of the necessary financial resources. Particularly, the EU sometimes could be put in the position to have to decide whether to give priority to the goals individuated in its "Green Deal" [119] - the new growth strategy founded on an action plan that provides for the promotion of an efficient use of resources, with the implementation of a clean and circular economy, the restoration of biodiversity, and the reduction of pollution - or to create possible impediments for FDI by stringently applying Regulation No. 2019/452.

[119]See the 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, *The European Green Deal*, COM (2019) 640 final, December 11, 2019.

In conclusion, the recent events suggest that a reform of international energy, trade, and investment law appears fundamental to allow States to safeguard their energy security and neutralize the *weaponization* of energy in the new geopolitical context[120]. However, as for other economic sector, also in the field of energy the main obstacle appears to be the achievement of a right balance between the recognition of a sufficient discretion for States to protect their energy security interests and the guarantee of free international trade and investment flows.

[120]On this aspect, see A. BOUTE, *Weaponizing Energy: Energy, Trade, and Investment Law in the New Geopolitical Reality*, in *American Journal of International Law*, 2022, 116(4), pp. 740-751.

THE RULES ON DIRECT INVESTMENT CONTROL IN THE TRANSPORTATION SECTOR IN GERMANY

Roland M. Stein*

ABSTRACT: *In light of the current war in Ukraine and continuing bottlenecks in various supply chains, the security of transportation networks has come again in the focus of the Federal Government of Germany. Therefore, this paper analyses the background of FDI screening in this field and presents the concerns of the German Government as well as the importance of the planned Trans-European Transport Network (TEN-T) for Germany and the rest of Europe.*

1. Investment control was introduced in Germany with the 11th amendment to the Foreign Trade and Payments Act (FTPA) in 2004. At that time, however, it only applied to military equipment. It was not until the 13th amendment to the FTPA in 2009 that the Federal Government of Germany was able to examine direct investments that do not belong to the defense sector, provided that the acquirer is not a member of the European Union. Triggered by the acquisition of the German robotics company Kuka by the Chinese Midea Group in 2016 and some other controversial acquisitions, investment control has been continuously tightened in recent years. Of particular relevance to the transportation sector was the 9th Foreign Trade and Payments Order (FTPO) amendment in 2017, which expanded the investment control regime to include non-defense acquisitions to which the German government attaches great strategic importance. This includes critical infrastructures as defined by the Act on the Federal Office for Information

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Security such as facilities and installations in the transport sector.

2. The scope of the German FDI rules is based in three factors: The sector of the target company, the acquisition by a foreign or non-EU acquirer and the reaching or exceeding of thresholds with regard to the acquisition of voting rights.

2.1. German FDI law consists of two procedures, the cross-sector review and the sector-specific review. The sector-specific review deals with the acquisition of companies from the defense sector, while the cross-sectoral review concerns the acquisition of all other companies. The acquisition term is broad and also includes asset deals (Sections 55(1a), 60(1a) FTPO). The cross-sectoral review can be further divided in two groups based on the target's activities. The first concerns targets in one of the critical areas mentioned in Section 55a (1) FTPO (group-related cross-sectoral audit review). The second concerns all other companies. The correct classification of the target company under one of these audit regimes is of great importance, as the regimes are linked to different prerequisites and also legal consequences (on the transport sector, see 3.1 infra).

2.2 In the case of the cross-sectoral review, the scope of application is only opened if the acquirer is a non-EU national (Section 55 (1) FTPO). In the sector-specific review, on the other hand, a foreign acquirer is sufficient (Section 60 (1) item 1 FTPO). According to German FDI law, "acquirer" also includes the indirect acquirer.

The terms "foreigner" and "non-EU national" are defined in Section 2 FTPO. The legislator focuses on the place of the registered office or management. For acquisitions by natural persons, the place of residence but not citizenship, is decisive. Foreign also refers to nationals from EU member states. Non-EU member states include all states that are neither members of the European Union nor of the European Free Trade Association.

2.3. The applicable thresholds of the sector-specific review are set out in

Sections 60a and 56 (2) - (5) FTPO and in Section 56 FTPO for cross-sector reviews. The audit regimes differ as to the required shareholding threshold. The thresholds are to be calculated according to the direct and indirect share of voting rights that the acquirer reaches or exceeds as a result of the acquisition. For the sector-specific audit regime, the threshold amounts to 10%. In the case of the group-related cross-sectoral reviews relevant for the transport industry, the legislator further differentiates between the case groups of No. 1 - 7 and No. 8 - 27 FTPO. In the former case - which also includes critical infrastructures - the threshold is also (only) 10%. In the cases of Nos. 8 – 27 FTPO, the threshold is 20% of the voting rights. In the case of the general cross-sector audit regime, the acquirer needs to reach or exceed 25% of the voting rights.

This also includes the successive acquisition of shares. The acquirer cannot circumvent the audit thresholds by gradually increasing its shareholding in a target company. Section 56 (3) - (5) FTPO aims to prevent circumvention of the audit entry thresholds. For example, the scope of application of the cross-sectoral test is also opened in the case of an atypical acquisition of control. This concept applies where an acquisition of less than 25% of the voting rights goes hand in hand with the possibility of influence through an atypical investor or shareholder agreement, which otherwise only exist when the 25% threshold is reached. In addition, an acquirer may also not circumvent the thresholds by dividing the acquisition of voting rights among several subsidiaries or investment vehicles. Section 56 (2) FTPO determines, based on the thresholds of Sections 60a (1), 56 (1) FTPO, when an investment control can take place if the acquirer has already previously exceeded the thresholds of Sections 60a (1), 56 (1) FTPO. Other threshold values, such as turnover or number of employees, do not exist in German investment control. Likewise, there is no de minimis rules concerning small targets.

3. The basic requirement of the German FDI screening procedure is that as

a result of the acquisition of a German company, the public order or security of the Federal Republic of Germany or another member state of the European Union is likely to be impaired (see Section 55 (1) FTPO). Hence, the definition of public order and security is the pivotal point for the government's ability to intervene. This abstract concept is to be read on the basis of EU law (see Article 52 (1) and Article 65 (1) (b) TFEU). In general, its interpretation is based on the EU-concept of free movement of capital and freedom of establishment. The ECJ considers public order or security to encompass the fundamental interests of the state (or society), its existence, its foundations and institutions, as well as life, health, the sphere of freedom and property of the individual, and coexistence in society. However, it also grants the Member States a broad scope for margin of appreciation.[1] The concrete understanding may therefore differ between Member States and certainly change over time.[2] The German lawmaker, for example, is of the (understandable) opinion that public order or security in particular covers the safeguarding of supplies and the provision of services of general interest or strategic importance in the event of a crisis.[3]

If the concept of public order and security were to be divided into its two individual aspects, one could suggest the following distinction: Public order includes "state interests of fundamental importance" or the "basic interests of society".[4] Public security, which is a subset of public order, refers to the state's system of protection to maintain its monopoly on the use of force, but also to the

[11] L. VON RUMMEL, J. GERTZ, *Einführung in deutsche Investitionskontrolle anlässlich des COSCO Investments am Hamburger Container Terminal Tollerort*, in Recht der Transportwirtschaft, 2022, 469 with reference to ECJ, *Judgement of the Court of 23 November 2010 – Land Baden-Württemberg v. Tsakouridis*, 2010, Case C-145/09.

[2] ECJ, *Judgement of the Court of 27 October 1977 – Regina v. Pierre Bouchereau*, Case 30/77.

[3] GERMAN BUNDESTAG, *Gesetzesentwurf der Bundesregierung – Entwurf eines Dreizehnten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung*, 2008, BT-Drs. 16/10730, 11.

[4] ECJ, *Judgement of the Court of 23 November 2010 – Land Baden-Württemberg v. Tsakouridis*, 2010, Case C-145/09.

protection of the existence of the state and its central institutions from threats.[5]

The concept of public order and security is further substantiated by the EU Screening Regulation. Although this piece of law does not contain its own definition of the concept, it provides guidance on the question of whether a foreign direct investment is likely to affect public policy or public security through the case groups mentioned in its Article 4. Accordingly, consideration may be given, *inter alia*, to the impact on: a) 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 critical to the use of such infrastructure; b) critical technologies and dual-use items (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, and nanotechnologies and biotechnologies; c) the supply of critical inputs, including energy or raw materials, and food security; d) access to sensitive information, including personal data, or the ability to control such information; or e) freedom and pluralism of the media.

3.1. In German foreign trade law, the legislator has followed this approach and defined several categories containing key industries, which according to its assessment are likely to affect the German public order or security. Pursuant to the already mentioned Section 55a (1) FTPO these include, among others, operators of critical infrastructure within in the meaning of the Act on the Federal Office for Information Security (no. 1), aerospace companies such as operators of sophisticated earth remote sensing systems within the meaning of Section 2 subsection 1 number 4 of the Satellite Data Security Act (no. 12) and operators of

[5] Similar GERMAN BUNDESTAG, *Gesetzesentwurf der Bundesregierung – Entwurf eines Dreizehnten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung*, 2008, BT-Drs. 16/10730, 11.

aviation companies with an operating licence within the meaning of Regulation EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293 of 31 October 2008, p. 3), developers or manufacturers of goods of subcategories 7A, 7B, 7D, 7E, 9A, 9B, 9D or 9E of Annex I of Regulation (EU) 2021/821 or goods or technologies intended for use in space or for deployment in space infrastructure systems (no. 18), developers of future technologies which use artificial intelligence processes to solve specific problems of application and are capable of independently optimising their algorithms of future technologies (no. 13) or manufacturers of robots, including automated or autonomously mobile robots (no. 15).

All these categories can be of relevance in the transport sector. However, in practice the case group of operating a critical infrastructure as specified in Section 55a (1) no. 1 FTPO is of a particular importance. It should be noted here that Section 55a (1) no. 1 FTPO refers to other pieces of legislation, namely the Act on the Federal Office for Information Security and through it to the Ordinance on the Identification of Critical Infrastructures under the afore-mentioned Act (see Section 2 (10) Sentence 2 Act on the Federal Office for Information Security). Any changes in this legislation do also need to be taken into consideration when reading the FTPO.

What is meant by critical infrastructure is defined in Section 2 (10) Sentence 1 of the Act on the Federal Office for Information Security. According to provision, critical infrastructures are facilities, installations or parts thereof that belong to the sectors transport and traffic (and thus at the core of this article) but also energy, information technology and telecommunications, health, water, food, finance and insurance as well as municipal waste disposal. The lawmaker has selected these sectors because they are essential to the functioning of the

community since their failure or impairment would result in significant supply shortages or threats to public safety. Moreover, these sectors were chosen because they are particularly dependent on each other and these interdependencies increase the risk of critical infrastructure failures. Failures in one sector can in many cases also lead to negative impacts on other sectors and industries.[6]

Who is considered the operator of a facility is defined by Section 1 (1) no. 1 and 2 of the Ordinance on the Identification of Critical Infrastructures. In that regard, the legislator has recently expanded the definition of an installation, which is now very comprehensive. Installations are determined as fixed as well as mobile facilities such as machines or devices, software and IT services. In addition, the installation covers all plant components and process steps that are necessary for the operation, as well as ancillary equipment that is operationally related to the plant components and process steps and is necessary for the provision of a critical service.

For the potential operator of a plant, the Ordinance on the Identification of Critical Infrastructures focuses on whether the operator exercises certain influence on the nature and operation of the plant, taking into account legal, economic and factual circumstances.

It is sometimes suggested that the operator concept of Section 55a (1) no. 1 FTPO should have an independent, narrower meaning. As a consequence, the target company would have to be the direct operator of a facility, meaning that more complex legal set ups would be excluded from the scope of application of

[6]Similar FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY (BMWi), *Runderlass Außenwirtschaft Nr. 5/2017 – Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung*, 2017, BAnz AT 17.07.2017 B1, 2 which states that a disruption could have far-reaching social and economic consequences and would therefore regularly affect the security of supply of the Federal Republic of Germany.

the case group.[7] However, the prevailing opinion and also the BMWK rightly disagree with this approach.[8]

In addition, the ordinance specifies whether a concrete plant within the meaning of the Ordinance on the Identification of Critical Infrastructures actually falls under the sectors named in the Act on the Federal Office for Information Security and deals with the question on the extent required for a plant to be considered as having a high significance for the functioning of the community (Section 2 to 8 of the Ordinance on the Identification of Critical Infrastructures in connection with its seven annexes). Of particular practical relevance are Parts 1 and 3 of each of the annexes. In Part 3, the legislator specifies the categories of installations – as a further subdivision – and the threshold value above which there is a high significance for the functioning of the community. The different asset categories are in turn legally defined in Part 1 of the respective annex. The regulatory threshold refers to the supply relevance of the plant for at least 500,000 persons per year.

In addition to Section 55a (1) No. 1 FTPO, No. 2 - developers or manufacturers of industry-specific software for the operation of critical infrastructures - is also of greater relevance in the area of critical infrastructure and the transport industry. The case group is intended to complete the protection of critical infrastructures. What is industry-specific software in the sense of the case group is in turn determined by Section 55a (2) FTPO, which in turn is subdivided according to the subcategories of the Ordinance on the Identification of Critical Infrastructures. With regard to the transport and traffic sector, industry-

[7] C. TORWEGGE, *Sektorübergreifende Prüfung von Unternehmenserwerben im Erneuerbare-Energien-Bereich*, in Zeitschrift für Neues Energierecht, 2018, 392.

[8] M. MAUSCH-LIOTTA, S. SATTLER, *Commentary on § 55 AWV in Heidelberger Kommentar zum Außenwirtschaftsrecht*, published by E. Hocke, B. Sachs, C. Pelz, 2020, marginal number 113; FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND CLIMATE ACTION (BMWK), *Section C.1 in the FAQ on investment screening under the Foreign Trade and Payments Act (AWG) and Foreign Trade and Payments Ordinance (AWV)*, 2021, https://www.bmwk.de/Redaktion/EN/FAQ/Aussenwirtschaftsrecht/faq-aussenwirtschaftsrecht.html.

specific software includes software for the operation of facilities or systems for the transport of persons or goods in air traffic, rail traffic, maritime and inland waterway transport, road traffic, local public transport or logistics (Section 55a (2) no. 6 FTPO). In addition, the software must be manufactured or developed especially for industry-specific operation. This means that only manufacturers or developers whose software has been created or modified specifically for use in one of the critical infrastructures are affected.

3.2 As shown, one of the critical infrastructure sectors is transport and traffic, which will now be examined in more detail. This sector is of special importance for the supply of the general public with services for the transport of persons and goods. Thus, disruptions in the transport sector have a noticeable impact on almost all areas of life. For example, they could lead to an inadequate supply of essential goods, impact the rescue and healthcare sector, or the availability of the workforce. Hence, the failure of national, regional, or even local transport could lead to a collapse of the whole (working) life which could affect the economy tremendously. Thus, safeguarding the transport and traffic sector serves, above all, to maintain the security of supply and the functioning of our society – thus clearly falling within the concept of public order and security as defined by the ECJ.[9]

Security is a primary concern for any transport system. Travellers expect safe transportation and nearly every industry in the globalised and European market relies on raw materials and goods arriving on time and reliably. Especially road, rail and port systems are used to move large volumes of goods, fuel and other resources crucial for the functioning of our economy. Furthermore, the development in international passenger traffic and the globalization of the production and international sales of goods (even taking recent "regionalization"

[9] M. NIESTEDT, *Commentary on Section 55a AWV in Beck'scher Online-Kommentar zum Außenwirtschaftsrecht*, 2022, marginal number 3.

trends into account) have increased enormously in the last decades. Supply chains still rely on timely deliveries and manufacturing is spread far and wide across national borders. Especially in the context of the Covid pandemic, the extent of the worldwide connection has been evidenced: We saw increased prices for containers, chaos at airports and ports, and extended delivery times.

Other developments have also played a role in disrupting the free exchange of products. We have seen long Brexit related truck queues, blockades in the Black Sea caused by the Ukraine war, or, in the Autumn of 2022, sabotage attacks on the communication program of *Deutsche Bahn*. This shows that, outages at ports, roads, and the rail infrastructure may have major impacts on existing supply chains and can disturb the security of supply. This and the spill over risks to other regions explains why several governments have shown a willingness to directly or at least indirectly control the operation or the operators of critical facilities in the transport sector. This is also true in Germany, where the Federal Government is looking to protect the vast national transport system:

In Germany, about 830,000 km of roads, 38,600 km of railways, 7,300 km of inland waterways and 24 main airports are the basis for the transport of goods and the mobility of persons. The legal foundation for the protection of this infrastructure is contained in the Ordinance on the Identification of Critical Infrastructures already described above. This Ordinance includes passenger and freight transport by road, rail, air, inland and maritime shipping, as well as the logistics sector (see Section 8 (2) of the Ordinance on the Identification of Critical Infrastructures):

- Within the air transport, a special focus lies on systems for passenger and cargo handling at airports, the infrastructure operations at airports, airline traffic control centres and airport management bodies, in each case if these exceed a certain size or dispatched transport quantities.

- The rail transport concerns passenger and freight stations, the entire railway network as well as the traffic control, control system and control center of the railroad.
- In the shipping sector, the Ordinance deals with systems for the operation of federal waterways, harbour information systems, control centres of maritime or inland waterways operators and transport companies.
- Lastly, the critical infrastructure concerning the road traffic concerns traffic control and guidance systems, the public transport and intelligent traffic systems.

3.3 While it is on the one hand crucial to maintain infrastructure assets and systems to be able to operate and provide services and the security of supply, on the other hand, relationships of reliance between nations and thus, dependencies have developed. Based on the negative example of Germany's dependency on Russian national gas, we assume that the German regulator is concerned that similar dependencies in the transport sector could be used to disrupt the security of supply of the population. This explains why the German Government is closely monitoring investments in the transport sector and other critical infrastructures. But what factors does the government take into account when reviewing a transaction from a foreign direct investment perspective?

A major issue regarding the investment control (also) in the transport sector is the investor, namely whether he is a state-owned, state-directed or state-funded person.[10] Because of the importance of the transport sector mentioned before, the government especially fears that even an economic participation could create political blackmail potential or the outflow of critical

[10] FEDERAL MINISTRY FOR ECONOMIC AFFAIRS (BMWi), *Proposals for ensuring an improved level playing field in trade and investment*, 2017, https://www.bmwk.de/Redaktion/DE/Downloads/E/eckpunktepapier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf?__blob=publicationFile&v=4; GERMAN BUNDESTAG, *Antwort der Bundesregierung – auf die Kleine Anfrage der Abgeordneten Kerstin Andreae, Katharine Dröge, Anja Hajduk, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 19/737 – Umfang und Prüfung von ausländischen Direktinvestitionen*, 2018, BT-Drs. 19/1103, 9.

information to foreign governments – most likely with far-reaching consequences within this sector and beyond. Thus, dependencies on other countries and their state-owned enterprises are a major concern.

Through the widening of national spheres of influence (colloquially referred to "backyards" of powerful countries), foreign governments could try to gain control over several European ports and thus retain the possibility to block important traffic routes, for example in the case of announced sanctions. This trend is supported by an increased digitalization, supply bottlenecks in the context of the Covid pandemic, and economic crises such as the Ukraine war. Likewise, financial support from foreign states can lead to a distortion of competition – another argument used by critics against certain transactions.

A second factor to be taken into account is peculiar to investments into the transport sector, namely its international nature. As a corollary, it is important to ensure a coordinated EU approach to major investments. The EU has understood that an efficient and well-connected infrastructure is of vital importance for competitiveness, growth, jobs and prosperity in the European Union. That is why the basic idea of a trans-European network is anchored in Article 170 TFEU. The wording is as follows: "*(…) the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures*" and "*Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks*".

Furthermore, the notion of an integrated EU transport has been implemented in the TEN-T Regulation (EU) No 1315/2013 of 11 December 2013 on Union guidelines for the development of the trans-European transport network. It addresses the implementation and development of a Europe-wide network of railway lines, roads, inland waterways, maritime shipping routes, ports, airports

and railroad terminals. This is to create and uphold a comprehensive core network, that allows efficient and secured infrastructure systems and mobility. Besides the construction of new physical infrastructure, it supports the application of innovation, new technologies and digital solutions to improve the use of infrastructure, reduce environmental impact, enhance energy efficiency and increase safety.

Not surprisingly, safeguarding the expansion as well as a trouble-free operation of TEN-T has recently become an objective of investment screenings. The German Government thus monitors closely if an investment is likely to have negative effects on its functioning or implementation. This is also a major focus of the European Commission who has in recent cases and to our knowledge issued opinions in the framework of the cooperation mechanism dealing specifically with TEN-T's role.

4. The German investment control procedure is divided into two phases: phase 1 and phase 2. The German Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz,* ***BMWK***) is the competent authority. The Ministry involves other ministries, depending on the sector of the target company. In the first examination phase, the BMWK can open an examination procedure within two months of gaining knowledge of the conclusion of the contract (Section 14a (1) No. 1 FTPA). The second examination phase in general takes up to four months (Section 14a (1) No. 2 FTPA) but may be extended under certain circumstances such as the consent of the parties or if the procedure is particularly difficult. The time limit is suspended during requests for documents and during contract negotiations between the BMWK and the acquirer (Section 14a (6) FTPA). The deadline starts anew if the BMWK withdraws, revokes or amends a positive decision or if a court reverses a negative decision in whole or in part (Section 14a (7) FTPA). During the entire procedure, the acquisition is subject to a clearance by the BMWK (Section 15 (2) FTPA). In practice, we

recommend including a closing condition when drafting the contract. Section 15 (2) AWG does not prevent this.

5. The importance of the transport sector is increasing recently. Especially in light of the Ukrainian war, the security of transportation networks has come more into focus since it is crucial for the security of supply. The German Government is concerned that it could be exploited for foreign state interests. Therefore, the basis for determining critical infrastructures has been amended on 1 January 2022. Since then, lower thresholds apply and the operation of new facilities, also in the transport sector, is considered critical. Thus, investments in this sector face rising difficulties. It can generally be said that a high security risk profile of the investor will most certainly lead to a comprehensive in-depth review and, possibly, to a clearance under conditions or even a prohibition.

ECONOMIC SECURITY CONSIDERATIONS IN FDI SCREENING

Yao Yuan *

ABSTRACT: *In recent years, with growing concerns from Foreign Direct Investment (FDI) about potential threats to national interests, many countries have established or updated their FDI screening mechanism on the grounds of national security. However, there is a lack of clear understanding of what national security is and also whether this includes economic security. Taking the FDI screening mechanism of the US, EU, and China as examples, this article compares their different attitudes towards the inclusion of economic security considerations in the FDI screening process, and the evolutions of their explanations in response to changing global investment environment and preferences. Through the comparison, this article tries to analyse the reason behind this shift and whether a distinction between legitimate national security and protectionism is possible.*

1. In recent years, with growing concerns from Foreign Direct Investment (FDI) about potential threats to national interests, many countries have established or updated their FDI screening mechanism on the grounds of national security. However, there is a lack of clear understanding of what national security is and whether this includes economic security. Instead of a comprehensive definition of "national security", it is common for states to adopt an open-ended list of factors to be taken into consideration when determining whether a

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particular transaction threatens national security. This rather ambiguous concept of national security gives states considerable political and administrative discretion in their review process and gives them much freedom to justify their decisions. Also, the real reasons behind final screening decisions may not always be clear. Sometimes the rejection is attributed to public opinions and media pressures to protect their country's economies. Although economic considerations play a role in national strength, economic goals *per se* may not be appropriate as national security objectives. It is necessary to discuss whether and to what extent economic security considerations should be included in FDI screening, and how to distinguish them from economic protectionism.

The attitudes and interpretations of economic security considerations vary from country to country. This article compares the different FDI screening systems in the United States (US), the European Union (EU), and China and attempts to analyse their different attitudes towards incorporating economic considerations into national security review processes. In the US, there have been heated debates between Congress and the executive branch during the legislative process over whether to broaden the scope of national security to include economic considerations. This has already shaped the US political debates about FDI regulations for decades, and still, it continues while also being impacted by current geopolitical developments. The longer list of considering factors in the newest amendment of the FDI screening rule, and more blocked foreign transactions in recent years, all reflect the US tendency to include economic considerations.

[1] The EU follows a similar path as the United States. The screening regulation adopted by the EU serves security and public order, but separating security and the economy appears to be becoming increasingly difficult.[2] Besides

[1] See further discussion in Section 3.
[2] See further discussion in Section 4.

FDI screening, the EU is also implementing various new policies and regulations, for example on export control,[3] foreign subsidies,[4] and anti-coercion,[5] to safeguard EU economic competitiveness and security. These actions reflect the EU's tendency to include economic considerations in the security sphere. However, a very different approach is taken by the Chinese government. China has a deep conviction that national security depends on a solid economic base, and explicitly recognizes national economic security as a very important dimension of security.[6] China's National Security Law defined "national security" in 2015, which includes "sustainable economic and social development".[7] These various viewpoints, either obscure or open towards economic security considerations, are interesting to assess, under the current global order, how states can strike a proper balance between a more protective investment policy and a free-trade and competition-based economic philosophy.

The rapidly changing world due to events, such as the COVID-19 pandemic and Russia's war of aggression against Ukraine, has highlighted the importance and relevance of economic security, which is also expected to become a frequent issue in FDI screening in the coming years. Given the trend of de-globalization and geopolitical instability, governments are prone to take advantage of this obscurity to pursue economic nationalism in the name of vested national interests. However, permitting the screening of FDI on purely economic grounds may open the door to protectionism. Therefore, a clearer understanding of economic

[3] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

[4] The Council of the European Union and the European Parliament reached a political agreement on the Regulation on foreign subsidies distorting the internal market on 30 June 2022.

[5] The European Commission published the proposal for an EU Anti-Coercion Instrument on 8 December 2021.

[6] See further discussion in Section 5.

[7] National Security Law of the People's Republic of China, issued and effective on 1 July 2015, article 2.

security is needed. To contribute to the discussion on the complex implication of national security in light of the FDI screening, this article attempts to elaborate on how to understand economic security considerations in the current global context, by comparing different interpretations of economic security under the FDI screening systems of the US, the EU and China. Section 2 discusses how the national security landscape has changed over the past decades. Sections 3-5 review the different attitudes of the US, EU and China. Accordingly, this article further analyses the following questions in Section 6: whether and to what extent the economic security considerations should be included in the scope of national security within the context of FDI screening; and if yes, how to distinguish between legitimate national security and economic nationalism or protectionism. Section 7 concludes.

2. The national security landscape has significantly transformed over the last decades. Traditionally, national security emphasized military and border security, on a country's defence capabilities to protect the lives and properties of its citizens.[8] This concept has been used in many circumstances, such as in international agreements. Most international trade and investment treaties and agreements entered into after World War II included exception clauses for national security-related measures.[9] The meaning of "essential security interests" in the General Agreement on Trade in Services (GATS) is an example of the traditional understanding.[10] According to Article XIV bis (1)(b) of the GATS, any contracting party of the GATS shall not be prevented from taking actions "which it

[8] Kelsen, Hans. "Collective Security and Collective Self-Defense under the Charter of the United Nations." *AMERICAN JOURNAL OF INTERNATIONAL LAW*, vol. 42, no. 4, 1948, pp. 783-796.
[9] Roberts, Anthea et al. "Geoeconomics: The Variable Relationship between Economics and Security." 2018.
[10] World Trade Organization, General Agreement on Trade in Services (GATS), Article XIV Bis: Security Exceptions, https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_bis_oth.pdf

considers necessary for the protection of its essential security interests: i) relate to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; ii) relate to fissionable and fusionable materials or the materials from which they are derived; iii) are taken in time of war or other emergency in international relations."[11] The phrasing of this clause indicates that the emphasis is on military and defence issues. These clauses, however, had little influence on limiting the misuse or broad interpretation of national security exceptions. What worked back then was states' self-restraint in invoking these clauses.[12] States shared a consensus that economic interdependence would foster peace and cooperation by raising the costs of interstate conflict.[13] If the exemption clause were widely applied, it would eventually weaken the trade and investment rules.[14] In the postwar liberal order, national security and economic globalization were two distinct areas.[15] There was a relatively clear division between everyday economic activities and national security concerns. The possible security risks posed by economic interdependence across a wide range of industries received little attention.[16]

However, this approach did not work for long. Things have changed recently, especially after the global financial and economic crisis in 2008. Since then, the international economic order is gradually shifting away from the "post-Cold War Neoliberal Order" and toward the "new Geoeconomic Order".[17] The "new Geoeconomic Order" is based on greater structural integration of security

[11] Ibid.
[12] Anthea et al. (n 9).
[13] Gartzke, Erik. "The Capitalist Peace." *AMERICAN JOURNAL OF POLITICAL SCIENCE*, vol. 51, no. 1, 2007, pp. 166-191.
[14] Anthea et al. (n 9).
[15] Heath, J. Benton. "The New National Security Challenge to the Economic Order." *Yale LJ*, vol. 129, 2019, p. 1020.
[16] Roberts, Anthea et al. "Toward a Geoeconomic Order in International Trade and Investment." *Journal of International Economic Law*, vol. 22, no. 4, 2019, pp. 655-676.
[17] Ibid.

and economics. The range and complexity of potential national security risks have increased in modern economies. Currently, national security has become a comprehensive concept mixed with economic, political, and social approaches to security. It has been frequently deployed as a shield for governments worldwide to address a range of increasing threats, risks, uncertainties and vulnerabilities.[18] The expansion of national security undermines the previous approach for separating security measures from ordinary economic regulations.[19] As a result, the global economic order and the concept of national security are nowadays deeply intertwined and difficult to disentangle.[20] Complex global supply chains have resulted in a high degree of interdependence among states, both with friends and potential rivals. Interdependence can boost economic efficiency while simultaneously creating strategic vulnerabilities.[21] Many governments are concerned about their reliance on other countries, particularly strategic rivals, for the supply of essential infrastructure or technologies required for economic growth and military capability.[22] States' national security strategies now place more emphasis on "economic security" and employ economic measures for political ends.[23] Increased economic and security convergence may necessitate a reassessment of security threats.

Against this backdrop, the meaning of national security in the FDI screening context has also evolved in recent years. In contrast to international trade and investment agreements, FDI screening mechanisms are primarily national norms, which care more about a particular country's interest needs than about balancing trade-offs and comprises among different parties. As a result, it is more susceptible to internal political and economic influences. In FDI screening

[18] Benton (n 15), 1026.
[19] Ibid, 1020.
[20] Ibid.
[21] Anthea et al. (n 16) 659-660.
[22] Ibid.
[23] Benton (n 15) 1029.

mechanisms, potential threats to national security risks are frequently used as justifications for screening or blocking foreign investments. Due to the evolution of the concept and its entanglement with economics, it is unclear if economic considerations could fall under the purview of national security in the context of FDI screening. The term is rarely defined in FDI screening mechanisms. The absence of a definition is since it is objectively difficult to define, as well as the reality that states prefer a rather broad and flexible term that will allow them to achieve other specific goals.[24]Today, investment screening mechanisms might have evolved into a new weapon used by many governments to maintain a country's economic, political and industrial competitiveness.[25] However, while the underlying goal of the FDI screening mechanism may have changed, this shift is generally not directly reflected in the language of FDI screening legal instruments.[26] To deal with uncertainty, law-making authorities often employ an obscure expression. Instead of a clear definition of "national security", it is common for states nowadays to adopt an open-ended list of factors to be taken into consideration when determining whether a particular transaction threatens national security. Few, if any, countries limit the scope of national security to the defence sector, which in most cases extends to the protection of other security-related interests.[27] For example, the US, the EU and China have provided a list of factors in their respective FDI screening rules. Apart from a few military-related factors, they have all broadened and extended the concept to cover other strategic sectors such as critical infrastructure, critical technologies, sensitive data,

[24] Esplugues, Carlos. *Foreign Investment, Strategic Assets and National Security* 2018. at 83.
[25] Nettesheim, Martin. "Screening for What Threat: Preserving "Public Order and Security", Securing Reciprocity in International Trade, or Supporting Certain Social, Environmental, or Industrial Policies?" *Ysec Yearbook of Socio-Economic Constitutions 2020*, Springer, 2020, pp. 481-504. at 484.
[26] Ibid.
[27] Bourgeois, Jacques. "The Eu Regulation on Screening Foreign Direct Investment: Another Piece of the Puzzle." *Eu Framework for Foreign Direct Investment Control*, Kluwer Law International, 2019, pp. 169-191.

and so on.[28] Besides, every transaction posing a potential national security risk in these jurisdictions will be assessed on a case-by-case basis, taking into account the specific facts of each transaction. The ambiguities and vagueness in the concept of national security provide screening authorities considerable discretion in their review process, and also give them a lot of leeway to justify their decisions. Furthermore, the real reasons behind final screening decisions are not always clear. It will be interesting to see how different jurisdictions react to the growing importance of economic considerations in national security concepts, and how they address this new trend in their FDI screening mechanism. The contrasting perspectives of the US, the EU, and China will be examined in more detail in the following three sections.

3. The US has formally invited foreign investment since the late 1970s.[29] In 1983, President Reagan publicly announced that the US welcomed foreign investment, which was the first open statement made by a US President.[30] The US also has a relatively long history of FDI screening on national security reasons. Since the establishment of the Committee on Foreign Investment in the United States ("CFIUS") in 1975, the US has created and been gradually developing a relatively mature national security review system. CFIUS, as the regulatory body, has been delegated and authorized by the US President to review and investigate certain transactions involving foreign investment in the United States and to determine whether such transactions have effects on US national security and

[28] E.g. for the EU, a list of factors that may be taken into consideration is stipulated in Article 4 of the Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union; For the US, Section 721(f) of the Defense Production Act of 1950, and Section 1701 (c) "sense of congress" of Foreign Investment Risk Review Modernization Act of 2018.

[29] Graham, Edward M. *Us National Security and Foreign Direct Investment.* Washington, DC : Institute for International Economics, 2006. David Matthew Marchick. Chapter 2, p.33.

[30] Ibid, 33.

whether such concerns can be mitigated.[31] For the last five decades, multiple amendments have broadened the scope of national security in the US and provided more stringent procedures to cope with the changing international investment environment.[32]

During the national security review legislative process in the US, there have been several heated debates between Congress and the Executive branch over whether to broaden the scope of national security to include economic considerations. For example, when considering the Exon-Florio Amendment in 1988,[33] there was a dispute between Congress and the Reagan Administration regarding the scope of national security.[34] This amendment planned to add a few broad-based factors for the CFIUS to consider, which triggered concerns that the Exon-Florio Amendment would result in a wide range of tightening in foreign investment.[35]At that time, rapid increases in foreign investment, especially from Japanese investors, produced a strong congressional backlash, while the Reagan Administration contended that foreign investment was beneficial to the United States economy and was reluctant to expand the scope of national security beyond the conventional military and defence framework to one which included economic grounds.[36] In this round, the Reagan Administration succeeded and the sole focus of the Exon-Florio Amendment at the end was to prevent transactions

[31] Executive Order 12661 of December 27, 1988, 54 F.R. 779, delegating responsibility to CFIUS to conduct investigations into foreign investment transactions.

[32] E.g. the Exon-Florio Amendment in 1988; the Byrd Amendment in 1992; Foreign Investment and National Security Act in 2007; and Foreign Investment Risk Review Modernization Act in 2018.

[33] Section 721 of the Defense Production Act of 1950, codified at 50 U.S.C. App. 2170; P.L. 100-418, Title V, Section 5021, August 23, 1988. The addition of section 721 to the Defense Production Act ("DPA") of 1950 by a 1988 amendment commonly known as the Exon-Florio Amendment in the United States.

[34] Edward (n 29) 47-48.

[35]Carroll, James FF. "Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security." *Emory Int'l L. Rev.*, vol. 23, 2009, p. 167.

[36] Ibid., 172-173.

threating national security, but not include potential economic implications.[37] The result also reflected the reluctance of the US in discouraging foreign investments back then.

The long-running discussion about whether to broaden the scope to include economic factors set the stage for political debates over FDI screening regulations for the next decades. And it was exemplified again by the enactment of the Foreign Investment and National Security Act of 2007 ("FINSA").[38] FINSA is the first major piece of legislation focused on the CFUIS review process.[39] During its legislation process, among the comments submitted for this amendment about the scope of national security, one commenter suggested that "national security" shall be specifically defined to encompass economic security.[40] However, according to CFIUS's response to these comments, CFIUS clarified that it would continue its practice of focusing narrowly on genuine national security concerns alone, not broader economic or other national interests.[41] CFIUS reaffirmed in its response that the longstanding policy of the US government is to welcome foreign investment. Moreover, the case-by-case approach followed by CFIUS was to ensure that the national security concerns could be fully addressed within the context of a given transaction, instead of identifying specific sectors where foreign investment is prohibited, restricted or discouraged.[42] FINSA expanded CFIUS' mandate to include a broader interpretation of national security that includes

[37] Stagg, J. C. "Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?" *IOWA LAW REVIEW*, vol. 93, no. 1, 2007, pp. 325-359.

[38] Foreign Investment and National Security Act of 2007 (FINSA), P.L. 110–49, 121 Stat. 246, enacted July 26, 2007 (codified at 5 U.S.C. § 5313, 31 U.S.C. § 301, 50 U.S.C. app. §§ 2061, 2170).

[39] Travalini, Joanna Rubin. "Foreign Direct Investment in the United States: Achieving a Balance between National Economy Benefits and National Security Interests." *Nw. J. Int'l L. & Bus.*, vol. 29, 2009, p. 779. at 792.

[40] Department of the Treasury, Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons, 31 C.F.R. Part 800, 73 F.R. (21 November 2008), 70705.

[41] Ibid.

[42] Ibid.

homeland security, energy assets and other critical infrastructure.[43] The factors that the President could consider when making his decision were widened as well.[44] But based on the explanation of the CIFUS, one could still argue that even under this expanded standard, CFIUS does not consider economic or other concerns.[45]

Besides the controversies in the legislative process, there are also inconsistencies in practice between different departments within the CFIUS about the interpretations of "national security".[46] In order to avoid excessive impediments of increased investigations to foreign investment, the Treasury Department has traditionally taken a narrow view of national security threats, focusing on the possible impact on U.S. national defence security, while other departments, for example the Department of Defence and the Department of Homeland Security, have considered that a narrow interpretation may limit the effectiveness of review system and have taken a much broader view of national security.[47]

In earlier years, these disputes, to some extent, struck a balance in the US, and the scope of national security was not broadened, at least in the literal sense, to include economic security. Now it has been gradually influenced by current geopolitical developments. To address new challenges in a rapidly changing and increasingly competitive world, the US has developed new strategies to accelerate and promote economic growth and opportunity. US's attitude started to transform around 2008, culminating in a clear change in the US economic and security strategy in 2017 and 2018.[48] In the 2017 US National Security Strategy,

[43] FINSA (n 38), 50 U.S.C.A. app. § 2170(a)(5) for the meaning of national security
[44] FINSA (n 38), 50 U.S.C.A. app. § 2170(f) for additional factors for consideration.
[45] *See e.g.*, Jose W. Fernandez, Lessons from the trenches, 33 IFLR, July/August 2014.
[46] James (n 35) 177.
[47] Ibid. See also, GAO. "Enhancements to the Implementation of Exon--Florio Could Strength the Law's Effectiveness." 2005. https://www.gao.gov/assets/gao-05-686.pdf.
[48] Anthea et al. (n 9).

Trump Administration clearly and openly indicated that "economic security is national security."[49] The same expression also appeared on the Strategic plan 2018-2022 of the Department of Commerce, which further declared that "America is safer when important technology and essential products are produced domestically".[50] This change indicates that the Trump Administration now views economic and strategic threats as national security concerns in the trade and investment regime.[51] This shift can also be reflected from the longer list of considering factors in each amendment of the US national security review rules,[52] and the increasing number of transactions blocked by the US president without convincing national security grounds in recent few years.[53]

This change has not been reflected in the language of the current national security review regulation. The latest revision of the review mechanism in the US is the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), which was enacted on 13 August 2018.[54] This amendment is a result of rising concern about China's economic might and mistrust of its growing acquisition of

[49] Trump, Donald J. "National Security Strategy of the United States of America." Executive Office of The President Washington DC Washington United States, 2017. Available at https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

[50] U.S. Department of Commerce. "Strategic Plan 2018-2022." 2018. https://www.commerce.gov/sites/default/files/us_department_of_commerce_2018-2022_strategic_plan.pdf.

[51] Anthea et al. (n 9).

[52] There were only 3 factors in the list in Exon-Florio in 1988, and then the list has been extended. FINSA in 2007 includes 11 determining factors, and FIRRMA in 2018 adds 6 additional factors that the CFIUS and the President may consider to determine if a proposed transaction threatens to impair U.S. national security.

[53] Seven transactions have been vetoed by the US presidents since the Exon-Florio amendment in 1988, which firstly enabled the President to exercise the authority. Among these cases, first one was blocked in 1990, the other six were all blocked after 2010s, and four of them were vetoed by President Trump. In all of these President decisions, no specific national security ground has been given.

[54] The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115–232, 132 Stat. 2173.

critical assets in the US.[55] In FIRRMA, neither a clear concept of "national security" nor a phrase like "economic security" are included, except for a statement from the Preamble that CFIUS should review transactions for the purpose of protecting national security and “should not consider issues of national interest absent a national security nexus”.[56]

However, from other sources and documents in the US, which will be presented in more detail later, it is not difficult to identify the tendency to include economic security, which results in the highly politicized foreign investment review process.[57] Critics have pointed out that the FIRRMA allowed the executive branch “to weaponize national security interests for political gain”.[58] In the 2022 US National Security Strategy, the US lays out its plan to “modernize and strengthen its export control and investment screening mechanisms, and also pursue targeted new approaches, such as screening of outbound investment, to prevent strategic competitors from exploiting investments and expertise in ways that threaten its national security”.[59] Additionally, the US President has planned to further broaden the scope of national security, and has extended the list of factors even longer. In September 2022, President Biden signed an executive order to strengthen the US’s national security mechanism, elaborating on existing statutory

[55] Canes-Wrone, B. et al. "Foreign Direct Investment Screening and Congressional Backlash Politics in the United States." *British Journal of Politics & International Relations*, vol. 22, no. 4, 2020, pp. 666-678.

[56] FIRRMA section 1702 (b).

[57] Brandice (n 55).

[58] See e.g. Shastry, Vasuki. "How Countries Can Regulate Investment Screening." 2022. https://www.chathamhouse.org/2022/04/how-countries-can-regulate-investment-screening.
List, Samuel. "Is National Security a Threat to Tiktok? How the Foreign Investment Risk Review Modernization Act Threatens Tech Companies." *Seton Hall Legislative Journal*, vol. 46, no. 1, 2022, p. 5.

[59] The White House. "National Security Strategy of the United States of America 2022." https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf

factors and expanding on the factors identified in FIRRMA.[60] Since the CFIUS was founded in 1975, this is the first executive order formally provided by the President on the risks that the CFIUS should take into account when reviewing a covered transaction.[61] This extension is regarded as a response to the evolvement of the national security environment.[62] Through this Order, additional factors in economic context have been added relating to aggregate industry investment trends.[63] There may be a comparatively low threat for acquiring a single firm in a sector, but a much higher threat for acquiring multiple firms within the sector. Thus, CFIUS will also consider the cumulative effect of a series of acquisitions over time in a sector or technology that may gradually cede domestic development or control in that sector or technology.[64] Besides, CFIUS may request the Department of Commerce's International Trade Administration to provide an industrial analysis about investment trends in a given sector or industry.[65] These new factors provide useful insight into how CFIUS will examine individual transactions. The examination will not look at the transaction in isolation but rather in light of broader industry, economic and policy trends.[66] When submitting CFIUS filings in the future, it would be inevitable for parties to explain how their transaction fits within the framework of larger industry trends. The White House press release declared that this Executive Order is "part of the Biden Administration's broader

[60] Executive Office of the President. "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States." Executive Order 14083 of 15 September 2022. For the list of factors, see Section 721(f) of the Defense Production Act of 1950, amended in FIRRMA in 2018 (50 U.S.C. App. 2170(f)).

[61] The White House. "Fact Sheet: President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States." 15 September 2022.

[62] Ibid.

[63] Executive Order 14083 (n 60), Sec. 3.

[64] Ibid, Sec. 3 (a)(i).

[65] Ibid, Sec. 3 (a)(iii).

[66] Sidley, Executive Order Directs CFIUS to conduct broad national security analysis, available at https://www.sidley.com/en/insights/publications/2022/09/executive-order-directs-cfius-to-conduct-broad-national-security-analysis

strategy to maintain US economic and technological leadership".[67] From these new sources, it suffice to say that even though it is not directly reflected in its national security review rules, the US is prone to incorporate economic security considerations in the scope of national security and use the national security mechanism to maintain its economic competitiveness and leadership.

4. The core idea of the European Union when it set up was economic integration, to create a free trade area and then an internal market.[68] Since its formation, the EU has been making efforts to promote foreign investment and maximize benefits from investment flows.[69] It has also been eager to adopt liberalizing regulations, such as the free movement of capital not only between EU Member States but also with third countries.[70] The global flows of FDI in the EU have slowed down since 2008 as a result of both external and internal determinants.[71] It then gradually recovered from the lower figures, and in 2015, the EU's inward FDI reached almost EUR 470 billion, which is more than the highest level before the crisis recorded in 2007.[72] At the same time, emerging economies are playing an increasing role as FDI providers, especially China, which

[67] The White House fact sheet (n 61).

[68] Begg, Iain. "The European Union and Regional Economic Integration: Creating Collective Public Goods-Past, Present and Future." *Briefing Paper, European Parliamentary Research Service*, 2021.

[69] Dimopoulos, Angelos. *Eu Foreign Investment Law.* OUP Oxford, 2011. at 50.

[70] Treaty on the Functioning of the European Union ("TFEU"), Article 63.

[71] Witkowska, Janina. "The European Union's Position in Global Foreign Direct Investment Flows and Stocks: Institutional Attempts to Improve It." *Comparative Economic Research-Central and Eastern Europe*, vol. 24, no. 1, 2021, pp. 27-43.

[72] 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." 2017, COM(2017)494., at 3.

is inherently different, as security non-ally, also has a unique political system.[73] Chinese capital in the forms of FDI increased 15-fold in the EU in the years 2010-2016.[74] There is no historical precedent for the boom of FDI from a developing to a developed economy, which shakes the traditional political dynamics of the EU's FDI policy. Hence, there are growing concerns in Europe regarding the potentially negative impact of certain foreign acquisitions on security and public order.

Against this backdrop, in 2019, a foreign investment review framework at the EU level was adopted in Regulation (EU) 2019/452 on establishing a framework for the screening of foreign direct investments into the Union ("EU Screening Regulation"), which applies from 11 October 2020.[75] The EU Screening Regulation tries to strike the appropriate balance between the EU's open and welcoming regime for FDI and the objective of protecting essential interests and addressing legitimate concerns raised for security and public order concerning certain FDI.[76] This Regulation does not establish a centralised FDI screening mechanism and the Member States are free to decide whether to set up or not and hold the sole responsibility to screen a particular FDI.[77] Until now, 25 out of 27 Member States have established, updated or are in the process of adopting their screening mechanisms, except Bulgaria and Cyprus.[78] The Russia's military aggression against Ukraine has further accelerated the trend to implement

[73] Meunier, Sophie. "Beware of Chinese Bearing Gifts: Why China's Direct Investment Poses Political Challenges in Europe and the United States." *China's International investment strategy: Bilateral, regional, and global law and policy*, 2019, pp. 345-359. at 6.

[74] Hanemann, Thilo et al. "Chinese Fdi in Europe: 2018 Trends and Impact of New Screening Policies." *A Report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS)*, 2019, pp. 2019-2003.

[75] European Parliament, Council of the European Union. "Regulation (Eu) 2019/452 of the European Parliament and of the Council of March 19, 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union." *O.J. 2019, L 79*.

[76] Commission Proposal (n 4) 4.

[77] Regulation (EU) 2019/452, (n 75) Preamble (8).

[78] European Commission. "Second Annual Report on the Screening of Foreign Direct Investments into the Union." 2022.

national screening mechanisms.[79]

The Regulation does not define the meaning of "security and public order", only provides a non-exhaustive list of factors that can be taken into consideration by a Member State when determining whether FDI is likely to affect security or public order. Member States may set additional factors depending on national specificities. Neither the Recital nor the main body of the EU Screening Regulation address whether economic considerations can be incorporated into the concept of "security and public order".[80] However, some traces could be found to learn the EU's position on this matter. A question about whether the EU Screening Regulation allows for the screening of FDI on economic grounds is included in a memo provided by the European Commission on *frequently asked questions about the EU Screening Regulation*.[81] According to the European Commission's interpretation, the EU framework does not allow for the screening of FDI based on other concerns than security and public order. Even though a disclaimer is included stating that these answers are given from the perspective of the Commission services and that only the Court of Justice of the EU ("CJEU") can give an authoritative interpretation of Union legislation, this answer at least reflects the Commission's stance on the exclusion of economic grounds from "security and public order".

Furthermore, although it is not applied for the same issue, the CJEU's judicial opinions on the circumstances in which Member States can derogate from fundamental freedoms, such as the free movement of capital, can provide some

[79] ---. "Guidance to the Member States Concerning Foreign Direct Investment from Russia and Belarus in View of the Military Aggression against Ukraine and the Restrictive Measures Laid Down in Recent Council Regulations on Sanctions." *2022/C 151 I/01*, 6 April 2022.

[80] Jacques (n 27), Section [A][3] screening limited to grounds of security and public order.

[81] European Commission. "Frequently Asked Questions on Regulation (Eu) 2019/452 Establishing a Framework for the Screening of Foreign Direct Investments into the Union (Updated June 2021).", question no.15, available at https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/7c76619a-2fcd-48a4-8138-63a813182df2/details

insights. EU prohibits any restriction on the free movement of capital except in certain exceptional circumstances, such as on the grounds of public policy or public security.[82] However, the justification for such restriction has been interpreted narrowly by the CJEU in its case law. For example, these exceptions cannot be used as "a means of arbitrary discrimination or a disguised restriction" of this freedom.[83] They are not allowed to be applied for purely economic reasons.[84]

Unlike China and the US, previously the EU was prone to separate economic interests from geopolitical interests.[85] Europeans preferred to believe that the EU has the collective economic size and capacity to determine its own economic destiny.[86] However, other global powers' behaviours challenge whether this is still an appropriate approach. European economic sovereignty is at stake because other countries are frequently using economic tools to gain geopolitical advantages. EU is also starting to strengthen its capacity to wield economic power and defend Europe's economic sovereignty, along with attempting to prevent a rise in protectionism or a retreat from globalisation.[87]

The Covid-19 pandemic and the recent energy crisis added significant pressure to the EU and further blurred the between security and the economy. It seems that the EU is becoming more comfortable in making an explicit connection

[82] Article 65(1)(b) of TFEU.

[83] Grieger, Gisela. *Foreign Direct Investment Screening: A Debate in Light of China-Eu Fdi Flows*. EPRS, European Parliamentary Research Service, Members' Research Service, 2017. at p 5.

[84] Janina (n 71) 24. *See* also, CJEU judgment of 14 March 2000, Case C-54/99, *Eglise de scientologie*, para 17. In similar sense, CJEU judgments of 16 January 2003, Case C-388/01, *Commission v. Italy*, para 22; of 17 March 2005, Case C-109/04, *Kranemann*, para 34; or of 11 September 2008, Case C-141/07, *Commission v. Germany*, para 60.

[85] Redefining Europe's economic sovereignty, June 2019, https://www.bruegel.org/policy-brief/redefining-europes-economic-sovereignty

[86] Ibid.

[87] See Hackenbroich, Jonathan et al. "Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion." *European Council on Foreign Relations. Ruhlig*, 2020.

between FDI screening and the protection of European economic interests. In the Guidance to the Member States in March 2020 at the outbreak of the COVID-19 pandemic concerning FDI, the Commission openly encouraged Member States to "make full use of" its FDI screening mechanism to protect Europe's strategic assets, to ensure the "continued critical capacity of EU industry".[88] Besides FDI screening, the EU is quickly implementing various new policies and regulations, for example on export control, foreign subsidies, and anti-coercion to safeguard its economic competitiveness and security. A topical issue has also arisen to discuss the possibility of reshoring production back to Europe in the recent EU policy debate to mitigate security of supply concerns.[89] In light of this, FDI screening regulation might be used as one of the tools to maintain the EU's industrial advantages and competitiveness, for the economic well-being of the region, not purely for security reasons.

The Commission's work program for 2023 is the most recent evidence of the EU's propensity to take economic security into account in its FDI screening regime. On 18 October 2022, the European Commission adopted its 2023 Commission work programme setting out a bold agenda for the next steps and listing key legislative proposals on the grounds across six of the Commission's headline ambitions.[90] Under the headline "an economy that works for people", the Commission seems to be willing to revise the EU's FDI screening regulation in light of two years of experience, strengthen strategic export controls, and also examine the possibilities to adopt additional tools in respect of outbound strategic

[88] 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." *COM(2020)1981 final*.

[89] Raza, Werner et al. "Post Covid-19 Value Chains: Options for Reshoring Production Back to Europe in a Globalised Economy." 2021.

[90] European Commission. "Commission Work Programme 2023, a Union Standing Firm and United." *COM(2022) 548 final*, 18 October 2022.

investment controls.[91] In a time of economic uncertainty, especially considering the effects of Russia's invasion of Ukraine on the EU's economy, the EU plans to "develop a strong set of strategic trade and investment controls to strengthen its economic security".[92] For the first time, economic security is mentioned as a goal of investment control rules in the EU's official document. All of this demonstrates, at least in practice, that the EU is highly concerned with protecting European economic security and tends to incorporate economic considerations in its FDI screening process.

5. A different approach is taken by the Chinese government. The Chinese version of "national security" has undergone significant reconceptualization over the past decades since the end of the Cold War.[93] Following the fall of communism in Eastern Europe and the disintegration of the Soviet Union in 1991, the Chinese government strengthened its belief that national security depends on a solid economic base as well as military strength. As a result, the Chinese government stated at the 14th Communist Party Congress in 1992 that "modern Chinese history and the realities of the present world show that as long as a country is economically backward, it will be in a passive position, subject to manipulation by others."[94] Since then, national economic security has been incorporated as an important dimension of security concept in China. To adapt to the world with rapid change and increasing complexity, besides the continuing emphasis on traditional security concerns such as sovereignty and territorial integrity, the new concept of national security adopts a more comprehensive understanding, to ensure the country's comprehensive national strength. At present, the scope of

[91] Ibid, 8-9.
[92] Ibid, 8.
[93] Yuan, Jingdong. "Chinese National Security: New Agendas and Emerging Challenges." *The Palgrave Handbook of National Security*, Springer, 2022, pp. 117-138. at 118.
[94] Anil Kumar, *New security concept of China*, INST. PEACE CONFL. STUD. (2012).

national security has been broadened to include military, economic, and other non-traditional issues, ranging from energy, technology to culture.[95] The National Security Law of the People's Republic of China in 2015 introduced a broad definition of national security, which refers to "a status in which the regime, sovereignty, unity, territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status".[96] Even though this definition is an explanation for national security in general and not specifically related to national security review in China, it can still shed some light on how Chinese regulators consider "national security" when making security review decisions.

For more than three decades after China first opened up to foreign investments in the 1970s, China did not have a systematic national security review regime in place, but only a few provisions in other foreign investment-related regulations took national security into consideration. During this period, the task of protecting national security in the foreign investment field was mainly carried on by market access restrictions and a case-by-case approval system.[97] Sporadic references to security review started to appear in Chinese law in 2003,[98] but a relatively systematic security review framework was first introduced in China in 2011 in the *Notice on Establishment of National Security Review System For M&As*

[95] Huang, Chieh. "China's Take on National Security and Its Implications for the Evolution of International Economic Law." *Legal Issues of Economic Integration*, 2021, pp. 119-146. at 26.
[96] Article 2 of the National Security Law of the People's Republic of China, 1 July 2015.
[97] Li, Xingxing. "National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and Us Laws and Practices." *Berkeley Bus. LJ*, vol. 13, 2016, p. 255.
[98] See e.g., in 2003, a concept similar to "national security review" appeared in the *Interim Provisions on Mergers and Acquisitions (M&As) of Domestic Enterprises by Foreign Investors* in China, which combined the competition and security review rules together; later, this interim provision was amended to the *Provisions on the M&As of Domestic Enterprises by Foreign Investors* in 2006, and in 2009.

of Domestic Enterprises by Foreign Investors promulgated by China's State Council.[99] Only inward M&As were subject to such censorship. A list of factors was included, which was not limited to national defence security, but also the "stable operation of the national economy", "the basic social order", and "the R&D capacity of key technologies".[100] From the wording, it is clear that economic considerations were included.

With internal requirement of foreign investment regulatory reform and external pressures from other trading partners, China conducted a significant revolution on foreign investment regulation, and the National People's Congress of China passed the *Foreign Investment Law* ("FIL") in March 2019.[101] This updated framework abolished previous case-by-case review and catalogue system for FDIs, instead provided a "pre-entry national treatment" regime with a "negative list" for all foreign investment entities and projects, which means that for foreign investments in those industries which do not fall within the scope of negative list, a same way will be regulated as investments made by Chinese domestic investors, and international investors will not be subject to the long-lasting case-by-case prior approval in the pre-establishment phase from Chinese authorities anymore.[102] This new law includes a general announcement about a nationwide national security review system, providing the existing national security mechanism with a higher hierarchy legal basis compared with the past practice.[103] Further details and procedures of the new national security review regime have

[99] General Office of State Council of China. "Notice of the General Office on the Establishment of National Security Review System Regarding the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors." 3 March 2011.
[100] Ibid, section II.
[101] National People's Congress of China. "Foreign Investment Law of the People's Republic of China." 1 January 2020.
[102] Li, Barbara. "China Overhauls Its Foreign Investment Regulatory Regime." *Norton Rose Fulbright*, 2019. https://www.regulationtomorrow.com/asia/china-overhauls-its-foreign-investment-regulatory-regime.
[103] Chieh (n 95) 131.

been regulated later in the *Measures for the Security Review of Foreign Investment,* which entered into force on 18 January 2021.[104] This new measure expanded the scope of security review from only M&As to all foreign investments. The problem is that this new measure does not abolish the previous national security review framework established in 2011 on M&A. There are many conflicts on key aspects of the review process, and how to solve those disparities is still unclear. Different from the previous review system for M&A, the new national security mechanism includes neither a definition of national security nor a list of factors to be considered when making screening decisions, only a list of sectors which will be covered by the new mechanism.[105] There is also no case law in China to provide more information. Since the implementation of new security review measures in 2021, there is very little public information available about its practical application, also no transactions have been openly blocked by the Chinese government. Even so, the clear definition of national security in China is enough to show its attitude toward incorporating of economic considerations in FDI screening.

6. Following an examination of various situations in the US, the EU and China, it is obvious from these examples that economic factors have been or are supposed to be incorporated into the purview of national security in the context of FDI screening. “Economic security” plays a larger role in states’ national security strategies. Hence, the question arises as to whether and to what extent economic security considerations should be included in the scope of national security within the context of FDI screening. If not, why did the EU and the US begin to shift their stance from open investment with prudence in broadening the scope of national

[104] China State Development & Reform Commission, China Ministry of Commerce. "Measures for the Security Review of Foreign Investment." issued on 19 December 2020, effective on 18 January 2021.
[105] Ibid, Article 4.

security, to relying more on FDI screening to achieve economic goals, and why China has taken a different approach?

To answer these questions, first and foremost, it is crucial to understand that an open investment policy is always accompanied by both economic advantages and potential security risks. Rapid capital flows promote the movement of goods, services and labour across international borders, as well as the exchange of ideas and technologies, which ultimately boosts the recipient country's economic growth and the degree of its dependence degree with other nations, including both allies and potential rivals. Although this strong interstate connection and dependence might increase economic efficiency, it can simultaneously aggravate a sense of crisis of recipient countries for strategic vulnerabilities.[106] The economic benefits and potential security risks are two sides of the same coin. What has changed in the last few decades is countries' points of view and emphasis.

There was a time in history with a relative divergence between economic and security considerations. After World War II, nations came to a new understanding that more collaboration and interdependence would be necessary to maintain peace.[107] Multilateral institutions and agreements were established, such as the World Bank[108] and The WTO precursor General Agreement on Tariffs and Trade (GATT)[109]. This consensus also made it possible for states to cooperate and accommodate minor differences. Some claim that the US did not see itself as having any economic and strategic rival, which contributed to this situation.[110] As explained earlier in section 2, previous narrow understanding of national security

[106] Anthea et al. (n 16) 659-660.
[107] Erik (n 13) 166.
[108] Founded in 1944.
[109] It has been updated in a series of global trade negotiations consisting of nine rounds between 1947 and 1995. Its role in international trade was largely succeeded in 1995 by the World Trade Organization.
[110] Anthea et al. (n 16) 661.

and limited invoking of exemption clauses on national security grounds in international trade and investment agreements were supported by this common vision shared by most countries to create a globalized world.

After the end of the Cold War, the global economy has grown rapidly and stepped into a new stage. Economic considerations gradually took precedence over security concerns. Most nations around the world have embraced the increasingly globalized "Neoliberal Economic Order".[111] During this period, the US established its economic and strategic dominance. Developed countries, most at that time as capital-exporting countries, were strongly in favour of ensuring the greatest possible level of free admission of FDI, only allowing some rare and exceptional limitations on the basis of public safety or national security.[112] This preference has been reflected not only in the Regan Administration's victory over Congress to exclude economic factors from the concept of national security in the Exon-Florio Amendment in 1988, but also in CFIUS's clarification for FINSA in 2007 that it would focus solely on genuine national security concerns, not broader economic or other national interests. On the contrary, host countries - most of them at that time were developing countries - usually pushed for broader limitations to protect their domestic market.[113] This partly explained why China adopted a case-by-case approval system for the market access of foreign investment since then and regarded national economic security as its most important dimension of security.[114]

However, the predominance role of economic considerations did not last

[111] Anthea et al. (n 16) 656.

[112] Carlos (n 24) 65. See also, Shihata, Ibrahim FI. "Recent Trends Relating to Entry of Foreign Direct Investment." *ICSID review*, vol. 9, no. 1, 1994, pp. 47-70.

[113] Ibid.

[114] Since 1995, China applied a "catalogue system" for the market access of FDI, by which all industries had been divided into four categories: encouraged, permitted, restricted or prohibited. This system has been replaced since the implementation of the Chinese Foreign Investment Law in 2019 by a "pre-entry national treatment" regime with a "negative list" for all foreign investment entities and projects.

for very long. Since the global economic and financial crisis in 2008, the balance has tilted gradually toward the security side. Some major actors have switched their priorities from cooperation to competition and confrontation. This change has been described by scholars as a new "Geoeconomic Order".[115] They also consider the rise of China as the US's main economic and strategic rival as a key driver of this transition.[116] There are growing concerns about FDI flows from emerging economies. When previous recipient countries became powerful enough to reverse investment directions, the desires of former capital-exporting countries for open investment diminished. They need to reconsider their new roles as recipient countries, and their focuses have shifted accordingly from seeking only absolute economic benefits to urging increased resilience.[117] This shift has, on the one hand, prompted many governments to introduce protective measures which may reduce cross-border FDI.[118] The United States is one of the driving forces behind this movement. On the other hand, rapidly developing countries that are heavily investing abroad are eager to ensure the free flow of FDI globally.[119] Thus, the distinction between the US, the EU, and China, derives from their different stages of development and respective positions on international investment.

There has never been a perfect solution to this puzzle. The previous approach, originally developed during the Cold War, relies on mutual restraint and political pressure to enforce the boundary between ordinary economic activities and national security.[120] Potential risks are always there in the field of FDI, but for a certain period of time, many countries chose to put them on the back burner or

[115] Anthea et al. (n 16).
[116] Ibid, 661.
[117] Anthea et al. (n 16) 659; see also, Grewal, David Singh. *Network Power: The Social Dynamics of Globalization.* Yale University Press, 2008. at 236.
[118] Chalamish, Efraim. "Protectionism and Sovereign Investment Post Global Recession." 2009.
[119] Esplugues, Carlos. *Foreign Investment, Strategic Assets and National Security* 2018. p. 65.
[120] Heath (n 15) 1026.

ignore them. This approach worked when the benefits of interdependencies outweighed the risks. Yet, history has also shown how fragile this approach is. When a crisis occurs, each state's first reaction is to prioritize self-interest and defend its superior competitive position and power. The artificial dividing line between security and economics becomes increasingly blurred. As a result, a growing number of issues become security sensitive which was not before.

Generally, the economic perspective is crucial for national security: a state may not be able to defend itself if it is not economically strong and is forced to rely on other foreign states.[121] In the context of FDI screening, as FDI itself is an economic activity, the screening of FDI is a balance between the benefits and risks of economic activities. It is difficult or impossible to completely separate economic and security considerations, as they are two sides of one thing and are inherently generated from foreign investments. The variable is the state's choice between an "economic mindset" and a "security mindset".[122] Even though it can partially explain why so many countries today tend to include economic considerations in their FDI screening mechanisms, it does not undoubtedly justify all protective measures taken by them. If the balance completely tilts toward the economic side, an FDI screening on national security reasons will become a virtual protectionist policy with a seemingly legitimate guise. The extent of economic considerations should be monitored to prevent economic nationalism or protectionism. For example, it goes too far if a state uses national security for FDI screening to protect domestic industrial competitiveness and strike for hegemonic status. As a result, this concept will ultimately become limitless in the sense that every decision made by an investor must be subject to investment control.[123] In that case, the screening will be regarded as a normal and open investment will be

[121] Anthea et al. (n 16) 665.
[122] Anthea et al. (n 16) 658.
[123] Martin (n 25) 490.

considered as an exemption.

The incorporation of economic considerations in the scope of national security in FDI screening mechanisms has become an inevitable trend. Now it is the time to reassess and reconsider how to handle the new security approach. The question further is the distinction between genuine security concerns and protectionism. Some economic, political, or geostrategic worries may be relevant to the FDI host state but are in essence the direct result of free market competition.[124] Government intervention into these transactions, under the name of the protection of national security, to prevent the acquisition of certain sectors of the economy by foreigners to protect domestic industries, will be prejudicial for effective market order and mask protectionism. Jackson envisaged a possible way – by using a complicated cost-benefit analysis– to assess the economic impact of more restrictive investment policies and help to make the distinction.[125] This analysis is based on the concept of marginal cost and benefits to the nation that come with FDI screening policies. The benefits, in this case, are a combination of the economic and non-economic benefits that could be anticipated from the restrictions, while the costs include a set of actual costs that the economy would be anticipated to bear as a result of the policies. FDI screening rules that are based on the assumption of gaining significant non-economic benefits relative to economic benefits and to high economic costs may not be an effective tool.[126] However, this analysis process is also faced with multiple challenges, such as the difficulty in peacetime when there is no immediate national security threat, and the complexity on a multi-lateral basis as each nation has its own understanding.[127] Therefore, it is far from easy, if possible, to make such

[124] Carlos, (n 24) 86.
[125] Jackson, James K. *Foreign Investment and National Security: Economic Considerations.* DIANE Publishing, 2010.
[126] Ibid, 19-24.
[127] Ibid, 19.

distinction.

In the current situation, another issue is that if a state is obviously pursuing protectionist measures out of concern for national security, international investors will be helpless and have few legal options, because states have taken steps to avoid commitments from international agreements, and also to avoid judicial review possibilities. States are striving to redirect decision-making authority from the international to the domestic level.[128] Most commitments made by states are in international investment agreements and treaties which focus on the post-establishment phase, while FDI screening mechanisms belong to national laws which deal with the pre-establishment phase of FDI. States are increasingly relying on domestic FDI screening mechanisms to avoid the application of international trade and investment obligations and to limit judicial review.[129] Legal remedies that foreign investors can receive from host countries for the screening decision can sometimes be limited. For example, according to the CFIUS statute, decisions made by the US President and the supporting findings are not subject to judicial review.[130] The problem of foreign investor protection due to unclear boundaries between genuine national security and protectionism is also a noteworthy question for further discussion.

7. To sum up, under the background of the rapidly changing global landscape and the meaning of national security, this article compares the different attitudes of the US, the EU and China towards incorporating economic

[128] Anthea et al. (n 16) 672.

[129] Ibid, 660.

[130] Section 721 of the Defense Production Act of 1950, 50 U.S.C. App. 4565 (e)(1). See also, *Ralls Corp. v. Committee on Foreign Investment in the US*, 758 F.3d 296 (D.C. Cir. 2014). In this case, the Court of Appeals relied on the political question doctrine to confirm that the decisions of the President are non-justiciable determinations, while the process by which the disposition of a transaction is determined may be reviewable to ensure compliance with the Due Process Clause of the Constitution.

considerations into their FDI screening mechanism. Benefiting from the ambiguous concept of national security and the broad discretion in this issue, they have included or at least have the tendency to include economic factors. These various viewpoints, either obscure or open towards economic considerations, provide an interesting perspective to assess, under the current global order, how to understand national security, and how to prevent the FDI screening mechanisms from becoming a guise for protectionist measures.

This is an inevitable trend because the economic benefits and potential security risks are two sides of the same coin. And many countries' balance has tilted to the security side in recent years. Previous international political pressure and mutual restraint among states to enforce the boundary between economic activities and national security is no longer existing. A new approach is urgently required to respond to this change. Instead of struggling to decide whether economic considerations should be included in the scope of national security, it seems preferable to focus on practical issues such as how to distinguish genuine national security and protectionism, how to protect foreign investors from unfair treatment, and how to maintain our globalized market order.

ELEMENTS FOR A STUDY OF ADMINISTRATIVE DISCRETION IN FDI SCREENING REGULATIONS: ENFORCING A THREAT-BASED MODEL

Andrea Gemmi*

ABSTRACT: *The paper investigates whether the discretionary power of imposing obligations under FDI screening regulations may be exercised by authorities as an interventionist tool to acquire influence on the governance of private companies. Based on administrative studies on discretionary public power, the vagueness of the concept of national security entails the lack of effective constraints to the screening powers. In this context, the actual goal pursued by the authorities is not subject to an effective judicial review. However, focusing on the equality principle, the screening powers may be understood under the threat-based model as a mere reaction to a threat, ruling out the legitimacy of their use to pursue further public goals.*

1. Foreign direct investment screening regulations have been implemented in recent years. Geopolitical circumstances have led most European states and the Western world to equip themselves with protection tools intended to protect national security against FDI. Despite the regulations being quite recent, national authorities are consolidating expertise in their use. of these. The scope of national

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regulations is steadily increasing, aided also by the growing favor of European institutions[1]. These circumstances concur to strengthen the role of FDI screening authorities, which may exercise screening powers to (i) veto certain transactions, or (ii) impose obligations on the investor or other operators involved in the transaction.

The gradual broadening of the application of these regulations, however, particularly concerned the events triggering a screening. Cases in which the authority exercises veto powers remain extremely rare. For example, in Italy, where in 2021 496 operations were notified, the FDI authority exercised a veto only 2 or 3 times per year[2]. At the European level, only 1% of screened transactions have been blocked[3]. Considering the vetoed transactions, the regulation appears to have statistically exceptional application.

However, the power to impose conditions and obligations concerning the transaction is a different matter. At the European level, 23% of the decisions imposed obligations[4]. The actual role of FDI authorities and the impact of FDI screenings on the regulation of the market is to be investigated concerning how

[1] EU Regulation 452/2019 provides a broad list of sectors in Article 4, to which the domestic FDI screening regulations may apply. The European Institutions called the Member States to strengthen the FDI screenings, See Communication from the commission (2020/C 99 I/01), *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, and Communication from the commission (2022/C 151 I/01), *Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions*, 6 April 2022.

[2] Presidenza del Consiglio dei Ministri, *Relazione concernente l'attività svolta sulla base dei poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni (Anno 2021)*, 30 June 2022. It must be noted that the FDI screening regulation was deemed applicable only to 212 out of 496 notified transactions. Furthermore, Italian regulations is peculiarly broad, and it includes infra-group transaction executed by Italian operators.

[3] Report from the Commission to the European Parliament and the Council (COM(2022)433) *Second Annual Report on the screening of foreign direct investments into the Union*, 1 September 2022. A further 3% of notified transactions was withdrawn by the parties.

[4] Report from the Commission to the European Parliament and the Council (COM(2022)433), *id*.

FDI authorities can exercise their powers to impose conditions and obligations. This consideration is not only due to the rare use of the veto powers but also to its effect. The veto constitutes an eminently defensive and negative power concerning economic dynamics. With this power, the national authority can only oppose a change. It cannot direct the future use of the assets, or the management of the company, involved in a screened transaction. The imposition of specific obligations, on the contrary, allows the authority to positively intervene in the economic dynamics by meddling in the management of a particular private asset. This creates an entirely different relationship between the public authority and the market, and different possibilities for the authority to intervene in the market.

National FDI screening regulations are grounded on Article 4(2) TEU and Article 346 TFEU, providing exceptions to the free movement of capital based on national security concerns. Therefore, FDI screening regulations must be aimed at pursuing national security interests. However, there is no provision stating how national security interests should be pursued. This choice relies on the national authorities. Each State, through its authorities, may set its national security policies. It should be inquired, however, to what extent the FDI screening powers (*i.e.* the imposition of obligations) can be exercised to promote national security interests. The FDI screening authorities have broad discretion in imposing conditions concerning the investments, and they may use these powers to limit or direct the activity of private assets and companies. This way, they may direct – to a certain degree – specific strategic operators to pursue certain public purposes. In this view, the screening powers seem suitable to enforce industrial policies by imposing a certain behavior on private operators. This imposed behavior would not be required by the market regulation (as for obligations related to competition law). The obligations imposed on the operators would be intended to pursue public goals set by the authorities, and possible public industrial policies (e.g. the increasing of energy production to ensure energetic security, or the diversification

of the supply chain). At first glance, this intervention of the State in the market to direct it would resemble a "return of the State" to the market after the privatizations of the 1990s, but it would be enforced by the imposition of obligations on certain operators, not using public investments (the "State capitalism")[5].

In this context, it has been argued that for both China and the United States of America there is no real difference between protecting national interests through investment screening and pursuing public industrial policies[6]. It does not seem doubtful that national authorities should consider their national interests - including industrial interests – in screening FDI. Indeed, the screening is aimed precisely at preventing dangerous investments, such as asset-tripping investments, and thus protecting the domestic production of strategic assets or the management of strategic assets. Moreover, the gradual expansion of FDI screening has gone hand in hand with the expansion of the concept of national security, which is now applied to various and diverse sectors. In this regard, a process of securitization of the national economy is ongoing[7]. Nevertheless, the question remains as to how screening powers should relate to these national security interests. In other words, the paper is aimed at verifying whether and when obligations can be imposed to provide the State with powers to influence the management of private companies because of their strategic importance.

It is ultimately a matter of discussing the nature of the FDI screening regulations. These can be seen as a means of implementing national industrial

[5] ARESU-NEGRO, *La Geopolitica della protezione. Investimenti e sicurezza nazionale: gli Stati Uniti, l'Italia e l'UE*, Fondazione Verso l'Europa, 2018, 8.

[6] ARESU, *Le potenze del capitalismo politico. Stati Uniti e Cina*, la Nave di Teseo, 2020, e ARESU-NEGRO, *Id.*, 124. In this regard, see the factors the CFIUS must consider under the Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States of 15 September 2022, expressly aimed "*to protect United States technological leadership*".

[7] On the concept of securitization, BUZAN-WÆVER-DE WILDE, *Security: A New Framework for Analysis*, Lynne Rienner Publishers, 1998.

policies to ensure national security interests (interventionist model) or merely as a means of defense against investments threatening security interests (threat-based model)[8]. Contrary to the latter, the first model of FDI screening grounds an interventionist approach and its use as a tool of statecraft[9].

[8] These two potential uses of FDI screenings reflect two ways to understand national security in FDI screenings: as protection of the nation's position and prosperity as before the investment, or as *raison d'Etat*, that "*qui va se situer entre un État présenté comme donné et un État présenté comme à construire et à bâtir*" (FOUCAULT, *Naissance de la biopolitique (1978-1979)*, Seuil, 2004, 6). Under the second approach, the perspective is not the protection of the State from the investment, but the need to guarantee a State that is protected: "*Gouverner selon le principe de la raison d'État, c'est faire en sorte que l'État puisse être rendu solide et permanent, qu'il puisse être rendu riche, qu'il puisse être rendu fort en face de tout ce qui peut le détruire*" (FOUCAULT, *id.*, 6). Viewing FDI screening regulations under the Foucault's *raison d'Etat* in the emergence of modern States seems to offer a view of these regulations as a new paradigm of relations between State and market. The geopolitical circumstances from which the strengthening of FDI screening regulations may lead to investigate their rationality in the market dynamics and in the economic operator's behavior, or in the State-person's will as competing with other States. The first relates to the ordoliberal principle grounding the public law expressed by the European treaties, and the economic regulation of independent authorities (AMATO, *Il gusto della libertà: l'Italia e l'antitrust*, Roma-Bari, 2000, 10; PERFETTI, *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, in Diritto amministrativo: rivista trimestrale, 2013, 21, 3, 309-400; DREXL, *La Constitution économique européenne – L'actualité du modèle ordolibéral*, in Revue internationale de droit économique, 2011, XXV, 4, pp. 419-454.). In line with Foucault's idea of liberalism, retrieving the rationality of the screening from the market dynamics leads to understand the screening powers as a tool to mitigate the risks arising from the competition among individuals under the rules of the market. Therefore, the screening powers may be understood as a tool to neutralize the shortcomings of the market dynamics for national essential interests. On the contrary, the *raison d'État* of a State that rediscovers itself in the competition with other States leads to the exercise of FDI screening powers based the rationality on the State-person's willingness. Significantly, Italian supreme administrative court has stated that FDI screening powers "can be aimed not only at protecting national instances, but also at not favoring the needs and purposes of Countries deemed (on only hostile, but even simply) competitor" (our translation; Consiglio di Stato, sez. IV, 9 January 2023, n. 289). In this context, the State imposes its rationality on the market, that is *un lieu de jurisdiction* on which imposing the pursuit of public aims. However, it is not in the study of *art de gouverne* that a solution between these two understandings may be found. The modern world is "*toute une série de rationalités gouvernementales qui se chevauchent, s'appuient, se contestent, se combattent les unes les autres*" (FOUCAULT, *Id.*, 316). The purpose of the investigation is to seek the legal principles and method under which understanding the *rationale* of the regulations and reviewing the decision of FDI screening authorities.

[9] See LAI, *National security and FDI policy ambiguity: A commentary*, in Journal of International Business Policy, 2021, 4, 496–505, and LENIHAN, *Balancing Power without Weapons: State*

Under the first approach to FDI screening, the authority would impose obligations on the investor or the target company due to its importance for national security interests, such as obligations to invest certain resources for production or to appoint only directors approved by the authority, or to modify the supply chain to avoid disruption risks. Along this model, by means of screening powers the private company may be obliged to pursue public interests. Under the second approach, on the contrary, any intervention must be limited to neutralizing the risks arising from the investment. For example, an obligation to invest certain resources should be linked to the risk of an asset-stripping investment. Any further goal, such as the improvement of the level of production, would not be a legitimate goal.

Both approaches may be reasonable and due to actual geopolitical needs, and both may be found in the authorities' practice. However, beyond analyses of international trends, needs, or opportunities, the question of how special powers can be used is a legal one. It is not a matter of comprehending how FDI screening powers should be used or are used. The rationale of FDI screening regulations is based on the degree of discretion the authority has in exercising these powers and, especially, in imposing obligations on private operators in the management of strategic assets or companies. The inquiry on this matter thus pertains to the legal principles governing the exercise of discretionary screening decisions, and to the review the courts may carry out based on these legal principles.

This legal inquiry must resort to the tools that administrative law has developed to limit the administration's arbitrariness in the exercise of its discretion. However, as will be further addressed below, the vagueness of the concept of "national security - as "public security" or "public order" - seems to entail a discretionary decision lacking clear legal restraints. Through the analysis of the administrative principles of discretion and the legal factors guiding the use of

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Intervention into Cross-Border Mergers and Acquisitions, in Cambridge: Cambridge University Press, 2018.

screening powers, the paper highlights the risks that the use of screening powers cannot be subject to an effective judicial review. The FDI authorities may therefore use their powers to enforce a public industry policy and to gain influence on important private companies in a vast array of sectors.

However, this does not seem a legitimate use of FDI screening powers. A means to enforce a threat-based model without the risks arising from the vagueness of "national security" may be found in the principle of equality. As detailed in the fourth paragraph, obligations must be grounded on the specific risks arising from the investment and limited to neutralizing them. Otherwise, the obligations would entail undue discrimination between the target company of the screened investment and other strategic companies not involved in the screening, but likewise relevant for national security.

In this way, FDI screening regulations can therefore only be understood as a legal tool to defend essential interests from threats. The screening powers may not exceed this purpose, and therefore may not be exercised to pursue further industrial policy goals.

The analysis will be structured along the following steps. The first paragraph outlines the characteristics of FDI screening as a discretionary power, addressing the issues related to the use of indeterminate concepts such as national security. The second paragraph explores the review of discretionary powers and the issues related to FDI screening regulations. The third paragraph details how the principle of equality may be seen as a guarantee enforceable by the judge against an interventionist use of screening powers.

2. As anticipated, the exercise of the screening function is discretionary. This concept refers to a debated category of administrative law, and this debate has led to different outcomes in different European legal systems. Discretion can

be investigated from different points of view[10]. For the purposes of this paper, we may note that by discretionary power we mean that the administration, in its activity of realization of administrative goals as well as the application of legal provisions, may behave in two or more equally legitimate ways[11]. Since, under modern constitutionalism, the source of administrative powers is the law, the power is discretionary when it is provided for in the power-conferring provision[12]. Specifically, the literature refers to discretion both with regard to the execution of regulatory provisions that expressly allow two or more permissible conducts or permissible solutions (a rare case), and those that include indeterminate terms[13].

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[10] Regarding French literature, see VENEZIA, É*loge de l'acte de gouvernement, in Gouverner, administrer, juger. Liber amicorum Jean Waline*, Paris, 2002, 723; LAUBADERE, *Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français*, in *Mélanges offerts à Marcel Waline*, Paris, 1974, 513; WOEHRLING, *Le contrôle juridictionnel du pouvoir discrétionnaire en France*, in *La Revue administrative*, 1999, 75 . With regard to the English-speaking literature, see GALLIGAN, *Discretionary Powers. A Legal Study of Official Discretion*, Oxford, 1990, and CRAIG, *Administrative Law*, Sweet & Maxwell, 2003, 521 et seq.; DWORKIN, *Taking rights seriously*, Cambridge, 1978. Concerning the Wednesbury doctrine, see JOWELL-LESTER, *Beyond Wednesbury: Substantive Principles of Administrative Law*, in (1988) *Public law*, 365. Concerning the German literature, see GILIBERTI, *Il merito amministrativo*, CEDAM, 2013. Concerning Italian literature, see LAZZARA, *Autorità indipendenti e discrezionalità*, CEDAM, 2001.

[11] PAKUSCHER, *e Use of Discretion in German Law*, The University of Chicago Law Review, 44, 1, 1976, 94–109.

[12] CRAIG, Administrative Law, London, Sweet & Maxwell, 2005, 5 ed., 521-686, defining discretion as "*the power to make choices between courses of action or where, even though the end is specified, a choice exists as to how that end should be reached*". Concerning the Italian literature, see ZANOBINI, *L'attività amministrativa e la legge*, in Rivista di diritto pubblico, 1924, I, 203-218; and BASSI, *Principio di legalità e poteri amministrativi impliciti*, Giuffrè, 2001. Concerning the principle of legality in Spanish literature, see GARCÍA DE ENTERRÍA-FERNÁNDEZ, Curso de Derecho Administrativo, I, Madrid, 2005: "*Ninguna magistratura, ninguna persona ni grupo de personas pueden atribuirse, ni aun a pretexto de circunstancias extraordinarias, otra autoridad o derechos que los que expresamente se les hayan conferido en virtud de la Constitución o las leyes*".

[13] Traditionally, German literature distinguish between *Ermessen*, discretionary application, and *Umbestimmen Rechtsbegriffe*, interpretation of the correct meaning. The latter refers to undetermined concept, which would not be therefore related to administrative discretion (REUSS, *Das Ermessen: Versuch einer Begriffklärung*, in Deutsches Verwaltungsblatt 68, 1953, 585). Under the most recent literature, the undetermined concept must be investigated to assess whether lawmakers intended to grant discretionary power to the authority (see BACHOF, *Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Vewaltungsrecht*, in

About the latter, the literature is vast and inconclusive, even concerning the issue of the definition[14]. By attempting to detect a common element in the various studies on this topic, it can be argued that indeterminate concepts are characterized by the indeterminacy of meaning[15]. In other words, it is not possible to investigate the meaning of the indeterminate term based on an interpretation intended to identify the correct reading. In that case, a problem of discretion would not arise at all, but it would be merely a question of interpretation[16]. It does not seem that this summary can extend to the further aspects the literature agrees on. The concept of "undefined term" seems to be a very broad category that brings together very different provisions and clauses. The choice as to which elements qualify the concept and bring the clauses together under a single label seems to influence the problem of analyzing how to apply these general clauses.

The literature on indeterminate concepts focuses on the problems of (i) investigating according to what (legal or extra-legal) criteria the interpreter should

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Juristenzeitung, 10, 1955; SCHMIDT-AßMANN, *Art. 19 IV*, in *Grundgesetz. Kommentar*, founded by MAUNZ-DÜRIG, Loseblattsammlung, 2003.

[14] It is significant to point out the multiplicity of defining formulas used by various authors to refer to similar concepts. See PEDRIN, *Le "clausole generali". Profili teorici e aspetti costituzionali*, Bononia University Press, 30. Among others, the terms used are *Ventilbegriffe* (valve concepts; WURZEL, *Das juristische Denken*, Wien-Leipzig, 1924, 86), *Sicherheitsventile* (security valve; WENDT, *Die exceptio doli generalis im heutigen Recht*, in Archiv für die civilistische Praxis, 1906, 106 et seq.), *Blankettvorschriften* (blank provisions; ZITELMANN, *Irrtum und Rechtsgeschäft. Eine psychologisch-juristische Untersuchung*, Leipzig, 1879, 19 et seq.) and *notions a contenu variable* (notions of variable content; PERELMAN-VANDER ELST (directed by), *Les notions a contenu variable en droit*, Bruxelles, 1984.

[15] "*vagueness is the hallmark of general clauses*" (our translation from Italian; PERFETTI, *id.*, p. 351). There is a common agreement that indeterminacy, and thus the impossibility of deriving a precise rule from the indeterminate legal term, marks the indeterminate legal concepts, but, in the context of a general theory of discretion, it may not be a sufficient parameter. Indeterminacy is not suitable for distinguishing legal concepts from general clauses or principles. For the purposes of this analysis, intended to be pragmatic and related to FDI screening regulations, it seems sufficient to assume indeterminacy as an identifying criterion.

[16] These reasonings ground the theory of Reuss (REUSS, *Das Ermessen: Versuch einer Begriffklärung*, in *Deutsches Verwaltungsblatt* 68 (1953), 585) who distinguishes *Ermessen* and *umbestimmen Rechtsbegriffe*. *Ermessen* refers to the choice between two different solutions. On the contrary, the application of an undetermined legal concept depends on an interpretative activity (*kognitiver Erkenntnisakt*), and only one solution is legitimate (REUSS, *id.*, 586)

concretely apply the rule, which, as mentioned, would not be definable in the abstract; and (ii) whether the administration's application of the clause is subject to judicial review and to what extent. As anticipated, this paper does not intend to provide a general theory of indeterminate concepts and discretion, but to note the dogmatic and pragmatic problems related to individual discretionary elements that may relate to FDI screening regulations. Hence, in line with the consideration that "there is no universal rule as to the principles on which the exercise of a discretion may be reviewed; each statute or type of statute must be individually looked at", the present contribution is based on a case-based approach to the study of undetermined terms[17].

The relevance of FDI screening is due to the fact that both indeterminate concepts and provisions expressly conferring discretion to the public authority are often present in FDI screening regulations. It is hardly conceivable that the decision on whether to exercise screening powers (that is the power to veto or to condition a screened transaction) may not be discretionary. The choice may be subject to stringent standards, but it remains an assessment carried out by the public authority. Notwithstanding this minimum level of discretion, each jurisdiction may provide, either expressly or through indeterminate concepts, additional areas of discretion. However, this discretion is not unlimited. For example, the principles of the rule of law and legality of administrative action prevent the scope of regulation - and thus the scope of the power-conferring provision- from being based on a discretionary choice[18].

The final decision is therefore based on discretionary elements, such as the choice as to whether exercise the powers, and that regarding the content of any

[17] The quote is from Lord Wilberforce, Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, [1977] A.C. 1014 at 1064 (C.A.), quoted in GREY, *Discretion in Administrative Law*, in Osgoode Hall Law Journal, 1979, 118.

[18] See GEMMI, *Certainty and predictability in FDI screening regulations*, in the book resulting from 2022 CELIS Forum on Investment Screening, edited by J. WARCHOŁ, T. PAPADOPOULOS, J. WIESENTHAL and J. HILLEBRAND (forthcoming).

conditions or obligations that the authority may impose on the parties. Such discretion is usually linked to a provision expressly granting discretion. Regarding the use of indeterminate concepts, as anticipated in the introduction, the most significant element is the goal the public function must pursue, which is national security.

The problem of defining "national security" is not merely national. It is well known that the competence of EU Member States to derogate from the principles of economic freedom is based on Articles 4(2) TEU and 346 TFEU, which refer respectively to the "*maintaining law and order and safeguarding national security*" and "*protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material*"[19]. Under Reg. EU 452/2019, recital nos. 3 and 4, "*grounds of security or public order*". The cited sources refer to the concept of "national security" (and "public order") without giving an exhaustive definition. However, the use of this term cannot be viewed as a self-judging exception clause as it is in international treaties[20]. In fact, under European law, national courts must verify whether national legislation has complied with EU law in applying the public security clause, by looking specifically at the principle of proportionality[21]. In other words, the interpretation of the concept of national security does not seem to be a purely

[19] Other references are made by Articles nos. 6, 45, 52 e 65 TFEU, providing exceptions to the free movement of goods, workers, the right of establishment and freedom to provide services, and the free movement of capital. See DANIELE, *Diritto del mercato unico europeo e dello spazio di libertà, sicurezza e giustizia*, , Milano, 2019, and NADDEO, *Il difficile bilanciamento tra sicurezza nazionale e tutela dei diritti fondamentali nella "data retention Saga" dinanzi alla corte di giustizia UE*, in Freedom, Security & Justice: European Legal Studies, 2022, 2, 188-207. The concept of public security is also related to the exception clause included in Articles nos. 6, 8, 10 and 11 of European Convention on Human Rights, and Article nos. 2 of Fourth Protocol and 1 of Seventh Protocol.

[20] ALFORD, *The Self-Judging WTO Security Exception*, in Utah L. Rev. 697, 2011.

[21] See CJUE, sentenza 4 giugno 2002, C- 483/99, caso Elf-Aquitaine, par. 48
Among others, PETERKA-SHEU, *The Public Security Exception in the Law of the European Union Scheu H.*, Security Theory and Practice 2019, 4, 21. On CJEU case-law on public security under the Free Movement Directive, KOSTAKOPOULOU, *When EU Citizens become Foreigners. European Law Journal*, in European Law Journal, 20, 4, 2014, 447-463.

domestic issue, but one concerning compatibility with the EU law, relevant to the obligation to interpret national law in conformity[22].

It is clear therefore that the concept of "national security" has a legal value. Nevertheless, it appears to be a concept lacking clear meaning, and is intentionally elastic and vague[23]. It has been significantly defined as an ambiguous symbol, limited to suggest a "protection through power"[24]. Its interpretation is long debated by security studies, and the meaning given to it has been inconsistent over time[25]. In recent years there has been an expansion of the concept of national security, with issues other than military issues being considered autonomous elements of national security[26].

It does not seem necessary to dwell on the evolution of national security in the economic sector. Whereas Article XVI bis of GATS refers to the concept of "*essential security interest*" as relating to military or war-related interests and

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[22] Italian regulation declines the vaguer concept of national security into "*Essential interests of national defense and security*" e "*Public interests relating to the safety and operation of networks and facilities and continuity of supply*"[22]. According to an interpretation consistent with EU law, these formulas should therefore be understood as exemplifying the concept of national security within the meaning of Articles 4(2) TEU and 346 TFEU.

[23] The European Commission of Human Rights stated that "*The Commission considers however that the principles referred to above do not necessarily require a comprehensive definition of the notion of "the interests of national security". Many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice*" (Esbester v. the United Kingdom, Application No. 18601/91, 2 April 1993).

[24] WOLFERS, *"National Security" as an Ambiguous Symbol*, in Political Science Quarterly, 67, 4, 1952, p. 483.

[25] The evolution of this concept is subject to international security studies. Among others, see BUZAN-HANSEN, *The Evolution of International Security Studies*, Cambridge University Press, 2009. From the second world war and during the cold war, the concept of national security mainly concerned military security. Other issues were taken into account, but not as security issues of themselves but "*because they impacted on 'the use, threat, and control of force', and thus on military security*". The concept has undergone an evolution process, however, so that "*Later a more general sectoral widening of security included societal, economic, environmental, health, development and gender*" See also WOLFERS, *id.*, 481-482; and ROMM, *Defining national security - nonmilitary aspects*, Council of Foreign Relations Press, 1993. WILLIAMS, *Words, images, enemies: Securitization and international politics*, in International Studies Quarterly, 7(4), 2003, 511–553.

[26] LAI, *id.*; WILLIAMS, *id.*, 511–531.

fissionable and fusionable material, the extent of sectors included in Article 4(1) of Regulation 452/2019 highlights a broad focus on securitizing interests in every aspect of the economy. Recently, the concept of economic security has gained ground in both the U.S. and European contexts[27].

Another example is health security. It does not seem easy to link public health issues with national security issues (except the intentional use of bacteriological weapons), but even before the Covid-19 outbreak, health matters were talked about as international security issues[28]. There is no doubt that there has been an evolution of the concept. It has been noted that "In the not too distant past, attempts to connect public health and national security would have raised eyebrows and perhaps condescending sympathy from experts in both fields"[29]. But, when French president Emmanuel Macron spoke about "*guerre*"

[27] Concerning the European context, see the Communication "Europe's moment: Repair and Prepare for the Next Generation', COM(2020) 456 final, 27 May 2020", para. 5.1, and the Commission work programme 2023, Strasbourg, 18.10.2022 COM(2022) 548 final, 7. Concerning the USA, see the U.S. Department of Commerce's 2022–2026 Strategic Plan, p. 18 (available at https://www.commerce.gov/sites/default/files/us_department_of_commerce_2018-2022_strategic_plan.pdf). On the concept of economic security, see YUAN, *What We Talk about When We Talk about National Security: Economic Security Considerations in FDI Screening*.

[28] With Resolution 2177/2014, the United Nations Security Council for the first time recognize a global public health crisis as "*threat to peace and international security*". See ELIA, *The United Nations Security Council approach to global public health crisis: Summary of the Resolution 2177/2014 on Ebola crisis*, in Civitas Europa, 2015, 2, 35, p. 271-272. A critic of securitization of public health is DE WAAL, *Reframing Governance, Security and Conflict in the Light of HIV/AIDS: A Synthesis of Findings from the AIDS, Security and Conflict Initiative*, in Social Science & Medicine, 2010, 70, 114; DE WAAL, *Militarizing Global Health*, in Boston Review, 2014; ELBE, *Should HIV/AIDS Be Securitized? The Ethical Dilemmas of Linking HIV/AIDS and Security*, International Studies Quarterly, 2006, 119. ELBE, *Haggling over Viruses: The Downside Risk Securitizing Infectious Diseases*, Health Policy and Planning 2010, 476. BUCCI, *Ebola, the Security Council and the securitization of public health*, in QIL Zoom-in, 2014 27-39; MCINNES-RUSHTON, *HIV/AIDS and securitization theory. European Journal of International Relations*, 2013, 19(1), 115–138; YOUDE, *The securitization of health in the Trump era*, in Australian Journal of International Affairs, 2018, 72(6), 535–550.

[29] FIDLER, *Public Health and National Security in the Global Age: Infectious Diseases, Bioterrorism,*
and Realpolitik, in George Washington International Law Review 2003, 35, 787. See also the previous footnote.

and "*mobilisation générale*" against Covid-19[30], the securitization of public health was already consolidated[31]. It is not surprising then that public health falls within the scope of FDI screening regulation, and indeed the Commission has urged its use with respect to the pandemic outbreak. However, the positive sanction of this evolution, namely the reference to the health sector in Article 4(1)(a) in Regulation 452/2019, does not conclude this process. Indeed, the question remains as to when a public health problem also qualifies as a national security concern.

The development of these new areas of security has been made possible by the inherent vagueness of the concept of security. It seems that the concept is tied to an idea of threat/defense, but it is not suitable to provide criteria to identify what threats to address and what values to protect[32]. Along this line, it has been noted that "security after all is nothing but the absence of the evil of

[30] *«Nous sommes en guerre»: face au coronavirus, Emmanuel Macron sonne la «mobilisation générale»*, le Monde, 17 March 2020.

[31] On the securitization of public health, among others, FIDLER-GOSTIN, *Biosecurity in the Global Age Biological Weapons, Public Health, and the Rule of Law*,

[32] CJEU case law occasionally provided a definition of national security. This definition does not seem to be intended as having general value, but only a relevance in the case at hand,focusing on national essential interests. Under this case law, national security "*couvre la sécurité intérieure d'un État membre et sa sécurité extérieure et que, partant, l'atteinte au fonctionnement des institutions et des services publics essentiels ainsi que la survie de la population, de même que le risque d'une perturbation grave des relations extérieures ou de la coexistence pacifique des peuples, ou encore l'atteinte aux intérêts militaires, peuvent affecter la sécurité publique*" CJEU, 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, C-72/22 PPU, Paragraphs 88. The definition is not compliant with regulations aimed at, among others, protecting the supply chain and economic sectors that have no immediate connection to the maintenance of political structures, and may have no connection to military or otherwise public supplies. However, the Court has already held that the objective of protecting national security corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society through the prevention and punishment of activities capable of seriously destabilizing the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities (see, to that effect, judgment of 6 October 2020, La Quadrature du Net and Others, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 135). Indeed, besides minimum national core values, there are marginal such as technological leadership concerns (WOLFERS, *id.*).

insecurity a negative value so to speak"[33]. The determination of the content of "national security" seems to rely on the choice of what are the essential interests to be defended[34]. Therefore, the concept does not offer legal criteria for its application. Instead, its content is linked to different assessments, possibly political or geopolitical[35].

The above remarks on the content of the concept of national security are not intended to provide an exhaustive framework of the issues to be addressed or to provide hermeneutical solutions. To the purpose of this paper, the above is aimed to highlight the inherent indeterminacy of the concept. This indeterminacy under consideration does not merely entail the recognition of a gray area left to the discretion of the administration, within the usual canons of reasonableness and proportionality. The vagueness is radical and affects the possibility to provide legal parameters for the judicial review. The following paragraph focuses on how the uncertainty regarding the meaning of the goal of an administrative function is likely to jeopardize judicial review of the exercise of public powers, and therefore effective limits on the exercise of the function of FDI screening.

3. Studies of administrative discretion investigate the limits of the administration's decision, and therefore the limits of the judicial review of administrative decisions. Based on currently undisputed assumptions in the Italian and European literature, we may try to make a summary – necessarily insufficient

[33] WOLFERS, *Discord and Collaboration: Essays on International Politics*, Jhon Hopkins Press, 1962, 153.

[34] "*Because the choice of goals is not a matter of expediency, it would seem to make no sense to ask whether it is expedient for nations to be concerned with the goal of security itself; only the means used to this end, so it would seem, can be judged as to their fitness- their instrumental rationality-to promote security. Yet, this is not so. Security, like other aims, may be an intermediate rather than an ultimate goal, in which case it can be judged as a means to these more ultimate ends"* WOLFERS, "National Security" as an Ambiguous Symbol, in Political Science Quarterly, 67, 4, 1952, p. 492. See also BUZAN-WÆVER-DE WILDE, *id.*, 25 et seq.

[35] See LAI, *id*. Concerning the case-law of Italian administrative courts, see Consiglio di Stato, sez. IV, 9 January 2023, n. 289.

– of a more complex issue: where the legal provisions assign the choice to the administration, the principle of separation of judicial and executive powers prevents the judge from usurping the administrative function by substituting his own choice of expediency for that of the administration[36]. Hence, the problem of the limits of discretionary decisions is a constitutional issue - even if it is declined in figures of administrative law - as it relates to the relationship between executive power and the judiciary[37]. Notwithstanding this constitutional consideration, it is to be stressed that one of the aims of administrative law is the investigation of the means of protection against arbitrary power. The following paragraph analyses the main limits that administrative law has erected to protect individuals and avoid arbitrary powers.

Concerning indeterminate concepts, the first problem is to identify the criteria under which to apply the concept in the specific case. Secondly, based on this analysis, the issue is to identify whether this activity is reserved for the

[36] The reference to questions of "expediency" is *per se* a reference to a specific reading of discretionary decision-making. Namely, the one - dominant in Italy - that sees discretionary decision-making as a volitional decision, *i.e.* a decision *latu* not entirely governed by legal criteria. The discretionary choice consists in the weighting of the public interest in the abstract - i.e., the purpose defined by the statute - with secondary private interests - i.e., the positions of individuals and other authorities that are harmed or interested in the exercise of public power. The outcome of this weighting is the public interest in the specific case, which is pursued by the administrative act. This theory of discretionary decision is mainly due to Giannini (among others, see GIANNINI, *Il potere discrezionale della pubblicaamministrazione*, Giuffrè, 1939; and *Problemi relativi al merito amministrativo e problemi connessi*, in Stato e diritto, 1941). Contrary, for a theory of discretionary power as enforcement of legal rules, MORTATI, "Discrezionalità", in Novissimo Digesto Italiano. UTET, 1060, 1099; JELINEK, Gesetz, Gesetzesanwendung und Zweckmäßigkeitserwägung, Mohr, 1913; KELSEN, *Pure Theory of Law*, Berkeley U. California P., 1967. Under the first theory, only the weighting of different interests is based on expediency criteria, and the purpose of the public function is a legal factor guiding the expediency decision. German literature is traditionally more skeptical towards the executive, and open to an intrusive review of discretionary decision (STARK, *Das Verwaltungsermessen und dessen gerichtliche Kontrolle*, in *Festschrift für Horst Sendler Horst Sendler*0, edited by BÜRGER – RICHTER – STAAT, 1991, C.H.Beck, 173; LAZZARA, *id.*, 118). However, since the 70s case law and literature has acknowledged more space reserved to the administrative choice (the *Beurteilungsspielraum*; see BACHOF, *Beurteilungsspielraum, Ermessen und umbestimmter Rechtsbegriffe im Verwaltungsrecht*, in JuristenZeitung, 1955, 97-102). See also footnote No. 42.

[37] LAZZARA, *id.*, 112.

administration. To summarize the various opinions expressed by literature, it may be argued that the content, and thus the precept, of indeterminate concepts, may be found in (i) extra-legal criteria, and thus social standards or values[38]; or (ii) extra-statutory but not extra- legal criteria[39]. In the first case, there is no judicial review of the decision, because it is not based on legal criteria[40]. However, this would not mean that the decision may be arbitrary. An external review of the authority's decision remains possible, regarding the violation of principles and rules that limit the authority's choice (such as the equality principle). In the second case, the decision is based on legal criteria, but not on a specific rule. A rule in a specific case is derived from the weighting of legal principles and general rules. The problem is to understand whether this weighting of general principles is intended to be sole responsibility of the administration, or instead of any interpreter, including judicial courts.

As anticipated, the analysis of the debate of the literature on undetermined concepts seems to entail the need to verify case-by-case the clause included in a given provision. In the following, we focus on the characteristics of the specific concept of national security in the FDI screening system and on its relevance within the discretionary decision of exercising screening powers.

As shown in the previous paragraph, the concept of national security has no

[38] PERFETTI, *id.*, 353. The problem is that "the mode of being of values is not ought-to-be, and value judgments are not normative propositions" for which "we have no sure methods to establish with certainty their truth or falsity" (our translation; MENGONI, *Spunti per una teoria delle clausole generali*, in Rivista critica del diritto privato, 1986, 8, 15-16). With reference to this reading of general clauses, it has been observed that it would be more correct to refer to indeterminate legal concepts as "*undefined statutory term*", since "*these are not legal terms, but terms from natural, economic or other sciences used in a statute*". OSTER, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, in German Law Journal, 9(10) 2008, 1272.

[39] PERFETTI, *id.*, 352. Under this theories, undetermined concepts refer to general principles or norms.

[40] GIANNINI, id.; BACHOF, id., 99. Certain literature argues that social rules and value referred to by legal provisions acquire legal value (MORTATI, *Norme non giuridiche e merito amministrativo*, Ed. Studium urbis, 1941; TEZNER, *Das freie Ermessen der Verwaltungsbehörden*, F. Deuticke, 14; JELLINEK, id., 37 et seq; LAZZARA, 132 et seq.).

core meaning. Since it is not suitable to provide criteria to identify what threats to address and what values to protect, it cannot be applied on the grounds of a weighting of legal principles in the specific case. The securitization of the economy shows that no legal rule governs its application. It also does not refer to social standards or values expressed by the society. Contrary to general clauses common in private law, such as "good faith", it seems not possible for a judge or an individual to interpret the meaning of national security by referring to values expressed by the society. The meaning derives from political, geopolitical, and strategic assessments, balancing – not legal principles, but – policies, threats, and geopolitical balance. This assessment can only be carried out by political authorities, gathering intelligence, expressing national policies, and maintaining foreign policy relations[41]. Therefore, with specific regard to the undetermined concept of national security, it seems that only the political authority can provide - on a case-by-case basis - a meaning. As stated by the Italian Council of State, "*appreciation of the strategic importance of an operation in relation to the national interest by the Council of Ministers has highly discretionary traits, given that the concept of national interest itself is not a prius, that is, an objective element pre-existing in nature, but rather a posterius, that is, the resultant of political evaluations and choices*"[42].

Given the above, the specific application of national security concept by the public authorities cannot be review by judicial courts. In the following, we consider how this circumstance affect the review of FDI screening decisions.

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[41] Even German literature, traditionally focused on safeguarding individuals from the administrative discretion, considers the application of political concept by governmental bodies as cases of weak judicial review. We make reference to the *Einschätzungsprärogative* under the *normative Ermächtigungslehre* (SCHMIDT-AßMANN, *id.*). See RODI, *I "concetti giuridici indeterminate". Comparazione tra sistemi giuridici e analisi economica del diritto*, available at https://iris.luiss.it/bitstream/11385/200946/3/20140318-rodi.pdf; 91 et seq.

[42] Consiglio di Stato, sez. IV, 9 January 2023, n. 289. Since the exercise of screening powers entails geopolitical assessment, granting screening powers to independent authorities does not seem consistent with the their independence from the Government.

In the mentioned context of difficult balance between constitutional powers, administrative law has been concerned with preventing public power from constituting arbitrary power - that is, power loose from limits and control - by investigating the limits of public powers[43]. In detail, in the following we consider the three main ways or figures to review a discretionary decision: the *détournement de pouvoir*, the proportionality test, and the reasonableness principle. Additionally, the analysis considers the factors set by law to guide the FDI authorities' discretion.

The problem of reviewing discretionary decision-making was addressed by French literature and case law, which, in the late 19th century, implemented the figure of *détournement de pouvoir*, influencing other legal systems and European jurisprudence[44]. This is the case when discretionary power is exercised for purposes (*les buts*) other than those set by the power-conferring provision. Regardless of the understanding of this review, which may be based on an objective (the purpose of the act) or subjective (the purpose actually pursued by the authority) viewpoint, it is clear that uncertainty about the aim set by law results in the failure of the parameter on which the review is based, and the court's review of the proper exercise of administrative discretion is thus prejudiced[45].

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[43] CANANEA, *Reasonableness in Administrative Law*, in *Reasonableness and Law. Law and Philosophy Library*, directed by Bongiovanni-Sartor-Valentini, 86, 2009, Springer.

[44] *Ex multis*, GAUDEMET, *Droit Administratif*, LGDJ, 2010,142. Italian literature and case law the same figure is called "*sviamento di potere*". See BENVENUTI, *Eccesso di potere amministrativo per vizio della funzione*, in Rivista trimestrale di diritto pubblico, 1, 1950: VILLATA, *Il provvedimento amministrativo*, Giappichelli, 2006, 411 et seq., L. MANNORI, *L'influenza francese*, in Le riforme crispine, Vol II: Giustizia amministrativa, Milano, 1990, 575 ss; AZZENA, *Natura e limiti dell'eccesso di poterevamministrativo*, Giuffrè, 1976, 21 ss. On the misuse of power in EU case law, CHITI, *Diritto amministrativo europeo*, Milano, 2008, 542, and RIVERO, *Le probléme de l'influence des droits internes sur la Cour de Justice de la CECA*, in Annuaire francais de droit International, 1958, 304.

[45] Concerning the subjective approach to the *détournement de pouvoir* see TROJANI, *Lineamenti di giustizia amministrativa nel sistema comunitario*, Pubblicazione dell'Istituto di Studi europei A.

In administrative law, the aim must be identified by the power conferring legal provision. In the case of the FDI screening procedure, it is national security. However, the indeterminate concept itself constitutes one of the moments of discretion, with the particularity that the concept offers no legal criteria and seems to depend on geopolitical assessments. The use of screening powers to pursue protectionist or purely economic aims, or to gain influence on an important private undertaking due to its relevance for national interests seems to not be effectively reviewable under the *détournement de pouvoir*.

The use of the indeterminate legal concept as the aim of the public function seems to undermine other substantive methods of reviewing discretionary decisions as well.

The main legal method of reviewing a discretionary decision is the proportionality test. This is a principle developed in Germany but widespread throughout Europe, also thanks to its centrality in the case law of the CJEU, which has also considered it a generally accepted rule of law[46]. CJEU case law on national FDI screening is based on the principle of proportionality[47]. The principle is based on the idea that the administration must choose measures that imply the least

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De Gasperi, 1990, 45. Concerning rhe objective approach, see VAN DER ESCH, *Pouvoir discrétionnaires de exécutif europée net controle jouridictionnel*, Deventer, 1968, 42.

[46] SCIACCA, *Proportionality and the Balancing of Rights in the Case-law of European Courts*, in federalism.it, 2019, 9. Concerning proportionality in EU law and from a comparative law perspective, See also MATHEWS, *Proportionality Review in Administrative Law*, in Comparative Administrative Law, edited by ROSE−ACKERMAN-LINDSETH-EMERSON, Edward Elgar Publishing, 2017, 405-419, CANANEA, *id*.; STONE SWEET-MATHEWS, *Proportionality Balancing and Global Constitutionalism*, in Columbia Journal of Transnational Law, 47(1), 2008, 73–165.

[47] CJEU, 26 March 2009, C-326/07, Commission v. Italy; 4 June 2002, C- 483/99, Commission v. France; 4 June 2002, C-503/99, Commission v. Belgium; 13 May 2003, C-463/00, Commission v. Spain; del 13 May 2003, C-98/01, Commission v. UK; 28 September 2006, C-282/04 and C-283/04, Commission v. Netherlands; 23 October 2007, C-112/05, Commission v. Germany; 8 July 2010, C-171/08, 10 November 2011, C-212/09,Commission v. Portugal; 8 November 2012, C-244/1, Commission v. Greece.

burden on the private interests at stake[48]. The proportionality test is applied with a variable degree of intensity in different jurisdictions based on the sectors the decision pertains to, but it is fundamentally based on a check for adequacy, necessity, and proportionality strictly construed[49]. In detail, the steps are intended to verify whether the decision (concerning both the balance of the public and private interests at stake and the measure adopted) (i) is suitable to achieve the purpose of the public function as set by law, (ii) is necessary, in the meaning that the decision entails the least restrictive means to achieve the purpose; and (iii) the proportionality *strictu sensu*, or the fair balancing between the costs imposed on other interests and the benefits gained in achieving the goal.

An additional initial step may be included in the proportionality test, the "legitimacy". From a constitutional point of view, this step consists of checking whether the aim of the legal provision can be legitimately pursued by lawmakers and is rationally related to the measure. From this perspective, it has therefore been deemed a very low bar[50]. However, the step of "legitimacy" can also be valued as the quality of the law. It has been noted that legal provisions not clearly defining their purpose risk undermining the effective use of the proportionality test[51]. In light of the three steps of the proportionality test, it seems that the goal

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[48] As effectively expressed by Fleiner, "the police should not shoot at sparrows with cannons" (FLEINER, *Institutionen des deutschen Verwaltungsrechts*, Mohr, 1928, 404, as quoted in MATHEWS, *id*.).

[49] CANANEA, *id*. See also BARAK, *Proportionality. Constitutional Rights and their Limitations*, Cambridge, 2012; SCIACCA, *id.*; for Italian law, see COGNETTI, *Il principio di proporzionalità. Profili di teoria generale e di analisi sistematica*, Giappichelli, 2011.

[50] MATTHEWS, *id.*, 3.

[51] See GERARDS, *How to improve the necessity test of the European Court of Human Rights*, in International Journal of Constitutional Law, 11(2), 2013, 466–490, which noted that "*The more aims and goals are formulated, or the more vaguely the legislature or decision-making body have stated their aims, the more difficult it will be for the Court to determine the precise aim that constitutes the relevant point of reference or "locus" for measuring the suitability of the chosen instrument*". Subsequently, "*The easy acceptance of very broad aims, which are mostly rather empty and meaningless in character, has the result that the requirement of a legitimate aim does not add anything substantial to the judicial reasoning in cases of conflicts between rights or interests. It is difficult to apply any sound proportionality test on basis of such broad aims as the*

to be pursued is always at the center of the compliance test, as the main parameter[52]. A measure is proportionate if suitable to the aim, necessary to the aim, or fairly balanced between the restrictions imposed on private interests and the positive effects in achieving the aim. It seems evident that the test cannot be applied unless the aim to be pursued is clearly identified. Therefore, the vagueness of the national security concept undermines the application of the proportionality test.

Another principle used to review discretional decisions is the principle of reasonableness. This review has its origins in the English Wednesbury doctrine, and it is an alternative to the proportionality test[53]. It is a less structured review, based on criteria of logic and rationality[54]. The review of reasonableness is more abstentionist than the proportionality test, as it is less intrusive and more respectful of the administration's sphere of competence. A decision is not compliant with the principle of reasonableness when so unreasonable to be aberrant. In this sense is the "narrow" or "weak" concept of reasonableness, and the Italian jurisprudence refers to the review of "manifest unreasonableness". It is, therefore, a review intended to safeguard the competence of the administration, to stigmatize only its obvious excesses, based on criteria such as logic, rationality, consistency, and coherence[55]. Hence, the principle of reasonableness itself constitutes a weak legal method to review discretionarily.

In addition to this abstentionist approach, the review of FDI screening

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"general interest."". See also BENNETT, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, in California Law Review, 1979, 1059; LINDE, *Due Process of Lawmaking*, Nebraska Law Review, 1976, 20. See also BICKEL, *The least dangerous branch: the supreme court at the bar of politics*, Yale University Press, 1962, 62–63 and 214–215.

[52] The aim has been defined as the "locus" of effectiveness review (GERARDS, *id.*, 478).

[53] CANANEA, *id.*, 297 et seq.

[54] CANANEA, *id.*, 304. LEDDA, *L'attività amministrativa*, in Il diritto amministrativo degli anni '80,. Milano, 1987, 109, which states that reasonableness is the "extent to which rationality can be achieved with regard to any kind of problem" (our translation).

[55] CANANEA, *id.*, 304, CASSESE, *Il diritto amministrativo e i suoi principi*, In *Istituzioni di diritto amministrativo*, edited by CASSESE, Giuffrè, 13, and CRAIG, *id.*, 616.

decisions under the reasonableness principle does not seem effective due to the national security concept being a parameter of the review.

Since the screening powers must address the risks for national security, these risks are a parameter of the review. Hence, the obligations may be unreasonable if not related to the risks the screening intend to address. For example, an obligation to appoint a director chosen by the authority is manifestly not consistent with the risk of strategic know-how being transferred abroad. However, it must be considered that the risks detected by the authority are relevant to the screening only if in a logical and rational relation to the aim of the screening, and if consistent and coherent with the aim of the screening. Therefore, reasonable connections are both measures-risks and risks-aim. In case the risks detected are not consistent with the aim of the screening, the decision is censored based on irrelevant considerations[56]. However, if the aim is undetermined due to the use of undetermined terms, any risk may be considered a legitimate concern to address, and the review is not effective. The aim of the function is again an important parameter, and its indeterminacy jeopardizes judicial review.

Considering the difficulties in reviewing discretionary decisions, FDI screening regulations set factors the authority must take into account to ensure that the FDI screenings are grounded on objective criteria subject to judicial review. However, they seem hardly relevant to ensure a proper review of the decision if the aim remains undefined. In the following, we will consider the factors set by European law and by Italian Law.

Regulation 452/2019 provides some non-exhaustive factors that may be taken into consideration. Specifically, Art. 4(1) lists “critical” assets or activities that may be affected by the screened transaction, while Art. 4(2) lists factors that relate to investor characteristics. Neither of these lists, however, seems useful in

[56] CANANEA, *id.*, 297 e 298.

providing objective criteria that define the content of the national security concept and thus resolve the difficulties of reviewing a screening decision.

The first list is very broad. The element that qualifies an asset or activity as relevant for screening is the "critical" nature, defined as "*essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union*"[57]. The reference to the essential for security reiterates the issue of what security is. The reference to "significant impact" on the other hand, reiterates the model of security as a defense against an assault on a value but remains silent as to the choice of goods and values to be protected.

The list in Art. 4(2), on the other hand, concerns the investor. It includes elements for assessing the trustworthiness of the investor, but they do not provide useful elements for the content of the screening aim. On the one hand, reference is still made to the concept of "security" without defining it (for example, "*whether the foreign investor has already been involved in activities affecting security or public order in a Member State*")[58]. On the other hand, reference is made to whether the investor has engaged in illegal activities or is subject to the influence of a foreign state. It is clear, however, that it is not enough for any of these elements to exist to ground a veto or conditions. Hence, the issue is to define when the "*serious risk that the investor will engage in illegal or criminal activities*" also entails a risk to national security. Clearly, just any illegal activity, such as the mere risk of tax evasion, would not suffice. Financial crimes may be a more complex issue since they call into question the investor's financial soundness, but it does not entail that the investment is not genuine in the intentions. The risk of lack of material criteria is even greater with regard to the factor related to the control by foreign states. It does not seem enough for the

[57] Regulation UE 452/2019, Recital no. 13.
[58] Regulation UE 452/2019, Article 4(2)(b).

investor to be controlled by a non-European public authority[59]. What is material is the relationship between the third state and the member state. The assessment here shifts to the geopolitical level, and it is even more difficult to foresee an effective judicial review. Courts may not be able to review whether there is reasonable concern arising from the screening or just the authority's intention to be involved in the management of the asset due to its importance.

Finally, the list provided by Regulation No. 452/2019 is non-exhaustive. This is due to the consideration that regulating screening procedures is the "sole responsibility of Member States"[60].

States, however, must provide a list of factors for the authority to consider, which is intended to make the judgment as objective as possible[61]. From the perspective of European law, these factors cannot concur to determine the meaning of the concept of national security. Otherwise, the content of the clause would be left to national law, instead of being a parameter of compliance of national laws with European law.

Regardless of the compliance of domestic law with European law, the domestic factors can be considered to assess their relevance for the screening discretion. From the perspective of domestic law, Italian law can be taken as an example due to its peculiar extent. Even in this legislation, however, it can be noted that - alike European legislation - the factors do not concur to define the concept of national security. Their wording is mostly consistent with that of the EU regulation, but with one important difference. Under the Italian regulations, the authority may also consider "*the suitability of the arrangement resulting from the*

[59] Concerning the Verisem/Syngenta case, the Italian supreme administrative court deemed legitimate the exercise of a veto power towards Psp Verisem Luxemburg Holding S.à r.l. due to the circumstance that the investor was ultimately controlled by the Chinese government. However, this judgment is grounded on the peculiarity of the Chinese legal and economic system, as well as the reference in the Chinese XIV plan quinquennial to agriculture as a strategic target (Consiglio di Stato, sez. IV, 9 January 2023, n. 289).

[60] Regulation UE 452/2019, Recital 7.

[61] CJEU, 26 March 2009, C-326/07, Commission v. Italy.

legal act or transaction [...] *to ensure (1) the security and continuity of supply; (2) the maintenance, safety and operation of networks and facilities*"[62]. The factors relate to the financial and technical soundness of the company operating the asset or carrying out the activity as resulting from the notified transaction. This assessment seems hardly consistent with the idea that FDI screenings are means of defense against economic actions carried out for geopolitical purposes. The focus here shifts to the importance of the asset being protected. The assessment does not only concern the buyer, but rather the business after the transaction. In this context is not relevant if the risks are due to the transaction or pre-exist the transaction. What is relevant is whether the use of the asset or management of the target company requires directives and obligations to ensure national security. This criterion is frequently applied in practice. The exercise of the powers is often justified by the importance of the assets held or activity carried out by the target company rather than by a specific feature of the investor (e.g. a lack of financial and technical soundness or connection with foreign states or criminal organizations). In fact, conditions have been imposed on major private investment funds without any dangerous relationship with "hostile" countries or organizations or any financial or technical lack of soundness being detected[63].

In this way, however, the screening is not aimed at protecting the market from investments moved by geopolitical strategies. As anticipated in the first paragraph, the exclusive focus on the asset or target company involves the risk of using screening decisions on FDI as a tool of intervention in the market.

It has been highlighted that the detection of a risk related to national security is based on a discretionary assessment that is difficult for a judicial court

[62] Art. 2(7)(b) Law Decree No. 21/2012.

[63] Even if the powers are often grounded exclusively on the importance of the target company, it has been noted that Italian authority's exercise of its powers has been "strict and immune to dirigiste temptations or discriminatory intentions" (our translation from Italian; NAPOLITANO, *I golden power italiani alla prova del Regolamento europeo*; in *Foreign Direct Investments Screening. Il controllo sugli investimenti esteri diretti*, directed by NAPOLITANO, il Mulino, 121-140).

to review, due to the absence of a definition of national security. Even if no element suggests the investor has a non-economic purpose, it would be difficult to claim that the management of a strategic or critical infrastructure does not in itself constitute a national security interest. Obligations solely grounded on this importance of the asset would not be, therefore, grounded on an irrelevant consideration.

However, as will be outlined in the next paragraph, such an exercise of screening powers does not seem legitimate. Indeed, it seems that a proper parameter for the review and a criterion of legitimacy may be investigated in the principle of equality. Basing the study of the discretionary decision on the principle of equality leads to qualifying the use of FDI screening as a securitarian safeguard, and thus as a means of defense against investments moved by or useful for geopolitical reasons.

4. The FDI screening procedure concerns a specific investor, a specific investment, and a specific target asset or company. Considering each of these elements in their individual connection to national security, it could be argued that the authority may base its decision on the risks associated with the importance of the asset and that the screening, given the private nature of the investor, may legitimately lead the authority to impose conditions on the use of a such sensitive asset, possibly directing or restricting its freedom of use. However, this use of screening powers does not seem to comply with the rationale for FDI screenings.

We noted that the discretionary decision of the administration can hardly be reviewed by a judge. Hence, considering the transaction as a whole – investment, investor, and target asset/company – and its relevance to the national interest, the court may not have the possibility to review a decision that is only based on the relevance of the assets involved, and not also on the feature of the

investor. The authority may have goals related to national security, and the activity of the company may be useful or dangerous to these goals. This relation would entail a concern on national security grounds that the court may not be able to review.

Broadening the perspective, on the other hand, helps to better detail the analysis that the authority must carry out. It must be considered that there are other assets of the same or comparable nature - or other companies engaged in the same or comparable activity - in addition to those involved in the transaction. These are assets or companies likewise subject to the screening of the target of investment since they are also critical, but they are not screened in the specific case since not affected by the screened investment. The exercise of screening powers is thus inevitably a discrimination between similar assets/companies; one or more are subject to obligations that do not burden the other non-screened ones. The principle of equality, which the CJEU has recognized as a fundamental principle of European law, then comes into play[64]. Under the equality principle, similar situations shall not be treated differently unless differentiation is objectively justified. In the case of FDI screening, the element that justifies the difference in treatment is the screened investment, on which therefore any obligation imposed on the investor or company must be justified. In this sense, an obligation that is due only to the nature of the target or that is designed to impose a certain management of the target company to achieve national security purposes would fail to comply with the principle of equality. Indeed, this obligation would not be justified by the investment, but by the relevance of the asset or activity to national security concerns. These concerns are features common to every similar asset/target, and it is therefore not suitable alone to

[64] CJEU, judgements of 19 October 1977, 117-76 and 16-77, Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen Diamalt AG v Hauptzollamt Itzeho; 13 November 1984, 283/83, Firma A. Racke v. Hauptzollamt Main; European Court; 13 April 2000, C-292/97, Kjell Karlsson and Others.

ground the exercise of screening powers.

The authority may assess the relevance of the infrastructure and impose certain obligations concerning the management of the infrastructure, even if there is no element suggesting the investment is motivated by non-economic intentions, or the investor is otherwise unreliable. In this scenario, however, the legitimacy of the exercise of screening powers should be assessed by taking into account the situation of other similar infrastructures (so-called *tertium comparationis*), not involved in the transaction, and therefore not subject to any obligation. Where the decision is based on the feature of the infrastructure and the need for it to be operated in a certain way to ensure national security, there would be unjustified discrimination among these infrastructures. Under the principle of equality, the imposition of specific obligations on one operator must be justified by objective elements that differentiate it from others. This element is the investment subject to screening. Therefore, it is not enough for conditions to be imposed for purposes of national security. Any obligation must be linked logically and legally to the investment, justifying the different treatment from other operators.

This is not a legal method of reviewing the discretionary decision, but a legal principle that constitutes an external limit to the discretionary assessment. For the purposes of FDI screening, however, this principle also serves as a criterion of the administrative decision and of the judicial review. The judicial courts carry out this review focusing not on the concept of national security, but on the factual and logical connection of the risk with the investment or investor[65]. Therefore, the enforcement of this principle does not entail the mentioned issues related to the indeterminacy of the concept of national security, and it can ensure that

[65] The application of the equality principle does not eliminate the discretion of the choice. The very concept of reliability calls for a discretionary assessment carried out by the administration. Nevertheless, under this principle, the authority would have an obligation to specify the reasons why it does not consider the investor trustworthy, not only by recalling the relevance of the asset. On this reliability assessment, a review by the court based on the criteria of reasonableness and proportionality would then be possible, but without relying on the vague concept of national security.

screenings are not used as a gateway for the State to enter the management of strategic private companies.

The principle can also be valued with regard to an assessment concerning the technical and financial soundness of the company as resulting from the transaction[66]. Under the principle of equality, the authority cannot impose conditions aimed at ensuring the best compliance of the target company's activity with national security interests in light of the importance of the operated infrastructure. Instead, the authority may impose conditions only aimed at remedying the lack of financial soundness due to the screened transaction (e.g., a risk of an asset-tripping investment or a leveraged buyout).

The principle provides a legal criterion on which the discretionary decision must be based, subject to judicial review even in the absence of similar assets or companies in the specific case. Indeed, the equality principle not only governs the application of the FDI screening regulations in the specific application but, being a fundamental principle of European law, also directs the interpretation of the legal provisions. The *rationale* of FDI screenings may be comprehended based on this principle, as FDI screenings have logical and legal grounds in the transaction. Accordingly, it can be stated that the discretionary assessment of the administration regards not only the connection between the use of the asset/company and the national interest but also the specific features of the investment and investor. It is thus clarified the purpose of FDI screenings as a tool to neutralize risks for national security arising from a transaction, and not as a tool to pursue national security purposes. Along with this reasoning, the principle of equality grounds a threat-based model of FDI screenings.

An additional limitation on screening powers seems to derive from the equality principle. The outcome of this analysis is that FDI powers are a reaction to a threat, which is the transaction being screened or the risks arising from it. The

[66] This factor is provided by Italian law, as mentioned in the previous paragraph.

consequence is that the powers are justified if the threat endures. Since the obligations imposed on the parties are based on the features of the investment and investor, they are temporary. This timing cannot be provided *ex ante*. However, the factual circumstances arising from the triggering events change sooner or later. The investor may sell the shares or sell the business. In this context, the threat entailed by the investor's shareholding ceases, and the imposed obligations lose their legal basis. If this second transaction entailing the cease of the threat is itself a triggering event, a screening may be initiated, and/or a further notification may be due, and possibly a further threat is detected and new obligations imposed. However, this outcome is based on a second and autonomous assessment. The obligations imposed cannot pursue a long-term goal, being only related to the temporary composition of the target company's shareholding.

This limit of the FDI screening powers is a consequence of the consideration of the FDI screening procedure as a protection against threats, in compliance with the principle of equality. On these premises, a study of FDI screenings may be carried out not focusing on how to achieve national security, but on how to protect the national and European economy from threats to national security.

5. The analysis moves from the indeterminacy of the concept of national security. As noted, the term seems tied to an idea of threat/defense, but it is not suitable to provide criteria to identify (a) what threats to address and (b) what values to protect. In the context of FDI screening regulations, our analysis shows that the equality principle dictates to the law-applying body that the threats to address are those arising from the investment.

However, due to the vagueness of the concept of national security, issues remain concerning what values the regulations are supposed to protect. Screening powers may be grounded on a vast array of national concerns, and the goal

effectively pursued by the authority may not be suitable to be reviewed by judicial courts. This entails a risk of politicization of the decision and a growing shadow of protectionism.

Consistently with the dogmatic and methodologic premise of the analysis, the study only concerns national security within FDI screening regulations. Additionally, the results do not imply that it is not possible for States to limit the economic freedom of certain sectors or equip themselves with tools to intervene in the market. To this end, however, suitable legal means must be introduced and used. If certain assets or sectors are considered particularly important for strategic reasons, States may regulate such assets or sectors providing further limits on private activities and imposing further controls and limitations. Under European law, national security remains a legitimate reason to limit economic freedom. To comply with the equality principle and with rule of law, the rising geopolitical need to limit corporate or investment rights concerning certain activities and direct private economy should be addressed with general or sectorial regulations. Common issues require general provisions, and not multiple ad-hoc decisions.

Regardless of security issues, there seems to be a growing tendency to reconsider economic freedoms, and thus the idea that the national interest lies in the maximal efficiency of the market. This tendency may lead to reconsidering the role of the State in the market, and thus the paradigm of the state-market relationship that has been dominant since the privatizations and liberalizations of the 1980s and 1990s under the ordoliberal approach to market regulation. In this context, since the FDI screening provides the administration with wide discretion to derogate economic freedom principles, they have been considered a new tool of State intervention in the market, contrary to the mentioned paradigm. However, the outcome of this analysis shows that FDI screening regulations must be understood under the threat-based model. Their exercise is a reaction to a threat, and not a key to enforce a new interventionism or dirigisme.

THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) IN THE EVOLVING NATIONAL SECURITY LANDSCAPE

Ferruccio M. Sbarbaro* – Ilaria Grimaldi**

ABSTRACT: *The increasing integration of trade and the wider effects of globalization have enhanced the potential issues related to foreign investments for national governments. As a shield towards deals and operations which may impair national security, United States established a dedicated body aimed to screen and review foreign investments – the Committee on Foreign Investment in the United States (CFIUS) – which is still struggling to find a balance between the multifaceted functions attributed by the Executive and the criticisms arising from the Legislative branch.*

The present article tries to draw a state of the art of CFIUS through the analysis of its reforms and implementing regulations since 1975 to the most recent provisions, highlighting its transformation from a relatively obscure executive committee to a major guarantor of national security towards foreign investment entities.

It also emphasizes how CFIUS and the U.S. administration reacted to the "Chinese investment era", as well as the coexistence of federal and state regulations on foreign investments in strategic industries, through the preemptive force of CFIUS regulation.

As a landmark case, Section 8 provides for a comprehensive overview of the TikTok saga, started under President Trump's administration and still under

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evaluation by President Biden's office. How TikTok will be addressed as a national security issue can clarify whether the new administration will differently react to further waves of Chinese investments in American critical infrastructures, and consequently whether CFIUS will finally find a balance between the two sides of the coin: granting the positive economic impacts of foreign investments and protecting domestic strategic assets linked to national security.

SUMMARY: 1. Introduction. – 2. The origins of CFIUS. – 3. The Foreign Investment and National Security Act (FINSA) of 2007. – 4. National Security and the Chinese Challenge. – 5. The Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018. – 6. Preemption of CFIUS regulations over state legislation in FDI screening. – 7. CFIUS's Last Call: President Biden's Executive Order N. 14083/2022. – 8. Back To China: The TikTok Saga and the open challenges for CFIUS.

1. In the United States, as in other countries, foreign investment regulation has always worked both as a reflection of political and economic uncertainties and as a response to general economic concerns related to national security issues. While in the original approach the American system would not substantially restrict foreign investments, through both legislative or *de facto* obstacles, most recent stances from Congress and the Executive branch have proved an increasing pressure on foreign operations in the territory of the U.S., towards a more domestically oriented economic policy[1].

[1] United States Trade Representative, *The Obama Administration's Unprecedented Trade Enforcement Record* (January 2015), available at *https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/january/fact-sheet-obama-administration%E2%80%99s*; see also CHANDY – SEIDEL, *Donald Trump and the future of globalization* (Nov. 18, 2016), in *Brookings Institution*, available at *https://www.brookings.edu/blog/up-front/2016/11/18/donald-trump-and-the-future-of-globalization/*; the domestically oriented economic policy is likely to continue under President Biden, *see Biden's new China doctrine*, in *The Economist* (July 17, 2021), available at *https://www.economist.com/leaders/2021/07/17/bidens-new-china-doctrine*.
For previous reflections on the traditional american approach to the "national security paradigm" see SACCO GINEVRI – SBARBARO, *La transizione dalla golden share nelle società privatizzate*

Defining national security is probably the major challenge in the analysis of any FDI screening system and, in the framework of this paper, for understanding CFIUS's scope.

Neither Congress nor the Executive, while regulating CFIUS, have dared to define what national security entails, sometimes providing for the misuse of the Committee's scrutiny to block transactions for mere political reasons.

Examining CFIUS original regulation and its various reforms may help to clarify whether the lack of a detailed definition of national security[2] allows a too broad authority for blocking foreign investments or it promotes CFIUS's ability to adapt to new sources and forms of investment threats, keeping its focus even when the landscape evolves.

2. Since its establishment, the *Committee on Foreign Investment in the United States* (CFIUS) had struggled in developing and focusing its precise function, due both to the criticism addressed by Congress, because of CFIUS's alleged blurred review process, and to the needed balance between addressing U.S. national security concerns and allowing the positive economic impact of potential investment and acquisition deals from foreign countries[3]. This led, during the years, to a dramatic alteration in the framework of CFIUS procedure,

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ai poteri speciali dello Stato nei settori strategici: spunti per una ricerca, in *Le Nuove Leggi Civili Commentate*, 1, 2013, at 33.

[2] See *Foreign Direct Investment, the Exon-Florio Foreign Acquisition Review Process, and H.R. 2624, the Technology Preservation Act of 1991, to Amend the 1988 Exon-Florio Provision: Hearings Before the Subcomm. on Econ. Stabilization of the House Comm. on Banking and Finance and Urban Affairs*, 102nd Cong., 2nd Sess. (1992), in which *"have not defined national security. I think the intent of Congress was very clear, that national security should be looked at in a broad sense"*.

[3] See *The Operations of Federal Agencies in monitoring, reporting on, and analyzing foreign investments in the United States: hearing before the H. Subcomm. on Government operation*, 96th Cong. 334-45, 335 (statement of C. Fred Bergsten): a Treasury memorandum is reported stating that the original scope of CFIUS was to *"dissuade"* Congress's efforts to regulate the aggressive investment coming from OPEC (*Organization of the Petroleum Exporting Countries*).

which was many times subject to discussion and reforms[4].

CFIUS was initially established in 1975 by President Ford with his Executive Order n. 11858[5] as an interagency board composed of the heads of several departments and agencies within the executive branch[6]. The Executive Order

[4] For analysis on the impact of congressional and regulatory amendments to CFIUS see ALVAREZ, *Political Protectionism and United States International Investment Obligations in Conflict: the hazards of Exon-Florio*, in *Virginia Journal of International Law*, 30, 1 (1989); NANCE – WASSERMAN, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, in *Michigan Journal of International Law*, 11, 926 (1990); CLARK – JAYARAM, *Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions*, in *Cornell International Law Journal*, 38, 391 (2005); more recently, see Securing American Food Equity Act (SAFE Act) of 2016, S. 3161, 114th Cong. § 2 (2016), presented by Senator Chuck Grassley to place the Secretary of Agriculture on the Committee, as a narrow amendment to CFIUS's modus operandi and as an attempt to introduce food security as a core factor in the Committee's review; Covington & Burling LLP, *CFIUS and Foreign Direct Investment Under President Donald Trump 5 (2016)*, available at *https://www.cov.com/-/media/files/corporate/publications/2016/11/cfius_and_foreign_direct_investment_under_president_donald_trump.pdf*; *J. Cornyn, Feinstein, Burr Introduce Bill to Strengthen the CFIUS Review Process, Safeguard National Security, John Cornyn: United States Senator for Texas* (Nov. 8, 2017), available at *https://www.cornyn.senate.gov/content/news/cornyn-feinstein-burr-introduce-bill-strengthen-cfius-review-process-safeguard-national*.

[5] Exec. Order No. 11858, 40 F.R. 20263 (May 7, 1975): President's order stipulated, pursuant to Section 1 (b), that the Committee would have *"the primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment"*. Due to its responsibility the Committee was directed to: *"(1) arrange for the preparation of analyses of trends and significant developments in foreign investments in the United States; (2) provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States; (3) review investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests; (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary; and (5) coordinate the views of the Executive Branch and discharge the responsibilities with respect to Section 721(a) and (e) of the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 et seq.) ("Defense Production Act")".* In fulfillment of its tenure, the Committee would *"as the need arises, (...) submit recommendations and analyses to the National Security Council and to the Economic Policy Board. It shall also arrange for the preparation and publication of periodic reports"*.

[6] In the original configuration, pursuant to Section 1 (a) of the enabling Executive Order of President Gerald Ford (no. 11858, 1975), the Committee was composed by the Secretaries of State, Defense, Treasury and Commerce, the Attorney General, the Director of the Office of Management and Budget, the United States Trade Representative and the Chairman of the Council of Economic Advisers. President Ford appointed the Secretary of the Treasury as Chairman of the Committee: in doing so, it granted to the Chairman the possibility to invite representatives of other departments

found its roots in the *Defense Production Act* (DPA) of 1950, which gave the President the power to order companies producing goods and supplying services to support national defense; the law was first used during the Korean War and was later enlisted to help the U.S. recover from natural disasters, energy security and to protect against terrorism. The Act was then followed by the Implementing Regulation called *Defense priorities and allocation system* (DPAS)[7].

The U.S. government appointed several industries as crucial to national security, demanding a specific committee to review acquisitions of American firms by foreign entities which could negatively affect the ability of the nation to defend itself. The legislative branch also pushed for the institution of a filter for foreign direct investment schemes, in light of the growing levels of inbound investment coming from OPEC entities and the suspicion that such investments were motivated by political rather than economic reasons[8].

In this regard, the Committee was mandated, through a significant responsibility duty, to analyze whether a proposed investment or acquisition of U.S. companies or operation by a foreign entity could afflict national security and, consequently, to report its recommendation to the President.

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and agencies to participate. In 1980, President Jimmy Carter added the United States Trade Representative and substituted the Chairman of the Council of Economic Advisers for the Executive Director of the Council on International Economic Policy (Exec. Order No. 12188, 45 F.R. 989, January 4, 1980).

[7] For further insights see The Defense Production Act: Choice as to Allocations, in *Columbia Law Review*, New York City: Columbia Law Review Association, Inc. 51 (3): 350-361, March 1951; LOCKWOOD, *Defense Production Act: purpose and scope*, Washington D.C., Congressional Research Service, June 22, 2001.

[8] In 1975, the United States were facing a difficult oil embargo, motivated by Middle Eastern dislike of American foreign policy: in this regard, Congress feared *"the return in the form of direct investment of a portion of the OPEC's huge petrodollar surplus, gained just after a politically motivated oil embargo on the United States"*: KANG, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, in *International Labour Organization*, 51, 302 (1997); see also BYRNE, *Protecting National Security and Promoting Foreign Investment: maintaining the Exon-Florio Balance*, in *Ohio State Law Journal*, 67, 2006, 849; STAGG, *Scrutinizing Foreign Investment: How much Congressional Involvement is too much?*, in *Iowa Law Review*, 93, 2007, 327-329; GRIFFIN, *CFIUS in the age of Chinese investment*, in *Fordham Law Review*, 85, 2017, 1762.

Specifically, following receipt of notice of a transaction from a foreign entity, which could not be withdrawn without CFIUS's approval[9], the Committee would start an initial thirty-day review. Then, if the Committee determines that the deal requires further evaluation, there would be a forty-five-day investigation about the potential effects of the transaction on U.S. national security; as the Committee's investigation would be completed, it would submit its final report to the President, who would resolve with a final decision regarding the deal within the next fifteen days[10].

However, since its infancy, the Committee was mostly inactive, only meeting ten times in the first five years of tenure; therefore, foreign counterparts were mainly concerned about the negative publicity resulting from CFIUS review, along with the fear of a possible negative outcome of the transaction, and these factors somehow concurred to discourage foreign investment. At the same time, on the opposite side, CFIUS showed a passive and investment-friendly approach to review when it came to screen an operation: unsurprisingly, this situation entailed growing tension between the Committee and the Congress, which advocated a

[9] Pursuant to 31 C.F.R. § 800.406 and § 800.509, and § 802.404 and § 802.509, a party or parties to a transaction could request withdrawal of their notice or declaration at any time during the notice review or investigation periods or declaration assessment period; it was mandatory that the request was made in written form and it was subject to the approval of CFIUS.

[10] Exec. Order No. 11858, at sec. 7 expressly regulates investigations as follows: *"(1) Investigations. (a) The Committee is designated to receive notices and other information, to determine whether investigations should be undertaken, and to make investigations, pursuant to Section 721(a) of the Defense Production Act. (b) If the Committee determines that an investigation should be undertaken, such investigation shall commence no later than 30 days after receipt by the Committee of written notification of the proposed or pending merger, acquisition, or takeover. Such investigation shall be completed no later than 45 days after such determination. (...) (d) A unanimous decision by the Committee not to undertake an investigation with regard to a notice shall conclude action under this section on such notice. The Chairman shall advise the President of said decision.*

(2) Report to the President. Upon completion or termination of any investigation, the Committee shall report to the President and present a recommendation. Any such report shall include information relevant to subparagraphs (1) and (2) of Section 721(d) of the Defense Production Act.".

more protectionist stance[11].

Simply put, Congress blamed CFIUS for acting just as an advisory board[12], even though the Committee was given broad powers pursuant to its enabling executive order[13]. However, CFIUS could not directly block the reviewed operations, but only recommend the President to do so. Therefore, the only effective way to take substantive action could have been recommending the President to invoke the *International Emergency Economic Powers Act* (IEEPA) of 1977[14], authorizing the President to proclaim an unusual and exceptional threat to the federal security, and to restrict transactions and freeze assets in response to such concerns. Nonetheless, invoking this Act could have been seen as a clear hostile act against the foreign counterpart.

The need for a legal mechanism or at least a governmental tool for the President to block acquisition of U.S. companies by foreign counterparts without invoking a national emergency culminated in the *Exon-Florio Amendment* of

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[11] See GRAHAM – MARCHICK, *U.S. National Security and Foreign Direct Investments*, *The Peterson Institute for International Economics*, 33-73 (2006).

[12] *Ibidem*. See also 135 CONG. REC. H 902 (daily ed. Apr. 3, 1989), when Representative Frank Wolf (R-VA) stated that CFIUS's scrutiny never required, since its establishment, *"any Federal intervention"*. On this regard, later in years, see *"Bush, Congress in Dark about Port Deal"*, CBS 4 Denver (Feb. 22, 2006), available at *http://web.archive.org/web/20060310080155/http://cbs4denver.com/national/topstories_story_053102937.html*.

[13] Exec. Order No. 11858, § 1 (b)(3), which authorized the Committee to review any deal that *"might have major implications for US national interests"*, while not giving to CFIUS actual executive powers to ensure its recommendations were fulfilled.

[14] International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. § 1701 (2012). Signed by President Jimmy Carter, the Act empowered the President to examine, regulate or prohibit foreign organizations' economic operation and to adopt and enforce, consequently, penalties rules. Violations of IEEPA penalties had and have severe civil and criminal consequences: it is illegal to violate, conspire to break or cause a violation of any license, order, restriction. As an example, IEEPA was used by President George W. Bush, after the 9/11 terrorist attacks, in order to seize terrorist groups' assets; and also, it was used by President Donald Trump in 2019 to impose tariffs on Mexican exports, due to the national security concern posed by illegal Mexican immigration into the U.S. See generally BLOCK, *Civil liberties during National Emergencies: the Interactions between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, in *N.Y.U. Review of Law & Social Change,* 29, 459-478 (2005).

1988[15], which explicitly gave the President the power to *"initiate an investigation to determine the effect on national security of mergers, acquisitions, and takeovers of U.S. corporations by foreign persons and persons engaged in U.S. interstate commerce"*[16], and to block acquisitions of particular concern or to impose conditions on the acquisition before approving the deal[17].

The President quickly delegated these duties straightforwardly to the Committee[18], which could consequently initiate reviews itself[19]; this evolutionist feature of CFIUS promoted its conversion from a purely administrative board to a significant authority recommending the President on foreign investment transactions.

Anyway, the core issue in this attempt to broaden and stiffen CFIUS scrutiny lied in the fact that neither its statute nor the subsequent Implementing Regulations[20] provided a clear definition of "national security" that could sharpen

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[15] In 1988 Congress passed and President Ronald Reagan signed the Omnibus Trade and Competitiveness Act (including the so called "Exon-Florio" Amendment), Pub. L. No. 100-418: the amendment was sponsored by Senator J. James Exon, of Nebraska, and Representative James J. Florio, of New Jersey; while the President no longer had to declare a national emergency in order to block acquisitions of U.S. companies, he had other different limits to this kind of 'veto', namely the fact that he had found *"credible evidence"* that the foreign investment would impair the national security. See JACKSON, Congressional Research Service, RL 33388, *The Committee on Foreign Investment In the United States (CFIUS)*, 1, 2016. With Exon-Florio, Congress amended Section 721 of the DPA: see also WALDECK, Note, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, in *Hastings Law Journal*, 42, 1175 (1991); SHEARER, Comment, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, in *Houston Law Review*, 30, 1729, 12 (1993).

[16] *Exon-Florio*, § 721 (a), 102 Stat., 1425.

[17] *Id*. § 721 (c), 102 Stat., 1425-1426.

[18] By the Exec. Order No. 12661, 54 F.R. 779 (December 27, 1988): President Reagan delegated to CFIUS his initial review and decision-making authorities, as well as his investigative responsibilities.

[19] See U.S. Government Accountability Office, *Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness* (2005), available at http://www.gao.gov/new.items/d05686.pdf.

[20] After extensive public comment, the Department of Treasury issued its final regulations in November 1991, implementing the Exon-Florio provision: Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R., 800.

the Committee's action[21]. It was only given a list of non-exhaustive factors to screen whether a deal could affect national security, such as the potential national-security-related effects on U.S. critical infrastructure, including major energy assets[22]; whether the covered transaction[23] could be a foreign-government-controlled transaction; the state of relations between the company's country and the United States.

The Legislative branch felt unsatisfied once again and tried to include economic interest considerations as a factor in CFIUS scrutiny, nonetheless meeting a strong opposition by the Executive; as a consequence, the general opinion claimed the main reason of a mild scrutiny would be the Treasury Secretary's will to encourage foreign investment[24].

The silver lining in the breadth and broadness of these factors can be found in the chance for CFIUS to involve in reviews also industries formally outside of the defense industrial base, and take into account the economic effects of such transactions, as the Congress wanted to construe the term "national security" in a more flexible way[25]. Nonetheless, CFIUS usually kept screening transactions in industries at least tangentially related to national security (such as technology, telecommunications, transportation).

With Exon-Florio, Congress also introduced a new honed tool for FDI

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[21] Treasury Department officials indicated that each member of the Committee was expected to apply the definition of national security consistently with the representative agency's specific legislative mandate: see JACKSON, Congressional Research Service, RL 33312, *The Exon-Florio National Security Test for Foreign Investment*, 2013, 8.

[22] 31 CFR 800, Discussion of Final Rule: where the Treasury Department indicated that transactions subject to review might be considered if they *"involve products, services, and technologies that are important to U.S. national defense security requirements"*.

[23] In *Exon-Florio* the term *covered transaction* is defined as *"any merger, acquisition, or takeover, that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States"* (50 U.S.C. § 4565 (a)(3)).

[24] BYRNE, at 886; GRAHAM – MARCHICK, at 49.

[25] See GRAHAM – MARCHICK, at 38 (quoting 134 Congressional Record, S48333 (daily ed. Apr. 25, 1988) (statement of Sen. Exon)).

screening: the President, and so the Committee, through one or more agency, could enforce a *mitigation agreement* with parties to a transaction, in order to moderate any critic aspect of the deal, which might be identified as a threat for national security and could not be addressed under other existing authority, and to hopefully conclude it and enjoy its potential positive effects on national economy[26].

Nonetheless, the perception of new threats arising from innovative technological fields tweaked CFIUS's quality and authority of reviews, claiming for legislative amendments that could remove any loophole in the existing regulations, as well as nurture American influence on international trade, encouraging foreign direct investments with a more economically focused review.

One successful attempt to amend Exon-Florio was launched in 1992 by Senator Byrd – the so-called *Byrd Amendment*[27] – which apparently strengthened CFIUS's tenure towards acquisitions pursued by foreign governments or their agents (specifically, in case of *state backed* transactions that could affect national security in terms of control[28]). Not only it narrowed the specific basic qualification in CFIUS's review, but the Amendment also enriched the Committee's procedure, by introducing a presidential written report regarding whether or not to intervene in a reviewed operation, to be delivered to Congress[29].

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[26] *Exon-Florio*, § 2170 (1)(1)(A).

[27] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837 (106 Stat. 2315, 2463-65 (1992)), entitled *"Defense Production Act Amendments"*. In 1993, in fulfillment to Committee's latest responsibilities, the makeup of CFIUS changed again under President B. Clinton (Exec. Order No. 12860, 58 F.R. 47201 (Sep. 3, 1993)), by adding the Director of the Office of Science and Technology Policy, the National Security Advisor and the Assistant of the President for Economic Policy.

[28] *Id.*, § 837 (a)(2)(b), 106 Stat. 2315, 2463-65 (1992), in which a *"state backed"* subject is *"controlled by or acting on behalf of a foreign government"*. See SACCO GINEVRI – SBARBARO, at 35.

[29] *National Defense Authorization Act for Fiscal Year 1993*, § 837 (c), which amended Section 721 (g) of the DPA of 1950 *"Report to the Congress"*, establishing that *"The President shall immediately transmit to the Secretary of the Senate and the Clerk of the House of Representatives a written report of the President's determination of whether or not to take action (...), including a*

However, Congress's discontent grew again because of its aim to construe the Amendment as a mandatory prescription for the Committee to start full investigation (the forty-five days phase), every time the covered transaction meets the mentioned requirements. By contrast, CFIUS took it only as a discretional indication[30], causing a new conflict between legislative and executive branches, basically because of Congress's apprehension for a "Middle East threat", after the terrorist attacks of 9/11[31]. Those events, indeed, changed U.S. approach towards national security and led to a comprehensive reconstruction of the Committee's review mechanism[32].

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detailed explanation of the findings made (…) and the factors considered (…). Such report shall be consistent with the requirements of subsection (c) of this Act".

[30] *Id*., § 837 (b), which is entitled *"mandatory investigations"*, nonetheless stating that *"the President or the President's designee shall make an investigation, as described in subsection (a), in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States"*.

[31] The leading case in which the Amendment came under intense scrutiny by the 109th Congress was the "Dubai Ports World transaction" (U.A.E. state-owned corporation) over an American corporation (2006): in particular, while many members of Congress believed that under the Byrd Amendment and subsisting the requirement of a "state backed" operation the Committee was mandated to conduct a full investigation (forty-five days), CFIUS decided not to, resolving, after an extensive review, that the operation did not affect the national security issue, so it did not meet the second requested requirement. See TURAK, *Dubai's massive port operator DP World is delisting and returning to private ownership*, CNBC (Feb. 17, 2020); MARCHICK, *National foundation for American policy, swinging the pendulum too far: an analysis of the CFIUS process post-Dubai Ports World*, National Foundation for American Policy, 5, 2007, available at *http://www.nfap.com/researchactivities/studies/NFAPPolicyBriefCFIUS0107.pdf*.

[32] As well as its composition, which was widened again by adding the Secretary of Homeland Security and, later, five observer agencies (see President Bush's Exec. Order No. 13286, 68 F.R. 10619 (Mar. 5, 2003)). The "healing" process dedicated to Committee's duties and functions culminated in late 2006 with the *Lucent Technologies Inc*. acquisition by a French company (*Alcatel SA*), approved by the Committee after a special "security arrangement". The arrangement led to a clear change in the operative mechanism of CFIUS: the usual procedure began with a voluntarily file report by foreign counterparts, so that they could find a *safe harbor* in the Committee's decision, which could have been construe as definitive. The special Security Arrangement in the Alcatel deal permitted CFIUS to reopen a review of the deal and overturn approval at any point (see JACKSON, CRS RL 33388, at 6-7).

3. The lack of strictness complained by Congress led in 2007 to the enactment of the *Foreign Investment and National Security Act* (FINSA)[33] and the consequential President Bush's Executive Order n. 13456 of 2008[34]: FINSA conducted to a reform of the original review process carried out by CFIUS and an actualization of the informal review process introduced by the Exon-Florio Amendment.

First, through the implementation of the mentioned executive order, FINSA broadened CFIUS's focus to every *state-backed* operation, designating a lead agency for each covered transaction[35] with respect to the nature of the transaction, in order to grant a more technical oversight. In particular, FINSA added *critical industries* and *homeland security* as core factors for the Committee's scrutiny process, including the foreign operations' effects on "critical infrastructure"[36]: such effort was made to identify specific economic areas which could be potentially treated as national critical infrastructure (i.e.

[33] Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending 50 U.S.C.S. app. § 2170) *"to ensure national security while promoting foreign investment and the creation and maintenance of jobs, to reform the process by which such investments are examined for any effect they may have on national security (...)"*. FINSA was introduced by Senator Dodd and was adopted by Senate by unanimous consent: a month later, the House accepted the Senate's version, which was then signed by President Bush. Concerning FINSA's effect see PLOTKIN, *Foreign Direct Investment by Sovereign Wealth Funds: using the market and the Committee on Foreign Investment in the United States together to make the United States more secure*, in *The Yale Law Journal*, 2008, 91; GUACCERO – PAN – CHESTER, *Investimenti stranieri e fondi sovrani: forme di controllo nella prospettiva comparata USA-Europa*, in *Riv. Soc.*, 06, 2008, 1359; O'BRIEN, *Barriers to Entry: Foreign Direct Investment and the regulation of sovereign wealth fund*, in *The International Lawyer*, 42, 1231 (2008); CARROLL, Comment, *Back to the future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, in *Emory International Law Review*, 23, 167, 183-86 (2009); WEIMER, Note, *Foreign Direct Investment and National Security Post-FINSA 2007*, in *Texas Law Review*, 87, 663, 672-78, 682-83 (2009).

[34] Exec. Order No. 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008), which implemented the law of 2007 also by making some substantive changes to the Act; the Treasury Department later finalized its regulations implementing the law (31 C.F.R. part 800, November 21, 2008; Federal Register, November 21, 2008, p. 70702).

[35] Pursuant to FINSA, Sec.3 (5).

[36] *Id.*, Sec. 2 (a)(5)(6), where the term 'national security' *"shall be construed so as to include those issues relating to 'homeland security' including its application to critical infrastructure"*.

telecommunications, energy, financial services); therefore control transactions of national companies to foreign entities could certainly raise national security concerns.

In this regard, CFIUS composition was innovated too, by adding the Secretary of Energy as a voting member, the Secretary of Labor and the Director of *National Intelligence* as nonvoting members, *ex officio*, in order to expand the technicality of the review process as requested by Congress.

The Committee's common procedure was also modulated by encompassing both voluntary and involuntarily filed transactions: the latter could occur if the covered transaction could result in the foreign control of a national corporation or in case of a previously reviewed transaction that presented false or misleading information.

This way, FINSA confirmed an informal review process, which allowed individual firms involved in a transaction, prior to the formal filing, to discuss the operation with the Committee directly and privately, in order to correct any glaring issue and possibly to abandon the deal without risking any negative publicity[37]. Congress, indeed, officially confirmed and actually codified CFIUS's *mitigation agreements* procedure[38], which gave the Committee – or a lead agency on behalf of the Committee – the authority to *"negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that*

[37] See Testimony of Robert Kimmett, Briefing on the Dubai Ports World Deal Before the Senate Armed Services Committee, February 23, 2006, where, according to Treasury Department officials, the informal mechanism allowed *"CFIUS staff to identify potential issues before the review process formally begins"*. See also JACKSON, CRS RL 33312, at 10.

[38] Defined as *"interim protections to address specific national security concerns identified during the review or investigation of withdrawn transactions"*: Committee on Foreign Investment in the United States, *Annual Report to Congress CY 2013*, at 20. From 2011 to 2013, twenty-seven reviews were subjected to legally binding mitigation measures; in 2013 alone, eleven cases used mitigation measures.

arises as a result of the covered transaction"[39]. For each investigation, based on a risk-based analysis and culminated in a *mitigation agreement*, the Committee could designate a specific agency responsible for the compliance to the agreement[40].

Furthermore, FINSA empowered President's action in reviewing and blocking any transaction which might impair national security: President's resolution became ultimate under FINSA, without any possible judicial review[41].

Since FINSA's enactment, on one hand Congress codified a broader control on the Committee, appointing itself as the monitor entity on CFIUS, through detailed reports to be provided by the Committee upon completion of either a review or an investigation or even upon simple requests from any member[42]. On the other hand, Congress sharpened CFIUS's operational script, mainly focusing on the economic impact of foreign investment rather than limiting its review to strict national security issues[43]. As a result, the reviews carried out by CFIUS would not limit to mergers, acquisitions and takeovers in case of a foreign government-controlled acquirer, but they would cover any acquisition which might impair

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[39] FINSA, Sec. 5.

[40] *Id*. Sec. 9, § 721 (h)(3)(A), which provided for the *"imposition of civil penalties for any violation […] including* [violations of] *any mitigation agreement"*. Moreover, on November 21, 2008, Treasury published regulations on the process of CFIUS: Regulation Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70, 702 (codified at 31 C.F.R. § 800 (2008)).

[41] FINSA, Sec. 6, entitled *"Action by the President",* at (e), which stated that *"The actions of the President […] and the findings of the President […] shall not be subject to judicial review".*

[42] FINSA, Sec. 2, § 721 (3) *"Certifications to Congress"* and Sec. 7, § 721 (g)(1), entitled *"Increased oversight by Congress"*, pursuant to which CFIUS had been mandated to *"promptly provide briefings on a covered transaction for which all action has concluded […] or on compliance with a mitigation agreement or condition imposed with respect to such transaction"*.

[43] See SAHA, *CFIUS now made in China: dueling National Security review framework as a countermeasure to economic espionage in the age of globalization*, in *Northwestern Journal of International Law and Business*, 33, 199, 220-22 (2013); STANLEY, *From China with Love: espionage in the age of foreign investment*, in *Brooklyn Journal of International Law*, 40, 1033, 1058-61 (2015).

national security or would result in foreign control of a "critical infrastructure"[44].

4. A significant shift in CFIUS's approach to national security from an economic standpoint happened as a consequence of the opening of what can be conventionally defined as the "Chinese investment era"[45]. Even though the U.S. government assured Chinese counterparts to *"maintain an open investment environment"*[46], Congress and CFIUS have reacted to Chinese inbound investment by applying deep pressure[47].

The primary concern triggered by Chinese corporations and their rapid growth in investing in the U.S. was their tight relationship with the government[48], as well as the tense nature of Sino-U.S. relations. Not only State-owned enterprises (SOEs) were an evident source of mistrust, given their unambiguously

[44] Letter from David F. Denison, President and Chief Executive Officer of the Canada Pension Plan Investment Board, to the U.S. Department of the Treasury, Dec. 7, 2007, which exposed FINSA's ambiguity about how to clarify whether a specific industry field is to consider as a "critical infrastructure". In this regard, the Department of Treasury reassured that CFIUS would conduct a case-by-case investigation in order to define the specific operation submitted as a threat for critical infrastructure. More in detail, 31 C.F.R. § 800.208 defined "critical infrastructure" as *"in the context of a particular covered transaction, a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security"*.

[45] Here's the main controversial aspect of CFIUS process: finding a balance between real national security issues for U.S. and the potential economic effects of increased investment. China's rapid accumulation of wealth posed a significant opportunity to boost U.S. economic growth: see HANEMANN ET AL., *Rhodium Grp., Two way Street: 25 years of US-China Direct investment*, 2016, available at *http://rhg.com/wp-content/uploads/2016/11/TwoWayStreet_FullReport_En.pdf.*

[46] Press Release, U.S. Dep't of State, Joint U.S.-China press statements at the conclusion of the Strategic & Economic dialogue (July 10, 2014), available at *http://2009-2017.state.gov /secretary/remarks/2014/07/228999.htm*.

[47] JACKSON, CRS RL 33388, at 36: the Author showed that between 2012 and 2014 Chinese companies were involved in 68 of the 356 covered transactions reviewed by CFIUS; U.K. corporations were a distant second at 45. Even later, between 2014 and 2017, Chinese corporations were the primary source of covered transactions for CFIUS scrutiny: see HANEMANN – ROSEN, *Rhodium Grp., Don't misread old tealeaves: Chinese investment and CFIUS* (2016), available at *http://rhg.com/notes/dont-misread-old-tealeaves-chinese-investment-and-cfius.*

[48] See MILHAUPT – ZHENG, *Beyond ownership: State capitalism and the Chinese firm*, in *Georgetown Law Journal*, 103, 716-717 (2015).

subordinate relationship with the Chinese government, but United States were also cautious to allow heavy investment by Chinese Private-owned enterprises (POEs), due to their blurred ties with the state[49].

What was mostly disruptive about both sources of foreign investment was the fact that, in specific cases, the alleged intrusion in national security did not directly relate to an evidently sensitive field (such as military, telecommunications or technological know-how); indeed, a couple of crucial transactions that effectively raised national security concerns (*Huawei* and *Ralls Corp*) forced a morphological change in the Committee's focus[50].

In the first case, *Huawei Technologies Inc.* entailed telecommunication issues when it tried to purchase assets from *3Leaf*, an insolvent start-up based in California[51]: national security concerns arose regarding the potential ties of the buyer with Chinese government and military, spreading suspicions towards intellectual property rights. It quickly activated CFIUS investigation procedure,

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[49] GRIFFIN, at 1778. In this regard, also see MAULDIN, *China Investment in U.S. Economy set for record, but political concerns grow*, in *The Wall Street Journal* (Apr. 12, 2016).

[50] One of the two transactions terminated by the President after a CFIUS review was *Ralls Corp.*, a company incorporated in Delaware but owned by two Chinese nationals: see Ralls Corp. v. CFIUS, 758, F. 3d 296 (D.C. Cir. 2014). Previously, the Committee's scrutiny was held towards China's largest telecommunication equipment manufacturer *Huawei Technologies Inc.*, and its attempt to acquire a Californian start-up. Notably, Huawei was unsuccessful in prior attempts to encounter CFIUS's safe harbor (in 2008 trying to invest in U.S. network security firm 3Com; in 2010 in investing with 3Wire Inc. and Motorola Inc.: in both cases, the Committee denied its approval because of Huawei's alleged ties to China's military and intelligence agencies): see VAUGHN – KONG, *Comply with Foreign Investment Rules, CFIUS Reviews Will Become More common as Chinese Companies Invest More in the United States, but Careful Preparation Can Help Companies Navigate a Complex Process*, in *China Business Review* (2013), available at *https://www.chinabusinessreview.com/complying-with-foreign-investment-rules/*.
Therefore, Congress focused its resolutions regarding Chinese deals not directly on the Chinese corporations themselves, but on sensitive fields in particular, such as telecommunications; see Staff of permanent select Committee on Intelligence, 112th Cong., *Investigative rep. on the U.S. national security issues posed by Chinese telecommunications companies Huawei and Zte* (2012), where Congress noted that *"in another industry, this development might not be particularly concerning"*. Nonetheless, Congress's stand the subsequent year seemed to backtrack completely.

[51] About *Huawei*, see also MONTLAKE, *U.S. Congress Flags China's Huawei, ZTE as security threats,* in *Forbes* (Oct. 8, 2012).

which led to an unfavorable recommendation of the transaction[52].

The *Ralls Corporation* deal triggered Congress's and CFIUS's attention due to the geographical location of the purchased domestic company. *Ralls Corp*. – an American corporation owned by Chinese executives – acquired four Oregon companies active in the development of wind farms, which were located around a restricted U.S. Navy site[53]. The proximity to the naval base spurred concern in the Committee, which claimed, after the initial thirty-days review, for the usual investigation of the transaction, trying to moderate those concerns through a mitigation agreement. Finally, CFIUS submitted its recommendation to President Obama, who applied his veto to the deal[54].

Ralls decided to challenge the order in court, claiming a lack of notification[55]. As aforementioned, pursuant to the Exon-Florio Amendment,

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[52] Congress responded to Huawei's chairman Ken Hu statement (HU, *Huawei Open Letter*, *Huawei* (Feb. 25, 2011), available at *http://pr.huawei.com/en/news/hw-092875-huaweiopenletter.htm #.WJqTm1UrKCh*) launching itself an investigation due to Huawei's lack of transparency about its internal governance structure. The investigation led to Congress's recommendation to block Huawei's deal *"because it poses a threat to national security"* (Staff of Permanent Select Comm. on Intelligence, 112th Cong., *Investigative Rep. on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and Zte* (2012), at VI.

[53] CFIUS intervened subsequently the acquisition, which was previously concluded by the foreign counterpart, without notifying the usual written notice of the transaction. Ralls Corp. is indeed considered as the most historic unwinding of a deal by the Committee: after receiving a notification by the Navy, which reported a potential national security issue regarding the deal, CFIUS requested to Ralls Corp. a formal written notice and started the usual scrutiny procedure. See STANLEY, at 1056.

[54] President Obama mandated Ralls to block the acquisition, ordering the divesting of all property interests in the companies and blocking access to the project site: see WEINMAN, *In Rare Move, CFIUS hands over Cache of Ralls Docs*, in *Law360* (2014), available at *http://www.law360.com/ articles/599760/in-rare-movecfius-hands-over-cache-of-ralls-docs.* The Ralls case is considered the paramount unwinding of a foreign transaction by the Committee.

[55] See BAKER – HEIFETZ, *Ralls may give Foreign Investors More Leverage with CFIUS*, in *Law360* (2014), available at *http://www.law360.com/articles/603312/ralls-may-give-foreign-investors-more-leverage-with-cfius.* The Court of Appeal for the District of Columbia primarily assessed that the executive decisions did not comply with due process. Consequently, the Court ordered the Committee to provide Ralls with all the information on which President sustained its resolution, feeding the intense debate about the extent to which the U.S. executive power could infringe individuals' rights in case of national security risks: see generally, YOO, *The Legality of*

Section 721 of the DPA provided that the President's actions upon CFIUS scrutiny were not subject to judicial review[56]; but because of the constitutional dimension of Ralls's complaints, the Court required CFIUS to provide anyway the foreign counterpart with the evidence of its decision regarding the deal[57].

In 2013, Congress and CFIUS were called to monitor another case of Chinese investment, this time involving the larger pork producer in the world – *U.S. Smithfield* – and China's biggest pork supplier – *Shuanghui International*[58].

Unsurprisingly, the operation found various oppositions among the Congress, mainly because of China's poor food quality, which was perceived as a threat to U.S. food security; moreover, the deal appeared openly irrational, considering that the Chinese corporation was actually half Smithfield's size and that the American company navigated in a florid financial situation[59].

The Senate Committee on Agriculture, Nutrition and Forestry tried again to tweak CFIUS's dimension, by addressing a letter to the Secretary of Treasury: it claimed the Committee to appoint the Department of Agriculture as a lead agency in the investigation, in order to add the *"broader issues of food security, food*

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the National Security Agency's Bulk Data Surveillance Programs, in *Harvard Journal of Law and Public Policy*, 37, 901 (2014).

[56] Pursuant to FINSA, Sec. 6.

[57] Ralls Corp. v. CFIUS, 758, F. 3d 296 (D.C. Cir. 2014): the D.C. Circuit Court of Appeals remanded the matter to the district court "*with instructions that Ralls be provided . . . access to the unclassified evidence on which the President relied and an opportunity to respond thereto*". See PICKARD – DALY – NEELAKANTAN, *Judge Orders CFIUS to Disclose Unclassified Information to Ralls*, in *Wiley Rein* (2014), available at *http://www.rileyrein.com/publications.cfm?sp=articles&id=10073*.

[58] See BACKALER, *What the Shuanghui-Smithfield acquisition means for Chinese overseas investment*, in *Forbes* (Nov. 5, 2013), available at *http://www.forbes.com/sites/joelbackaler/2013/11/05/what-the-shuanghui-smithfield-acquisition-means-for-chinese-overseas-investment/#1653d69276b6*. The merger was indeed seen as a desirable deal for both companies, giving U.S. Smithfield access to the Chinese market and the Shuanghui a higher level of quality pork in its supply chain.

[59] See KRASNY – YOUNGLAI, *U.S. Lawmakers air concerns about Smithfield-Shuanghui deal*, in *Reuters* (June 5, 2013), available at *http://www.reuters.com/article/us-smithfield-shuanghui-congress-idUSBRE9540YN20130605.* See also JOSSELYN, *National security at all costs: why the CFIUS review process may have overreached its purpose*, in *George Mason Law Review*, 21, 1347, 1366-67 (2014).

safety and biosecurity" to the scope of the Committee's review, as a broader construction of the national security paradigm[60]. Despite its efforts, the Department of Agriculture did not gain a chair in the Committee, and at the same time CFIUS did not assume food security as a "critical infrastructure": thus, after the usual forty-five days of investigation, the Committee approved the deal[61], receiving strong criticism for its alleged biased procedure[62].

Predictably, this drove to several congressional efforts to reform CFIUS scrutiny mechanism, even though narrowing the national security paradigm seemed impossible[63]. But, again, this urge to use CFIUS as a political tool inevitably led to potential prejudice to the U.S. economy by rejecting beneficial investments. During the next five years, the need for a balance between the positive economic impacts of such operations and the protection of national security became more stringent: CFIUS investigations from 2013 to 2017 were, again, mainly focused on

[60] Press Release, Debbie Stabenow, U.S. Senator, Bipartisan group of Senators urge appropriate oversight of proposed Smithfield purchase (June 20, 2013), available at *http://www.stabenow.senate.gov/news/bipartisan-group-of-senators-urge-appropriate-oversight-of-proposed-smithfield-purchase#sthash.OiyujdHt.dpuf*.

[61] The Committee's stand regarding food security being not a component of national security lied on the assumption that doing so would *"essentially mean all foreign investment transactions are subject to review"*. See JOSSELYN, at 1368.

[62] See BOTTEMILLER, *Government Extends Review of Smithfield-Shuangui Deal*, in *Food Safety News* (2013), available at *http://www.foodsafetynews.com/2013/07/government-extends-review-of-smithfield-shuangui-deal#.VgRiAU10z50*.

[63] In 2014, Congresswoman Rosa DeLauro (Democrat of Connecticut) proposed a reform entitled "Foreign Investment and Economic Security Act of 2014" (FIESA), H.R. 5581, 113th Cong. § 1, which would alter CFIUS scrutiny extending its scope. In particular, the proposed legislation would include in CFIUS reviews an analysis of transactions focused on the *"net benefit"* to U.S. interests, including *"economic activity, employment, technology, productivity, public health and safety"*; it would also mandate CFIUS to consider *"the governance and commercial orientation of the foreign government"*, analyzing how and in which extent the foreign person involved is owned or controlled by a foreign government. It would finally provide for a new procedural protection of transactions' parties by including a right to appeal the final decision of the Committee and the President (see BREWSTER, *DeLauro Legislation Would Broaden Reach of CFIUS Reviews*, in *Law360* (2014), available at *http://www.law360.com/articles/580422/delauro-legislation-would-broaden-reach-of-cfius-reviews*). Focusing more on food safety, a further legislative addition originated from Senator Debbie Stabenow (Chairwoman of U.S. Senate Committee on Agriculture, Nutrition and Forestry, Democrat from Michigan): Press Release, Debbie Stabenow; moreover, see SAFE Act of 2016.

Chinese transactions, especially related to technology, and almost all of them were formally blocked by CFIUS or, eventually, by the President[64].

In later years, the Committee focused its scrutiny on acquisitions raising issues related to sensitive information, technological competitiveness and influence of U.S. companies in such sectors. On the political side and on top of the U.S. food security concern, which at first did not arise as a prominent factor in CFIUS scrutiny process[65], the legislative branch expressed doubts also regarding potential IP appropriation.

Treasury noted that the Committee should not expand its scope, but it mandated CFIUS to scrutinize such industries that were recognized as related to national security – *"manufacturing, technology, energy, natural resources, transportation and […] telecommunications"*[66]. This nuanced approach addressed the concerns raised by the growth of Chinese investment, without explicitly tackling it, as well as the potential threats to national security that might arise in the future, precisely related to technology firms.

As a result, China, that was many times accused of IP theft, tried to circumvent CFIUS review process, limited to mergers and acquisitions, by using joint ventures or minority investments to achieve the same strategic result[67].

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[64] For example, China Resources - Hua Capital Management regarding U.S. Fairchild Semiconductor; Montage Technology Group towards U.S. Pericom Semiconductor; Procon and China National Machinery Industry Corporation regarding U.S. Lincoln Corporation; moreover, a Chinese investment firm in the acquisition of Aixtron, a Germany-based firm with assets in the United States; China Venture Capital Fund Corporation from acquiring Lattice Semiconductor Corporation.

[65] Indeed, the Department of Agriculture was not in the Committee.

[66] GRIFFIN, at 1790.

[67] See VOGT, *U.S. Companies Brace For Wider Scrutiny Of Chinese Deals*, in *Wall Street Journal*, 2018, available at *https://www.wsj.com/articles/u-s-companies-brace-for-wider-scrutiny-of-chinese-deals.1517230800*; KUO, *CFIUS and China: The FIRRMA Factor*, in *The Diplomat* (October 17, 2018), available at *https://thediplomat.com/2018/10/cfius-and-china-the-firrma-factor/*. The Trump Administration stated that China *"uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entites"* (Office of the U.S. Trade Representatives, August 18, 2017).

5. With that in mind, in 2018 Congress introduced the *Foreign Investment Risk Review Modernization Act* (FIRRMA), particularly focused on critical technology and venture capital industries, which final text passed in the National Defense Authorization Act for Fiscal Year 2019[68]. The development of this Act was grounded in the evidence that the national security landscape had shifted in years and so had the nature of the investments that could pose a potential risk to national security. From a terminological point of view, under FIRRMA CFIUS was mandated to assess risks, not threats.

The key core entailed by the 2018 Act was to grant U.S. technological supremacy and to protect U.S. significant technological capabilities, overhauling again CFIUS process by empowering the Committee *(i)* to evaluate a company's record of complying with U.S. laws; *(ii)* to cover foreign transactions directly or indirectly aimed to acquire a substantial interest in a domestic company[69].

From an objective point of view, FIRRMA increased the range of covered transactions beyond mergers, acquisitions and takeovers, including any other investment related – through an industrial-based analysis – to critical infrastructure, critical technologies or sensitive personal data[70]. In doing so, CFIUS could even cover mere minority investments, which to some extent could be

[68] Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, Title XVII Sub. A. H.R. 4311, 115th Cong. (2017), presented by Representative Pittenger, then introduced in the Senate as S. 2098 by Senator Cornyn, as an Act *"to modernize and strengthen the Committee on Foreign Investment in the United States to more effectively guard against the risk to the national security of the United States posed by certain types of foreign investment, and for other purposes"*.

[69] See ZIMMERMAN, *The Foreign Risk Review Modernization Act: how CFIUS Became A Tech Office*, in *Berkeley Technology Law Journal*, 34, 2019.

[70] *"Any investment, other than a passive investment, by a foreign person in any United States critical technology or United States critical infrastructure company that is unaffiliated with the foreign person"*, 50 U.S.C. 4565 (a)(5)(B)(iii). A "passive investment" is limited to investments which do not allow access to any material, nonpublic technical information, membership on the board, or *"any involvement, other than through voting of shares, in substantive decision-making relating to the management, governance, or operation of the United States critical infrastructure company or United States critical technology company"*.

considered as covered transactions[71], meeting specific assumptions:

(a) if the operation allowed a foreign access to "*material nonpublic technical information*" (specifically, knowledge, know-how, processes, techniques, methods), regarding a critical technology, not in the public domain[72];

(b) if the investment led to a foreign influence on a "*governing body*" or influence over "*substantive decision-making*"[73];

(c) if the purchase or lease derived from or was directed to a foreign person of real estate located in proximity to sensitive government facilities[74].

To complement this expanded role and to better arrange the increased workload, the review process became branched in further subphases. FIRRMA introduced the so-called *light filing* procedure, a declaration system specifically related to critical technology, in which parties to a covered transaction could file a short-form declaration to the Committee[75]. The Staff Chairperson would determine whether the declaration met all requirements to circulate it to all CFIUS agencies, which in a shorter review timeline (thirty days) would resolve advising the parties in writing if the Committee required further information or action. This mechanism was implemented in order to receive a potential "safe harbor" letter, which limited the Committee from subsequently initiating a review.

On the other hand, CFIUS might require filing a formal written notice, if needed by the complexity of the review: the thorough scrutiny was extended to a forty-five days of initial review, as a risk-based analysis; if risks are identified, or if the transaction would result in control of a U.S. business by a foreign government

[71] See FIRRMA, § 1703 (amending 50 U.S.C. § 4565 (a)(4)(B)): minority investments without a change of control could fall within CFIUS's review process by construing the change in the nature of the transaction as a covered transaction itself (see ZIMMERMAN, at 1287).
[72] *Id*. § 1703 (amending 50 U.S.C. § 4565 (a)(4)(D)(i)(I).
[73] *Id*. § 1703 (amending 50 U.S.C. § 4565 (a)(4)(D)(i)(II)-(III)).
[74] Such as military installations: *id*. §1703 (amending 50 U.S.C. § 4565 (a)(4)(B)(ii)(II)(bb)(AA)).
[75] A party to a covered transaction *"may submit to the Committee a declaration with basic information regarding the transaction, instead of a written notice (…) submitted as abbreviated notifications that would not generally exceed five pages in length"*, 50 U.S.C. 4565 (b)(1)(C)(v)(I) and (II).

or someone acting on behalf of it, this triggers the forty-five-day investigation period, with an optional fifteen-day extension for *"extraordinary circumstances"*[76]. Within this timeline, the increasing authority given to the Committee mainly expressed as the power to negotiate with the transaction parties and to impose mitigation agreements to soften identified risks[77]; in the event of noncompliance, CFIUS might also react with a more appropriate agreement or even seek injunctive relief. Mitigation agreements' content might range from limiting the transfer of certain intellectual property to ensuring that certain activities and products are located only in the United States. Additionally, every non-declared transaction might be detected by CFIUS through a *unilateral review* procedure.

Finally, if the Committee believes that, despite every effort, national security risks have not been or could not be addressed, it may advise the President to block the transaction within the next fifteen days.

In this regard, using CFIUS powers under FIRRMA, President Trump blocked the largest deal in tech history, preventing Broadcom – a Singapore-based corporation – from buying U.S. owned Qualcomm[78]. Treasury emphasized the

[76] In accordance with the regulations at 31 C.F.R. § 801.403. CFIUS was requested to expand the range of mandatory declarations, beyond the Byrd Amendment, which mandated a declaration when the purchaser was a government or a SOE: in particular, under C.F.R. § 801.401, the regulations implemented FIRRMA's mandatory declarations for covered transactions, where a foreign government was acquiring a "substantial interest" in certain U.S. business and certain covered transactions that involve critical technologies.

[77] FIRRMA, § 1709 (2) (amending 50 U.S.C. § 4565 (b)(2)(C)(i)-(ii). Mitigation measures can include, for example, a prohibition or limitation in transferring or sharing certain intellectual property, trade secrets or technical knowledge or ensuring that certain activities and products are located only in the United States. See U.S. Dep't of Treasury, *CFIUS Annual Report to Congress – CY 2020*, at 40: in 2020, CFIUS imposed mitigation measures for twenty-three notices of covered transactions, approximately 12 percent of the total number.

[78] On January 2018, Qualcomm submitted a unilateral notice to CFIUS, which proceeded with the usual review, addressing a letter to the parties through which it enumerated several concerns with the transaction (among which, the national security risk if China dominated the 5G space) and believing it requested full investigation. In this regard, CFIUS required the parties to provide all responsive information relating to its concerns and later noted that *"in absence of information that changes CFIUS's assessment of the national security risks posed by this transaction, CFIUS would consider taking further action, including but not limited to referring the transaction to the*

United States' need to protect Qualcomm's long-term technological competitiveness and influence[79]; consequently, following that advise, CFIUS and President Trump were clearly mistrustful of giving an Asia-based company control over an American premier tech company.

On January 2020, the Department of Treasury enacted the final version of the Implementing Regulations of FIRRMA, dealing with the expansion of CFIUS review process on critical infrastructures and covered control transactions, especially in *TID* sectors (Technology, Information and Data).

The Implementing Regulations introduced the so-called "Excepted Foreign States" category, to which CFIUS's expanded jurisdiction on non-controlling investments in *TID* businesses would not apply. Australia, Canada and United Kingdom, originally, and then New Zealand, could receive a preferential treatment, being excused from CFIUS's scrutiny, without prejudice to certain standards required by the Committee[80]. Such *whitelist* was expressly described as temporary and expired on February 2022, even though the Committee recently extended it until February 2023[81].

As a bottom line, FIRRMA was a sensitive attempt to strengthen CFIUS's

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President for decision". It quickly conducted to the President's order blocking the operation. See KANG – RAPPEPORT, *Trump Blocks Broadcom's Bid for Qualcomm*, in *New York Times* (2018), available at *https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html*.

[79] Letter from Aimen N. Mir, Deputy Assistant Secretary of Investment Security at Dep't of Treasury, to Mark Plotkin, Covington and Burling, and Theodore Kassinger, O'Melveny & Myers, 2 (2018), available at *https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm#Exhibit99_1_081114*.

[80] *Provisions pertaining to certain investments in the United States by foreign persons*, 85 Fed. Reg. 3112, 3116 (U.S. Dep't of Treasury, Jan. 17, 2020), to be codified at 31 C.F.R., pts. 800, 801; *CFIUS's Excepted Foreign States Provision: U.S. Economic Security policy gets longer arms,* in *Lawfare* (Nov. 13, 2020), available at *https://www.lawfareblog.com/cfiuss-excepted-foreign-states-provision-us-economic-security-policy-gets-longer-arms.*

[81] 31 C.F.R., pts. 800.218 and 802.214. After February 2023, remaining or becoming an excepted foreign state will require a more formal determination by CFIUS, that the foreign country *"has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security"*: 31 C.F.R. § 800.1001(a).

function in several new investment sectors and industries, even though it probably remained short of equipment in relation to its new technology focus[82].

6. Not only Congress has put CFIUS in discussion where its review process did not seem to prove its strict function. In June 2021, Texas enacted the *Lone Star Infrastructure Protection Act* (LSIPA)[83] in order to prohibit both companies and Texas governmental entities from entering into agreements relating, again, to critical infrastructure with companies tied, in certain ways, to China, Iran, North Korea or Russia. The blocking effect entailed by this Act would operate if the proposed agreement would grant the foreign counterpart *"direct or remote access to or control of critical infrastructure in this state, excluding access specifically allowed by the business entity for product warranty and support purposes"*[84]. The protectionist stance expressed in the statute addressed presumed acts of aggression towards United States regarding *"intellectual property theft, previous critical infrastructure attacks, and ties to other hostile actions"*[85].

The main issue raised from a state-imposed control on foreign investment was the conflict with parallel federal procedure carried out by the Committee, which already operated reviewing inbound foreign investments for national security concerns. Thus, this led to clarify CFIUS's preemptive scope on state laws: although both Texas legislation and CFIUS scrutiny aim at screening potential risks to national security, the two systems can overlap, conducting to obstacle preemption of CFIUS regulations[86].

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[82] The sole scientific member of CFIUS was at that time the Director of the Office of Science and Technology Policy, as requested under FINSA (§ 3(k)(2), amending 50 U.S.C. App. 2170).
[83] Lone Star Infrastructure Protection Act, S.B. 2116, 87th Leg., Reg. Sess. (Tex. 2021), available at *https://capitol.texas.gov/tlodocs/87R/billtext/html/SB02116F.htm*, hereinafter "LSIPA".
[84] *Id.* §113.002 (a)(1).
[85] See The Texas Senate Research Center, *Bill Analysis*: S.B. 2116, 1 (2021).
[86] See EICHENSEHR, *CFIUS Preemption*, in *Harvard National Security Journal*, vol. 13:1, 2022, in which the Author highlights the emergence of a state-imposed control on foreign investment as

As is known, article VI, clause 2 of the U.S. Constitution – the so-called *Supremacy Clause* – provides for the supremacy of federal law over state law, pursuant to which federal law prevails over conflicting state law. When legislating, Congress may include an express preemption provision in a statute, or it may also impliedly preempt state law *"in cases where compliance with both federal and state regulations is a physical impossibility"*[87]. However, in this case it is certainly possible to comply with both CFIUS procedure and LSIPA, mainly because the Committee's approval is only permissive and not mandatory: transaction parties could comply with both statutes by simply desisting from filing or activating the operation.

Another implied preemption mechanism is "field preemption", which bans states to start regulations among exclusive-governance fields of the Congress: usually, this kind of preemption is entailed where there is a *"federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"*[88].

In this case, even if CFIUS statute lacks of an express preemption provision, Texas's attempt may be construed as an obstacle preemption[89], as state law poses a ban to the full realization and execution of Congress's purposes (*rectius* of CFIUS's). Under LSIPA, state security concerns might cover any agreement that would give access to or control of critical infrastructure. CFIUS procedure, instead, only applies to a specific range of foreign operations and is based on individual-review, also implementing negotiation with foreign counterparts through its mitigation agreements.

"an opportunity to consider the preemptive scope of the CFIUS process", even in absence of an express preemptive provision in the Committee's statute.

[87] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[88] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[89] *"Which focuses more sharply on Congress's actual aims, rather than field preemption, which draws inferences from patterns of legislation and not from a particular statute"*: see GOLDSMITH, *Statutory Foreign Affairs Preemption*, in *The Supreme Court Review*, 2000, 175, 213-14.

By contrast, the inflexibility displayed by LSIPA could also impact on the Presidential leverage in the reviewing process of inbound foreign investment: imposing to the state a complete prohibition of foreign operation means the President would not have any economic and diplomatic authority on economic competitiveness at the national level[90] . It is crucial to highlight that transactions occur in the context of broader diplomatic relationships: the risk-based analysis carried out by CFIUS is specifically aimed to define whether to approve transactions considering the threats posed by the foreign entity involved, the vulnerabilities of U.S. business and the consequences for U.S. national security. In this regard, the federal government, including the intelligence community, possesses far better expertise than state governments to make such assessments.

The preemptive force of federal regulations is clear as the President operates the Committee's scrutiny pursuant to expressed authorization from the legislative branch. But it is also clear solely considering the potential disruptive outcome of a state-based investment review scheme, blocking a deal potentially florid from a federal standpoint which might have been already screened by the Committee, after addressing every kind of concerns through mitigation agreements with the foreign counterpart[91].

Or again, if Texas decided to designate additional threatening countries for critical infrastructure, prohibiting agreements between business entities and

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[90] See, e.g., White House, National Strategy for critical and emerging technologies, 9, 2020, available at *https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/10/National-Strategy-for-CET.pdf*.

[91] This federal-state conflict was indeed evident in the former *Chinese People's Liberation Army General* case which CFIUS reportedly cleared to proceed: see DETSCH – GRAMER, *Deep in the heart of Texas, a Chinese wind farm raises eyebrows,* in *Foreign Policy* (June 25, 2020), available at *https://foreignpolicy.com/2020/06/25/texas-chinese-wind-farm-national-security-espionage-elecrtical-grid/*; HYATT, *Why a secretive Chinese billionaire bought 140,000 acres of land in Texas,* in *Forbes* (Aug. 9, 2021), available at *https://www.forbes.com/sites/johnhyatt/2021/08/09/why-a-secretive-chinese-billionaire-bought-140000-acres-of-land-in-texas/?sh=2cc90b3d78c3_*. CFIUS approved the transaction in December 2020 and the Department of Defense imposed a mitigation agreement in July 2021, sparking concerns among Texas' representatives.

companies headquartered in those countries, such resolution could affect the federal government's foreign policy and its diplomatic relationships. For example, pursuant to FIRRMA the Treasury Department appointed specific countries for a preferential treatment to their investments, based on their *"robust intelligence-sharing and defense industrial base integration mechanisms with the United States"*[92].

Consequently, in absence of a preemption mechanism, if a specific foreign country was designated as a prohibited party under LSIPA and, at the same time, as an excepted foreign state under CFIUS, the federal process in particular and the federal government's investment policy more generally could be completely twisted by state laws.

Committee's scrutiny mechanism *"is not just a floor over which states can layer on additional security-focused regulations"*[93]. Certainly, the state perspective must be taken into account in the event of foreign investments related to critical infrastructure in a state's territory[94]; but, at the same time, the federal legislative branch has already appointed CFIUS to address and mitigate those concerns. In this regard, the Committee promises a "safe harbor" to transactions already completely reviewed, while allowing subsequent state action to block an agreement would undermine the efforts companies sometimes bore through expensive mitigation measures.

In conclusion, for transactions within its jurisdiction, CFIUS review should

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[92] *Provisions pertaining to certain investments in the United States by foreign persons*, 85 Fed. Reg. 3112, 3116.

[93] EICHENSEHR, at 21.

[94] As a latest update, Texas experience has recently been taken into account by South Dakota, where Governor Kristi Noem and legislators have announced, on December 13, 2022, proposed regulation to restrict foreign purchases of agricultural land in the state territory: the plan would create a new board, named "the Committee on Foreign Investment in the United States – South Dakota" (CFIUS-SD) as a dedicated committee for investigating in proposed acquisitions of agricultural lands by foreign interests, which will require approval to the Governor.

be viewed as a cap and not a floor[95].

7. The last crucial step in CFIUS's strenuous path is the recent presidential Executive Order n. 14083, signed by President Biden on September 15th 2022[96].

It represents the first-ever presidential directive defining additional national security factors for CFIUS transactional review process. The importance of continuous improvements to foreign investment scrutiny is to be seen as a guarantee that it *"remains responsive to an evolving national security landscape and the nature of the investments that pose related risks to national security"*[97].

While the Executive Order does not alter the Committee's process structure, it broadens the core factors the Committee may consider during its review. First of all, the President's Order is once again focused on U.S. critical technology and infrastructure which may be impaired by *"the legal environment, intentions, or capabilities of the foreign person, including foreign governments, involved in the transaction"*. Moreover[98], the expansion of CFIUS scrutiny concerns wider components of the national security paradigm, *"including those requirements that fall outside the defense industrial base"*, particularly focusing on the transaction's effect on supply chains' resilience and technologies that may have national security implications[99]. In this regard, it is dutiful to underline that

[95] Where state officials might liaise with their federal representatives, as a privileged and direct line of input into the Committee's process.

[96] Exec. Order No. 14083, 40 F.R. 20450 (Sep. 20, 2022), issued for *"Ensuring robust consideration of evolving national security risks by the Committee on Foreign Investment in the United States"* which outlines a more open presidential and executive approach to foreign investment by stating, pursuant to Sec. 1, that *"The United States welcomes and supports foreign investment, consistent with the protection of national security (...) commitment to open investment is a cornerstone of our economic policy and provides the United States with substantial economic benefit".*

[97] *Id.*, 40 F.R. 20450, sec. 1.

[98] *Id.*, secc. 2 and 3, entitled *"Elaboration on Existing Statutory Factors"* and *"Additional Factors to be Considered"*.

[99] *Id.*, sec. 2, (ii), where critical technologies fundamental to national security are referred to *"microelectronics, biotechnology and biomanufacturing, quantum computing, advanced clean*

the Executive Order includes references to the agricultural industrial base that have implications for food security, which was not previously addressed – in the *Smithfield* case of 2013 – as a critical infrastructure.

The Order also enhances the consideration of a transaction's impact on U.S. national security: covered transactions are not viewed as isolated acquisitions but, by contrast, are considered part of a broader strategy of foreign investors in a specific sector[100].

As a central core of Biden's directive, the Committee is mandated to consider personal sensitive data's risks: while previous CFIUS regulations identified several categories of identifiable personal data, deemed to be particularly sensitive and consequently under its jurisdiction, the Executive Order emphasizes that *"advances in technology, combined with access to large data sets, increasingly enable the re-identification or de-anonymization of what once was unidentifiable data"*[101].

From a procedural point of view, the Order enforces the *Periodic Review*[102] the Committee must apply to its procedures and regulation, in order to meet the mutability of the national security paradigm. At the same time, it may be considered as part of a long-term strategy to maintain U.S. economic and technological leadership and to protect national security, through strengthening domestic investments and competitiveness, while maintaining an open investment environment.

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energy (…), climate adaptation technologies, critical materials, elements of the agriculture industrial base that have implications for food security".

[100] In fulfillment of this consideration, pursuant to sec. 3, (a)(iii), CFIUS *"may request, as part of the Committee's review of a covered transaction, that the Department of Commerce's International Trade Administration provide the Committee an analysis of the industry or industries in which the United States business operates, and the cumulative control of, or pattern of recent transaction by, a foreign person, including, directly or indirectly, a foreign government, in that sector or industry"*.

[101] *Id.*, sec. 3, (c)(i).

[102] *Id.*, sec. 4, which emphasizes the ongoing basis through which CFIUS must update its functions in order to assess and address evolutive national security threats.

8. The "*TikTok deal*", a 2017 Chinese investment scheme involving personal data risks, can be regarded as a paramount, yet *cold*, case, which once again exposes CFIUS to its novel responsibilities in critical technology fields.

Musical.ly was a social media application which was sold in 2017 to a Chinese technology company, *ByteDance Ltd.*, and was then rebuilt as the current TikTok[103], one of the most popular social media applications. To sign-up and create an account, the app requires several information such as username, email, address, phone number or to link another social media page.

It is evident that TikTok collects a wide-variety of data, including location data, internet address, in-app messages, browsing/search history, etc.[104]. Primary concerns may be addressed focusing on many of the world's most popular platforms and social media applications (Facebook, Google, etc.), which collect just as much personal data from users but, unsurprisingly, TikTok raises critical national security concerns because data are collected by a Chinese corporation[105].

Consequently, two Senators requested the Intelligence Community to conduct an assessment of national security risks (especially political censorship

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[103] LEE, *The popular Musical.ly app has been rebranded as TikTok*, in *The Verge* (Aug. 2, 2018), available at *https://www.theverge.com/2018/8/2/17644260/musically-rebrand-tiktok-bytedance-douyin*; IQBAL, *TikTok revenue and usage statistics (2020)*, in *Business of Apps* (Oct. 30, 2020), available at *https://www.businessofapps.com/data/tiktokstatistics/~text=Sensor%20Tower%20stats%20reveals%20TikTok,was%20downloaded%20219%20million%20times.*

[104] See McMILLAN – LIN – LI, *TikTok user data: what does the app collect and why are U.S. Authorities concerned?*, in *Wall Street Journal* (July 7, 2020), available at www.wsj.com/articles/tiktok-user-data-what-does-the-app-collect-and-why-are-u-s-authorities-concerned-11594157084.

[105] See SHI – LIN, *Here's why U.S. Officials are worried about TikTok*, in *Wall Street Journal* (July 23, 2020), available at *https://www.wsj.com/articles/heres-why-u-s-officials-are-worried-about-tiktok-11595558218*. In the event of ByteDance's acquisition of Musical.ly, now TikTok, in October 2019, Senator Marco Rubio stated that *"any platform owned by a company in China which collects massive amounts of data on Americans is a potential serious threat to our country"*: see ROUMELIOTIS – YANG – WANG – ALPER, *Exclusive: U.S. opens national security investigation into TikTok - sources*, in *Reuters* (Nov. 1, 2019), available at *https://www.reuters.com/article/us-tiktok-cfius-exclusive/exclusive-u-s-opens-national-security-investigation-into-tiktok-sources-idUSKBN1XB4IL*.

and data collection practices) posed by TikTok and the Committee launched its formal usual investigation[106].

A few months later, those concerns were confirmed by President Trump's Executive Order n. 13942[107], through which the President banned all U.S. citizens from transacting with ByteDance or any of its subsidiaries, underlining his distrust towards TikTok by stating that its automatic apprehension of data could led *"the Chinese Communist Party to access to Americans' personal and proprietary information – potentially allowing China to track the locations of Federal employees and contractors, to build dossiers of personal information for blackmail and to conduct corporate espionage"*[108].

President Trump's attempts to undermine TikTok's ascend on personal data went further with another presidential provision (issued on August 14th, 2020)[109], demanding for TikTok to be sold to an American corporation by divesting all ownership *"used to enable or support* [ByteDance's] *the operation of the TikTok application in the United States"*[110] as well as any collected data. Trump designated a 120-days deadline to complete the divesture and to submit proof of it to the Committee for review, in order to avoid a nationwide ban[111].

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[106] Press Release, Leader Schumer, Senator Cotton Request Assessment of National Security Risks Posed by China-owned Video-Sharing Platform, TikTok, A Potential Counterintelligence Threat with Over 110 million Downloads In U.S. alone (Oct. 24, 2019). In this regard, Senate's representatives noted that during Hong Kong Protests only few videos were actually widespread, while those events dominated international headlines for months, invoking concerns about using this kind of mobile application for disinformation campaigns.

[107] Exec. Order No. 13942, 3 C.F.R. 48637-48639 (Aug. 6, 2020), *"Addressing the threat posed by TikTok, and taking additional steps to address the National Emergency with respect to the Information and Communications Technology and Services supply chain"*. The emphasis of this directive is once again dedicated to Chinese investment in the U.S., in particular China's continuous efforts *"to threaten the national security, foreign policy, and economy of the United States"*.

[108] *Ibidem.*

[109] 85 Fed. Reg. 51297, 51298 (Aug. 14, 2020).

[110] *Id.* Sec. 2, (d)(ii).

[111] See SPERLING, *Trump Officially Orders TikTok's Chinese Owner to Divest*, in *New York Times* (Aug. 14, 2020), available at *https://www.nytimes.com/2020/08/14/business/tiktok-trump-bytedance-order.html*; see also *Trump orders Chinese owner of TikTok to sell US assets*, in *A.P.*

Since this regulation, the only proposed transaction accepted by both U.S. and China is a deal between ByteDance, Oracle – a U.S. based computer technology company with a focus on cloud data storage – and Walmart – a popular U.S. retail chain: Oracle would have been the host of TikTok's U.S. data while Walmart would operate for advertising[112]. Yet, no official merger or acquisition has been closed: while President Trump kept on with a strict protectionist stance towards the deal, underlining U.S. block towards ByteDance involved in the operation, Courts have blocked President's ban on the app[113].

As President Biden assumed office, it is still unclear how CFIUS and the new administration will resolve in this huge and complex operation. Undoubtedly, President Biden's stance has been less hostile towards China in general, but the TikTok case has represented in the last few years one of the most explanatory examples of the need for a balance CFIUS has struggled with; a balance between, again, an open-investment environment and the protection of national security. In this regard, in the wider range of national security concerns, data protection certainly poses an interesting dilemma on how the Committee shall direct its purview and on how it can respond to the multifaceted positions of each

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News (Aug. 14, 2020), available at *https://apnews.com/article/ap-top-news-technology-foreign-policy-politics-business-1f636191b0b9e28c7041fb64fb547801*. Since the E.O., TikTok had haunted American buyers to comply with the President's order: at first, Microsoft was likely in the crosshairs, but ByteDance rejected the original offer. See THORP-LANCASTER, *Report: Microsoft wants all of TikTok, but Trump signs order for new restrictions,* in *Windows Central* (Aug. 6, 2020), available at *https://www.windowscentral.com/microsoft-reportedly-talks-buy-out-us-portion-tiktok*; WARREN, *Microsoft says it's not acquiring TikTok after ByteDance rejects offer*, in *The Verge* (Sept. 13, 2020), available at *https://www.theverge.com/2020/9/13/21360130/microsoft-tiktok-acquisition-bid-rejection-bytedance*.

[112] See SEILER, *TikTok, CFIUS, and the Splinternet*, in *University of Miami International and Comparative Law Review*, 29, 36 (2022), at 50.

[113] TIKTOK INC., et al. v. Donald J. Trump, 507 F. Supp. 3d 92 (D.D.C. 2020), where the Court ruled in favor of TikTok, granting the emergency injunction as requested and stating that the President's executive order *"exceeded IEEPA's expressed limitations"*, mainly because TikTok's data transmissions entailed *"personal communications which do not involve anything of value"*. See SEILER, at 51; HOROWITZ – CHECK, *TikTok v. Trump and the Uncertain Future of National Security-Based Restrictions on Data Trade*, in *Journal of National Security Law and Policy*, 13:61, 2022, at 87-88.

President and administration.

While his general political position is clear, President Biden signed an Executive Order – the aforementioned n. 14083 – in which personal data protection arises as one crucial factor CFIUS shall consider while conducting its review process. Thus, even if the TikTok saga is not yet terminated, President Biden seems sensitive to personal data protection and could even ultimately connect to Trump's attempt to block and ban a foreign data collection from U.S. citizens.

How the TikTok script will play out will eventually determine whether CFIUS review will actually become as effective as it is required for national security purposes.

At the same time, President Biden's stance seems to fit the Committee's main challenge since 1975: finding the meeting point – the balance – between national security protection and globalization.

NATIONAL SECURITY AND PUBLIC ORDER IN INVESTMENT SCREENING: ANY LESSONS FROM THE EU TRADE CONTROLS EXPERIENCE?

Alessandra Moroni *

ABSTRACT: *Countries around the world have recently adopted and expanded investment screening mechanisms to review and potentially restrict investments on national security and public order grounds. Despite their relevance, the concepts of 'national security' and 'public order' are hardly defined in legislation. They remain ambiguous concepts capable of covering multiple, diverse interests, which creates uncertainty and unpredictability as to how competent authorities may apply investment screening rules. In the quest to give meaning to 'national security' and 'public order', this article notes the close interplay between investment screening and the areas of export controls and sanctions. It hence proposes to investigate how the EU has pursued security and public policy objectives in export controls and sanctions to infer what the legislative developments and practice in export controls and sanctions can tell us about the notions of 'national security' and 'public order' in investment screening.*

1. Regimes for screening inward investments have multiplied across the

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world over the past few years. Reforms to introduce or expand investment screening rules followed geopolitical developments, with fears of predatory acquisitions amid Covid-19 causing several countries to adopt additional emergency measures. In the European Union (EU), the adoption of the EU Screening Regulation in 2019[1] further prompted EU Member States to protect EU strategic 0assets.

Although investment screening rules vary across countries, these regimes are broadly conceived as mechanisms to review and potentially restrict investments on national security and public order grounds. Covered investments are typically identified based on criteria relating to the type of transaction; the identity of the investor; and the (deemed) sensitivity of the target business. To the contrary, the concepts of 'national security' and 'public order' are hardly defined in legislation, and attempted legislative definitions tend to ambiguously point to broad concepts such as the need to maintain the continuity and security of activities that are essential for maintaining the vital functions of society, health, safety, and the economic and social well-being of the population.[2] In essence, 'national security' and 'public order' are concepts that are capable of covering multiple, diverse interests, and entail inherently political considerations.[3] It may, therefore, be challenging for investors to anticipate what interests competent authorities may pursue as part of the 'national security' and 'public order' test in

[1] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 079I 21.3.2019 (consolidated).

[2] See, e.g., Article L. 151-3 and R. 151-8 of the French Monetary and Financial Code (*Code Monétaire et Financier*); Articles 1-2 of the Italian Decree-Law No. 12/2012 (*Decreto-Legge No. 12 del 15 marzo 2012 convertito con modificazioni dalla Legge No. 56 del 11 maggio 2012*), as integrated by, e.g., Article 2 of Decree of the President of the Council of Ministers No. 179/2020 (*Decreto del Presidente del Consiglio dei Ministri No. 179 del 18 dicembre 2020, convertito, con modificazioni, dalla Legge No. 56 del 11 maggio 2012*); Article 3 of the Austrian Investment Control Act (*Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen – Investitionskontrollgesetz*).

[3] For an analysis, see e.g. B. DE JONG, W. ZWARTKRUIS , *The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?*, in *European Business Law Review*, 31(3), 2020, 447-474; C. ALLEN, *Contemporary Security Studies*, Oxford University Press, 2016.

screening investments.[4]

In the quest to give meaning to 'national security' and 'public order', this article proposes to investigate the EU experience in pursuing security and public policy objectives in the area of export controls and sanctions, and consider possible implications for investment screening. Export controls and sanctions have been around for a few decades, and are interestingly intertwined with investment screening. Many investment screening regimes, particularly in the EU, provide for the review of investments in technologies subject to export controls, which are rules that govern trade in items deemed sensitive for their technical specifications or intended uses.[5] Similarly, investments by investors that are implicated by sanctions are generally subject to strict investment screening review.[6] This article will hence argue that the accumulated experience in export controls and sanctions may shed light on the interests that competent authorities are likely to pursue through applicable investment screening regimes.

This article starts by mapping the development of export controls and how 'national security' and 'public order' interests appear to have been pursued in this field (Section 2). It proceeds with drawing a similar overview for sanctions (Section 3). It then considers what the legislative developments and practice in export controls and sanctions can tell us of the notions of 'national security' and 'public

[4] For additional considerations on the ambiguity and arguable lack of transparency of decision-making processes in investment screening, see the upcoming article by J. BOURGEOIS, A MORONI, *Screening Authorities in the EU: Considerations on Governance, Powers, and Accountability*, upcoming.

[5] See Article 4.1(b) of the EU Screening Regulation, as implemented by EU Member States. For instance, Article 12 of the Italian Decree 179/2020 (*Decreto del Presidente Del Consiglio Dei Ministri 18 dicembre 2020, n. 179*) and Articles R151-3-I-2 and R151-3-III-2 of the French Monetary and Financial Code (*Code Monétaire et Financier*) which, among others, subject to screening investments into businesses conducting research and development or otherwise dealing in dual-use items.

[6] See Article 4.2(b) of the EU Screening Regulation. Consistently, most of EU Member States require investors to disclose, as part of their filing and reporting requirements, whether they are subject or otherwise implicated by sanctions. Some EU Member States impose a filing and approval requirement on investments by parties that are subject to sanctions or are owned or controlled by sanctions persons regardless of the activities of the target (e.g., Spain, pursuant to Royal Decree-Law 34/2020 of 17 November 2020; and Malta, pursuant to Article 11(1)(a) and Schedule, ACT No. LX of 2020, 18 December 2020).

order' in investment screening (Section 4). Last, it draws conclusions (Section 5). The article will limit the investigation to the frameworks and practice of the EU and its Member States, in order to focus on a group of countries that share a homogenous geopolitical and legal context.

2. Export controls generally refer to rules that govern trade in items (product, software, and technology) deemed sensitive for their technical specifications, and intended or potential uses. Items subject to export controls are particularly items that are classified as military or dual-use because, respectively, they are specially intended for military applications or otherwise capable of both civil and military uses. However, export control legislation continues to evolve to follow technological advances and newly perceived threats, and has potential implications for a wide range of industries. While EU export controls are rooted in the efforts of the international community to counter weapons proliferation, EU export controls have, with time, evolved to serve new security threats, such as terrorism, as well as protection of human rights and cybersecurity.

The following paragraphs will aim to trace this development. Section 2 will map the origin of modern export controls (Section 2.1), and then focus on recent EU practice for controlling trade in military items (Section 2.2) and dual-use items (Section 2.3), in order to infer how the EU has pursued security and public order objectives in the context of export controls.

2.1. EU export controls as currently conceived originated in the aftermath of the Second World War with the clear intention of countering proliferation of weapons on the international market. This objective is still at the core of current rules.

During the Cold War, Western countries (particularly, the United States, Japan, and NATO countries with few exceptions) came together and started cooperating to control and restrict trade in weapons, in an attempt to slow down

the technological development of the Soviet Union.[7] That was the birth of the Coordinating Committee for Multilateral Strategic Export Controls (CoCom) in 1949.[8] With the dissolution of the Soviet Union in 1994, CoCom was terminated and the international community repurposed the cooperation efforts to promote international security and stability by ensuring transparent and responsible transfers of weapons under the umbrella of Wassenaar Arrangement of 1995, which remains at the core of the international framework for export controls. International cooperation expanded to additional focus groups pursuing security in specific areas, with particular attention to countering proliferation of nuclear chemical and biological weapons. Among others, the Nuclear Supplier Group was established to contribute to the non-proliferation of nuclear weapons after the Indian nuclear explosion in 1974; the Australia Group was created in 1985 to prevent proliferation of chemical weapons following the event of the Iran–Iraq War; and finally the Missile Technology Control Regime was established in 1987 to prevent the proliferation of unmanned delivery systems.[9]

EU export controls have their roots in the foregoing international initiatives, which the EU has implemented and complemented regionally. Similarly to the above, at the heart of EU export controls, there is the objective to control trade in weapons, be it traditional arms as well as nuclear, chemical, and biological

[7] See, e.g., C. WHANG, *Refocusing Export Control Regimes to Effectively Address Cyber Security Concerns*, Cooperative Cyber Defence Centre of Excellence (CCDCOE), 2020; A.G. MICARA, *Current Features of the European Union Regime for Export Control of Dual-Use Goods* in *Journal of Common Market Studies*, 50(4), 2012, 578-593; D.E. MCDANIEL, *United States Technology Export Control*, Praeger Publisher, 1993; G. SCHIAVONE, *Export Controls: General Framework* in Maresceau, M. (ed.), *The Political and Legal Framework of Trade Relations between the European Community and Eastern Europe*, Nijhoff, Dordrecht, 1989, 245-252.

[8] CoCoM was created in 1949 by Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States; later, Spain and Australia also joined.

[9] MTCR is a voluntary arrangement among like-minded countries aiming to limit the spread of missile proliferation. MTCR consists of guidelines and each member country honors their commitment by applying their domestic export control laws and regulations.

weapons, perceived as key threats to peace and security.[10] But with time EU export controls have evolved and expanded in pursuit of more modern and complex security interests.

2.2. Countering proliferation of weapons remains at the heart of the EU export controls concerning military items, that is items specially designed for military application.[11]

While EU Member States retain competence to set out the detailed rules governing military items, the EU has taken significant steps to align domestic legislation and ensure better coordination in achieving consistent objectives. In particular, in the early nineties, the Council of the EU provisionally agreed on certain criteria that would need to inform national authorities' assessment on whether to grant licenses allowing trade in military items.[12] These criteria were formalized in 1998,[13] and are currently laid out in the Council's Common Position 2008/944 of December 2008.[14] Over time, these criteria have been detailed and improved, but not materially changed. They require authorities to consider the following factors when deciding whether to grant licenses:[15]

a. Respect for the international obligations and commitments of Member

[10] See also Council of the European Union, *A Secure Europe in a Better World. European Security Strategy*, 15895/03, 8 December 2003, identifying proliferation of weapons of mass destruction as one of the greatest threat to security.

[11] These are identified on control lists. See Common Military List of the European Union adopted by the Council on 21 February 2022, OJ C 100, 1 March 2022.

[12] Seven Common Criteria agreed at the Luxembourg European Council, 28 and 29 June 1991, EPC Bulletin, 91/196; one additional Common Criterion agreed at the Lisbon European Council, 26 and 27 June 1992, SN 3321/1/92.

[13] European Union Code of Conduct on Arms Exports of the Council of the European Union, 8675/2/98 Rev 2, 5 June 1998.

[14] Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335, 13 December 2008.

[15] Article 8 of Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335, 13 December 2008.

States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

b. Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

c. Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

d. Preservation of regional peace, security, and stability.

e. National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.

f. Behavior of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.

g. Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.

h. Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defense needs with the least diversion of human and economic resources for armaments.

Overall, as it emerges from the wording reported above, with its eight criteria the EU seems to primarily aim to maintain regional and international peace and stability and counter arms conflicts, prioritizing human rights, peace and conflict prevention over economic, commercial and industrial interests. In application of these criteria, EU Member States have, for instance, suspended export of weapons to the Arab region (e.g. Egypt, Libya, Bahrain) following the

Arabic Spring.[16]

2.3. The evolution of EU export controls beyond weapons proliferation is possibly more evident in the development of the regime governing trade in dual-use items.

At the high level, dual-use items are items capable of being used for both military and civilian uses, by virtue of their technical specifications or their intended uses. They are identified in control lists,[17] which are complemented by rules targeting certain end-uses of items regardless of whether these items are expressly included in the control lists.[18]

Rules governing dual-use were harmonized at the EU level in the course of the nineties to level out obstacles to the internal market and ensure a more coherent foreign and security policy.[19] Following an initial proposal in 1992, Regulation 3381/1994 was eventually adopted in 1994 to set out a common regime for controlling trade in dual-use items.[20] Countering proliferation remained at the heart of Regulation 3381/1994, with particular emphasis on risks of military misuses of dual-use items, including in embargoed countries and in connection

[16] For this and other examples, see N. DUQUET, *Business as Usual? Assessing the Impact of the Arab Spring on European Arms Export Control Policies* in *Flemish Peace Institute Report*, March 2004.

[17] See Annex I of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11 June 2021, as possibly complemented by national dual-use control lists maintained by EU Member States.

[18] See primarily Articles 4, 5, and 9 of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11 June 2021.

[19] This was following the judgment of 4 October 1991, Case C-367/89, *Richardt*, ECLI:EU:C:1991:376, which showed the need to eliminate border controls. For a comment, see H. ALAVI, T. KAHMICHONAK, *The EU Export Controls Regime: Dual Use Goods and Technologies in the European Legal Framework* in *Hungarian Journal of Legal Studies*, 57(2), 2016, 244; A.G. MICARA, *Current Features of the European Union Regime for Export Control of Dual-Use Goods* in *Journal of Common Market Studies*, 50(4), 2012, 578-593, citing P. EECKHOUT, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford University Press, 2004, 454 *et seq*.

[20] Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, OJ L 367, 31 December 1994.

with weapons of mass destruction. But with time, and especially with the recast Regulation 428/2009[21] and the recently adopted new Regulation 2021/821,[22] there has been an increased attention to new threats, which evidences a broader scope of the EU security interests. This article in particular emphasizes four areas of new security interests:

a. Terrorism: Following the events of 2001, export controls have become part of the EU toolkit to counter terrorism perceived as a threat to "the openness and tolerance of our societies, and … to the whole of Europe".[23] By restricting the circulation of sensitive dual-use items and their access by state actors as well as non-state actors,[24] export controls aims to prevent terroristic attacks on people and countries.[25]

b. Human rights: Alongside fighting terrorism, the EU has increasingly focused on ensuring respect of human rights and countering violations of fundamental rights and freedoms around the world, among others, making use of export

[21] 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 (recast), OJ L 134, 29 May 2009; Council Regulation (EU) 428/2009 was preceded by Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ L 159, 30 June 2000.

[22] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11 June 2021.

[23] See Council of the European Union, *A Secure Europe in a Better World. European Security Strategy*, 15895/03, 8 December 2003; For a comment, see A.J.K. BAILES, *The European Security Strategy – An Evolution History* in *SIPRI Policy Paper*, 10, February 2005; Council of the European Union, *European Security Strategy. A Secure Europe in a Better World*, 2009.

[24] See current Article 9 of Regulation 2021/821 allowing EU Member States to prohibit or impose an authorisation requirement on the export of dual-use items not listed on the EU dual-use control list (Annex I to Regulation 2021/821) for reasons of public security, including the prevention of acts of terrorism.

[25] See Proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology, COM (2006) 828 final, 18 December 2006. See also H. ALAVI, T. KAHMICHONAK, *The EU Export Controls Regime: Dual Use Goods and Technologies in the European Legal Framework* in *Hungarian Journal of Legal Studies*, 57(2), 2016, 240.

controls to restrict the circulation of potentially harmful items.26 This is particularly evident in the provisions allowing EU Member States to restrict trade in dual-use items on ground of human rights concerns. These provisions have existed since 2000s,27 and have been relied upon, among others, in connection to the Saudi Arabia and Yemen situation in 2020-21, and even more recently in connection to the Russia-Ukraine war in 2022.

c. Cybersecurity: Connected to human rights, and as a further reaction to technological advances, cybersecurity has emerged as a key security interest to counter online cyberattacks and practices by autocratic states to monitor dissidents.[28] As a result, controls lists have been expanded to include new technologies and software, such as intrusion software and surveillance technologies, among restricted dual-use items. In addition, Regulation 821/2021 added a new end-use control to specifically target cybersurveillance.[29] It restricts trade in cybersurveillance items (items specially designed to enable the covert surveillance of persons by, e.g., monitoring, extracting, collecting, or analyzing data from information and telecommunication systems), especially if potentially

[26] See B. IMMENKAMP, *Review of Dual-Use Export Control* in *EU Legislation in Progress Briefing*, 24 July 2017, available at https://www.statewatch.org/media/documents/news/2017/aug/ep-briefing-review-dual-use-export-controls-third-edition-24-7-17.pdf; Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM (2016) 616 final, 28 September 2016; C. WHANG, *The Diverging Path: Changes in Dual-Use Export Control Regime for the United States and the European Union and its Implications* in *Society of International Economic Law*, July 2018, 22.

[27] Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ L 159, 30 June 2000. See current Article 9 of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11 June 2021.

[28] See C. WHANG, *Refocusing Export Control Regimes to Effectively Address Cyber Security Concerns*, Cooperative Cyber Defence Centre of Excellence (CCDCOE), 2020, 225; M. KANETAKE, *The EU's Dual-Use Export Control and Human Rights Risks: The Case of Cyber Surveillance Technology* in *Europe and the World: A Law Review*, 3(1), 2019.

[29] Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016)616, 28 September 2016.

intended for human rights or international humanitarian violation.[30]

d. Technology supremacy: A perhaps more subtle interest underlying export controls is the support to regional technology advancement by avoiding transfer of technologies and related know-how, in particular to less friendly actors and destinations.[31] This emerges from the revisions of the dual-use control lists that include more and more advanced technologies pertaining to a variety of industries (e.g. aviation, navigation, chemicals, industrial) in a quest to build and maintain technological supremacy.[32]

The examples above show how the security interests that the EU has been pursuing with export controls, while rooted on countering weapons proliferation, have expanded covering, among others, threats connected with terrorism, human rights violations, and cybersecurity, while arguably also aiming at securing the technological supremacy of the region.

3. Sanctions are instruments used by states and international organizations to pursue foreign policy objectives. They entail "the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations",[33] and may take the form of comprehensive embargoes or more targeted economic, financial, trade or other restrictions targeted at specific persons.[34] They are generally intended to signal disapproval of a certain

[30] Article 5 of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11 June 2021.

[31] See, e.g. Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016)616, 28 September 2016.

[32] See, e.g., O. HRYNKIV, *Comparative Analysis of the Practice of the United States, the European Union, China, and Russia* in *Journal of World Trade*, 56(4), 2022, 633-656.

[33] See, e.g., G.C. HUFBAUER et al., *Economic Sanctions Reconsidered*, 3rd edition, Peterson Institute for International Economics, 2007, 3. See also A.F. LOWENFELD, *International Economic Law*, Oxford University Press, 2008, 850.

[34] See, e.g., J. KLABBERS, *International Law*, Cambridge University Press, 2013, 179.

behavior,[35] and hence coerce a change in policy or conduct.[36] The EU has increasingly resorted to sanctions to assert its interests and values on the international scene.[37]

After providing an overview of the EU sanctions regimes (Section 3.1), some examples will be drawn of recent sanctions by the EU to detect the security interests underlying the EU action in this field (Section 3.2).

3.1. The EU's competence to adopt foreign and security policy measures was first expressly recognized in the Treaty of Maastricht,[38] and now forms part of the EU Common Foreign and Security Policy (CFSP).[39]

The EU resorts to three type of sanctions. First, the EU implements sanctions adopted by the UN Security Council.[40] The UN Security Council imposes sanctions upon "determining the existence of a threat to peace, breach of peace

[35] See, e.g., C. HOTTON, *Targeted Sanctions: Providing a Solution to the Issue of General Sanctions* in *Creighton International & Comparative Law Journal*, 86(7), 2016.

[36] See, e.g., T. BIERSTEKER et al., *The Effectiveness of United Nations Targeted Sanctions*, Graduate Institute of International and Development Studies, 2013, 12; N. ZELYOVA, *Restrictive Measures – Sanctions Compliance, Implementation and Judicial Review Challenges in the Common Foreign and Security Policy of the European Union* in *ERA Forum*, 22, 2021, 162; G. HERNANDEZ, *International Law: Distance in International Law*, 2nd edition. Oxford University Press, 2019; J. GORDON, *The United Nations Security Council and the Emerging Crisis of Legitimacy* in *Yale Journal of International Affairs*, 40(9), 2004; P. HILPOD, *EU law and UN Law in Conflict: The Kadi Case* in *Max Planck Yearbook UN Law*, 13, 2009; A. MOISEIENKO, *The Future of EU Sanctions against Russia. Objectives, Frozen Assets, and Humanitarian Impact* in *EUCRIM*, 2, 2022, 130-131.

[37] Article 32 of the Treaty on European Union, OJ C 202, 7 June 2016 (consolidated).

[38] Article 113 Treaty of Maastricht on European Union, OJ C 191, 29 July 1992. For a discussion, see, e.g., M. CREMONA, F. FRANCIONI, and S. POLI, *Challenging the EU Counter-Terrorism Measures through the Courts* in *EUI Working Papers*, 10, 2009.

[39] The legal basis for the CFSP was set out in the Treaty of Maastricht on European Union (TEU) and revised in the Lisbon Treaty. Articles 21-46, Title V, of the TEU establish the 'General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy (CFSP)'. For a discussion, see, e.g., K. ALEXANDER, *Economic Sanctions: Law and Public Policy*, Palgrave MacMillan, 2009.

[40] Pursuant to Article 48 UN Charter, the UN Security Council's resolutions are binding upon states, which are requested to take action directly and within international organisations of which they are members (i.e. the EU).

or act of aggression".[41] Second, in implementing UN sanctions, the EU may choose to apply sanctions that are more restrictive than those at UN level.[42] Third, the EU may impose wholly autonomous sanctions, in pursuit of its own foreign policy objectives[43] and "bring about peaceful change".[44]

So far, the sanctions packages promoted by the UN Security Council[45] have focused on promoting peace and the international legal order, pursuing objectives such as the political settlement of conflicts, countering terrorism, or preventing nuclear proliferation.[46] The objectives autonomously pursued by the EU have arguably been broader.[47] In particular, EU sanctions must remain consistent with the principles of the EU external action set out in Article 21 Treaty of the European Union:[48]

a. Safeguard its values, fundamental interests, security, independence and integrity.

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[41] See Chapter VII of the Charter of the United Nations 1945, 1 U.N.T.S. XVI (UN Charter). See especially Articles 39 and 41 of the UN Charter.

[42] Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 5664/18, 4 May 2018, para. 3.

[43] Basic Principles on the Use of Restrictive Measures (Sanctions), Doc. 10198/1/04 of 7 June 2004, para. 3.

[44] Council of the European Union, *A Global Strategy for the European Union's Foreign and Security Policy*, 14392/16, 14 November 2016.

[45] Since 1966, the UN Security Council has established 30 sanctions regimes, 14 of which are currently in place (see https://www.un.org/securitycouncil/sanctions/information).

[46] P.J. CARDWELL, E. MORET, *The EU, Sanctions and Regional Leadership* in *European Security*, 2022.

[47] P.J. CARDWELL, E. MORET, *The EU, Sanctions and Regional Leadership* in *European Security*, 2022; A. CHARRON, C. PORTELA, *The Relationship between United Nations Sanctions and Regional Sanctions Regimes*, in T.J. BIERSTEKER, S.E. ECKERT, M. TOURINHO (eds.), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, Cambridge University Press, 2016, 101-118; P.J. CARDWELL, *Values in the European Union's Foreign Policy: An Analysis and Assessment of CFSP Declarations* in *European foreign affairs review*, 21(4), 2016, 601-621.

[48] Whether successful it is outside of the scope of this article, but see, e.g., L. AGGESTAM, L.M. JOHANSSON, *The Leadership Paradox in EU Foreign Policy* in *Journal of Common Market Studies*, 55(6), 2017, 1203-1220; L. AGGESTAM, E. HEDLING, *Leaderisation in Foreign Policy: Performing the Role of EU High Representative* in *European security*, 29(3), 2020, 301–319.

b. Consolidate and support democracy, the rule of law, human rights, and the principles of international law.

c. Preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders.

d. Foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.

e. Encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.

f. Help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

g. Assist populations, countries, and regions confronting natural or man-made disasters.

h. Promote an international system based on stronger multilateral cooperation and good global governance.

Consistent with the interests and values above, EU sanctions have progressively expanded to cover political stability as well as protection of democracy and human rights, as detailed in the next section.

3.2. Over the past years, the EU has increasingly resorted to sanctions in pursuit of its foreign and security objectives and currently counts over 40 sanctions regimes in place.[49] The below paragraphs highlight certain key trends visible in recent EU sanctions measures.

[49] EU Sanctions map, https://www.sanctionsmap.eu/#/main?checked=, last updated on 21 December 2022. See also M. ERIKSSON, *Targeting Peace: Understanding UN and EU Targeted Sanctions*, Routledge, 2016; and F. GIUMELLI, F. HOFFMANN, A. KSIĄŻCZAKOVÁ, *The When, What, Where and Why of European Union Sanctions* in *European Security*, 2020.

First, the EU has used sanctions to complement export controls efforts in countering weapons proliferation. This is particularly evident in the sanctions imposed on Iran since 2007 and intended to restrict nuclear-related transfers and activities.[50]

Second, a significant number of sanctions regimes focus on countering political instability and repression with measures targeting countries or specific political bodies. This is the case of a few long lasting regimes, including sanctions targeting Libya, Venezuela, and Syria:

a. Libya: Since the late nineties, the EU has imposed sanctions targeting Libya, which evolved over time consistently with, but going beyond, UN sanctions. The more recent sanctions package, adopted and revised since 2011, clarifies that the EU restrictions on Libya aim to counter the internal disorders that affect the peace, stability, and security of the country and its successful political transition from prior repressive regimes.[51]

b. Syria: Deemed one of the first regimes where the EU scaled up its sanctions response with broad trade and financial restrictions,[52] the EU imposed sanctions targeting Syria since the early 2000s. Sanctions were primarily intended to condemn the violence and the continued widespread and systematic gross violations of human rights by the Syrian regime and its militias, including

[50] Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran, OJ L 103, 20 April 2007, repealed by Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007, OJ L 281, 27 October 2010, repealed by Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010, OJ L 88, 24 March 2012. The restrictions imposed by EU were kept even after the Council lifted all nuclear-related economic and financial EU sanctions against Iran on 16 January 2016.

[51] See Council Decision (CFSP) 2015/1333 of 31 July 2015 concerning restrictive measures in view of the situation in Libya, and repealing Decision 2011/137/CFSP, OJ L 206 1 August 2015 (consolidated); Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) No 204/2011, OJ L 012 19 January 2016 (consolidated).

[52] See H. MAHONY, *EU Ministers Set to Beef up Syria Arms Embargo* in *EU Observer*, 20 July 2012.

expressing concern for the rise of religiously or ethnically motivated violence.[53]

c. Venezuela: Similarly, since 2017 the EU has had sanctions in place targeting Venezuela as a reaction to the continuing deterioration of democracy, the rule of law, and human rights in the country, with a view of supporting and fostering a credible and meaningful process that can lead to a peaceful negotiated solution.[54]

Third, the recent EU sanctions wave targeting Russia certainly stands out for its unprecedented comprehensiveness, complexity, and fast adoption. The EU adopted nine sanctions packages since February 2022, adding on the already broad sanctions regime in place since 2014.[55] The 2014 sanctions followed the Russian annexation of Crimea/Sevastopol, and aimed to show disapproval of the consequent threat to the sovereignty and territorial integrity of Ukraine. Similar interests motivated the 2022 sanctions, aimed at countering the unprovoked military aggression of Ukraine – both signaling disapproval, and attempting to prevent further escalation and push for a resolution of the matter by limiting, among others, Russia's access to financing and critical products and technology.[56]

Fourth, and similarly to the developments noted for export controls,[57] the EU has further implemented thematic sanctions regimes that focus on a certain concerned area rather than specific countries or regions. Currently, the EU thematic sanctions regimes target the proliferation of chemical weapons,

[53] See Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures in view of the situation in Syria, OJ L 147 1 June 2013 (consolidated); Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011, OJ L 016 19 January 2012 (consolidated).

[54] See Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, OJ L 295 14 november 2017 (consolidated); Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela; OJ L 295 14 November 2017 (consolidated).

[55] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229 31 July 2014 (consolidated).

[56] See, e.g., A. MOISEIENKO, *The Future of EU Sanctions against Russia. Objectives, Frozen Assets, and Humanitarian Impact* in *EUCRIM*, 2, 2022, 130.

[57] See above, Section 2.

terrorism, as well as human rights violations and cyber-attacks. Interestingly, the human rights regime was launched in 2020 to establish a horizontal regime allowing for the adoption of restrictive measures against persons perpetrating or otherwise involved in serious human rights violations and abuses wherever in the world,[58] in clear furtherance of the EU foreign and security objective to promote human rights.[59] The cyber sanctions regimes were similarly launched in 2019 as part of the EU actions to protect the integrity and security of the EU and its citizens against cyber threats and malicious cyber activities,[60] hence allowing for restrictive measures on persons responsible for or otherwise supporting actual or attempted cyber-attacks.[61]

Fifth, it is worth recalling that the EU has long had in place the EU Blocking Statute,[62] an instrument intended to protect EU operators against extraterritorial sanctions adopted by third countries, that is against sanctions that conflict with the EU sanctions policy and affect the operations of the EU operators despite not having a nexus to the regulating country. The EU Blocking Statute signals how the EU attempts to ensure that its policy objectives and interests are not defeated by the actions of other countries.[63]

Based on the foregoing overview, the security interests that the EU has

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[58] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7 December 2020 (consolidated).

[59] Article 21 TEU. See also *EU Action Plan on Human Rights and Democracy 2020-2024*, https://www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf, which set out the EU's level of ambition and priorities in this field in its relations with all third countries.

[60] See Cyber Diplomacy Toolbox, which was adopted by the Council of the European Union on 19 June 2017, https://www.cyber-diplomacy-toolbox.com/.

[61] Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ L 129I 17 May 2019 (consolidated); Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ L 129I , 17 May 2019 (consolidated).

[62] Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom OJ L 309 29 November 1996 (consolidated).

[63] M.W. DOWDLE, *Transnational Law: A Framework for Analysis*, Cambridge University Press, 2022, 448-450.

been pursuing with sanctions are varied, and overall EU sanctions appear capable of adjusting to new threats and everchanging geopolitical circumstances. Nonetheless, some of the key security interests pursued in this field can be summarized in maintaining political stability, protecting a country's sovereignty and territorial integrity, and countering some of the newer threats to society.

4. The concepts of national security and public order are rarely defined in investment screening regimes despite playing a critical role in the assessment of transactions. Whether a transaction is likely to be restricted will depend on the national security and public order concerns that competent authorities identify during their screening analysis. It is therefore key to the predictability and overall functioning of a regime to identify the interests covered in these concepts. But where to look for guidance?

National regimes rarely include a definition but tend to broadly refer to "national security and public order". At best, they point to ambiguous concepts such as the need to maintain the continuity and security of activities[64] which, while offering the flexibility to adjust over time and respond to evolving interests, are so ambiguous that make it hard to grasp what authorities may be going after. The EU Screening Regulation, which among others provides for guiding principles informing EU Member States' regimes, similarly lacks any definitions.[65] As definitions are not in the legislative texts, practice could offer some guidance. The investment screening reviews and decisions that have followed one another over the past years should have formed a body of jurisprudence revealing key interests pursued. Although some decisions hit the press, most cases remain confidential to the public and decisions themselves are often cryptic and do not give away many

[64] See above, footnote 4.

[65] See Proposal for a regulation establishing a framework for screening of foreign direct investments into the European Union, COM (2017) 487 final, 13 September 2017, 2.

insights on the factors taken into account by authorities.[66] Noting the interplay between investment screening and export controls and sanctions, therefore, this article intends to draw some takeaways on the interests that may be pursued under the 'national security and public order' test of investment screening from the experience accumulated in export controls and sanctions.

The paragraphs above aimed at mapping the key interests and objectives that the EU has been pursuing in export controls and sanctions. As noted, export controls appear to have expanded from countering weapons proliferation to new threats connected with terrorism, human rights violations, cybersecurity, as well as aiming at securing technological supremacy.[67] Sanctions have been evolving in pursuit of everchanging geopolitical circumstances, including maintaining political stability, protecting a country's sovereignty and territorial integrity, and fostering some of the newer threats to society.[68] On that basis, the EU action would appear targeting the following interests which arguably play a role in investment screening, and may direct the assessment of competent investment screening authorities:

a. Protect a country's integrity and independence: Sanctions have been used as a reaction to military aggression and political instability; export controls to prevent technological enrichment of unfriendly countries. Investment screening could serve similar interests, allowing authorities to restrict investments that would enable foreign countries to exercise excessive influence via ownership of and access to local assets, information, or technology. The EU institutions have

[66] The OECD Secretariat has for instance noted that "[the l]imited circumstantial information on the interpretation or application of [screening] criteria and a typically low number of cases that could serve as reference points may limit investors' understanding of the application of rules to their case", and that "[i]nformation on practice and past decisions only provides limited additional information, at least to outsiders, as most decisions and the reasons for these decisions are not publicly available." See OECD Secretariat, *Transparency, predictability and accountability for investment screening mechanisms*, 27 May 2021, 23-24.

[67] See above, Section 2.

[68] See above, Section 3.

effectively emphasized how investment screening authorities should be careful against attempts of foreign countries to increase their influence and potential interference with critical activities in the EU.[69]

b. Protecting a country's people against foreign interferences: In line with the recent actions taken by the EU in the export control and sanctions space targeting cybersecurity and surveillance, investment screening authorities are likely to use investment screening to monitor access to data, including not just information historically deemed sensitive because defense- or intelligence-related, but also newer categories of sensitive data, such as personally identifiable information and information pertaining to large portion of society.

c. Safeguard a country's technological expertise and economic resilience: As export controls restricts trade in technology among others to maintain the know-how and intel of certain advanced items locally, investment screening can serve the purpose of preventing access to technology and expertise. Through investment screening, a country can aim to maintain relevant knowledge within its territory, avoid facilitating development of competing economies, while ensuring continuous availability of input to satisfy local demand and maintaining the operability of local industries and society.

d. Overall further EU interests and policy: Ensuring policy consistency and successful achievement of policy objectives may be another relevant takeaway. The EU has long tried to block the effects of foreign sanctions.[70] Investment screening could complement that, and ensure that operators do not become more

[69] See Guidance by the European Commission to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ C 151I , 6 April 2022, where, with focus on Russia and Belarus, it is noted that "particular attention must be given to the threats posed by investments by persons or entities associated with, controlled by or subject to influence by the two governments because these governments have a strong incentive to interfere with critical activities in the EU and to use their ability to control or direct Russian and Belarusian investors in the EU for that purpose."

[70] See Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom OJ L 309 29 November 1996 (consolidated).

prone to act inconsistently with domestic policy objectives while abiding to foreign measures following foreign takeovers.[71]

The few cases publicly available do suggest that the abovementioned interests and objectives have been guiding decision-making in recent investment screening reviews. Investments have been prohibited, for instance, when foreign investors have attempted to purchase businesses with local capabilities concerning innovative technologies,[72] when the investment could threaten the economic and technological independence of the region,[73] and when foreign takeovers could result in sensitive technology and know-how flow to unfriendly countries[74] and potentially contribute to their military capabilities.[75]

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[71] See Communication by the European Commission on the European economic and financial system (fostering openness, strength and resilience), COM(2021) 32 final, 19 January 2021, where it is emphasized that "[w]hen assessing the impact of foreign direct investments into the EU on security and public order, the Commission will also consider the likelihood that the transaction results … would render the EU target company more prone to abide by such extra-territorial sanctions, regardless of the country that imposed them. Such an outcome could thereby endanger the capacity of the EU target company to maintain critical infrastructure in the EU, or to ensure security and continuity of supply of critical inputs into the EU …"

[72] See, e.g., the prohibition of the acquisition of French company Photonis (E. VINCENT, *Défense: Veto de la France au Rachat de Photonis par Teledyne*, in *Le Monde*, 19 December 2020, https://www.lemonde.fr/economie/article/2020/12/19/defense-veto-de-la-france-au-rachat-de-photonis-par-teledyne_6063950_3234); and of the Italian screen printing equipment business of Applied Materials (G. FONTE, E. CAO, *Italy's Draghi Vetoes Third Chinese Takeover this Year*, in *Reuters*, 23 November 2021, https://www.reuters.com/article/italy-china-mergers-veto-idCNL8N2SE559).

[73] See, e.g., the prohibition of the acquisition of German Heyer Medical for the supply of essential medical products (C.H. SEIBT, *China? Thanks but no Thanks*, in *Manager Magazin*, 3 May 2022, https://www.manager-magazin.de/politik/weltwirtschaft/china-thanks-but-no-thanks-a-5b019b4d-405a-4854-9b1b-bb0e2fbd0027); and of seed producer Verisem in Italy (G. FONTE, *Italy Vetoes Sale of Seed Producer to Chinese-Owned Syngenta, Officials Say*, in *Reuters*, 25 October 2021, https://www.reuters.com/article/china-italy-agrifood-idUSKBN2HF1EQ).

[74] See, e.g., the prohibition of the acquisition of German ERS Electronic (*Germany Blocks Sale of Two Chipmakers to China*, in *Euractiv*, 9 November 2022, https://www.euractiv.com/section/global-europe/news/germany-blocks-sale-of-two-chipmakers-to-china/).

[75] See, e.g., the prohibition of the acquisition of IMST in Germany (*Regierung stoppt Übernahme deutscher Firma durch China*, in *Spiegel*, 3 December 2020, https://www.spiegel.de/wirtschaft/unternehmen/imst-regierung-stoppt-uebernahme-durch-chinesischen-konzern-a-325e11ad-0b7a-4627-acc0-35a928f782f1).

5. Investment screening allows competent authorities to review and potentially restrict investments on grounds of national security and public order. Despite the concepts of 'national security' and 'public order' being at the heart of investment screening regimes, the scope and meaning of these concepts are hardly ever defined. To contribute to the investigation of what interests and objectives may be effectively pursued, and starting from the observation that investment screening is deeply intertwined to the fields of export controls and sanctions, this article looked at the EU experience in export controls and sanctions over the past years to identify trends capable of shedding light on the practice in investment screening – at least within the EU. The analysis identified certain interests and prerogatives that competent authorities may pursue within investment screening, including securing political and economic independence while maintaining technological supremacy and competitiveness. In a context of limited transparency in investment screening decision-making, the interplay of investment screening with export controls and sanctions may in fact offer helpful insights in the interests and objectives pursued in the name of "national security" and "public order", providing some form of predictability to investment screening assessments.

NATIONAL SECURITY AND THE QUEST FOR TECHNOLOGICAL LEADERSHIP

Jonas Fechter *

ABSTRACT: *The concept of national security is embodied in EU primary and secondary law. Historically, the term has been construed narrowly and only applied to serious threats to the state and society. With rising geopolitical and geoeconomic tensions, the range of national security concerns has been broadened into what were once considered purely economic realms. This is particularly true in relation to critical technologies that the European Commission and other Western governments are increasingly keen to protect. However, in its current state, the law is far from comprehensive when it comes to safeguarding Europe's technological edge.*

1. National security is both a political concept and a legal term widely used in primary and secondary legislation. A champion of free trade economics, the European Union has pursued liberal, market-driven economic policies since the end of the Cold War. For instance, the Union and its members have concluded thousands of free trade agreements and helped set up the World Trade Organization. In addition, the Union has constructed a liberal legal framework for itself, through which it has, among other things, unilaterally liberalized capital flows worldwide without reciprocal assurances from third countries

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(Art. 63(1) TFEU).[1] However, with geopolitical tensions and even war on the rise, Europe has had to adjust its open market policies considerably. In 2016, it announced the emerging doctrine of "Open Strategic Autonomy" which combines the advantages of liberal economics and prudent policymaking.[2] Delivering on this new strategy, the Union introduced the EU Screening Regulation and pushed for other trade and investment tools such as the Foreign Subsidies Regulation and the Anti-Coercion Regulation.[3]

National security is at the core of these instruments. Traditionally, national security has been a rather narrow concept constrained to the contexts of military capability, the inner and outer security of the state, and critical infrastructure. Reflecting this understanding, the European Treaties contain safeguards that explicitly protect national sovereignty over issues of national security in Art. 4(2) TEU and Art. 346 TFEU and also in Art. 65(1) TFEU. However, as the world becomes more complex and intertwined, this narrow understanding of national security is broadening both politically and academically and there is growing recognition of new security risks emerging from the economic sphere.[4] As the Corona crisis and the war in Ukraine have shown, modern societies rely heavily on resilient supply chains and access to cutting-edge technology. Thus, Europe found itself cut off from key medical products early in the pandemic and is currently in

[1] *Hindelang*, The Free Movement of Capital and Foreign Direct Investment, 2009.

[2] See the European Union Global Strategy entitled *Shared Vision, Common Action: A Stronger Europe*, available at: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (30.01.2023).

[3] The Foreign Subsidies Regulation entered into force on 12 January 2023. The European Commission proposed an Anti-Coercion Instrument in December 2021 which is currently in the legislative process.

[4] *Zwartkruis/De Jong*, The EU Regulation on Screening of Foreign Direct Investment: A Game Changer? European Business Law Review, 2020, 447 (450 et seqq.).

the midst of an energy crisis.[5] At the same time, the Russian economy is crumbling without access to vital Western technology[6] and a tech race is unfolding between the United States and China for economic and political hegemony in the 21st century.[7] In response, governments have been specifically designing investment screening procedures to protect critical technologies from being accessed or manipulated through strategic foreign investments. However, the current state of the law is far from comprehensive and there are various ways to channel critical technologies out to the single market. This article addresses the concept of national security in EU primary law and secondary legislation. It considers how the concept is evolving in light of the current geopolitical tensions, then, highlighting the importance of technological sovereignty, it identifies loopholes in the law and how they can be closed.

2. National security is a concept derived from the political sciences that is widely used in the study of international affairs and security studies.[8] As a legal term, it is embodied in both EU primary law and secondary legislation. The actual term "national security" is prominently used in Art. 4(2) TEU. In addition, there is a range of provisions in primary law that do not use the term explicitly but are shaped by the concept. For example, Art. 346 TFEU contains provisions for the protection of state secrets and preventing weapons trading, while Art. 65(1) TFEU and other derogations of the four freedoms permit the infringement of the

[5] https://www.swp-berlin.org/publikation/supply-chain-instability-threatens-security-of-supplies (30.01.2023).

[6] *Milov*, The Sanctions on Russia Are Working, Foreign Affairs, 2023, available at: https://www.foreignaffairs.com/russian-federation/sanctions-russia-are-working (30.01.2023).

[7] *Schmidt/Bajraktari*, Foreign Affairs, 2022, available at: https://www.foreignaffairs.com/united-states/america-losing-its-tech-contest-china (30.01.2023).

[8] *Zwartkruis/De Jong*, The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?, European Business Law Review, 2020, 447 (450 et seqq.).

freedoms for reasons of "public policy and public security".

In a broader sense, Art. 4 TEU regulates the relationship between the Union and the Member States in a fundamental way. It contains the principle of conferral (para. 1), the duty to respect certain characteristics of the Member States (para. 2), and the principle of sincere cooperation between the Union and the Member States (para. 3). The duty to respect in para. 2 and the principle of sincere cooperation are very abstract and difficult to apply to individual cases. Yet, they determine the relationship between the Union and the Member States in a fundamental way and are reflected in secondary legislation.[9] Thus, Art. 4(2) TEU stipulates that the Union shall respect the essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. Interestingly, the German version of the TEU does not use a literal translation of "maintaining law and order" but the term "öffentliche Ordnung" (public policy), which is the same term used for the derogations of the four freedoms in Art. 65(1) TFEU. Furthermore, Art. 4(2) TEU affirms that national security remains the sole responsibility of each Member State.

The "essential State functions" protected by Art. 4(2) TEU refer to the traditional protective functions of the state, as defined in this section.[10] As national security is a key part of the "essential State functions" and is closely related to security policy, the Member States have, historically, wanted to prevent the Union from legislating too broadly in related areas such as terrorism

[9] *Schill/Krenn*, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, September 2022, Art. 4 TEU para. 1.

[10] *Obwexer*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 2015, Art. 4 TEU para. 38.

prevention.[11] Furthermore, the term "national security" is used in a somewhat similar fashion to "public security", which the TFEU uses when permitting the derogations of the fundamental freedoms (Art. 36, Art. 65(1)(b) TFEU etc.). For this reason, the CJEU case law on these derogations is thought to give further indications how "national security" is being understood.[12] However, given the different wording of Art. 4(2) TEU, it appears that national security should be construed more narrowly than "public security". In essence, national security is about the "existential security concerns of the Member States"[13] and must have a nationwide dimension.[14] At the same time, the concept is not fixed and, therefore, also covers new threat scenarios.

According to Art. 4(2) TEU, national security remains the sole responsibility of each Member State. However, the Union is already responsible for various governance policies that have implications for national security, most notably the Common Foreign and Security Policy (Art. 23 TEU et seqq.) and the provisions on the Area of Freedom, Security and Justice (Art. 67 TFEU et seqq.).[15] However, enacting the principle set out in Art. 4(2) TEU, the treaties provide safeguards for national sovereignty.[16] The CFSP is designed as an intergovernmental area of European law[17] and Art. 72 TFEU embodies Art. 4(2) TEU.[18] Trade and investment policies may also impact the national security interests of the Member States,

[11] *Calliess*, in: Calliess/Ruffert, EUV/AEUV, 2022, Art. 4 TEU para. 45; *Obwexer*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 2015, Art. 4 TEU para. 46.
[12] *Schill/Krenn*, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, September 2022, Art. 4 TEU para. 42; *Hatje*, in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 2019, Art. 4 TEU para. 19.
[13] *Hatje*, in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 2019, Art. 4 TEU para. 19.
[14] *Schill/Krenn*, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, September 2022, Art. 4 TEU para. 42.
[15] *Streinz*, in Streinz: EUV/AEUV, 2018 para. 17.
[16] *Geiger/Kirchmair*, in: Geiger/Khan/Kotzur/Kirchmair, EUV/AEUV, 2023, Art. 4 TEU para. 4.
[17] *Streinz*, Europarecht, 11. Edition 2019, para. 1334.
[18] *Geiger/Kirchmair*, in: Geiger/Khan/Kotzur/Kirchmair, EUV/AEUV, 2023, Art. 4 TEU para. 4.

which is why Art. 1(2) of the EU Screening Regulations refers specifically to these areas as the sole responsibility of the Members States.[19] Nevertheless, given the interconnectedness of the legal, infrastructural, and societal features of the Member States, national security is becoming an increasingly united endeavor and shared destiny.[20]

In addition, Art. 346 TFEU protects "the essential interests of security" of the Member States in regard to information sharing and the defense industry. According to the provision, no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. The same principle applies to the production of or trade in arms, munitions, and war materials provided that these measures do not adversely affect dual-use goods.

Member States may adopt the measures they consider necessary to safeguard their essential security interests. This highly indeterminate term, "essential security interests", refers to the state's internal and external security.[21] Given the almost "self-judging" nature of this clause, Member States have broad discretion in determining what constitutes their essential security interests.[22] However, the ECJ has stated that "the provision cannot be construed as conferring on Member States a power to depart from the provisions of the Treaty simply in reliance on those interests. The Member State which wishes to avail itself of the derogation allowed under Article 346(1)(b) TFEU must show that such derogation

[19] Art. 1(2) EU-Screening-RL:
"This Regulation is without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU."
[20] *Calliess*, in: Calliess/Ruffert, EUV/AEUV, 2022, Art. 4 TEU para. 47.
[21] *Wegener*, in: Calliess/Ruffert, EUV/AEUV, 2022, Art. 346 TFEU para. 4.
[22] *Eisenhut*, in: Geiger/Khan/Kotzur/Kirchmair, EUV/AEUV, 2023, Art. 346 TFEU para. 5.

is necessary in order to protect its essential security interests."[23] At the same time, the ECJ tends to be cautious in its assessment of Member State measures.[24] Under Union law, the exercise of Article 346 TFEU is controlled by a special procedure set out in Art. 348 TFEU.[25]

The protection of national security is further reflected in the clauses related to the derogation of fundamental freedoms, albeit under the designation of "public policy or public security". According to Art. 65(1)(b) TFEU, the freedom of capital movement shall be without prejudice to the right of Member States to take all requisite measures which are justified on grounds of public policy or public security. The same provisions, with additional criteria, are found in Art. 36, 45(3), 52(1) TFEU. As exceptions to the fundamental freedoms, these clauses must be interpreted narrowly.[26] According to the case law of the ECJ, Member States are, in principle, free to determine the requirements of public policy and public security in the light of their national needs.[27] It follows, therefore, that these grounds may vary from country to country.[28] At the same time, the Court has made it clear that the scope of the derogation cannot be determined unilaterally by each Member State without any control by the Union institutions.[29] This effectively means that the Court is the final arbiter on whether a purported reason for derogating from the fundamental freedoms is acceptable under Union law. Famously, it has stipulated that "public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest

[23] ECJ, ECLI:EU:C:2014:2139 – C-474/12 – para. 34.
[24] *Wegener*, in: Calliess/Ruffert, EUV/AEUV, 2022, Art. 346 TFEU para. 7.
[25] *Kokott*, in Streinz: EUV/AEUV, 2018 para. 4.
[26] ECJ, ECLI:EU:C:2000:124, C-54/99 – *Église de Scientology*, para. 17.
[27] ECJ, ECLI:EU:C:2000:124, C-54/99 – *Église de Scientology*, para. 17.
[28] *Ukrow/Ress*, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, September 2022, Art. 65 TFEU para. 66.
[29] ECJ, ECLI:EU:C:2000:124, C-54/99 – *Église de Scientology*, para. 17; ECJ, ECLI:EU: C:2003:272 - C-463/00, para. 72.

of society".[30]

In the case law of the Court, it has been determined that a variety of reasons reach the high threshold of "genuine and sufficiently serious threat to a fundamental interest of society". For example, the Court has had to examine situations in which Member States sought permission to derogate from the fundamental freedoms on grounds similar to the national security considerations described in Art. 4(2) TEU. In *Albore,* it decided that the defense of the national territory constituted a reason to derogate from the freedom of capital movements.[31] On the facts of the case, there was an Italian law that made it mandatory for foreign nationals to get approval from the competent authority when purchasing land in certain designated areas deemed relevant to national security. According to the Court, such a provision would only be accepted if the Member State demonstrated that the "non-discriminatory treatment of the nationals of all the Member States would expose the military interest of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures".[32]

Similarly, in *Bordessa*, the Court acknowledged that money laundering, drug trafficking, and terrorism may all justify derogations from the freedom of capital movements[33] because, as shown above, terrorism comes under the narrow understanding of "national security" in Art. 4(2) TEU. However, money laundering and drug trafficking can be related to terrorism but also take place in criminal contexts that are not related to threats against the state of government itself.

Furthermore, the Court has had to deal with a range of cases in which

[30] ECJ, ECLI:EU:C:2000:124, C-54/99 – *Église de Scientology*, para. 17; ECJ, ECLI:EU:C:2003:272 - C-463/00, para. 72.
[31] ECJ, ECLI:EU:C:2000:401 - C-423/98 - *Albore*, para. 24.
[32] ECJ, ECLI:EU:C:2000:401 - C-423/98 - *Albore*, para. 24.
[33] ECJ, ECLI:EU:C:1995:54 - C-358/93 – *Bordessa*, para. 21.

Member States attempted to restrict fundamental freedoms based on activities that are more economic in nature than would fit the narrow, security-specific reasons included under Art. 4(2) TEU. However, as a general point, the Court has repeatedly emphasized that fundamental freedoms may not be limited for "purely economic ends".[34] Nevertheless, in the case of *Campus Oil*, which concerned the free movement of goods, the Court has acknowledged that a shortage of petroleum products may pose a risk to public security because its effects are not purely economic but also affect the state and society at large[35] - a rather prophetic statement from today's perspective. Following the privatization of many formerly state-owned companies, especially in the energy and telecommunication sector, the ECJ has had to deal with a large number of so-called *Golden Share* cases.[36] In these cases, the Court has examined a range of laws by which the governments of Member States have attempted, to varying degrees, to retain some influence over privatized companies. In most cases, the governments either obliged investors to seek their approval prior to investing in the companies or reserved special rights for themselves – the "Golden Shares" – which they would not normally retain under company law or which were not commensurate with their normal voting powers.

In the instructive case of *Commission v. Spain,* the Court had to evaluate a law that required government approval for certain actions in formerly state-

[34] ECJ, ECLI:EU:C:2000:124, C-54/99 – *Église de Scientology*, para. 17; ECJ, ECLI:EU:C:1984:256 – C-72/83 - *Campus Oil*, para. 35.

[35] ECLI:EU:C:1984:256 – C-72/83 - *Campus Oil*, para. 34: "It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect."

[36] For an overview: *Apel*, Golden Shares, 2017.

owned companies from the oil, telecommunication, banking, tobacco, and electricity sectors.[37] The law affected company decisions, *inter alia*, regarding the restructuring of the company, changes in the company's objectives, and the disposal of the assets or shareholdings necessary to attain their objective. In essence, the law was designed to help ensure the affected companies continued to function well. As a starting point, the Court stipulated that restrictions on both tobacco companies and banks could not be justified as they did not perform public-service functions.[38] While this may seem obvious with regard to the tobacco industry, the Court further explained that, on the facts of the case, the Spanish government had failed to show that the banking companies affected provided services similar to a central bank or other public services. However, it is a different matter for the petroleum, telecommunications, and electricity sectors:

As regards the three other undertakings concerned, which are active in the petroleum, telecommunications and electricity sectors, it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reasons and therefore may justify an obstacle to the free movement of capital.[39]

These cases demonstrate that the Court is willing to accept derogations from fundamental freedoms, even in cases that are primarily economic scenarios, when there are spillover effects for more fundamental societal and governmental interests. However, the Court has developed strict criteria for the justification of these derogations, in particular, the principle of proportionality.[40] Thus, it is rare

[37] ECJ, ECLI:EU:C:2003:272 - C-463/00 – *Commission/Spain*.
[38] ECJ, ECLI:EU:C:2003:272 - C-463/00 – *Commission/Spain* - para. 70.
[39] ECJ, ECLI:EU:C:2003:272 - C-463/00 – *Commission/Spain* - para. 71.
[40] ECJ, ECLI:EU:C:2000:124, C-54/99 – *Église de Scientology*, para. 18.

that the Court finds that a Golden Share regulation meets these criteria.[41] Therefore, despite paying lip service to the alleged right of the Member States to determine their own "public policy and public security" exceptions, the Court has been strict in enforcing the freedoms.

3. Primary law protects the national security interests of Member States with a variety of provisions. Most notably, the foundational provision in Art. 4(2) TEU reserves the domain of national security for the Member States. Given the broad competences of the Union in areas including the Common Foreign and Security Policy and the Area of Freedom, Security, and Justice, this provision is narrowly construed and limited to serious threats to the state. In addition, Union law allows Member States to derogate from the fundamental freedoms, inter alia, for reasons of public policy or public security. These concepts are related to national security but are broader in scope. They are not limited to specific threats to the state or trade in weapons, as Art. 346 TFEU is, and they may have an economic dimension. However, the Court has consistently emphasized that Member States may not derogate from the fundamental freedoms on purely economic grounds. According to the case law, measures restricting the free movement of capital will only be permitted in exceptional circumstances.

In the wake of increasing geopolitical and geoeconomic tensions around the world, we appear to be witnessing a broadening of the scope of national security and public security concerns that go beyond the understanding outlined above.[42] In fact, situations that one might have formerly considered purely economic in nature, seem to be increasingly viewed as impingements on national security. Since the end of the Cold War, the United States, Europe, and Japan have

[41] A case in point is: ECJ, - ECLI:EU:C:2002:328 - C-503/99 – *Commission/Belgium*.
[42] https://www.lawfareblog.com/geoeconomic-world-order (30.01.2023).

developed an international economic order that has attempted to separate the realms of (security-related) politics and economics as much as possible.[43] To this end, they have created several powerful institutions including the World Trade Organization and the system of international and bilateral investment treaties. However, there has been growing concern about unrestricted trade and investment with regard to both its economic and security ramifications. Translating the famous words of former Commission president Jean-Claude Juncker, "we are not naïve free-traders"[44], into actual policies, the European Commission has developed a whole range of trade and investment instruments under the new doctrine of "Open Strategic Autonomy". This new approach, originally developed in the context of foreign policy, aims to make Europe more resilient in an increasingly challenging and competitive international environment.[45] It contains defensive instruments such as investment screening mechanisms, the Foreign Subsidies Regulation, the International Procurement Instrument, and the Anti-Coercion Instrument.[46] Moreover, the Union and the Member States aim to enhance Europe's economic security with industrial policies designed for key economic sectors. For example, the Commission has proposed the Chips Act with a view to strengthening the European semiconductor industry. The Corona pandemic highlighted how vulnerable the supply chains for key medical products are in many Member States, and also, how reliant Europe is on Asian supply chains.[47] Furthermore, following the Russian attack on Ukraine and

[43] https://www.lawfareblog.com/geoeconomic-world-order (30.01.2023).

[44] President Jean-Claude Juncker's State of the Union Address 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 (30.01.2023).

[45] https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159434.pdf (30.01.2023).

[46] For an overview, see: *Müller-Ibold/Herrmann*: Die Entwicklung des Europäischen Außenwirtschaftsrechts (2020-2022), EuZW 2022, 1029.

[47] https://impact.economist.com/perspectives/sites/default/files/ei202_-_fragile_supply_chains_-_dv6.pdf (30.01.2023).

the subsequent economic war between Russia and the West, many Member States have struggled economically with soaring energy prices and shortages.[48] All of which demonstrates the reality of the security implications of economic interconnectedness.

In addition to concerns about supply chains, there has been increasing awareness of access to critical technologies such as semiconductors and other foundational technologies. In addition to capital and labor endowments, technology is a key determining factor for the growth potential of any economy.[49] Technological leadership in the military sphere can also give countries a commanding advantage over their competitors. Thus, Western technology has increasingly become the target of foreign strategic investments. The EU-Screening-Regulation is specifically designed to prevent third countries from channeling critical technology out of the Union. According to Art. 4(1)(b) EU-Screening-Regulation, when determining whether foreign direct investment is likely to affect security or public order, Member States should consider its potential effect on:

critical technologies and dual use items […] including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies.

After introducing and expanding investment screening mechanisms, many Member States have started to screen FDI with a particular focus on these critical technologies. For instance, the German Economic Ministry, the competent authority under German law,[50] has thoroughly scrutinized deals involving the

[48] https://www.faz.net/aktuell/wirtschaft/energiekrise-was-den-gaspreis-verteuert-18172833.html (30.01.2023).
[49] *Mankiw/Taylor*, Grundzüge der Volkswirtschaft, 8. Edition 2021, p. 710.
[50] § 13 Abs. 2 Nr. 2 lit. c Foreign Trade and Payments Act.

German semiconductor industry. In 2021, Taiwanese company GlobalWafers attempted to purchase German wafer manufacturer Siltronic. However, the deal failed because GlobalWafers could not secure the Ministry's approval before the end of the long stop date, which ended the bidding process. GlobalWafers sought an injunction from the Administrative Court Berlin allowing the deal to move forward, but it failed. During the trial, the Ministry emphasized the importance of the semiconductor industry citing this as the reason why it did not allow the deal to move forward.[51] A few months later, the Ministry prohibited the acquisition of another semiconductor company, Elmos, by a Chinese investor.[52]

Other countries have adopted similar measures. The United States, in particular, has unleashed a range of instruments to curb China's access to cutting-edge semiconductors. In addition to investment screening, the US government has adopted new export controls designed to deny China access to the latest generation of advanced chips.[53]

4. Despite the importance of critical technologies, the European system of investment screening is far from comprehensive and there are various methods third countries can still use to gain access to European technology. Three of these loopholes deserve further investigation: foreign investors can gain access to European technology through asset acquisitions rather than direct investment (1); European investors can transfer technology to other countries using outbound investments (2); and foreign investors can gain substantial influence over European companies through portfolio investments.

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[51] VG Berlin, Beschl. v. 27.01.2022 – 4 L 111/22 – para. 22.

[52] https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/11/20221109-chipfabrik-elmos-darf-nicht-an-chinesischen-investor-verkauft-werden.html (30.01.2023).

[53] *Brown*, The Return of Export Controls, ForeignAffairs, 2023, available at: https://www.foreignaffairs.com/united-states/return-export-controls (30.01.2023).

5. Specifically, investors can still gain access to European technology by acquiring a European company's assets, rather than acquiring the company itself. Such transactions may include acquisitions, licensing agreements, and similar transactions. However, the EU Screening Regulation only covers foreign direct investment which, according to Art. 2(1) EU-Screening-RL, is defined as:

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.

Therefore, access to critical technologies by way of asset acquisition is not restricted through the EU Screening Regulation. Furthermore, restrictions on the transfer of technologies under the Dual-Use Regulation[54] and the General Export Regulation[55] are far more limited than the EU Screening Regulation when it comes to direct investments. On the other hand, interestingly, the new National Security and Investment Act 2021 (NSIA), which established an investment screening mechanism in the United Kingdom for the first time, not only applies to the control of "qualifying entities" (Sec. 8) but also to the control of "qualifying assets" (Sec. 9). Both constitute trigger events (Sec. 5(1)) which give the Secretary of State the power to assess the acquisition on grounds of national security. In July 2022, the Secretary of State prevented the acquisition of critical technology according to Sec. 26 NSIA.[56] On the facts of the case, a Chinese company entered into a

[54] Regulation (EU) 2021/821.
[55] Regulation (EU) 2015/479.
[56] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092802/aquisition-scamp5-scamp7-know-how-final-order-notice-20220720.pdf (30.01.2023).

licensing agreement with the University of Manchester that enabled the company to use intellectual property relating to certain vision sensing technology to develop, test and verify, manufacture, use, and sell licensed products. However, under Sec. 26(3) NSIA, the Secretary of State has the power to assess whether such a transaction may or has constituted "a risk to national security". In this specific case, the acquisition also had dual-use applications that would potentially be covered by the European Dual-Use Regulation. However, the "risk to national security" test is much broader than that and may take into account other threat scenarios as well.

Under current European secondary law, acquisitions of critical technologies are only covered in particular circumstances. Most importantly, the Dual-Use Regulation, which is an updated version of an older dual-use control regime, established a system of prior authorization for the export of dual-use items.[57] According to Art. 2(1) Dual-Use-RL, dual-use items are items that can be used for both civil and military purposes. This not only covers physical goods but also software and technology. Crucially, though, there needs to be a military dimension to the item in order for the Regulation to be applied. This is different from Art. 4(1)(b) EU-Screening-RL, which covers both dual-use items and other critical technologies. In addition, the Dual-Use Regulation allows for the control of items that may be used in connection with internal repression or other serious violations of human rights (Art. 5(1) Dual-Use-RL). Thus, Member States may impose further authorization requirements for dual-use items that are or may be intended for use in ways that are a risk to public security including acts of terrorism and human rights violations (Art. 9(1) Dual-Use-RL). Although it covers important non-proliferation issues and further expands into the realm of human rights

[57] For an overview, see: *Bungenberg*, Export- und Importkontrollverwaltungsrecht, in: Terhechte [Edit.], Verwaltungsrecht der Europäischen Union, 2. Edition 2022, § 29 para. 67 et seqq.

protection, the Dual-Use Regulation is not designed as a general geoeconomic tool in the way that the EU-Screening-Regulation is.[58] In essence, Member States will not be able to withhold authorization when there is no evidence for any dual-use application. This is a very different approach from the United Kingdom's National Security and Investment Act's "risk to national security" test. Furthermore, the United States has developed a strong set of export control laws that are designed to curb China's access to semiconductors.[59]

In addition, the General Export Regulation does also not allow for the restriction of foreign entities' access to European critical technologies. According to Art. 1 General-Export-RL, exporting products from the Union to third countries shall be free and the Union and Member States can only derogate from Art. 1 General-Export-RL for a few specific reasons.[60] The Commission may take certain protective measures in order to prevent a critical situation from arising on account of a shortage of essential products (Art. 5 et seq. General-Export-RL), a power that was actively employed during the Corona crisis.[61] In addition, Member States may apply quantitative restrictions on exports on the grounds of public morality, public policy, or public security according to Art. 10 General-Export-RL, a section that repeats the phrasing of the grounds for derogation used in Art. 36 TFEU. However, these derogations have also been narrowly construed.[62] While Member States may certainly take into account new threat scenarios, it is unlikely that they will be

[58] *Giesemann*, Die Novelle der EU-Dual-Use-Verordnung: Ein Überblick über die neue europäische Ausfuhrverordnung, EuZW 2021, 365 (368 et seq.).
[59] *Brown*, The Return of Export Controls, Foreign Affairs, 2023, available at: https://www.foreign affairs.com/united-states/return-export-controls (30.01.2023).
[60] For an overview: *Bungenberg*, Export- und Importkontrollverwaltungsrecht, in: Terhechte [Edit.], Verwaltungsrecht der Europäischen Union, 2. Edition 2022, § 29 para. 57a et seqq.
[61] *Bungenberg*, Export- und Importkontrollverwaltungsrecht, in: Terhechte [Edit.], Verwaltungsrecht der Europäischen Union, 2. Edition 2022, § 29 para. 63.
[62] *Ehlers/Pünder*, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, September 2022, Art. 10 General-Export-RL, para. 4.

able to limit the export of critical technology to the same extent as Art. 4(1)(b) EU-Screening-RL allows for the screening of inbound FDI.

Given that the European Union does not, therefore, have a mechanism to prevent non-dual-use related acquisitions of technology for the time being, any such powers would have to be adopted by the Union under its exclusive legislative competence according to Art. 3(1)(e), Art. 207(2) TFEU. However, such a mechanism will need to be carefully tailored to avoid creating overly negative consequences for the European export industry.

6. Outbound investments by European companies may also severely impact the Union's ambition to become more sovereign.[63] As an open economy, many European companies have invested in and source vital products from other nations. Whilst the interconnectedness of the world economy has huge economic benefits that make European companies more competitive, overreliance on global networks may have negative consequences during periods of geopolitical and geoeconomic tension. In particular, European and other Western nations have become reliant on many globally sourced products, from Asia in particular, a reality that had significant implications during the Corona pandemic. Causing further concern, many Asian countries have corporate structure requirements that force foreign investors to enter into joint venture agreements with local partners and share vital trade secrets with them.[64] Such practices may lead to a loss of technological knowledge for the investing countries.

In light of these supply chain and technology related concerns, the US Congress is currently debating whether to introduce the National Critical

[63] See also: *Fechter*, Next-level Screening? The Case of Outbound Investment Screening, *to be published soon*.
[64] *Sykes*, Journal of Legal Analysis, 2021, 127.

Capabilities Defense Act (NCCDA), a bill which was approved by the House of Representatives in the last Congress and is now being debated in the new Congress.[65] The NCCDA would establish the new Committee on National Critical Capabilities (Sec. 1002) that would screen the outbound investments of businesses based in the United States. The bill covers a large range of transactions and is not limited to direct investment, which is why it has been criticized by the business community. According to Sec. 1001(5)(A)(i), it covers

(i) Any transaction by a United States business that –

(I) shifts or relocates to a country of concern, or transfers to an entity of concern, the design, development, production, manufacture, fabrication, supply, servicing, testing, management, operation, investment, ownership, or any other essential elements involving one or more national critical capabilities identified under subparagraph (B)(ii); or

(II) could result in an unacceptable risk to a national critical capability.

After assessing the risks associated with the transaction, the committee would refer the matter to the President who would make the final decision as to whether the transaction should be prohibited or mitigated. The whole process is designed to minimize the risk to national critical capabilities.

Given the current geopolitical climate, the European Commission has announced that it will assess whether there is a need to introduce a similar outbound investment screening mechanism in Europe.[66] This is a recognition of the need to further enhance the Union's geoeconomic toolbox as part of the overall doctrine of "Open Strategic Autonomy".

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[65] https://www.skadden.com/insights/publications/2022/06/congress-reportedly-advances-broad-proposal (30.01.2023).

[66] https://commission.europa.eu/system/files/2022-10/com_2022_548_3_en.pdf: "Moreover we will examine whether additional tools are necessary in respect of outbound strategic investments controls."

Given the lasting commitment of the Union to a free, rules-based economic order, it seems likely that any future outbound screening mechanism would only target direct investment (rather than the broad application of the NCCDA) and only apply to investments made by European countries to third countries. There are good reasons to believe that screening outbound investments to third countries would fall under the exclusive competence of the Union according to Art. 3(1)(e) and 207(2) TFEU. In fact, the wording of Art. 206 et seq. TFEU clearly states that the Common Commercial Policy, which falls under the exclusive competence of the Union, extends to "foreign direct investment". There is no indication that this is to be understood as referring only to direct investments by third countries.[67] In fact, such a reading would make it more difficult for the Union to conclude trade and investment treaties because it would have to coordinate with Member States whenever agreements are entered into that may also affect direct investment by Europeans. However, given the experience with the EU Screening Regulation, the Union could create a common European screening framework and delegate the legislative competence back to the Member States (Art. 2(1) TFEU) in order to expand the scope of the framework.

As for the legal limitations, any outbound screening mechanism must be in line with the fundamental freedoms and rights of the Charter. Furthermore, if Member States are given the legislative competence to establish their own screening mechanisms, their respective constitutional rights and provisions may have to be taken into consideration as well.[68] As with inbound investment screening, it is not at all clear whether the freedom of establishment (Art. 49

[67] *Weiß*, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, September 2022, Art. 207 TEU para. 39; https://www.faz.net/einspruch/das-blueht-der-freiheit-des-kapitalverkehrs-18463726.html (30.01.2023).

[68] For German constitutional law: BVerfG, Beschl. V. 06.11.2019 – 1 BvR 16/13 – Recht auf Vergessen I; BVerfG, Beschl. v. 06.11.2019 – 1 BvR 276/17 – Recht auf Vergessen II.

TFEU) or the freedom of capital movements (Art. 63 TFEU) would apply to outbound direct investments.[69] In fact, secondary establishments are generally covered by Art. 49(1) TFEU although the territorial scope of the provision is limited to establishments within the Union.[70] Therefore, outbound investments do not fall under the scope of the freedom of establishment. In contrast, Art. 63 TFEU does extend to worldwide capital movements and is not limited to the single market[71] and, moreover, direct investment, in principle, is a form of capital movement.[72] However, as both Art. 49 TFEU and Art. 63 TFEU cover direct investment, the ECJ has adopted a somewhat ambiguous approach to delineating those fundamental freedoms.[73] The question is whether Art. 49 TFEU takes precedence over Art. 63 TFEU even when an investment is not covered by its territorial scope. There were earlier cases in which the Court applied both freedoms to the same transactions.[74] However, in recent years, in the context of taxation law in particular, the Court has given precedence to the freedom of establishment over the freedom of capital movement. While the criticism of this delineation is justifiable,[75] it is somewhat unclear whether the Court will apply this stream of case law to the outbound investment scenario.

In any event, it is submitted here that a potential European screening

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[69] On the debate regarding inbound investment screening, see: *Clostermeyer*, Staatliche Übernahmeabwehr und die Kapitalverkehrsfreiheit zu Drittstaaten, 2011; *Velten*, Screening Foreign Direct Investment in the EU, 2021.

[70] ECJ, ECLI:EU:C:2012:707, C-35/11 – *Test Claimants in the Fii Group litigation*, para. 97.

[71] *Barnard*, The Substantive Law of the EU, 6. Edition 2019, p. 525.

[72] *Barnard*, The Substantive Law of the EU, 6. Edition 2019, p. 524.

[73] On inbound investments, see: *Hindelang/Moberg*, CML Rev. 1427 (1440 et seqq.).

[74] ECJ, ECLI:EU:C:2002:328 - C-503/99 – *Golden Shares*, para. 36 et seqq.; *Clostermeyer*, Staatliche Übernahmeabwehr und die Kapitalverkehrsfreiheit zu Drittstaaten, 2011, p. 193 et seqq.

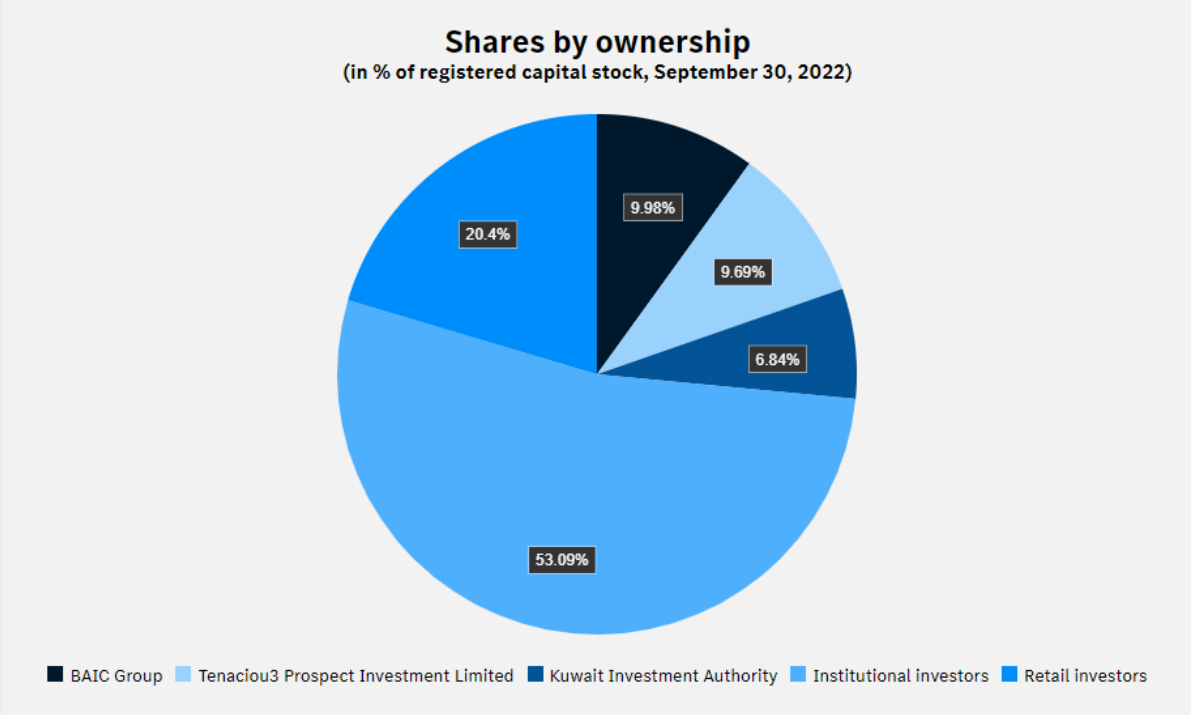
[75] *Lübke*, Die binnenmarktrechtliche Kapital- und Zahlungsverkehrsfreiheit, in: Müller-Graf [Hrsg.], Europäisches Binnenmarkt- und Wirtschaftsordnungsrecht, § 5 para. 48 et seq.; *Clostermeyer*, Staatliche Übernahmeabwehr und die Kapitalverkehrsfreiheit zu Drittstaaten, 2011, p. 214 et seqq.

mechanism would only be in line with European primary law if it is limited in scope and provides for procedural guarantees similar to those included in Art. 3 EU-Screening-RL. As outlined above, such a mechanism should be limited to direct investments and only cover transactions by European companies in third countries, so as not to disrupt the internal market. With regard to the protection of critical technologies, the framework should single out those technologies deemed to be of vital importance for the future of the economy in a way similar to Art. 4(1)(b) EU-Screening-RL.

7. Depending on the shareholding structure of the company, shareholders may gain significant influence over companies through portfolio investments. Portfolio investments are defined as those which do not reach the level of influence of FDI. While FDI aims to establish control or significant influence over the investment target, portfolio investment is said to be designed to gain financial benefit[76] and the EU-Screening-Regulation specifically excludes portfolio investments, without setting a fixed threshold for FDI.[77] However, it is generally assumed that FDI starts at a 10 % shareholding level[78] and the German investment screening mechanism sets the level for FDI at a minimum of 10 % of the voting rights.[79] While this delineation may be appropriate in most cases, the actual shareholding structure of a company may give investors with less than 10 % of the voting rights significant influence.[80] This is especially true for companies with widespread shareholdings such as the Mercedes-Benz Group AG, which currently has two Chinese investors conveniently avoiding investment controls by holding

[76] EuGH, ECLI:EU:C:2017:376, C-2/15 – *Singapore*, para. 80, 227.
[77] Consideration 9.
[78] *Schülken*, Drittstaatliche Direktinvestitionen in Energieinfrastrukturen, 2021, p. 49.
[79] § 56 Abs. 1 Foreign Trade and Payments Ordinance.
[80] With reference to national company law: *Clostermeyer*, Staatliche Übernahmeabwehr und die Kapitalverkehrsfreiheit zu Drittstaaten, 2011, p. 187 et seq.

just under the 10 % threshold. This demonstrates that minority shareholders may, indeed, materially influence company decisions, including those related to technology transfers.



Source: https://group.mercedes-benz.com/investors/share/shareholder-structure/ (30.01.2023)

There are good reasons to limit the scope of investment screening and related instruments, given that they raise transaction costs for companies and investors and make it more difficult for European companies to gain access to financing. However, should Member States intend to screen portfolio investments, they would be able to do so without prior authorization by the Union. The ECJ has determined that the exclusive competence of the Union under Art. 3(1)(e) and Art. 207 TFEU for “foreign direct investment” does not cover

portfolio investments.[81] Simultaneously, Member States have to respect the limits set out by the freedom of capital movements according to Art. 63(1) TFEU. However, unlike in the FDI scenario, portfolio investments do not constitute an "establishment" in the sense of Art. 49 TFEU. Therefore, Art. 63(1) TFEU does apply to portfolio investment with no delineation problem.

8. National security is a concept well-known in primary and secondary law. It is found in Art. 4(2) TEU ("national security"), Art. 346 TFEU ("essential interests of its security"), Art. 65(1) TFEU, and other derogations from the fundamental freedoms ("public policy or public security") to varying degrees, all clauses that the ECJ has construed narrowly. However, given the changing geopolitical landscape, the Union and Member States have adopted a range of legislative measures that seem to push the boundaries of the "national security" concept, broadly understood. The quest for technological leadership and control over foundational and critical technologies appear to have become a defining feature of today's great power rivalries. Technology, such as semiconductors, allow countries to gain commanding advantages in the economic and military spheres. In order to prevent the poaching of its critical technologies, the Union has extended inbound investment controls to cover those critical technologies (Art. 4(1)(b) EU-Screening-RL). However, the law is far from comprehensive and contains multiple loopholes. This study has analyzed three of these loopholes: investors gaining access over (non-)dual-use goods by way of asset acquisition rather than direct investment (1); critical technologies flowing outside the Union through outbound direct investment by companies from the Union (2); and third-country investors materially influencing European companies through portfolio investments in the case of companies with widespread shareholdings (3).

[81] EuGH, ECLI:EU:C:2017:376, C-2/15 – *Singapore*, para. 227.

Governments will have to take these loopholes into account when addressing the challenges posed by the new geoeconomic world order.[82] When putting the Union's "Open Strategic Autonomy" into action, it may be prudent to make it more difficult for third countries to gain access to European technology. However, if they clamp down too hard on third-country investments, governments risk making Europe a less attractive investment and trading partner. Any further regulation will, therefore, need careful calibration.

[82] https://www.lawfareblog.com/geoeconomic-world-order (30.01.2023).

THE STATE'S ROLE IN STRATEGIC ECONOMIC SECTORS

Lorenzo Locci* - Caterina Pistocchi**

ABSTRACT: *This paper briefly summarizes the evolution of the Italian legal framework on Golden Powers and highlights the new role of the Italian State in strategic economic sectors, as well as the existence of concerns as regards the compatibility of the regulatory framework in force with the principles set out in the European Treaties.*

SUMMARY: 1. Introduction to the special powers of the Italian State in strategic economic sectors. – 2. The protection of essential public interests. – 3. State influence in the defense and national security sectors. – 4. The special powers of the State in the energy, transports and telecommunications sectors. – 5. (*It follows*): and in other strategic sectors. – 6. The transition from the "entrepreneur" State to the "strategist" State. – 7. *The compatibility with the European freedoms*. – 8. A recent opinion on the relationship between European freedoms and FDI screening mechanisms.

1. The role of the Italian State in strategic economic sectors has undergone a deep evolution over the last two decades, during which we have assisted to a shift from a system focused on management by the State of entrepreneurial activities in areas of general interest to the progressive privatization, first formal and then substantial, of formerly public enterprises[1].

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Paragraph 8 is attributable to Caterina Pistocchi while all the remaining paragraphs are attributable to Lorenzo Locci.

[1] In order to identify a moment of symbolic divide between the historical phase in which the State directly managed the most important enterprises in strategic economic sectors (hence the

The need to maintain safeguards to protect the general interests in strategic economic sectors justified, in 1994, the attribution to the State of *special powers* in companies now privatized and operating in sectors deemed strategic, regardless of the effective participation of the public shareholder in the share capital of such companies (the so-called "*golden share*")[2]. These special rights – which attributed to the State powers of management influence over strategic companies disproportionate to the entrepreneurial risk assumed by the same – raised the objection by the European Court of Justice with regard to their compatibility with the principles of freedom underlying the European construction. In compliance with the Court's decisions, the Italian legislator (first in 2003 and then in 2012) restricted the scope and the conditions for the exercise of the aforesaid powers, with a view to apply them only in residual and extreme cases (*extrema ratio)*[3].

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reference to the "entrepreneur-State") and that in which the privatization policy started, reference should be made to the enactment of Legislative Decree no. 332 of 31 May 1994, converted into law no. 474 of 30 July 1994 (which accelerated the procedures for the progressive divestment of said shareholdings). See, among others, G. OPPO, Diritto privato ed interessi pubblici, in Riv. dir. civ., 1994, I, 25 et seq.; S. CASSESE, La nuova costituzione economica, Bari, 2004, 7 ss.; N. IRTI, L'ordine giuridico del mercato, Bari, 2003, 121 et seq.; B. LIBONATI, La faticosa "accelerazione" delle privatizzazioni, in Giur. comm, 1995, I, 20 et seq.; D. SICLARI, Privatizzazioni e mercato in un sistema concorrenziale, in Elementi di diritto pubblico dell'economia, edited by M. PELLEGRINI, Padua, 2012, 459 et seq.

[2] On the "golden share" regulation introduced by the aforementioned Legislative Decree no. 332 of 31 May 1994, see, among others, F. SANTONASTASO, La "saga" della golden share tra libertà di movimento di capitali e libertà di stabilimento, in Giur. comm., 2007, I, 302 et seq.; S.M. CARBONE, Golden share e fondi sovrani: lo Stato nelle imprese tra libertà comunitarie e diritto statale, in Dir. comm. int, 2009, 503 et seq.; I. DEMURO, La necessaria oggettività per l'esercizio dei poteri previsti dalla golden share, in Giur. comm., 2009, II, 640 et seq.; T. BALLARINO - L. BELLODI, La golden share nel diritto comunitario, in Riv. soc., 2004, 2 et seq.; F. MERUSI, La Corte di Giustizia condanna la golden share all'italiana e il ritardo del legislatore, in Dir. pubbl. com. eur., 2000, 1236 et seq.

[3] The list of special powers and the situations that triggered their application were significantly reduced at first by Law no. 350 of 24 December 2003 and then further reduced by Decree Law no. 21 of 15 March 2012, converted into Law no. 56 of 11 May 2012 (see below).

Indeed, the attribution of special powers to the State over privatized companies, which characterizes not only the Italian legal framework but also the domestic jurisdictions of other EU Member States, has been scrutinized and objected by the European Commission and the Court of Justice on several occasions. Reference is made to the cases in which the presence of the aforementioned powers has been deemed capable of restricting intra-EU investments, and thus breaching the principles set forth in the Treaty on the Functioning of the European Union on the free movement of capitals and freedom of establishment[4].

The internationalization of financial systems[5] and the substantial equalization, at a European level, between public and private companies[6], led to the introduction of Law Decree no. 21 of 15 March 2012 (converted into Law no. 56 of 11 May 2012), which – by repealing the previous regulation on "golden share" – granted the Italian Government with renewed special powers to intervene over the ownership structure and extraordinary transactions of companies operating in the strategic economic sectors of defense, national security, energy, transport and communications. These are still today the "traditional" strategic sectors, provided that additional sectors of European origin

[4] On this topic see F.M. MUCCIARELLI, La sentenza Volkswagen e il pericolo di una convergenza forzata tra gli ordinamenti societari, in Giur. comm., 2009, II, 273 et seq.; G. PATTI, I diritti speciali dello Stato tra libera circolazione di capitali, golden shares e regole di diritto societario, in Europa e dir. priv, 2011, 525 et seq.; S. DE VIDO, La recente giurisprudenza comunitaria in materia di golden shares: violazione delle norme sulla libera circolazione dei capitali o sul diritto di stabilimento?, in Dir. comm. int., 2007, 861 et seq.; M.T. CIRENEI, Riforma delle società, legislazione speciale e ordinamento comunitario: brevi riflessioni sulla disciplina italiana delle società per azioni a partecipazione pubblica, in Dir. comm. int., 2005, 41 et seq.

[5] See F. CAPRIGLIONE, La finanza come fenomeno di dimensione internazionale, in Manuale di diritto bancario e finanziario, edited by F. CAPRIGLIONE, Padua, second edition, 2019, 70 et seq.

[6] On this topic see G. BERTI DE MARINIS, Disciplina del mercato e tutela dell'utente nei servizi pubblici economici, Naples, 2015, spec. 51 et seq.

which have been gradually added, as specified below[7]. In this context, the circumstance that the application of this legal framework does not depend on the active participation of the Italian State, or of public authorities – and, therefore, on the acquisition by the latter of equity shareholdings in the companies identified as "strategic" – is significant and affects the functioning of the foreign direct investment regime in Italy[8].

2. A relevant innovation introduced by the current regulatory framework compared to the one in force before 2012 consists in the broadening of the strategic economic activities and operations potentially subject to the State's special powers. Indeed, these now extend beyond the traditional perimeter of privatized (and therefore formerly public) companies, to include all assets of vital

[7] The need to proceed with a further reform of the special powers is due to the objections made by the European Commission in the years preceding it, which, being accepted in the decisions of the Court of Justice of the European Union, prompted the Italian legislator first to amend the physiognomy of the special powers with Law no. 350 of 24 December 2003, limiting their exercise only to cases that harmed the vital interests of the State, and then – after having noted the inadequacy of the measures adopted until then from the point of view of the European institutions – to issue Law Decree no. 21/2012, still in force today albeit with significant additions and amendments with respect to the text originally issued. In this perspective it is possible to understand the recourse to emergency legislation and the reasons for certain regulatory solutions adopted by the Italian legislator in Law Decree no. 21/2012, including, for instance, and as specified below, the distinction of the scope of application – and of the exercise procedure – of the special powers depending on whether they concern the defense and national security sectors or the energy, transport and communications sectors (and then, subsequently, the other strategic sectors of European derivation), as well as the greater incisiveness of the powers of public intervention when it is the investment by a non-EU entity that jeopardizes the essential interests of the State.

[8] On the golden power regulation see, among others, A. SACCO GINEVRI, *L'espansione dei golden powers fra sovranismo e globalizzazione*, in *Rivista trimestrale di diritto dell'economia*, 2019, no. 1, I, 151 et seq.; L. ARDIZZONE - M.L. VITALI, I poteri speciali dello Stato nei settori di pubblica utilità, in Giur. comm., 2013, I, 919 et seq.; D. GALLO, Corte di Giustizia UE, golden shares e investimenti sovrani, in Dir. comm. int, 2013, 917 et seq.; F. BASSAN, Dalla golden share al golden power: il cambio di paradigma europeo nell'intervento dello Stato sull'economia, in Studi sull'integrazione europea, 2014, 57 et seq.; A. SACCO GINEVRI - F.M. SBARBARO, La transizione dalla golden share nelle società privatizzate ai poteri speciali dello Stato nei settori strategici: spunti per una ricerca, in NLCC, 2013, 109 et seq.

interest for the State concretely identified by the Government through separate decrees or regulations.

This explains why the special powers attributed to the State by the legal framework in force are commonly referred to as "*golden powers"* and no longer *as "golden share*", since now there is no connection (not even etymological) with a current or previous shareholding belonging to public entities in the share capital of the strategic companies potentially subject to State influence.

Basically, the Italian legislator has redefined the function of special powers, which were originally aimed at maintaining a public influence over privatized strategic companies after having lost their corporate control. Rather, today the adoption of mechanisms to safeguard the essential public interests that can be triggered whenever activities of strategic importance are jeopardized (regardless of the nature of the entity formally owning them) has been preferred.

A further evidence that these special powers now aim at safeguarding general interests also lies in the fact that, in the current regulatory framework, they are differently graduated based on the economic sectors to which they apply, being them more incisive in the sectors of defense and national security, and softer in the other strategic sectors.

Moreover, while in the regulatory framework applicable before 2012 the inclusion of a specific privatized company within the scope of application of the special powers regime required an *ad hoc* provision in that company's by-laws (so as to allow its identification on the basis of its functional essence), instead *golden powers* now operate exclusively on the basis of the specific indications provided by the applicable laws and regulations. This results in a significant widening of the economic activities potentially subject to the exercise of the special powers of the State, and seems consistent with a regulatory approach that abandon the recourse to corporate law tools (adjusted to meet public needs) and, conversely,

favors external and sectoral supervision schemes of economic activities of significant relevance for the State[9].

The legislative choice indicated, albeit subject to doubts of excessive interventionism of the State over private economic initiative, has the merit of protecting domestic strategic activities from risks deriving from the significant influence of foreign investors who might be driven by speculative intentions potentially detrimental to essential public interests of the State[10]. Moreover, this approach is in line with solutions adopted in foreign jurisdictions where, despite being driven by liberal economic ideologies, entrepreneurial autonomy is sacrificed whenever it conflicts with essential public interests[11].

The spread of the Covid-19 pandemic significantly contributed to this regulatory process towards the strengthening of the special powers. Indeed, the health emergency further accelerated the *unstoppable rise*[12] of the State's golden powers in several jurisdictions, including Italy, in the belief that the strengthening of the Government's prerogatives could prevent "*predatory buy-outs of strategic*

[9] Evidence of the change in perspective referred to above can be found, among others, in the elimination from the list of the special powers of the State corporate law tools such as, for instance, the unmodifiable statutory clauses that governed the former *golden share* or the right to appoint directors without voting rights. On this topic see A. SACCO GINEVRI, *Golden powers e funzionamento delle imprese strategiche*, in *Foreign Direct Investment Screening - Il controllo sugli investimenti esteri diretti*, edited by G. NAPOLITANO, Bologna, Il Mulino, 2019, 153 et seq.

[10] On this point see D. SINISCALCO, *Governi alle porte: crisi del credito e fondi sovrani*, in *Mercato concorrenza regole*, 2008, 75 et seq.; F. BASSAN, *Una regolazione per i fondi sovrani*, in *Mercato concorrenza regole*, 2009, 95 ss.; M. LAMANDINI, *Temi e problemi in materia di contendibilità del controllo, fondi sovrani e investimenti diretti stranieri nei settori strategici tra libera circolazione dei capitali e interesse nazionale*, in *Riv. dir. soc.*, 2012, 510 et seq.

[11] For instance in the United States, where the *national security* paradigm has long been the legal justification for significant restrictions on foreign investments. See M. PLOTKIN, *Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together to Make the United States More Secure*, in *The Yale Law Journal*, 2008, 91 et seq.; A. GUACCERO, E. PAN, J. CHESTER, *Foreign Investment and Sovereign Wealth Funds: Forms of Control in the US-Europe Comparative Perspective*, in *Riv. soc.*, 2008, 1359 et seq.

[12] The expression is the English translation of the Italian "*inarrestabile ascesa*" by G. NAPOLITANO, *L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere*, in *Giornale dir. amm.*, 2019, 549 et seq.

activities by foreign investors"[13], otherwise favored by depressed company values due to the pandemic.

Therefore, what emerges is a widespread use – at an international level – of the protective instrument offered by the golden powers as a defensive tool with real effects, aimed at preserving the localism of major national companies at a time when they are easily scalable by foreign investors[14].

3. The special powers that the State may exercise in the *defense* and *national security* sectors are set out in Article 1 of Law Decree 21/2012 and, as anticipated, are more incisive than those concerning the strategic sectors of energy, transport and communications, as well as the sectors deriving from the EU regulation. This is because, on the one hand, defense and national security hold a prominent role in the scale of the essential interests of the State and, on the other hand, these sectors are historically considered to fall within national competences and, therefore, are less harmonized at EU level than others.

Given the above, the exercise of the power of public interference in the sectors of defense and national security is independent from the EU or non-EU nature of the players involved.

The perimeter of application of the *golden powers* in the sectors at hand is defined by one or more decrees of the President of the Italian Council of Ministers; decrees which are subject to continuous updating as regards the identification of activities of strategic importance for the national defense and

[13] Reference is made to the Communication from the Commission of March 26, 2020 on "*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)*" (2020/C 99 I/01).
[14] See A. SACCO GINEVRI, *Le società strategiche*, in *Trattato delle società*, edited by Vincenzo Donativi, Utet, 2022, to. IV, 843 et seq.

security system, including key activities[15].

In relation to activities concretely identified as *strategic*, the President of the Italian Council of Ministers may exercise – only in the event of a threat of serious prejudice to essential defense and national security interests – the following special powers:

(i) imposition of specific conditions in the event of acquisition, for any reason whatsoever (whether by EU or non-EU entities), of shareholdings in companies engaged in activities of strategic importance in the aforementioned sectors; or

(ii) opposition to the acquisition of shareholdings in the aforesaid companies where the purchaser is other than the Italian State, Italian public entities or entities controlled by the latter, and where the magnitude of the purchase is such as to compromise the interests of defense and national security[16]; or

(iii) veto power on the adoption of certain corporate resolutions[17] having a particular impact under a managerial o strategic perspective[18].

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[15] As of today, reference shall be made to the Decree of the Presidency of the Council of Ministers no. 108 of 6 June 2014, which, in addition to identifying the activities of strategic importance, including key strategic activities, for the national defense and security system (pursuant to Article 1, paragraph 1, of Law Decree no. 21/2012), also provides for certain limitations on the application of the special powers in case of intra-group transactions (see Article 4 of the above-mentioned Decree). In addition, Presidential Decree no. 35 of 19 February 2014 identifies the procedures for the activation of the special powers in the defense and national security sectors (pursuant to Article 1, paragraph 8, of Law Decree no. 21/2012).

[16] The provision at hand marks the completion of a process of evolution that has led the power of public interference from an initial public *approval of* the transfers of significant shareholdings (see the original version of Article 2(1)(*a)* of Decree-Law No. 332/1994), to an intermediate phase of possible public opposition to the transfers of significant shareholdings (*following* amendment of letter *a)* mentioned by Law No. 350/2003), and eventually to the current power of opposition to transfers of shareholdings of a magnitude that could compromise the interests of the reference strategic sectors.

[17] It should be noted that, pursuant to Article 1(4) of Decree Law 21/2012, the veto power is exercised in the form of the imposition of specific prescriptions or conditions whenever this is sufficient to ensure the protection of essential defence and national security interests.

[18] In essence, the veto power can prevent the taking of certain decisions by the shareholders' meeting and/or the board of directors of strategic undertakings that - on the basis of an *ex ante* assessment - could jeopardise sectoral public interests because they are likely to change: the

While the special powers mentioned above *under points (i) and (ii) above* limit, with increasing intensity, the negotiating autonomy of shareholders with regard to the circulation of the stakes they hold, the special veto power indicated *under point (iii) above* restricts the entrepreneurial autonomy to which the corporate bodies [19] of strategic enterprises are entitled.

Should one of the conditions for triggering the potential exercise of special powers be met, then the *golden powers'* regulation applies. The regulatory framework provides indications on the criteria through which the State shall assess the existence of a serious prejudice to essential defense and national security interests. In particular, the possible exercise of the *veto* power by the public authority shall be preceded by various assessments, including as regards: the strategic relevance of the assets of the companies being transferred, the suitability of the final structure resulting from the overall corporate transaction (i.e., the circumstance that it is capable of guaranteeing the integrity of the national defense and security system), the security of information relating to military defense, the international interests of the State, as well as the protection of national territory, critical and strategic infrastructure and borders.

On the other hand, in case of exercise of special powers concerning the *transfer of* shareholdings (see the powers referred to under points (i) and (ii) above), the Italian Government shall assess the existence of a serious prejudice to essential public interests of the State. Reference shall be made to the economic, financial, technical and organizational capacity of the purchaser, as well as to the impacts of its industrial project on the target company's operations and on the proper and punctual performance of the contractual obligations undertaken towards the

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characteristic *business of* the undertaking or the law applicable to it, or the direct or indirect ownership of strategic assets belonging to the company.

[19] I.e., the shareholders' meeting and the administrative body, depending on their competence in the specific matter.

public authorities.

In addition, arguments of a political nature, such as the existence of ties between the buyer and third countries that do not recognize the principles of democracy or the rule of law or do not comply with international law (by engaging in risky behaviors towards the community of States), can also be invoked to justify the exercise of special powers[20].

In order to allow governmental scrutiny, transactions entered into by strategic companies, potentially subject to the exercise of a veto power, must be notified by the latter to the Presidency of the Council of Ministers; differently, the transfer of significant shareholdings must be notified by the purchaser. In the latter case, until the notification – and, thereafter, until the expiry of the deadline reserved to the Italian Government for the imposition of conditions or the exercise of the power of opposition – the voting rights, and in any event any right not having an economic content, attached to the relevant shareholdings are suspended[21]. If the power of opposition is exercised, the transferee may not exercise the aforementioned corporate rights relating to the relevant shareholding, which shall be transferred within one year[22].

4. The special powers of the State in the energy, transport and

[20] Given that the special powers relating to the circulation of shareholdings may be exercised regardless of whether the purchaser is European or non-European, the general principle provided under Article 3(1) of Decree-Law No. 21/2012, according to which the acquisition, for any reason whatsoever, by a non-EU party of shareholdings in companies holding one or more of the assets identified as strategic is permitted *subject to reciprocity* (in compliance with international agreements signed by Italy or the European Union), remains unaffected.

[21] Where the power is exercised in the form of the imposition of conditions, in the event of any non-compliance with the conditions imposed on the purchaser for as long as such non-compliance continues, the voting rights and all other rights other than proprietary rights attached to the shares representing the relevant stake are suspended.

[22] In the event of non-compliance, the court, at the request of the Presidency of the Council of Ministers, shall order the sale of the aforesaid shares in accordance with the procedures set forth in Article *2359-ter of the* Italian Civil Code. Any shareholders' meeting's resolutions taken with the casting vote of such shares shall be null and void.

communications sectors are set out in Article 2 of Law Decree 21/2012. These apply, first and foremost, towards companies holding strategic assets (identified by the Presidency of the Council of Ministers with one or more decrees) falling within the following categories: *(a)* networks and plants, including those necessary to ensure the minimum supply and operation of essential public services; *(b)* assets and relations of strategic importance – even if they are the subject of concessions, however entrusted, including concessions for large hydroelectric derivation and cultivation of geothermal resources[23] – for the national interest in the energy, transport and communications sectors[24].

Similarly to what already described for Article 1 above, also in the aforementioned sectors the special powers of the State may be exercised with regard to both certain transactions resolved (or implemented) by companies holding strategic assets (if they are capable of affecting the relevant public interests) and the transfer of controlling interests in such companies.

In the first case, the Italian Government may veto any resolution, act or transaction that results in a change in the ownership, control or availability of strategic assets or in a change in their destination of use (including certain resolutions that are exhaustively indicated, such as those concerning the transfer of subsidiary companies holding these assets).

In the second case, the Italian Government may limit the acquisition for any reason by an entity outside the European Union – as well as, as a result of the last amendments permanently introduced by Law Decree No. 21/2022, by entities

[23] The provision referred to in the text was introduced by Article 25, paragraph 1, letter 0a), of Law Decree 21 March 2022, No. 21, converted, with amendments, by Law 20 May 2022, No. 51, and by Article. 6, paragraph 2-*bis*, of Law Decree 17 May 2022, No. 50, converted, with amendments, by Law 15 July 2022, No. 91.

[24] Presidential Decree No. 180 of 23 December 2020 identifies the strategic activities in the energy, transport and communications sectors that are subject to the special powers referred to in Article 2 of Law Decree No. 21/2012, while Presidential Decree No. 86 of 25 March 2014 sets forth the procedure for the exercise of such special powers, where also certain exemptions to the application of the special powers are provided for in the case of intra-group transactions.

belonging to the European Union, including those resident in Italy, upon the occurrence of the relevant conditions – of stakes in strategic companies in the event that they allow the permanent establishment of the purchaser by acquiring a control position over the target company[25]. In such a case, the Italian Government may either impose *conditions and prescriptions to the effectiveness of* the purchase upon the parties involved in the transaction, or *oppose* to the purchase in presence of risks for the protection of strategic interests that cannot be in any way excluded through conditions and/or prescriptions.

The regulation for the exercise of special powers in the sectors indicated under Article 2 of Law Decree 21/2012 is similar to that set forth in Article 1 of the same decree, although not fully coincident. Indeed, in the sectors at hand, a company's resolution or operation can be prevented only upon the occurrence of something more than a mere threat of serious prejudice to the State's essential interests, and namely in presence of an *exceptional situation* (not governed by national or European law) of threat of serious prejudice to public interests relating to the safety and operation of networks and implants, as well as the continuity of the relevant supplies.

The special powers granted to the State in the sectors at hand can be exercised exclusively on the basis of objective and non-discriminatory criteria; to this end, the Italian Government takes into account, with regard to the nature of the transaction, both political and economic criteria[26].

[25] For the purposes of Article 2 of Law Decree 21/2012, the notion of "control" shall be referred to the situations indicated in Article 2359 of the Italian Civil Code and Article 93 of Legislative Decree No. 58 of 24 February 1998. On this topic see, among others, F. PRENESTINI, *Golden power, acquisition of control and company law profiles*, in *Il Nuovo Diritto delle Società*, 12/2022, 2315 et seq.

[26] In particular, the Italian Government shall consider: *(a) the* existence of objective grounds to consider that there may be links between the purchaser and third States which do not recognize the principles of democracy or the rule of law, or which do not abide by the rules of international law, or which have adopted conducts that pose a risk to the international community, as well as *(b) the* suitability of the structure resulting from the legal act or transaction, taking into account also the

5. In addition to the "traditional" strategic sectors mentioned above, also broadband electronic communication services based on 5G and cloud technology referred to in Article *1-bis* of Law Decree no. 21/2012 – introduced by law Decree no. 22 of March 25, 2019, converted into law, with amendments, by Law no. 41 of May 20, 2019, and subsequently amended by Law Decree no. 105 of September 21, 2019, and then fully replaced by Article 28, paragraph 1, of Law Decree no. 21/2022, converted, with amendments, by Law no. 51 of May 20, 2022 – are considered to be of strategic importance for the national defense and security system pursuant to the golden powers regulation.

Moreover, in the last years the golden powers framework has been affected by far-reaching changes concerning each of the pillars on which the regulation is based, and namely: the scope of application, the prerequisites triggering the notification obligations, the related public intervention powers in the event of danger to national interests, and the structure of control[27].

In this perspective, it shall be recalled that, on October 11, 2020, EU Regulation no. 2019/452/EU of the European Parliament and of the Council of March 19, 2019 establishing a framework for monitoring foreign direct investments in the Union, including a mechanism for cooperation between Member States and the Commission with regard to foreign direct investments that may affect security or public order[28], became applicable in all Member States.

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acquisition funding and the economic, financial, technical and organizational capacity of the purchaser, to ensure both the security and continuity of supply and the maintenance, security and operation of the networks and plants.

[27] On this point see A. SACCO GINEVRI, *I golden powers fra Stato e mercato ai tempi del COVID-19*, in *Giur. comm.*, 2021, I, 282 et seq.

[28] In general on the aforementioned EU Regulation see G. NAPOLITANO, *Il regolamento sul controllo degli investimenti esteri diretti alla ricerca di una sovranità europea nell'arena economica globale*, in *Rivista della regolazione dei mercati*, 2019, 2 ss.; R. GAROFOLI, *Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative*, in *Federalismi*, 2019, no. 17, 4 et seq.; S. VELLUCCI, *The new regulation on the screening of FDI: the quest for a balance to protect EU's essential interests*, in *Dir. commercio int.*, 2019, 142 et seq.; P. MACCARRONE, *Poteri speciali e settori strategici: brevi note sulle*

In a nutshell, Article 4 of the abovementioned EU Regulation provides that, in determining whether a foreign direct investment may affect security or public order, the Member States and the Commission may take into consideration its potential effects, inter alia, at the level of:

(a) critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and sensitive facilities, as well as investments in land and buildings critical for the use of such infrastructures;

(b) critical technologies and dual-use products, including artificial intelligence, robotics, semiconductors, cyber security, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnology and biotechnology;

(c) security of supply of critical production factors, including energy and raw materials, as well as food security;

(d) access to sensitive information, including personal data, or the ability to control such information; or

(e) media freedom and pluralism.

In addition, Article 6 of the aforementioned European Regulation establishes a cooperation mechanism in relation to foreign direct investments, providing that Member States shall notify the European Commission and the other Member States of all foreign direct investments that are subject of an ongoing control on their national territory. As a result of these notifications, it is up to the Member States and the Commission to issue comments and opinions in the case of

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recenti novità normative, in *Osservatorio cost.*, 2020, 130 et seq.; B.P. AMICARELLI, *Il controllo degli investimenti stranieri nel Regolamento europeo del 2019*, in *Giornale dir. amm.*, 2019, 763 et seq.; G. SCARCHILLO, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei. Un primo commento al Regolamento (UE) 2019/452 sul controllo degli investimenti esteri diretti*, in *Riv. dir. comm. int.*, 2020, 569 et seq.

transactions that are likely to affect supranational security or public order. Then subsequent Article 7 of the EU Regulation extends the cooperation mechanism to foreign direct investments not subject to an ongoing control. This is the case when a Member State considers that a foreign direct investment planned or already carried out in another Member State which is not subject to an ongoing control is likely to affect security or public order on its territory, or has relevant information in relation to that foreign direct investment. Should this situation materialize the Members State may submit comments to that other Member State and share them simultaneously with the Commission.

At first the EU Regulation's provision have been partially implemented in the Italian legal framework with Law Decree-no. 105 of September 21, 2019, which, among others, extended the governmental scrutiny to companies holding strategic assets or relationships in a number of sectors in addition to the "traditional" ones of security, defense, energy, transport, telecommunications or 5G networks, by introducing a direct reference to the list of sectors provided under the EU Regulation (see Article 2, paragraph *1-ter*, Decree-Law No. 21/2012, introduced by Decree-Law No. 105/2019). However, the actual operation of this extension was hindered by the lack of a detailed identification of the relevant strategic assets comprised in these new sectors, which was left to subsequent decrees of the Italian Prime Minister not yet issued at that time.

Pending the adoption of such implementing provisions – set forth, as of today, by Presidential Decree no. 179 of December 18, 2020, which now identifies the assets and relations of national interest in the areas referred to in Article 4(1) of the EU Regulation – the spread of the Covid-19 pandemic prompted the European Commission to invite Member States "*to make full use (...) of foreign direct investment control mechanisms*", in order to address the risk of takeovers of strategic companies and assets with the consequent "*loss of critical resources and*

technologies" (see the Communication dated March 26, 2020).

In particular, the European Commission called for the early adoption of new, fully-fledged control mechanisms, where appropriate, while preserving all available options to deal with cases where the acquisition or control of a certain company, infrastructure or technology poses a risk to security or public order in the EU, also taking into account the interdependencies that exist in an integrated market such as the European one. Therefore, according to the Commission restrictive measures are legitimate in order to protect national security and public order as they are necessary to ensure security of supply, the provision of essential public services and/or financial stability in the context of the health crisis, mitigating the risk of buy-out of European industrial and commercial operators, including small and medium-size enterprises.

Following the aforementioned communication by the Commission and in light of the health emergency, the Italian legislator introduced further significant amendments to the golden powers' legal framework. In particular, Articles 15 and 16 of the so-called "Liquidity Decree" (i.e., Law Decree no. 23 of April 8, 2020) extended, in certain respects until December 31, 2022[29] , the cases in which the golden powers can be exercised "*in order* to *counter the epidemiological emergency from COVID-19 and contain its negative effects*"[30].

In particular, on the one hand, the acquisitions of corporate control[31] by foreign European investors (and no longer non-EU investors only) and the acquisition of shareholdings equal to, or exceeding, 10% of the corporate capital of companies

[29] Term last extended by Article 17(1)(a) of Decree-Law no. 228 of December 30, 2021, converted, with amendments, by Law no. 15 of February 25, 2022.

[30] On this topic see, among others, F. CAPRIGLIONE, *La finanza UE al tempo del coronavirus*, in *Riv. trim. dir. econ.*, 2020, 37 et seq.

[31] The provision refers, in particular, to acquisitions for any reason of shareholdings, by foreign persons, including European ones, of such importance as to determine the permanent establishment of the purchaser by reason of the acquisition of control over the target company, pursuant to Article 2359 of the Italian Civil Code and Article 93 of the Consolidated Financial Act (Legislative Decree No. 58 of February 24, 1998).

operating in all sectors referred to in Article 2 of Law Decree no. 21/2012 by non-EU purchasers – if the total value of the investment was equal to, or greater than, Euro 1 million – was temporarily made subject to the restrictions on shareholding transfers pursuant to Article 2, paragraph 5, of Law Decree no. 21/2012.

On the other hand, also the resolutions, acts or transactions, involving a company that holds the assets and relationships in the sectors referred to in the aforementioned Presidential Decree no. 179 of December 18, 2020 which result in the change of the ownership, control or availability of said assets or in a change of their destination, including in favor of a European entity, had been temporarily included in the scope of application of the golden powers.

In addition, Article 16 of Law Decree No. 23/2020 introduced the possibility for the special powers to be exercised *ex officio* by the Government, including in case of breach of the notification obligations provided for by Decree-Law No. 21/2012 in all relevant sectors[32].

Moreover, Article 25 of the aforementioned Law Decree no. 21/2022 introduced certain provisions aimed at further reshaping the special powers of the State in the energy, transport and communications sectors and in the additional "European sectors" mentioned above.

Among the most significant changes are those introduced by Article 25, paragraph 1, letter b), of the aforementioned decree, which amends Article 2, paragraph *2-bis*, of Law Decree no. 21/2012 by including in the scope of the Government's veto power also those resolutions, acts and transactions of the target company that result in a change of the ownership, control or availability of assets in favor of a European person, including persons established or residing in

[32] See, for a similar provision in the US legal system, C. MANN, *The global rush towards foreign direct investment screening: lessons from the United States*, in VV.AA., *Foreign Direct Investment Screening, Il controllo sugli investimenti esteri diretti*, edited by G. Napolitano, Bologna, 2019, 15 et seq.

Italy, when such assets are strategic for the communications, energy, transport, health, agricultural and financial sectors, including credit and insurance sectors.

Subsequent subparagraph (c), of paragraph 1, of Article 25 of the decree at hand amended Article 2, paragraph 5, of Law Decree no. 21/2012 by providing the possibility that the purchaser and the target company file a joint notification in respect of relevant acquisitions. In addition, the provision introduces in paragraph 5 of Law Decree no. 21/2012 the obligation to notify acquisitions of shareholdings by persons belonging to the European Union, including those resident in Italy, in the sectors of communications, energy, transport, health, agriculture and finance, including credit and insurance sectors, of such importance as to determine the permanent establishment of the purchaser by reason of the acquisition of the control over the target company. This provision crystalizes and make permanent, although by delimiting their sectoral scope, the measures of a temporary nature introduced to contrast the effects of pandemic emergency.

A further significant amendment is introduced by Article 25(1)(c)(3) of Law Decree no. 21/2022, which provides for a notification obligation in respect of the acquisition of shareholdings, by foreign non-EU persons, in companies holding assets identified as strategic within the meaning of paragraphs 1 and 1-ter attributing a share of the voting rights or the corporate capital of at least 10%, taking into account the stakes already directly or indirectly held, where the total value of the investment is equal to or exceeds EUR 1 million, and acquisitions that cause the thresholds of 15, 20, 25 and 50% of the share capital to be exceeded are also notified. Again, this is amendment stabilizes the transitional regime introduced by Law Decree no. 23/2020 in the context of the pandemic.

Last, Article 26 of Law Decree No. 21/2022 introduced a new Article *2-quarter* in Law Decree no. 21/2012, which delegates to a Presidential Decree the identification of simplification measures of the notification modalities, deadlines

and procedures related to the preliminary investigation for the purposes of the possible exercise of the special powers of the Government without the need to adopt a formal resolution by the Presidency of the Council of Ministers.

In particular, reference is made to proceedings being settled without the need to take such a resolution in the event of non-exercise of the special powers upon a unanimous decision of the members of the coordination group, provided that each Administration and the parties may request the examination of the notification to the Council of Ministers. Also, paragraph 2 of Article 26 delegates to the same decree the identification of the modalities for the filing of a "pre-notification" allowing the examination of the transaction by the Coordination Group or the Council of Ministers, prior to the formal notification, in order to provide a preliminary assessment on the applicability of the golden powers' legal framework and preliminary indications on the outcome of the scrutiny over the transaction[33].

6. The systematic balance that was established with the 2012 legal framework implies the decision to pursue the protection of general interests in strategic economic sectors with no distinction between public and private companies. However, this implies that the Italian Government's interference can be justified, in concrete terms, when the *essential interests of* the State are seriously and objectively threatened, with the consequence that the Government's intervention can prevail over the freedom of private economic initiative[34].

[33] For the implementing measures see Decree of the President of the Council of Ministers no. 189 of September 1, 2022.

[34] The need for the powers of public influence on private business initiatives to be inspired by and subject to a strict principle of proportionality also emerges clearly from the amendments made to Article 2449 of the Civil Code (by Law No. 34 of 25 February 2008) and from the repeal of Article 2350 of the Civil Code (by Law Decree No. 10 of 15 February 2007, converted into Law No. 46 of 6 April 2007). See, *among others*, V. DONATIVI, *La nomina pubblica alle cariche sociali nelle società per azioni*, in *Trattato di dir. comm.* founded by Buonocore and directed by R. Costi,

Therefore, we assist to an evolutionary trend of special powers marked by a progressive abandonment of their function as a device for the substantial privatization of (formerly public) enterprises. Indeed, the regulatory framework under analysis is aimed now at activating external supervisory instruments that may affect the ownership structures and operations of all companies active in strategic sectors, whenever essential public interests are seriously threatened.

In particular, the prevalence of the State's role over private economic initiatives is no more limited to corporate relations as happened in the past. Instead, we are now in front of a significant transition from the "entrepreneurial" State – which dates back in time[35] – to a new logic according to which all "strategic" companies remain a business between their shareholders, but transfer a portion of their decision-making sovereignty to a "strategist" State, that intervenes whenever the events concerning those companies may prejudice interests of a higher order[36].

This preference for a supervising State instead of an entrepreneurial State[37], in addition to being more consistent with the principles of European law and the progressive expansion of private initiative in the economy, does not, however, prevent public power from regaining – in limited circumstances, and in any case to safeguard general interests – a leading role. This results from the analysis of the

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Torino, 2010; F. SANTONASTASO, Sub *art. 2449 c.c.*, in *Commentario romano al nuovo diritto delle società* (directed by d'Alessandro), Padova, vol. II, book II, 2011, 1091 et seq.

[35] See, for all, E. CIANCI, *Nascita dello Stato imprenditore in Italia*, Milan, 1977, *passim*.

[36] To date, strategic companies are supervised through external, sector-based supervision schemes, consistent with what happens in other related contexts where public authorities intervene to protect enhanced constitutional values.

[37] In this respect it shall be noted that Article 19 of Law Decree No. 78 of 1 July 2009 clarified that the direction and coordination activity over subsidiaries (*pursuant to* Articles 2497 et seq. of the Italian Civil Code) can never be attributed to the State since the latter physiologically lacks the economic and financial management purposes of the investee companies that constitute the essential core of entrepreneurship. On this topic see CARIELLO, *Brevi note critiche sul privilegio dell'esonero dello Stato dall'applicazione dell'art. 2497, comma 1, c.c. (art. 19, comma 6, d.l. n. 78/2009)*, in *Riv. dir. civ.*, 2010, I, 343 et seq.

remedies adopted to contrast the financial and health crisis[38], which highlight a contingent State's action that led to initiatives where the prevailing need was to overcome, on a temporary basis, the adversities of the moment, rather than to make structural changes preparatory to adequate forms of recovery in line with the European Union's indications[39].

This is confirmed also by the Italian Government's applicative practice[40], where the golden powers are concretely exercised also with reference to transactions involving Italian operators only. Indeed, as anticipated, the regulatory framework at hand has been applied – even before the entry into force of the recent amendment described above – to include all resolutions, acts or transactions of strategic companies having an extraordinary nature or, in any event, resulting in the change of the ownership, control or availability of the strategic assets themselves or the change of their destination, regardless of the nationality of the beneficiary of the change of control.

The described scenario raises concerns – indeed widespread in the pandemic context – about the excessive invasiveness of public monitoring in the economy[41]. In fact, strategic companies subject to golden powers comprise entities incorporated and operated on privates' initiative and with exclusively private capital, including in the financial area, where the supervision carried out by

[38] Among the numerous measures adopted by the Government to tackle the crisis and its effects, it is sufficient to mention, by way of example, the initiative to set up a service company for the capitalization and restructuring of Italian companies pursuant to Article 7 of Legislative Decree no. 3 of 24 January 2015.

[39] On the measures adopted to counter the 2007 financial crisis see, among others, F. CAPRIGLIONE, *Misure anticrisi tra regole di mercato e sviluppo sostenibile*, Turin, 2010, 9 et seq.; on the need to adopt structural changes within the different European national frameworks see F. CAPRIGLIONE-A. TROISI, *L'ordinamento finanziario dell'UE dopo la crisi*, Turin, 2014, 121 et seq.

[40] Reference shall be made to the annual reports pursuant to Article *3-bis* of Legislative Decree 21/2012, which illustrate the cases in which the Government has use its Golden Powers, available at *www.governo.it*.

[41] See M. CLARICH, *Alle radici del paradigma regolamentazione dei mercati*, in *Rivista della Regolazione dei mercati*, 2020, 230 et seq.

sectoral authorities already significantly affects the business plans of operators in the financial sectors[42].

Moreover, the approach of the Italian regulator to golden powers seems to re-propose in certain respects a logic that seemed to have been superseded by Law Decree no. 21/2012, such as, for example, that underlying the publicly appointed director (which, over time, has become without voting rights) referred to in the original "golden share"[43]; a figure which was indeed evoked by the specialized press at the height of the pandemic[44] as an instrument of organic supervision of public powers over private economic initiatives. In this perspective, it is legitimate to wonder whether being subject to the potential exercise of the golden powers activates the withdrawal right of the shareholders of strategic companies[45], as was the case under the regime of the original golden share (pursuant to law no. 474/1994), given the potential interference allowed to the public powers with regard to the organization and management of such companies[46].

7. As anticipated, the changes introduced in Italy by the aforementioned Law

[42] It has been observed at European level that the existence of sectoral supervisory mechanisms in the banking, insurance and financial sectors discourages the adoption of FDI screening mechanisms by the Member States; see H. BERGER, *The Banking and Insurance Sector*, in *YSEC Yearbook of Socio-Economic Constitutions*, Springer, 2020, 1 et seq. On topic, see also A. SACCO GINEVRI, F. ANNUNZIATA and C. SAN MAURO, *I golden powers fra Stato e mercato*, in *Sistema produttivo e finanziario* post *Covid-19: dall'efficienza alla sostenibilità - Voci dal diritto dell'economia*, edited by Malvagna and Sciarrone Alibrandi, Pisa, Pacini giuridica, 2020, 433 et seq.

[43] See A. SACCO GINEVRI, *La nuova* 'golden share'*: l'amministratore senza diritto di voto e gli altri poteri speciali*, in *Giur. comm.*, II, 2005, 707 et seq.

[44] See e.g. the editorial by A. DE MATTIA, *Scudo anti-scalate? Ok, ma attenti ai furbetti del golden power*, in *MF*, 4, 2 April 2020.

[45] This position, originally expressed in A. SACCO GINEVRI, *Golden power e funzionamento delle imprese strategiche*, *cit.*, 157, is also accepted by P. RESCIGNO, *Il nuovo Regolamento UE 2019/452 sul controllo degli investimenti esteri diretti: integrazione dei mercati, sistemi nazionali e ruolo dell'Europa*, in *Giur. comm*, I, 2020, 859, and in E. RIMINI, *Gli investimenti esteri diretti in Italia e dall'Italia verso Paesi terzi: è ravvisabile un percorso che possa davvero agevolare un "commercio libero ed equo"?*, in *Giur. comm.*, I, 2020, 1152.

[46] See on this point A. SACCO GINEVRI, *Golden powers e banche nella prospettiva del diritto dell'economia*, in *Rivista della Regolazione dei mercati*, 2021, 67.

Decree no. 23/2020 – and partially confirmed by Law Decree no. 21/2022 – on the scope of application of the Italian golden powers are consistent with what has happened in other foreign legal systems and with what the EU Commission recommended in its communications dated 13 and 26 March 2020[47].

Since these measures are essentially aimed preventing takeover-related risks, they were accompanied, as already happened in the past (e.g. in 2014 and 2017), by a simultaneous strengthening of the financial markets' transparency provisions; also, Law Decree no. 23/2020 also enhanced Consob's prerogatives in the area of disclosure of significant shareholdings and declarations of intention (pursuant to Article 120 of the Consolidated Financial Act).

What emerges, therefore, is a widespread use – at an international level – of the protective instrument offered by golden powers as a defensive device with real effectiveness, aimed at preserving the localism of the main national companies at a time (during the pandemic and the subsequent energy and raw materials crisis) when they were easily scalable by foreign investors. For these purposes, the strengthening of the disclosure obligations on the size of equity shareholdings and the relevant future strategies, as well as of measures against speculative transactions, were considered a prerequisite.

The circumstance that, in this economic context, Law Decree no. 23/2020 extended the golden powers to the strategic sectors referred to under Article 2 of Law Decree no. 21/2012 to acquisitions of controlling shareholdings by foreign investors, including those belonging to the European Union, and of shares equal to or greater than 10% of the share capital by non-EU purchasers (as well as to corporate resolutions triggering a change in the control, availability or destination of strategic assets held by companies operating in such sectors) – for the entire

[47] As noted in the Commission's Communication dated 13 March 2020, "*Member States must be vigilant and use all available instruments at national and EU level to prevent the current crisis from leading to a loss of critical resources and technologies*".

duration of the health emergency – was intended to effectively preserve the country's financial stability jeopardized by the serious epidemiological emergency.

From the perspective of European law[48], however, it is necessary to assess whether the potential restrictions to investments introduced by the Italian golden powers legal framework, as recently amended, may limit, on the one hand, the freedom of establishment of potential EU purchasers, which applies to the latter in the event of the acquisition of stable controlling interests, such as to attribute "*a definite influence on the decisions of the company and to direct its activities*"[49], and, on the other hand, the freedom of movement of capital of investors, including non-EU investors, which can also be directly invoked by the latter in the event of acquisition of shareholdings which, while not granting a permanent control, nevertheless are aimed at establishing or maintaining lasting and direct links with the company[50].

A restriction to the European freedoms at hand can only be justified, in addition to the cases referred to in Article 65 TFEU, if there are overriding reasons of general interest and the principles of necessity and proportionality of the measure introduced are respected[51].

The strengthening of the national safeguards on foreign direct investment

[48] On the fact that, following the Lisbon Treaty of 2009, the European Union has exclusive competence on foreign investments within the framework of the common commercial policy (Articles 3(1)(e) and 207(1) TFEU) see P. BERTOLI, *Tutela degli investimenti esteri e rilancio dell'economia italiana*, in *Dir. commercio internaz.*, 2020, 3 et seq.

[49] See M. LAMANDINI-F. PELLEGRINI, *Investimenti diretti e investimenti di portafoglio tra diritto di stabilimento e libera circolazione dei capitali*, in *Diritto societario europeo internazionale*, directed by M.V. Benedettelli-M. Lamandini, Turin, 2017, 89 et seq.; see also G. ROJAS ELGUETA, *Il rapporto fra discipline nazionali in materia di "foreign direct investment screening" e diritto internazionale degli investimenti*, in *Riv. dir. comm. int.*, 2020, 325 et seq.

[50] See M. LAMANDINI - F. PELLEGRINI, *mentioned*, 89 et seq.

[51] See, e.g. EU Court, Polbud judgment, 25/10/2017, C 106/16, para. 52. On this topic see F. M. MUCCIARELLI, *Trasformazioni internazionali di società dopo la sentenza Polbud: è davvero l'ultima parola?*, in *Società*, 2017, 1331 et seq.; N. DE LUCA - A. GENTILE - F. SCHIAVOTTIELLO, *Trasformazione transfrontaliera in Europa: prime considerazioni su Polbud*, in *Società*, 2018, 5 et seq.; A. BARTOLACELLI, *Trasformazione transfrontaliera e la sentenza Polbud: corale alla fine del viaggio?*, in *Giur. comm.*, 2018, II, 428 et seq.

implemented by Law Decree no. 23/2020 was to be considered compatible with the aforementioned regulatory framework in view of the *temporary nature* of many of these restrictions, which, aiming at limiting the negative consequences of the epidemiological emergency in progress, were based on the aforementioned "*overriding reasons of general interest*"[52].

This is also true for companies operating in the financial, banking and insurance sectors, given that – in line with European case law – the extension of foreign direct investment restrictions to these operators is not of a "*purely economic nature*"[53], since these are measures "*of an economic nature that pursue an objective of general interest*"[54], being aimed at protecting entities that, in the pandemic situation, have been "*an essential source of financing for companies active in the various markets*"[55] and therefore, as such, play a key role at systemic level. Even during the Greek crisis, for example, the European Commission had occasion to observe that, in emergency circumstances, *"the stability of the financial and banking system constitutes a matter of overriding public interest and public policy that seems to justify the temporary application of restrictions on capital flows*"[56].

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[52] See, among others, D. GALLO, *La questione della compatibilità dei golden powers in Italia, oggi, con il diritto dell'Unione europea: il caso delle banche*, in *Rivista della regolazione dei mercati*, 2021, 26 et seq; S. SANTAMARIA, *Il controllo degli investimenti esteri diretti tra la protezione degli assets strategici e la tutela degli investitori. Questioni di compatibilità*, in *Federalismi*, 2023.

[53] See EU Court 16/01/2003, Case C-388/01, paragraph 22.

[54] See EU Court of Justice 11/09/2008, Case C-141/07, paragraph 60.

[55] See EU Court 19/07/2016, Kotnik, C-526/14, paragraph 50, as well as, more recently, EU Court 16/07/2020, Oc and Others, C-686/18, paragraphs 92 and 93 [reiterating that "*according to the case-law of the Court, the objectives of ensuring the stability of the banking and financial system and of avoiding a systemic risk constitute objectives of general interest pursued by the Union. Indeed, financial services play a central role in the Union's economy. Banks and credit institutions are an essential source of financing for undertakings active in the various markets*"]. On this topic see A. ANTONUCCI, *Gli "aiuti di Stato" al settore bancario: le regole d'azione della regia della Commissione* , in *SIE*, 2018, 587 et seq.; M. RABITTI, *La Corte di Giustizia tra scelte di mercato e interessi protetti*, in *Persona e mercato*, 2018, spec. 227 et seq.

[56] See the *Statement by Jonathan Hill on behalf of the European Commission on capital controls*

The approach adopted in Italy in this regard with the "Liquidity Decree", which included the banking and insurance sectors among the strategic sectors subject to golden powers, also seemed consistent with the requirements of the financial supervisory authorities regarding the need for banks' and insurance companies' operating profits to be "carried forward" in order to finance local businesses to counter the systemic crisis produced by Covid-19. This demonstrates the particular strategic importance of these institutions for the economy, since these intermediaries, as noted by the ECB, played a "crucial" role in financing "*households, small and medium-sized businesses and corporations amid the coronavirus disease 2019 (COVID 19)-related economic shock*"[57].

Notwithstanding the foregoing, the fact that the nature of the restrictions introduced by Law Decree no. 23/2020 – as a result of the amendments introduced by Law Decree no. 21/2022 – is no longer temporary but permanent, now makes it more complex to assess the compatibility of the national framework on golden powers with the aforementioned European freedoms, since the exceptional nature of the restrictive measures at hand has disappeared.

Moreover, a significant application problem is that the Government's powers

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imposed by the Greek authorities, 29/06/2015, available at *https://ec.europa.eu/commission/presscorner/detail/it/Statement_15_5271*.

[57] See ECB, *Recommendation of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation (ECB/2020/1)*, 27/03/2020, available at www.ecb.europa.eu; see also EBA, *EBA statement on actions to mitigate the impact of COVID-19 on the EU banking sector*, 12/03/2020, available at *eba.europa.eu*; EBA, *Statement on dividends distribution, share buybacks and variable remuneration*, 31/03/2020, available at *eba.europa.eu*; *EIOPA*, *EIOPA statement on actions to mitigate the impact of Coronavirus/COVID-19 on the EU insurance sector*, 17/03/2020, available at *www.eiopa.europa.eu*; EIOPA, *EIOPA statement on dividends distribution and variable remuneration policies in the context of COVID-19*, 02/04/2020, available at *www.eiopa.europa.eu*; BANCA D'ITALIA, *Raccomandazione della Banca d'Italia sulla distribuzione dei dividendi da parte delle banche italiane meno significative durante la pandemia da COVID-19*, 27/03/2020, available at *www.bancaditalia.it*; IVASS, *IVASS recommends extreme prudence to companies in dividend distribution*, 30/03/2020, available at *www.ivass.it*. On this topic see A. SCIARRONE ALIBRANDI- C. FRIGENI, *Restrictions on Shareholder's Distributions in the COVID-19 Crisis: Insights on Corporate Purpose*, in VV. AA., *Pandemic Crisis and Financial Stability*, European Banking Institute, available at *www.ebi-europea.eu*, May 2020, 429 et seq.

under observation can now also apply to Italian purchasers, with the consequence that even entirely domestic strategic transactions are subject to potential scrutiny by the Italian Presidency of the Council of Ministers[58].

The above arguments are adequately summarized in the reference to the changes introduced in the system of financial supervision following the crises that affected the European economic order. It is well known, in fact, that the measures to overcome the stalemate recession phase caused by the financial crisis included the definition of a new architecture of the Union's financial supervisory structure[59].

Such a construction – consistent with the exercise of a unitary strategic power attributed to a public authority superordinate to each Member State – implies a logic similar to that governing the configuration of the golden powers examined above. The specificity of the same, however, must be emphasized considering that, unlike the strategic powers typically belonging to national authorities, supervision – and, therefore, the activation of the relevant measures – is rooted in a complex of supranational bodies of a technical nature[60].

In other words, the permanent need for *golden powers* that could and should have be granted to a federative political summit (conceivable in the original vision of the constituent fathers of the European Community) has not yet fully succeeded in

[58] In this regard, the issue that certain acquisition hypotheses excluded from the restriction to the transfer of stakes could fall within the scope of application of the golden powers through the broad catalogue set forth in Article 2, paragraph 2, of Law Decree no. 21/2012 itself was pointed out since the very beginning; see L. LOCCI, *Foreign Direct Investments. The Vivendi/TIM case*, in *Commentaries and Cases on Italian Business Law*, second edition, edited by A. Sacco Ginevri, Padua, 2021, 263 et seq.

[59] See, among others, M. PELLEGRINI, *L'architettura di vertice dell'ordinamento finanziario europeo*, in *Riv. trim. dir. ec.*, 2012, I, 54 et seq.; V. TROIANO, *L'architettura di vertice dell'ordinamento finanziario europeo*, in *Elementi di diritto pubblico dell'economia*, *mentioned*, 552 et seq.

[60] See F. CAPRIGLIONE, *European Banking Union: A Challenge for a More United Europe*, in *Law and Economics Yearly Review*, 2013, Part I, 5 et seq.; F. CAPRIGLIONE- A. SACCO GINEVRI, *Politics and Finance in the European Union*, in *Law and Economics Yearly Review*, 2015, Part I, 4 et seq.

finding an appropriate definition, given that the aforementioned EU Regulation – despite having introduced a significant extension of the number of "strategic" sectors – does not in any case impact on the control mechanisms of foreign direct investment in place in each Member State, which continue to operate. As a result, the above-mentioned powers have given content to new operational forms which do not allow for their full explication. This produces negative impacts not only at the level of adequate development of the sectors concerned, but also in the process of European integration.

8. The above mentioned considerations on the general compatibility between European freedoms and Foreign Direct Investment Screening mechanisms is confirmed by the opinion issued on 30 March 2023 by the Advocate General Capeta on an Hungarian case regarding the local legal framework in the FDI sector. Such opinion has recently clarified the scope of the principles regulating the scrutiny of the competent European bodies in such a field.

In particular, in 2021 the Hungarian Minister for Innovation and Technology blocked the acquisition of a Hungarian stretegic target company operating in the quarry sector by another Hungarian bidder (with indirect third country ultimate controlling entity) since the proposed acquisition was considered in contrast with Hungarian national interests.

In deciding on the validity of the Minister's decision to prevent the acquisition, the Hungarian High Court has asked whether EU law permits Hungary to put in place legislation which restricts foreign direct investment in EU-based companies if such investments are implemented via another EU-based company.

In his opinion, the Advocate General Tamara Ćapeta considered first, that foreign direct investments of third country provenance fall within the scope of the FDI Screening Regulation, even in the case in which a third-country investor indirectly

gains control over an EU company. Since such investment falls within the scope of Article 207 TFEU, the European FDI screening regulation cluld apply.

In addition, according to the opinion at hand, national screening mechanisms, enabled by the European FDI screening framework, must also comply with the rules of the internal market.

In other words, domestic legislation of EU Countries has to oblige the national competent bodies to adopt individual screening decisions under legitimate justifications for restricting capital flows, which may only be justified on grounds of security or public order. Such justifications can be relied upon only if there is a genuine and sufficiently serious threat to a fundamental interest to society. Therefore, any measure restricting capital flows has to be proportionate to the aim it pursues.

In the concrete case, securing the supply of certain raw materials may, in times of crisis, be capable of justifying a restriction on foreign direct investment on grounds of public policy or public security.

In conclusion, what is really important under a legal perspective is the reasoning under the opinion, which clearly highlights a relevant change in the European authorities approach in the FDI field.

STATE AID AFTER TWO CRISIS

Diego Rossano* - Anna Maria Pancallo** - Claudia Marasco ***

ABSTRACT: *This work aims to investigate the suitability of the current European disciplinary framework in the field of State aid to the financial sector, in the context of the most recent economic crises. It seems that European Commission is adopting a more flexible interpretation of the criteria for granting State aid. Hence, the opportunity to evaluate the introduction of forecasts capable of determining suitable flexibility criteria in the field of state aid.*

1. In September 2015, the European Commission created a plan called the "Action Plan on Building a Capital Markets Union"[1]. The Commission recognized that the European economic system had undergone significant changes due to various factors such as globalization, the introduction of the single currency, financial innovation, and the economic crisis of the late 2000s. These changes have made it more challenging for small businesses to access the funding they

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The whole work has been thought about and discussed by all the authors as a whole; however, paragraphs 1 and 2 are attributable to Diego Rossano and Anna Maria Pancallo, while paragraphs 3, 4 and 5 are attributable to Claudia Marasco.
[1] See the following link https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52015DC0468&rid=1.

need through traditional banking methods[2].

In 2017, the European Commission updated the plan with the adoption of the "Accelerating the Capital Markets Union: Addressing National Barriers to Capital Flows"[3] report. This update included several actions such as: i) strengthening the powers of ESMA for better surveillance, ii) creating a regulatory environment for SMEs; iii) reviewing the prudential treatment of investment firms; iv) exploring the feasibility of establishing a fintech framework, supporting secondary markets for non-performing loans; v) enhancing the ability of secured creditors to recover value; vi) following up on the recommendations of the High-Level Panel on Sustainable Finance; vii) facilitating cross-border distribution and surveillance of UCITS and alternative investment funds; viii) providing guidance on EU cross-border investments; ix) and proposing an EU-wide strategy to support local and regional capital markets.

The Covid-19 pandemic had a global impact and resulted in emergency economic laws being introduced[4]. In response, the European Commission has once again intervened to promote the establishment of the Capital Markets Union (CMU). In 2020, the Commission adopted "A Capital Markets Union for People and Businesses: New Action Plan" (COM(2020) 590)[5] to achieve this goal. This communication highlights the importance of capital markets in helping banks increase their capacity to lend to the economy. The Commission suggests that "banks can offload some of their loans to institutional investors by turning them into marketable securities." Thus, the European institution intends to promote the

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[2] Cfr. SUPINO, *Individuazione delle fonti di finanziamento per le PMI nelle previsioni della Capital Market Union*, in *Contratto e Impresa*, 2016, 4-5, 495.

[3] See the following link https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52017DC0147.

[4] Cfr. ANNUNZIATA, *La distribuzione di prodotti di investimento e l'emergenza sanitaria. Una proposta*, in *dirittobancario.it*, editoriale del 4 maggio 2020.

5 See https://eur-lex.europa.eu/legal-content/IT/TXT/?uri= CELEX:52020DC0590.

use of securitization and this move would allow banks to transfer credit risk and free up capital for business loans. Conversely, the aforementioned Communication highlights the importance to "direct SMEs to alternative providers of funding."

The following documents complete the comprehensive framework: the European Parliament communication of 16 December 2020, the Report published in May 2021 by the Technical Expert Stakeholders Group (TESG), and the Action Plan released by the EU Commission on November 25, 2021. In particular, the Report makes recommendations on how to improve access to capital markets for SMEs, especially after the COVID-19 crisis.

The Action Plan outlines several interventions that the Commission is proposing to implement, including a revision of the regulation and directive pertaining to financial instruments markets. The main objectives of these proposed changes are to: (i) establish a unified system in Europe for the publication of trading data related to equities, bonds, and derivatives across all EU trading venues; (ii) increase transparency in capital markets by prohibiting payment for order flow and dark pool practices; and (iii) enhance the competitiveness of the EU's financial markets by eliminating the requirement for open access to exchange-traded derivatives.

The objectives are to offer EU businesses a broad diversification of funding opportunities and to reduce their over-reliance on bank lending. In this way, the creation of integrated capital markets opens up more financing opportunities for businesses[6].

[6] Cfr. the Communication of 26 November 2021 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Results achieved one year after the action plan on the CMU, available on https://data.consilium.europa.eu/doc/ document/ST-14380-2021-INIT/en/pdf, which stresses that capital markets play a key role in providing EU businesses with finance to invest and expand. This

In this regard see the s.c. Small Business Act (SBA)[7] passed by the European Commission in 2008 (COM(2008) 394). In particular, the principle n. VI indicated the necessary interventional modalities in order to face the difficulties of some types of enterprises in seeking financings through the banking channel. This makes it possible to further stimulate Europe's venture capital markets by improving SMEs' access to micro-credit (and mezzanine financing) while developing new products and services[8]. In the Communication it is clear that Member States are being advised to remove regulatory and fiscal obstacles that hinder the progress of alternative finance. Significant are the additional considerations of the Annual Reports published by the Italian Ministry of Economic Development on the SBA in which it was criticized the lack of recourse by SMEs to alternative tools of innovative finance[9].

2. In this context, the public financial support instruments offered to companies in difficulty due to contingent national economic emergency situations are particularly important. Of course, such forms of State support for SMEs must

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is also important as the EU economy is gradually recovering from the COVID-19 crisis. However, EU capital markets remain fragmented, which hampers companies' ability to raise capital across the EU.

It should be noted that the European Commission recently presented, on 7 December 2022, certain measures to further develop the EU Capital Markets Union on clearing and insolvency and listing of companies on regulated markets, in order to: make EU clearing services more attractive and resilient, supporting the EU's open strategic autonomy and preserving financial stability; harmonise some rules on corporate insolvency across the EU, making them more efficient and helping to promote cross-border investment; lighten the administrative burden for companies of all sizes, in particular SMEs, by means of new listing legislation, so that they can more easily access public funding by listing on the stock exchange. On the point cfr. www.dirittbancario.it.

[7] Avaible at https://eur-lex.europa.eu/legal-content/IT/TXT/?u ri=celex%3A52008D C0394.

[8] Cfr. PUPO, *Lo "Small Business Act" ed il "work in progress" della sua attivazione*, in *Analisi giur. econ.*, 1, 2014, p. 135 ss.

[9] See Rapporto 2016, Small Business Act Le iniziative a sostegno delle micro, piccole e medie imprese adottate in Italia nel secondo semestre 2015 e nel primo semestre 2016, avaible at https://www.mise.gov.it/ images/stories/documenti/Rapporto_SBA_singole.pdf.

be implemented in full compliance with the general State aid regulatory framework. It is clear the reference to the provisions of art. 107 et seq. TFEU that seek to limit public contributions which "in any form" are intended to distort (or threaten to distort) competition[10]. The European Commission, with the Council, has a significant role to play in this regard. The Commission must check whether the concessions granted by the public authorities are compatible with the internal market and it has the power to cancel or modify the contribution granted.

During the recent financial crisis, the EU Commission has been more flexible than in the past and it has considered the economic support measures implemented by States to be in conformity with the Treaty. Moreover, this logic was inspired by the indications it gave during the period of difficulty. These directives were based on art. 107, par. 3, lett. b) of the TFEU that aid intended "to remedy a serious disturbance in the economy of a Member State" should be considered eligible. This provision has provided a solid legal basis for assessing the legality of the measures taken under emergency conditions in favour of companies, including banks. In the period preceding the crisis in this sector, the Commission did not provide the banks with any indications other than those envisaged in the industrial field.[11]. Therefore, pursuant to art. 107, par. 3, lett. c), direct aid "to facilitate the development of certain activities or certain economic regions" was considered legitimate, "where such aid does not adversely affect trading conditions to an extent contrary to the common interest"[12]. It has been

[10] See Rapporto 2016, Small Business Act Le iniziative a sostegno delle micro, piccole e medie imprese adottate in Italia nel secondo semestre 2015 e nel primo semestre 2016, consultabile sul sito https://www.mise.gov.it/ images/stories/documenti/Rapporto_SBA_singole.pdf.

[11] Cfr. CROCI, *L'impatto della crisi finanziaria sugli aiuti di Stato al settore bancario*, in *Il Dir. Un. Eur.*, 4, 2014, p. 735 s.

[12] Important are the indications given by foreign doctrine concerning the aims pursued by the Commission in its communications. These aims are mainly aimed at avoiding possible domino effects resulting from the bankruptcy of large banks. In this regard, cf. the Commission Communication on the treatment of impaired assets in the EU banking sector of 25 February 2009,

necessary to identify an appropriate legal basis to justify (and legitimise) measures during the crisis that would otherwise not have been considered adequate. That is why the Commission has been given even more power to take decisions than in the past[13].

In particular, it should be borne in mind that, with regard to the public aid granted to banking undertakings, the Commission first set out the guiding principles for possible measures to support the Banking Communication of 13 October 2008. Subsequently, it defined more precisely these principles (Recapitalisation communication of 5 December 2008 and Impaired assets communication of 25 February 2009). It was dangerous to expand immeasurably the operational options available to support States in the banking sector without setting appropriate conditions. The risk was that recipient institutions would take a moral hazard attitude[14]. Hence the need, neglected in a very early emergency phase, for the indication of appropriate burden-sharing measures in the restructuring plans of failing credit institutions by shareholders and creditors who had trusted in the soundness of the institution (Bank Restructuring Communication of 23 July 2009)[15].

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where it explicitly stated that in a period of low resources, "the support measures" were concentrated "on a limited number of systemically important banks". Cfr. GILLIAMS, *Stress testing the Regulator: Review of State Aid to financial Institutions After the Collapse of Lehman*, in *European Law Review*, vol. 36, 2011, p. 3 s.

[13] Cfr. PIERNAS LOPEZ, *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, Oxford University Press, 2015, who says that aid "is 'living instrument' that has been applied in accordance with the main policy priorities of the European Commission", from here the key role played by the European Commission to contributing to the evolution of this concept.

[14] See for all DIVERIO, *Gli aiuti di Stato al trasporto aereo e alle banche. Dalla crisi di settore alla crisi di sistema*, Milano, 2010, p. 104.

[15] These measures were finally confirmed in the EU Communication of 1 August 2013.
With regard to the European Commission's position on state aid in the banking sector during the financial crisis, cfr. D'ARIENZO, *Gli aiuti di Stato al settore bancario*, Tesi di dottorato, Napoli, Università Suor Orsola Benincasa, 2009. Regarding the role of Commission in the european

In the background, it is necessary to find a compromise between the different interests involved in order to verify the legitimacy of state interventions in favor of enterprises. This situation is aggravated by the problem of the verification of operational evaluations carried out in the technical area, which are not free from errors because of the need to make decisions quickly. Consequently, it is difficult to evaluate more appropriate alternative actions to the objective pursued: to combat distortions of competition and, at the same time, to strengthen financial stability[16].

3. As said, Article 107 TFEU explicitly contemplates the exceptional possibility for the State to intervene, in predefined circumstances, to support undertakings affected by adverse events that have significantly affected the general economy. Of particular relevance on this point are the provisions of Article 107(2)(b) and (3)(b) TFEU, which set out the conditions under which State interventions shall (or may) be considered compatible with the internal market. This therefore refers to aid to remedy the damage caused by natural disasters or other special events, as well as aid to repair a serious disturbance in the economy.

On closer inspection, European jurisprudence has long accepted a particularly restrictive interpretation of such exceptional hypotheses[17],

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governance during crisis, cfr. for all TUFANO, *Il ruolo della Commissione nella governance europea: quali prospettive?*, in *Dir. un. eur.*, 1, 2012, p. 133 ss. Cfr. also CHITI - VESPERINI, *The administrative architecture of financial integration. Institutional design, legal issues, perspectives*, Bologna, 2015.

[16] Cfr. GEBSKY, *Competition First? Application of State Aid Rules in the Banking Sector*, in *Competition Law Review*, 2, 6, 2009, p. 89 ss.

[17] E*x multis*, see the decision of the UE General Court, of 15 december 1999,(joined causes T-132/96 and T-143/96), *Freistaat Sachsen* and *Volkswagen AG* and *Volkswagen Sachsen GmbH c. Commissione*, for which in order to be considered serious, the disturbance referred to the art. 107 par. 3 lett. b) TFEU must affect all or an important part of the economy of the Member State concerned and not only that of one of its regions or part of the territory; in the same sense, UE

considering that the application of Article 107(3)(b) TFEU should only concern specific cases, endowed with peculiar profiles of macroeconomic relevance[18]. In fact, on the occasion of the well-known crisis' events of year 2007 and following[19], the EU Commission found the exceptional circumstances (in the occurrence of which, pursuant to paragraph 11 of the Communication of the EU Commission of 13 October 2008 (2008/C 270/02), the entire functioning of the financial markets would have been at risk[20]), which would have justified the adoption of a derogatory and temporary regulatory framework in this matter[21].

General Court, 30 September 2003, (case C-301/96), Germany v. Commission, in part. see point 66.

In doctr., see BIONDI, EECKHOUT, FLYNN, *The Law of State Aid in the European Union*, Oxford University Press, Oxford, 2004.

[18] In this sense, see LO SCHIAVO, *The Impact of the EU Crisis-Related Framework on State Aids to Financial Institutions: From Past Practice to Future Prospects*, on *The Competition Law Review*, n. 2/2013.

[19] Before the financial crisis of 2008, the EU Commission had shown itself particularly rigorous in applying the state aid ban and the applications of the derogation provided for by art. 107 TFEU had been very few. See BIONDI, EECKHOUT, FLYNN, *The Law of State Aid in the European Union*, Oxford, 2004. In jur. the aforementioned Court judgments, 15 December 1999, cases T-132/96 and T-143/96, Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v. Commission, p. II-3663 ff., point 167.

About a revision of the restrictive approach mentioned by the EU Commission in the context of the 2008-2013 financial crisis, see also GIGLIO, *State aid to banks in the context of the financial crisis*, on Riv. Mercato Concorrenza Regole, 2009, p. 23 ff.

With regard to the eventuality of a crisis in individual banks, however, until October 2008 the Commission had largely applied the exception provided for by art. 107 par. 3 lett. c) TFEU, according to which aid intended to facilitate the development of certain activities or certain economic regions, provided that it does not affect trading conditions to an extent contrary to the common interest. In this sense, cf. FEDERICO, *Crisis of the Venetian banks and "state aid"*, in Riv. Questione Giustizia, n. 3/2017, p. 212.

[20] See European Commission, *Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis* (2008/C 270/02) del 25 ottobre 2008, point 11.

[21] We refer, in detail, to the abovementioned Communication (2008/C 270/02) of 13 October 2008, OJEU C 270, of 25 October 2008, p. 8 ff. (so-called *Banking Communication*); to the Communication (2009 / C 10/03) of 5 December 2008, *The recapitalisation of financial institutions (1) in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition* (so-called *Recapitalization Communication*);

In fact, the risk of an excessively flexible interpretation of State aid regulation was immediately evident As the doctrine underlined[22], it could have favoured the adoption of moral hazard behaviour by beneficiary companies[23]. Hence, the appropriateness of subordinating the effectiveness of public support interventions in the banking sector to the condition that credit institutions implement specific burden sharing measures by shareholders and creditors, who had confided in the solvency of the credit institution in crisis. In particular, the provisions of the 2013 Communication (the 'Banking Communication') which, with the aim of balancing the different interests of the parties involved in the cases in question, defines specific procedures for the involvement of private individuals in the recovery of banks in distress, point in this direction[24].

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to the Communication from the Commission on the treatment of impaired assets in the Community banking sector (2009/ C 72/01), of 25 February 2009 (so-called *Impaired Assets Communication*); to the *Communication from the Commission on the treatment of impaired assets in the Community banking sector* of 23 July 2009 (so-called *Bank restructuring Communication*) and subsequent supplementary and extension Communications , until the Communication of 2013 on the application, from 1.8.2013, of the rules on state aid to support measures for banks in the context of the financial crisis (2013 / C 216/01) (so-called *Communication on the sector banking*).

[22] See ROSSANO, *La nuova regolazione delle crisi bancarie*, Milan, 2017, p. 41.

[23] On this topic see European Commission, *Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication')* (2013/C 216/01), par. 18. In doct., see M. BEBLAVÝ, D. COBHAM, L. ÓDOR, *The Euro Area and the Financial Crisis*, Cambridge University Press, 2011, pp. 244 e ff.

[24] In fact, following the gradual worsening of the financial crisis, the EU Commission replaced the 2008 Banking Communication with the aforementioned Communication on the banking sector, through which it brought the state aid regime back on a path of greater rigor, in fact modifying and integrating all previous Communications (see in particular points 15-20 and points 21-24 of the 2013 Communication). With this in mind, it strengthened the obligation of prior burden sharing and established a permanent procedure for recapitalization and support measures for impaired assets. In particular, in order to avoid outflows of funds, the EU Commission has introduced rules on the repurchase of hybrid instruments and prohibitions on the distribution of coupons and dividends, without however setting ex ante thresholds for own contributions or further conditions. Thus, holders of hybrid capital and subordinated debt, in addition to shareholders, must contribute to reducing the capital shortfall to the maximum extent possible (paragraph 42), hence the

The Commission's intention is clear: to prepare a well-defined regulatory framework on the subject, in order to allow credit institutions to support themselves solely by their own means, limiting recourse to a system of continuous assistance[25]. To this end, the regulatory framework thus defined in its essential features appears to be consistent with that subsequently outlined by Directive 2014/59/EU (the so-called BRRD)[26] which, as is well known, introduced precise regulations on the management of banking crises.

4. Due to this and in order to mitigate the negative economic effects of the recent and well known crisis events, the EU Commission considers that the prerequisites justifying the derogation from the reference regulatory framework on the subject existed. In particular, the aforementioned European Authority considers the ongoing pandemic, as well as the ongoing war in Ukraine, to be events that justify the application of a special discipline, as it was the case during the financial crisis of 2007 onwards.

The consequence of such a softer approach than that adopted under

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additional effect of avoiding the granting of aid before equity, hybrid and subordinated debt have been used in full to offset any losses (paragraph 44).
For an in-depth analysis of the enhanced measures envisaged by the 2013 Communication, see LIBERATI, *La crisi del settore bancario tra aiuti di stato e meccanismi di risanamento e risoluzione*, on *Riv. dir. publ. com.* n. 6/2014, p. 1350 f.

[25] In this sense, see the speech of the then Vice-President of the EU Commission and Commissioner for Competition Joaquin Almunia, during the press conference held in Brussels on 10 July 2013, when he declared: "*Today's changes of the crisis rules are based on the good practices of the last years in dealing with bank bail-outs and restructuring. In particular, bank owners and junior creditors will need to contribute before any more taxpayers' money is spent on bank bail-outs. This will level the playing field between similar banks located in different Member States and reduce financial market fragmentation. Moreover, banks that ask for a recapitalisation will need to present a soundrestructuring plan. This will lead to swifter and more efficient restructuring*".

[26] We refer to the Directive 2014/59/EU of the European Parliament and of the Council, of 15 may 2014, (also known as BRRD), which establishes a recovery and resolution framework for credit institutions and investment firms.

ordinary conditions has been the non-application of the so-called *burden sharing mechanism* and thus of the *burden sharing procedure* by certain categories of creditors of the institution in need of support. The Communications of 2020[27] and 2022[28] (the latter called the Temporary Crisis Framework), adopted respectively in response to the economic crises resulting from the pandemic and the Russian-Ukrainian conflict, are relevant on this point. The continuation of hostility, recently made a new intervention necessary, which can be said to be more incisive. We refer to Communication of 9 march 2023 called "Temporary Crisis and Transition Framework"[29] that, among other things, fits into the context of the Green Deal Industrial Plan for the Net-Zero Age Deal, the new European industrial plan published on 1 February 2023 aimed at strengthening the competitiveness of industries and supporting the transition towards neutrality climate.

Well, the TCTF is the result of a consultation that the Commission, at the beginning of last February, had launched with the Member States asking them for comments on the possibility, which has now become concrete, of devising a new "transitional" framework capable of facilitating and above all, accelerate the European green transition.

We are in the presence of measures that, inspired by principles developed by the Commission in the past, confirm the wide discretion granted by the legislation to the aforementioned European Institution in authorising public

[27] We refer to the Communication of European Commission called *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* (COM (2020) 1863 final) of 19th march 2020 (cd. *Temporary Framework*).

[28] We refer to the Communication of European Commission called *Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* (2022/C 131 I/01) (cd. *Temporary Crisis Framework*) of 24th march 2022.

[29] We refer to the Communication of European Commission called Temporary Crisis and Transition Framework" (C(2023) 1711 final) of 9th march 2023.

support measures for banks[30]. The latter, in fact, has wide margins of evaluation in verifying the conditions in the presence of which the case contemplated in paragraph no. 45 of the 2013 Communication can be applied; this possibility admits exceptions to the general discipline if the application of the ordinary measures could put "financial stability" at risk or determine "disproportionate results"[31].

The suggestion that the European Commission has too much discretion in the matter is supported by the measures adopted on the occasion of the pandemic crisis. These measurements, justified by similar emergency needs, could perhaps have been based on the same legal basis. In contrast, it should be observed that the decision to bring 'exceptional occurrences' within the scope of Article 107(2)(b) rather than Article 107(3) was the result of circumstances unrelated to purely technical evaluations, having been motivated by opportunistic reasons dictated by the broader room for manoeuvre that the latter provision offers the competent authority in the matter[32].

This equivocal interpretation of the regulation is at the basis of the 2020, 2022 and 2023 Communications adopted also in favour of banks in distress, which are taken out of the general framework if they are in need of "extraordinary public financial support", necessary to remedy the negative effects deriving from the

[30] As recognized by case law, the Commission's discretion concerns not only assessments of a technical nature, but also of opportunities from an economic and social point of view. In jur., see Corte Giust., 11 September 2008 (joined cases C-75/05 P and C-80/05 P), *Germany and Others c. Kronofrance*, ECLI: EU: C: 2008: 482, paragraph 59; Court of Justice, 8 March 2016 (case C-431/14 P) *Greece v. Commission*, ECLI: EU: C: 2016: 145, paragraph 68.

[31] On this topic, see MINTO, *Il rilassamento delle regole europee sugli aiuti di Stato nell'attuale pandemia da CoViD-19 (ben tornato, Bail-Out?)*, on *Riv. Nuova giur. civ. comm.*, suppl. to n. 5/2020, p. 17, who stressed that, in the context of the economic crisis resulting from the Covid-19 pandemic, the emergency does not, however, justify the reintroduction of the *notorious* bail-out, against which the European institutions have strenuously fought.

[32] See SCHEPISI, *Aiuti di Stato ... o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel "comune interesse europeo"* on *Riv. della regolazione dei mercati*, n. 1/2021, p. 120 ff.

well-known crisis events. In particular, the EU Commission, in its 2020 Communication, made express recourse to the exception provided for in paragraph 3(b) of Article 107 TFEU to justify interventions aimed at restoring the soundness, liquidity or solvency of the credit institution ''in the form of liquidity, recapitalisation or impaired asset measures''[33]. In the presence of exceptional conditions[34], therefore, the credit institution receiving public support must not be considered to be failing or at risk of failing, contrary to the general provisions of the BRRD (Art. 32) [35].

Similarly, the 2022 Communication allows for an exceptional non-application of the same principle of prior burden sharing when state aid is adopted "*...address problems linked to the aggression against Ukraine by Russia*"[36].

It is therefore apparent that an assessment on a case-by-case basis is necessary, whether or not the implementation of the principle of burden sharing could put the stability of the entire financial system at risk; a check that, however, creates situations of interpretative uncertainty due to the danger of considering concrete events, profoundly different in ontological terms, in the same way.

[33] See the Temporary Framework, Sec. 1.1, point 7.

[34] We refer to the provisions of the mentioned Dir. 2014/59/EU of 15 may 2014 (BRRD).

[35] See EU Commission Communication on banking sector of 2013 (2013/C 216/01) that, at points 15 -20, states that state support should be granted on conditions that there is adequate burden sharing by those who have invested in the bank (paragraph 15): before granting any kind of restructuring aid to a bank, in other words, all capital-generating measures, including lower-ranking debt swaps, should be exhausted, provided that fundamental rights are respected and financial stability is not jeopardized. Since any restructuring aid is necessary to prevent the possible disorderly bankruptcy of a bank, to reduce aid to the minimum necessary, the burden-sharing measures must be respected regardless of the bank's initial solvency. Before granting restructuring aid to a bank, Member States will therefore have to ensure that the shareholders and subordinated equity holders of that bank either provide the necessary contribution or establish the necessary legal framework for obtaining such contributions (par. 19).

[36] For a first comment on the *Temporary Crisis Framework* to stem the consequences of the Russian-Ukranian conflict, see PREVIATELLO, *Crisi ucraina e nuovo Quadro temporaneo in materia di aiuti di Stato*, on Riv. *Eurojus*, n. 2/2022, p. 87 ff.

5. In light of what has been said, the reader shall wonder about the extent of the powers conferred on the EU Commission in this matter and with regard to the binding nature of the Communications adopted by the same in contexts not characterised by specific emergency needs. The advisability of disapplying the so-called burden sharing mechanism in additional and less dramatic circumstances compared to the current ones, which obviously require special attention, must be assessed.

In is therefore necessary to consider the appropriateness of bringing within the scope of events causing a "*serious disturbance of the economy*", events that, while not producing negative effects on the general economy, may nevertheless lead to adverse consequences in specific sectors of the market and with reference to certain companies.

It is self-evident that this possible outcome requires a review of the disciplinary framework provided for State aid, or the adoption of measures that do not fully comply with the interpretative canons provided by the European Commission. This is based on the assumption that, as the Court of Justice clarified, soft law instruments do not produce enforceable effects against the Member States[37], nor against the very institution that adopted them[38]. In this direction are the Advocate General's arguments in the well-known Kotnik case[39], in which he

[37] The Court of Justice was called upon to rule on a request for a preliminary ruling from the Slovenian Constitutional Court regarding the binding nature of the 2013 Communication (Case C526 / 2016). In this context, the conclusions of Advocate General Nils Wahl, presented on 18 February 2016, were significant, arguing that the aforementioned Communication does not constitute a strictly binding act for Member States, which could therefore be authorized to derogate from the *bail-in* principle.

[38] See PREVIATELLO, *Crisi ucraina e nuovo quadro temporaneo*, cit. p. 94.

[39] We refer to case *Kotnik e a.* (case C-526/14), with a judgment of 19 July 2016 issued by the Grand Chamber of the EU Court of Justice, in which the latter ruled, as a preliminary ruling, on the compliance of some measures concerning the sharing of burdens by shareholders and subordinated creditors of credit institutions with art. 105 par. 3 lett. b) TFEU, considering aid intended to remedy a serious disturbance in the economy of a Member State compatible with the

stated that the Commission cannot consider burden sharing (...) to be a condition sine qua non for declaring planned aid to a bank in difficulty to be compatible under Article 107(3)(b) TFEU[40]. It follows from this that Member States may submit to the competent European Authority intervention projects requiring the use of State resources in derogation of the criteria predefined by the Commission in the Banking Communication[41].

In conclusion, the so-called burden sharing mechanism should not be an operational criterion to which the EU Commission is obliged to resort at any cost. Hence, it would seem desirable in the future for it to carefully evaluate the possibility of adopting less rigid attitudes than in the past. After all, the exceptions to the ordinary intervention plans contained in the Banking Communication do not appear to limit its scope of application to cases of extraordinary seriousness. It follows that, albeit in specific circumstances that have yet to be clearly defined, public interventions in support of banks unrelated to burden sharing and, therefore, to the principle of burden sharing, could be considered compliant with the TFEU; this in consideration of the fact that the Treaty rules do not contain any provision relating to such a form of interconnection. Moreover, the literal wording of the 2013 Communication testifies in this regard, which traces burden sharing

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internal market. In the present case, these measures consisted in the partial or total cancellation of certain liabilities of the bank and in the conversion, also partial or total, of the same liabilities into new ordinary shares of the same bank.

[40] For a comment on this decision, see FERRARO, *La risoluzione delle crisi bancarie e gli aiuti di Stato: alcune riflessioni sui principi delineati dalla recente giurisprudenza della Corte di giustizia dell'Unione europea*, in *Riv. it. dir. pubbl. com.*, n. 6/2016, pp. 1591 ff.; but also RUCCIA, L*e crisi bancarie al vaglio della Corte di giustizia. Osservazioni sulla sentenza del 19 luglio 2016, Causa C-526/14, Tadej Kotnik e altri*, in Riv. *Eurojus.it*, published on 5 september 2016, p. 3.

[41] On closer inspection, the need for greater interpretative *flexibility* of the reference discipline in this direction had been affirmed, in previous years, by both European doctrine and jurisprudence. See ROSSANO, *Gli aiuti di Stato alle banche e le ritrattazioni della Commissione: tra distorsioni della concorrenza e (in)stabilità finanziaria*, on *Riv. trim. dir. econ.*, n. 1/2016, p. 1 ff.; LIBERATI, *op. cit.* See also the decision of General Court of 12 november 2015 (cause T-499/12) (case *HSH Investment Holdings Coinvest-C Sàrl c/ EU Commission*).

back to a substantial exhortation to the competent authority to authorise public intervention measures in respect of banks.

At present, it is not possible to predict whether and when the Commission will dictate new guidelines on State aid to the credit sector to be implemented under normal market conditions. It is conceivable that in drawing up these guidelines, some food for thought may emerge from the results of the public consultations launched in April of 2022[42]. In the background remains the need to rewrite the rules on the subject, taking care to ensure a fair balance between the needs of market protection and the private interests of those called upon to personally contribute to the reorganisation of banking institutions.

More generally, as has recently been claimed[43], it seems that the state aid system is gradually transforming itself from a system of control over market competition to one of active aid policy. On closer inspection, it is clear that rules on aid system have incorporated the assumption that public spending is essential for the achievement of certain social and economic ends. In this sense, it directs the interaction between Aid Regulations and Next Generation EU program. In particular, the relationship between the state aid system and the PNNR reaffirms a new flexibility of the aid control policy.

[42] We refer to the Consultations launched by the EU Commission on March 17, 2022 about the assessment of the rules on state aid for banks in difficulty, in order to verify whether the ordinary regime on state aid has been effective over time, with specific reference to the ability to: support the restructuring of credit institutions in crisis and the orderly exit from the market of unprofitable ones; discourage moral hazard behavior; mitigate distortions of competition caused by the granting of state aid. For further information on the subject of the consultation see the documents available at SSRN https://ec.europa.eu/competition-policy/public-consultations_en.

[43] BIONDI, Il Regolamento RRF e gli aiuti di Stato, in Federalismi.it, paper published on 15 february 2023, p. 2.

OVERVIEW OF THE ITALIAN FDI REGIME AND CURRENT TRENDS

Federico Riganti[*] - Linda Lorenzon[**]

ABSTRACT: *This paper will focus on the main aspects of the Italian FDI Regime, known as Golden power, as it results from the latest amendments to the relevant rules.*

The relevant regulation has been amended several times during the last years, with measures aimed at enlarging the scope of application of the legislation especially (but not only) in relation to the "strategic sectors" concerned. In recent times, this enlargement has been also due to the entering into force of the EU Regulation no. 452/2019 on Foreign Direct Investments and to the national emergency regime connected to the pandemic-related economic interventions.

By providing an overview of the Golden power regulation, as it is currently in force, a focus will be made to specific profiles of the regulation, such as the areas of particular sensitiveness (and with a specific reference to the banking and finance sector), in order to test whether the primary purpose of 'balancing the public order and security needs with the economics ones' is still valid and whether some interferences among different principles, competences and/or other authorities is to be envisaged.

Indeed, the paper further deals with the scrutiny drivers provided under Decree 21/2012, as they are interpreted and applied from time to time by the Italian Government, also by making reference to practical guidelines and to report of the

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The contributions made under Paragraphs 1, 3 and 5 are to be referred to Linda Lorenzon. The contribution made under Paragraph 2 is to be referred to Federico Riganti.

authorities in order to ascertain the status of the Golden power policy and trends and to understand the related rationale. By going through the recent provisions on FDI matters, both at national and internal level, the discussion seems to move from a strict foreign direct investment control to a 360° perspective screening mechanism.

Considering all the above, the paper questions whether the Italian Golden power policy represents (or not) a "best practice" at global level and whether the national legal system preserves the liberalization to foreign investments, even in strategic sectors.

SUMMARY: 1. The Golden power regime among "former", "fleeting" and "forever" provisions – 2. Golden powers in the finance and banking sector – 3. New procedural mechanisms: a stairway to heaven? – 4. Status of implementation, policies and trends

1. The domestic framework, established during the 90's with the aim of safeguarding the national interests in some sectors related to public services (defence, transport, energy, communications), was based on Law. 332 of 1994 regulating the privatization of many public Italian companies. Accordingly, the special powers which were granted to the Italian Government covered certain rights to be exercised in relation to control shareholdings the Italian State in such companies (so-called the "golden share" regime).

Such former regime has been subject to a decision rendered by the EU Court of Justice (judgment of 23 May 2000 in relation to proceeding C-58/99, Commission vs. Italy) stating the conflict of such rules with the right of free establishment, free provision of services and free movement of capitals within the EU territory provided under the EC Treaty. As a consequence, the regime was revised and Law Decree no. 21 of March 15, 2021 ("**Decree 21/2012**") was adopted, nowadays constituting the corner stone of the relevant regulation.

The provisions contained in Decree 21/2012 have been subject to copious

amendments during the last years, especially starting from 2017 to 2022, which contributed to enlarge the scope of application of the legislation in relation, first of all, to the "strategic sectors" concerned. This enlargement - which is, on one side, a 'physiological' effect of the developments on new technologies which are potentially of national interests - has been accelerated during the Covid-19 emergency in order to prevent distortive effects on the market and in light of the entering into force of the EU Regulation no. 452/2019 on Foreign Direct Investments ("**FDI Regulation**"), occurred in October 2020.

In particular, a significative role has been played by Law Decree no. 23 of 8 April 2020 in relation to the Covid outbreak which introduced an emergency regime meant to expire at the end of that year, but that has instead been extended from time to time and was supposed to be in force until end of 2022.[1]

Such emergency regime, primarily aimed at facing the pandemic crisis and then the economic consequences went into two main directions: (i) enlargement of the 'objective' scope of the Golden power, including among the strategic sectors all the "further sectors" covered under Article 4 of the FDI Regulation – the ones which are actually referred to as "factors" to be taken into account pursuant to the FDI Regulation[2] and (ii) extension of the Golden power rights of intervention to intra-UE investments for controlling interests acquisition - a circumstance that was previously limited only to the defence and national security

[1] The emergency regime is no more in force since it has been not extended after 2022.

[2] Indeed, Italian Law Decree enacted during April 2020 (and former regulations, such as Decree Law no. 105 of 2019) included among the "new strategic sectors", in a general way, all those mentioned as "factors" under Article 4, of FDI Regulation. The general and all-inclusive reference to such list of factors caused an indiscriminate enlargement of the "strategic" activities under Italian law. This broad extension was intended to last - in principle - until the issuance of subsequent implementing decrees defining in more detail the specific assets and relationships included in these new strategic sectors. However, according to the literal interpretation of subsequent provisions, and as it had also been confirmed by the Official Report on the exercise of special powers for year 2021 (see "*Relazione concernente l'attività svolta sulla base dei poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni (anno 2021)*, page 4)) issued by the Italian Government, this "generic" extension was intended to be in effect and to coexist, during the entire "emergency" regime, with the more analytical determination of the sectors under the implementing decrees.

sector, where the nationality of the investor was irrelevant. Also, a lower threshold of relevant for extra-UE acquisitions, combined with a value threshold, was introduced according to the "temporary" regime.

What was expected to happen[3] – pursuant to the provision of Decree Law no. 21 of 21 March 2022 (so-called "Ukraine Decree", as converted into Law) – is the temporary regime to become permanent (in all its main aspects) starting from 1° January 2023, so that operators have to take as "acquired" into the ordinary regime the two aspects mentioned above. As regards the second one, it is worth noting that the Ukraine Decree also reviewed the definition of Extra-UE investor, welcoming an even more substantial approach, aimed at verifying the control chain of the investor in question: such specification, which has been perceived as quite a novelty by the early readers of the decree, is nevertheless consistent with the past practice of the Golden powers' office and is in line with the related interpretation that considered the mere fact of being resident or registered in Italy not sufficient to exclude the "foreign" nature of the investor.

Furthermore, such Decree expressly set out for the first time that incorporation of companies – the so-called greenfield investments – are subject to notification obligation too, provided that, in some sectors, an Extra-EU investor acquires at least a certain minority stake in the share capital[4]. Needless to say that, in most of the incorporation cases (and especially where the incorporation is not performed in the context of a reorganization or as part of a wider transaction), the transaction in itself is not apt to show the indices of strategicity of the relevant activity or to assess the criticality of the assets and relationships, these latter being the necessary requirements for falling within the scope of the Golden power right of intervention. So that it can be questioned whether the 'mere' provision inserted as corporate purpose of a newly established company is to be considered

[3] See note 5.

[4] According to the Report (see note 20 below), Italy was among the top ten greenfield investments' recipients where foreign projects failed to take off in 2021 compared to 2020.

per se strategic activity or whether further implications should be evaluated for such ends. In those cases, the "potentiality" of the "strategic nature" of the activity and/or asset in question demotes the bar of attention to a truly primal and preliminary level of analysis in matter of public order and security threat.

The sensitivity of the matter has also been the reason legitimating the provision of wide and ad hoc powers of control, screening and intervention in the 5G, cybersecurity and cloud technologies; indeed, transactions involving such assets have been made subject to a completely different notification, which requires submission, in extreme summary, of an annual plan. Such sector is considered per se of "*national security*"[5] due to the fact that 5G technology and the associated risks of data misuse are deemed to have implications for national security (they are implicitly to be traced to the scope of Article 1, of Decree 21/2012, in matter of defence and national security).

As a result, recent measures in Golden power regulation tend to create a 'control' stratification in many sectors, such as the communication, transports, energy sector, as well as the financial and banking one, that are separately regulated in many aspects and are already supervised by specific authorities, which have also elaborated similar principles or have however construed their own concept of "*national interest*" enabling their intervention.

2. With reference to the specific topic of the credit sector a twofold order of problems emerges. The first, specifically, pertains to definitions used by the norm. The second, on the other hand, concerns the critical issues characterizing the concrete application of the regulation in question.

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[5] Some comments have been made by DE NITTO, *Il golden power nei settori rilevanti della difesa e della sicurezza nazionale: alla ricerca di un delicato equilibrio*, in Diritto Amministrativo, fasc.2, June 1, 2022, page 553, where the author investigates the notion of "defense", public order" and "national security". For an exhaustive reading on the notion of "national security and defence", see AA.VV., *Rivista Italiana di Intelligence*, December 2017, Gnosis, available at the following link: https://www.sicurezzanazionale.gov.it/sisr.nsf/wp-content/uploads/2017/11/sicurezza-e-liberta.pdf

As for the first side, it is necessary to focus on two distinct issues, relating to (i) the definition of the notion of "financial infrastructure" and (ii) the link between the golden power discipline and existing prudential supervision provisions.

With reference to the first aspect, as already pointed out by authoritative doctrine[6] , the current legislature – in fact confirming the hypothesis in this sense advanced by a timely academic intervention[7] – has contributed to clarify some interpretative questions that arose in Italy with the previous discipline[8] and has also clarified the perimeter of the subject matter of the Italian golden power regulation on the financial sector.

In fact, on this point, it is important to recall the critical issues highlighted by that author who, precisely in relation to the definition of the topic, also underlined the problem concerning whether regulated markets as well as MFTs and OTFs (as well as structures operating in the context of *post-trading*) can be ascribed to the category of financial infrastructures. A question, the latter, the answer to which (i) required an extensive effort of regulatory-regulatory

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[6] Reference is made, for all, to SACCO GINEVRI, *Golden powers and financial infrastructure after the Liquidity Decree*, in "D.B. Editorials", April 9, 2020, at www.dirittobancario.it. See also RIGANTI, *Investimenti esteri diretti e supervisione finanziaria e bancaria: dal «governo» delle banche al governo nelle banche*?, in "Banca Impresa e Società", 2022, p. 105 ff.

[7] The reference is to ANNUNZIATA, *Financial Infrastructure and the Control of Foreign Investment, in The Control of Foreign Direct Investment*, cit. p. 108. But see also ALVARO, LAMANDINI, POLICE, and TAROLA, *The New Silk Road and Foreign Direct Investment in Technology-Intensive Sectors. Il* golden power *dello Stato italiano e le infrastrutture finanziarie*, in "Quaderni Giuridici Consob," January 20, 2019, p. 45, where, on the basis of a comparative path, it is highlighted how "by financial infrastructure it seems to have to be understood, in a very first approximation, the set of all those specific elements that constitute an essential tool for the functioning of the financial system, or parts of it, of a country. The notion seems, therefore, apt to encompass the institutions, information, technology, networks, facilities, installations and, indeed, the physical and technological "infrastructures" that enable operations in the financial sector and thereby the efficient functioning of markets, payment systems and financial intermediaries. In summary, "financial infrastructure" should be understood to mean that structure that enables the financial sector to operate smoothly, fulfilling the functions that are typical for it."

[8] On this point see ANNUNZIATA, *Financial Infrastructure and the Control of Foreign Investment, in The Control of Foreign Direct Investment*, cit. p. 108.

coordination and (ii) was marked by a potential duplicity of interpretative solutions: positive, if made with reference to the (in fact similar) function of all *trading venues*; negative, where it went by focusing on the specificities of regulated markets only[9] .

Now, through Article 8[10] of the aforementioned Prime Minister's Decree Dec. 18, 2020, no. 179, it is instead established that in the financial sector, the assets and relationships to be referred to for the application of the rules on intervention powers are, among others: (i) critical infrastructures, including platforms, for the multilateral trading of financial instruments or monetary deposits, for the provision of core services of central securities depositories and clearing services as central counterparties as well as for the clearing or settlement of payments; (ii) critical technologies, such as artificial intelligence and distributed ledgers, instrumental to service and product innovation in the financial, credit, insurance, and regulated markets sectors, as well as digital technologies related to payment, electronic money and money transfer systems and services, liquidity management, lending, factoring, trading, and investment management; and, finally; (iii) economic activities of strategic importance financial, credit and insurance, even if carried out by intermediaries, carried out by enterprises with an annual net turnover of not less than 300 million euros and having an average annual number of employees of not less than two hundred and fifty.

This clarification offered by the regulation – which is particularly broad, even more if related to point *sub* (iii), where fortunately a quantitative limitation is at least placed on the otherwise too extensive and heterogeneous inclusion on a qualitative basis[11] of the subjects covered by the discipline – helps the interpreter

[9] Thus, again, the precise analysis of ANNUNZIATA, *Financial Infrastructure and the Control of Foreign Investment, in The Control of Foreign Direct Investment*, cit. p. 108

[10] Dictated on assets and relationships in the financial sector, including credit and insurance, and financial market infrastructure.

[11] The problem is underlined, accurately, by LENER, *Brief notes on* golden power *in the financial sector in light of the Liquidity Decree,* op. cit., p. 549.

to understand the perimeters and content of the notion of financial infrastructures. A notion in which, therefore, credit institutions would now also be fully included.

The subject of *golden powers* has a strong and direct impact, therefore, also on the profile of banking supervision and thus, first and foremost, on the provision under art. 5 of the Italian banking law consolidated act (t.u.b., as per Italian legislative Decree no. 385 of 1993, as subsequently amended and integrated).

Such last provision has a programmatic nature, which - correctly and dutifully, given the extremely technical and evolving nature of the matter - only identifies the general objectives, referring the substance of the discipline (thus in a key of strong de-regulation and administration of the sector's rules) to the Bank of Italy, which provides for that by issuing secondary regulations, both of a general and particular character.

In this regard, it should be pointed out that the provision of the t.u.b. under analysis, in particular concerning (i) the "sound and prudent management" of supervised entities; (ii) the overall stability, efficiency and competitiveness of the financial system as well as (iii) the compliance with credit provisions, if, on the one hand, seems able to ensure the "safety" of the banking system and, *a fortiori*, the protection of its strategic nature (therefore underlying a kind of irrelevance of the golden power discipline in the subject matter), on the other hand, it clearly appears to affirm the intention of the national legislator to delimit *ex ante* and in a precise way the stakes of public intervention in the subject matter in question.

It must be remembered that this delimitation is in force also in the face of the uncertainty arising from the broad terminological choices adopted by the law ("sound and prudent management"[12]).

[12] Concept on which reference may be made to my RIGANTI, *Il controllo interno nelle s.p.a. bancarie. Lineamenti evolutivi e profili di specialità organizzativa*, Turin, Giappichelli, 2020, pp. 17 ff, where further bibliographical references including, SARTORI, *Disciplina dell'impresa e*

3. According to the recent measures, the legislator rationalized, also from a procedural point of view, the exercise of special powers. Without going through the internal re-organization details of the Golden power offices and departments and relevant procedural aspects[13], which constitute however an important stone of the current regime, it would be sufficient to remind that the special powers (i.e. the types of intervention), that can be exercised by the Italian authority on the different types of transactions or acts subject to filing obligation are now the same in all sectors, expect for the 5G and cybersecurity, in relation to which, as already outlined, a specific procedure is in place. As part of the rationalization, a joint-filing procedure of both the relevant investor and the target entity, where possible, has been envisaged; accordingly, the target company has to be in any case notified of the Golden Power filing which is made, in order to avoid possible conflicts, lack of coordination or interruptions at a later stage of the proceeding.

Further to the Ukraine Decree, the implementing decree (Presidential Decree no. 133 of August 1rst, 2022, hereinafter as "Decree 133") which has been published in the Official Gazette on September 9, 2022 and that come into force on September 24, 2022, by replacing the prior procedural regulation (Prime Minister Decree of August 6, 2014), regulated a pre-filing procedure mechanism which should be aimed at ascertaining, at a very preliminary stage of the project, whether the transaction or the relevant assets at stake fall within the scope of the Golden power regulation.

Such innovations should allow, in principle, to have a smoother screening

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statuto contrattuale: il criterio della "sana e prudente gestione", in "Banca, Borsa e Titoli di Credito", 2, 2017, I, pp. 131 ff.

[13] On this regard, see SANDULLI, *La febbre del golden power*, Rivista Trimestrale di Diritto Pubblico, fasc.3, September 1, 2022, page 743. According to Decree 133, as mere example, the so-called Coordination Group ('*Gruppo per il Coordinamento Amministrativo'*), together with the competent ministries, has been reformulated in its composition and internal organization and many aspects related to the preparatory activities for the exercise of the golden powers, including the timing of internal transmission of the notification among the offices, has been revised, without any disruptive change.

process and to encourage early discussions with the Golden power department in the view of collaboration and simplification[14]. As it has been noticed by some authors[15], such mechanism is really close to the one provided under foreign regulations, such as the US CFIUS, where interlocutory relationships can be established between the federal body and the entities concerned, thus being very useful in providing guidance to the interlocutors and deflating litigation.

4. As last remark, the Italian Golden power regime reflects the trends which are taking place also at international, or at least, European level, where the FDI legislation – especially when it comes to identify national security concerns – has to be read in connection with other specific regulations, such as the one concerning the dual use items (covered under EU Regulation no. 821/2021, as subsequently identified and amended), it being reminded that dual use activities are included the scope of the Golden power rules, provided that certain thresholds are met. At the same time, the export control regime (affecting dual use items) is linked to the trade sanctions legislation – in this case of course, the notion of EU security results in the capacity of the EU to act autonomously – that is, without being dependent on other countries – and the so-called "strategic autonomy"; last but not least, some intersections can now be envisaged in light of the adoption of the EU Foreign Subsidies Regulation[16] aimed at preventing distortion mechanisms of the market and in relation to investments made in the European Union.

[14] In the view of simplification, a faculty of preliminary screening by the so-called Coordination Group has been also confirmed ('simplified procedure'). Accordingly, intra-group transactions, which are still subject to mandatory filing, benefit from the simplified procedure.

[15] See SANDULLI, note 16.

[16] Reference is to be made to EU Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market ("Foreign Susbidies Regulation"), which came into force on January 12, 2023, and which was still under discussion at the time of the interventions made by the authors. The Foreign Susbidies Regulation depends however on implementing regulations, with a first application phase starting as of July 12, 2023, and with notification obligations for companies being effective as of October 12, 2023.

In that respect an even greater coordination also at EU level is desirable. On September 2nd, 2022, the second version of EU investment screening rules was issued[17], showing that the use of the mechanism has expanded in 2021 and that, in principle, the "*EU mechanism does not hold back the EU's openness to FDI*". On the same note, at internal level, it may be noted that despite an increasing number of notifications before the Golden power offices (taking the number of notifications submitted over the last years as a reference, it rose from 83 in 2019, to 342 in 2020, to 496 in 2021)[18], the exercise of special powers amounted to only 18 cases in total. The conclusion, at least *prima facie*, is that we should be reassured that "*the strengthening of the security and protection profiles of strategic national facilities, accompanied by an investment-friendly regulatory climate, can be considered an effective instrument of attractiveness for foreign investors*"[19].

[17] The Report is available at the following link: https://ec.europa.eu/commission/ presscorner/ detail/en/ip_22_5286. Also, according to such Report, Italy was one of the 5 five counties responsible for more than 85% of the notifications according made under the Coordination mechanism provisions pursuant to the FDI Regulation.

[18] Source: Official Report on the exercise of special powers for year 2021, as per note 6 above.

[19] See note 21 above.

THE NEW COMPETENCIES
OF THE POLISH COMPETITION AUTHORITY IN FDI SCREENING

Anne-Marie Weber * - Weronika Herbet-Homenda **

ABSTRACT: *In the wake of the COVID-19 pandemic, a number of countries have amended their FDI screening regulation to enable closer monitoring of foreign investments in companies that are vital to a country's security, public order, and health care framework. The aim of our paper is to present, assess and evaluate a new FDI screening mechanism that has been introduced in Poland.*

Although the purpose of mechanisms to control foreign investments that function in different jurisdictions is essentially convergent, the regulations significantly differ in their specificities, particularly in terms of the sectors protected, the level of protection provided, the sanctions for failure to comply with certain obligations and, crucially, the entities authorized to conduct the screening. Through the amendment of the act of July 25, 2015, on the control of certain investments, the Polish legislator has supplemented the existing FDI screening framework by granting competencies to the Polish Competition Authority (pl. Prezes Urzędu Ochrony Konkurencji i Konsumentów; hereinafter as: the President of UOKiK). As of July 24, 2020 the conventional powers of the President of UOKiK pertaining to merger control have been enriched by the authorization to approve strategic transactions involving, on one hand, companies based outside of EU, EEA or OECD, and on the other, Polish public companies that meet a turnover criterion and operate in one of the sectors of utmost relevance to public order and public safety (e.g. energy, armaments, telecommunications).

Our paper intends to present and evaluate the main characteristics and objectives

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of the new FDI screening mechanism. To this end, we discuss the personal and material scope of the new regulation, as well as selected procedural aspects related to the notification and follow-up proceedings. Most importantly, the paper deals with systemic issues regarding the competent authority responsible for conducting the screening proceeding in the new regime. In addition to the characteristics of the OCCP itself, we outline and discuss the key concerns related to the attribution of strategic investment control to an authority whose primary statutory task is competition and consumer protection.

1. Congruent to tendencies in many other countries[1], the COVID-19 pandemic has induced an extension of the Polish FDI screening rules. As a component of the economic rescue package "Anti-crisis-shield 4.0." (pol. *Tarcza Antykryzysowa* 4.0.)[2], which tackled various fields of law, a significant amendment to the Law on Control of Certain Investments of 24 July 2015[3] (hereinafter: LCCI) was adopted on 24 July 2020. Initially, the new screening mechanism was introduced for 24 months. In 2022 it was prolonged for another three years (until July 2025).

The new FDI screening regulations (hereinafter: New FDI Law) were introduced as an additional layer alongside the previously existing FDI control regime (hereinafter: Old FDI Law), which remained in force. Crucially, unlike the Old FDI Law,

[1] See: SHARMA, *Covid-19 and recalibration of FDI regimes: convergence or divergence?*, 2020, p. 62-73; European Commission, Reports from the Commission to the European Parliament and the Council, First Annual Report on the screening of foreign direct investments into the Union and Report on the implementation of Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, 23.11.2021, p. 10-12.
[2] The Act of 19 June 2020 on Subsidies to Interest on Banking Loans Granted to Entrepreneurs Affected by COVID-19 and on Simplified Composition Proceedings Related to COVID-19 (Journal of Laws of 7 June 2019 2020 item 1086).
[3] The Act of 24 July 2015 on Control over Certain Investments (consolidated text in the Journal of Laws of 2020 item 117 as amended).

which "classically" empowered ministerial authorities, the New FDI Law entrusted the President of the Office of Competition and Consumer Protection (pol. Prezes Urzędu Ochrony Konkurencji I Konsumentów; hereinafter: OCCP) with the foreign investment screening procedure. Consequently, the legislator created a framework of parallel FDI regimes that rest in the powers of different public authorities.

The aim of this article is to assess the features of the New FDI Law, in particular regarding the conveyance of screening authority to the OCCP. The article proceeds as follows. First, we shortly outline the Old FDI Law as a point of reference for the new regime (sec. 2). Subsequently, we analyze the scope and procedure of the New FDI Law (sec. 3). In the following section, we portray the OCCP as the authority in charge of the new screening regime (sec. 4). In the last section, we identify and discuss the challenges which arise from entrusting the OCCP with the additional task of FDI screening (sec. 5).

2. Although often identified in the literature as an FDI screening mechanism, it is essential to note that the Old FDI Law covers investments carried out both by foreign and domestic investors[4]. Transactions regarding any target company covered by the Regulation fall under the screening procedure. Nonetheless, the protection regime is highly selective as it applies only to investments in target entities explicitly listed in an executive (implementing) regulation of the Council of Ministers[5] (Art. 4 sec. 2 LCCI). Leaving discretion to the executive, the Old FDI Law solely enumerates the sectors that can be subject to protection, including, in particular: energy, fuel, armaments, and telecommunications (Art. 4 sec. 1 LCCI)[6]. In other words, the Council of Ministers is restricted to including only companies from these specific sectors in its

[4] JAŚKOWSKI, *FDI screening in Poland*, 2019, p. 3.

[5] BAŁDOWSKI, *Ustawa o kontroli niektórych inwestycji jako mechanizm zapewniający bezpieczeństwo energetyczne* (Law on control of certain investments as a mechanism to ensure energy security), 2019, p. 122.

[6] JAŚKOWSKI, *FDI screening in Poland*, p. 4.

list of protected entities, currently entailing 13 companies[7].

The screening procedure applies to transactions leading to either direct or indirect domination or important participation in the protected companies (Art. 3 sec. 1-8 LCCI).

The investment control procedure is based on notifications addressed to individual ministers, assigned to specific companies, or – in particular cases – *ex officio* proceedings (Art. 9 sec. 1-3 LCCI). As specified in the aforementioned Regulation, with regard to 12 out of 13 companies currently listed by the Council of Ministers, regulation of the council of ministers on the list of protected entities and the competent control bodies for them is the minister responsible for state assets. General provisions governing administrative proceedings apply (Art. 11 sec. 5 LCCI).

The final ruling that completes the screening procedure is rendered in the form of a decision approving or opposing the transaction. It is issued upon recommendation of the Consultative Committee, consisting of the Prime Minister, relevant ministers, and the representatives of other listed authorities (Art. 13 sec. 3 LCCI).

3.1. The Polish legislator decided to explicitly declare the purpose of the New FDI Law in Art. 12 b LCCI, which is to protect public order, public security, or public health, as referred to in Art. 52 sec. 1 and Art. 65 sec. 1 of the Treaty on the Functioning of the European Union, taking into account Art. 4 sec. 2 of the Treaty on European Union. These intentions behind the New FDI Law align with the objectives of the European Commission articulated in its 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 on 25 march 2020

[7] Regulation of the Council of Ministers of 16 December 2022 on the list of protected entities and the competent control bodies for them (Journal of Laws of 29 December 2022 item 2838).

(hereinafter: Commission Guidance)[8]. While declaring the openness to foreign investment, the Commission made clear that the possible consequence of the current economic shock induced by the pandemic is an increased potential risk to strategic industries. This, in particular, concerns healthcare-related sectors but is not limited to these[9]. Consequently, combined efforts both at European Union and at Member States level are deemed necessary. This includes striking an appropriate balance between the EU's openness to foreign investment and screening tools. Vigilance is thus required to ensure that such investments do not negatively impact the EU's capacity to cover the health needs of its citizens.

3.2.1. The screening mechanism, as defined under the New FDI Law, applies solely to buyer entities from outside the European Union, outside the EEA or outside OECD. For natural persons, citizenship determines the relevant link to the investor's origin (Art. 12a sec. 1 b LCCI). Regarding legal persons, the New FDI Law covers entities not having a registered office within the EU, EEA or OECD for at least two years before the date of the notification (Art. 12a sec. 1 a LCCI). The exemption of OECD countries significantly limits the scope of application. In practice, the applicability of the new regime potentially concerns primarily Russian, Chinese, and other Asian investments and is, therefore, rather slim[10]. However, a transaction involving an investor with its registered office in a member state of the EU, EEA or OECD but is a subsidiary of an entity from outside the EU, EEA or OECD will be subject to the new screening regulation.

3.2.2. The obligation to notify an investment for the purposes of the new

[8] 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), Brussels, 25.3.2020 C(2020) 1981 final.

[9] RÓG-DYRDA, WIERZBOWSKI, *Nowe uregulowania w zakresie kontroli niektórych inwestycji* (New regulations concerning certain investments), 2021, p. 296.

[10] Discordantly: MATACZYŃSKI, *Podstawowe założenia „COVID-owej" nowelizacji reżimu kontroli inwestycji zagranicznych w Polsce* ((Basic assumptions of the „COVID" amendment of the foreign investments' control regime in Poland), 2022, forthcoming, working paper on file with Authors.

screening mechanism arises in the event that a covered entity (i) intends to acquire or achieve significant participation, or (ii) intends to acquire dominance or (iii) has acquired or achieved significant participation or (iv) has acquired dominance (Art. 12 e sec. 1 LCCI).

Acquisition or achievement of significant participation means: (a) obtaining significant participation in a covered entity by acquiring shares or rights from shares or taking up shares or (b) attaining or exceeding, respectively, the threshold of 20% and 40% of the total number of votes in the constituent body of the covered entity, participation in the profits of the covered entity, or equity participation in a partnership that is a covered entity with respect to the value of all contributions made to that partnership by acquiring shares or rights from shares or taking up shares, or (c) acquisition or lease from a covered entity of an enterprise or an organized part thereof (Art. 12 c sec. 5 LCCI). The term significant participation is defined as a situation that allows exerting influence on the activity of an entity by (a) ownership of shares representing at least 20% of the total number of votes, or (b) holding an equity interest in a partnership with a value of at least 20% of the value of all contributions made to the partnership, or (c) holding a share in the profits of another entity amounting to at least 20% (Art. 12 c sec. 1 item 1 LCCI).

Acquisition of dominance means the acquisition of the status of a dominant entity within the meaning of Art. 3 sec. 1 item 1 e LCCI with respect to a covered entity by (a) acquiring shares or rights from shares or taking up shares, or (b) entering into an agreement providing for the management of that entity or the transfer of profits by that entity (Art. 12 c sec. 4 LCCI. A dominant entity is an entity (a) which holds directly or indirectly through other entities a majority of the total number of votes in the bodies of another entity, including through agreements with other persons, or (b) which is entitled to appoint or dismiss the majority of members of the management or supervisory bodies of another entity, or (c) for which more than half of the members of the management board of another entity are also members of the

management board, proxies or persons performing managerial functions of the first entity or another entity with a relationship of dependence with the first entity, or (d) who holds an equity interest in a partnership with a value of at least 50% of the value of all contributions made to the partnership, or (e) who has the ability to otherwise decide on the directions of the other entity, in particular on the basis of an agreement providing for the management of that entity or the transfer of profits by that entity (Art. 3 sec. 1 item 1 e LCCI).

The screening regime also covers indirect acquisitions, i.e. cases in which (a) the acquisition or attainment of significant participation in a covered entity or the acquisition of dominance over such an entity is made by a subsidiary, including under agreements entered into with the parent entity or a subsidiary of such an entity, (b) the acquisition or attainment of significant participation in a covered entity, or the acquisition of dominance over such an entity, is carried out by an entity whose charter or other act governing its functioning contains provisions regarding the right to its assets in the event of dissolution of the entity or other form of its termination, including the right to dispose of such assets without acquisition, (c) the acquisition or attainment of a significant participation in a covered entity or the acquisition of dominance over such an entity is carried out on behalf of another entity, including in the performance of a portfolio management contracts, (d) the acquisition or achievement of a significant participation in a covered entity, or the acquisition of dominance over such an entity, is carried out by an entity with which another entity has entered into an agreement, the object of which is the transfer of powers to exercise voting rights, or other rights to shares or other participation rights, or rights from shares, stocks or other participation rights of a covered entity, (e) the acquisition or achievement of significant participation or acquisition of dominance over a covered entity is made by a group of two or more persons, if at least one of these persons is an entity with which another entity has entered into an agreement, concerning the acquisition of shares or stocks of a covered entity, or at least the

acquisition of shares or stocks or assets of entrepreneurs based in the Republic of Poland, if the subject of the agreement is the transfer of powers to exercise voting rights, or other rights to shares or rights from shares or stocks of entrepreneurs based in the Republic of Poland, (f) acquisition or achievement of significant participation in a covered entity or acquisition of domination over such entity is made by an entity acting on the basis of a written or oral agreement concerning the acquisition by the parties to such agreement of shares or stocks or components of assets of a covered entity or acquisition of shares or stocks or components of assets of entrepreneurs based in the Republic of Poland (Art. 12c sec. 6 LCCI).

3.2.3. The target entities covered by the protection mechanism enshrined in the New FDI Law must fall into any of the five categories laid out in Art. 12d sec. 1-3 LCCI.

First, a covered entity is an entrepreneur with a registered office in the Republic of Poland, which is a public (listed) company[11]. Consequently, the new rules apply to investments into companies whose shares (at least one) are admitted to trading on a regulated market or multilateral trading facility (MTF) on the territory of the Republic of Poland (Art. 12d sec. 1 LCCI).

Second, the New FDI Law mandated the screening of investments in companies that are holders of critical infrastructure, which is included in the list of facilities, installations, equipment, and services included in the critical infrastructure, as referred to in Art. 5b sec. 7 item 1 of the Crisis Management Act of April 26, 2007[12] (Art. 12d sec. 2 item 1 LCCI).

Third, the new regime applies to companies with a registered office in the Republic of Poland, which develop or modify software: (a) for the control of power plants, networks or operation of facilities or systems for the supply of electricity, gas, fuel, fuel oil or heat, or (b) for the management, control and automation of drinking

[11] Within the meaning of the Act of July 29, 2005 on Public Offering and Conditions for Introducing Financial Instruments to the Organized Trading System and on Public Companies.
[12] See: Journal of Laws of 2020, item 1856.

water supply or wastewater treatment facilities, or (c) for operating equipment or systems used for voice and data transmission or for data storage and processing, or (d) for operating equipment or systems used for the provision of cash, card payments, conventional transactions, for the settlement or management of securities and derivative transactions, or for the provision of insurance services, or (e) for the operation of hospital information systems, to operate equipment or systems used in the sale of prescription drugs, and to operate a laboratory information system or laboratory tests, or (f) for the operation of equipment or systems used in the transportation of passengers or goods by air, rail, sea or inland waterway, road transportation, public transportation or logistics, or (g) for the operation of equipment or systems used in food supply (Art. 12d sec. 2 item 2 LCCI).

Fourth, the newly adopted rules introduce the FDI screening obligation of investments in companies that provide cloud computing storage or processing services (Art. 12d sec. 2 item 3 LCCI).

Fifth, a covered entity is an entrepreneur with its registered office in the Republic of Poland, which conducts business activities in specifically listed business fields of the "old-economy"[13], i.e.: (a) production of electricity, or (b) production of motor gasoline or fuel, or (c) pipeline transportation of crude oil, motor gasoline or diesel fuel, or (d) storage and warehousing of motor gasoline, diesel fuel, natural gas, or (e) underground storage of crude oil or natural gas, or (f) production of chemicals, fertilizers and chemical products, or (g) manufacture and marketing of explosives, weapons and ammunition, and products and technology for military or police use, or (h) regasification or liquefaction of natural gas, or (i) transshipment of crude oil and its products in seaports, or (j) distribution of natural gas or electricity, or (k) transshipment in ports of primary importance for the national economy within the meaning of Art. 2 sec. 3 of the Act on Sea Ports and Harbors of December 20, 1996,

[13] MATACZYSKI, *Podstawowe założenia „COVID-owej" nowelizacji reżimu kontroli inwestycji zagranicznych w Polsce*, 2022, forthcoming, working paper on file with Authors.

or (l) telecommunications activities, or (m) transmission of gaseous fuels, or (n) production of rhenium, or (o) mining and processing of metal ores used in the manufacture of explosives, weapons and ammunition, and products and technologies for military or police use, or (p) manufacture of medical devices, instruments and appliances, or (q) manufacture of drugs and other pharmaceutical products, or (r) trading of gaseous fuels and gas with foreign countries, or (s) generation or transmission or distribution of heat, or (t) transshipment in inland ports, or (u) processing of meat, milk, cereals fruits and vegetables (Art. 12d sec. 3 LCCI).

In addition, even if a company falls into any of the five categories listed above, applying the New FDI Law depends on its revenue (Art. 12 d sec. 4 LCCI). The legislator has stipulated a carve-out based on a revenue threshold of EUR 10 000 000. Only if the revenue from sales and services on the territory of the Republic of Poland exceeds the threshold in any of the two fiscal years preceding the notification, the new screening mechanism covers the relevant company. Art. 12d sec. 6 LCCI empowers the Council of Ministers to determine further exemptions by administrative regulation after consultation with the President of the OCCP and taking into account the situation caused by COVID-19 or the international situation distorting the market or competition and the objectives of the control mechanism outlined in Art. 12b LCCI.

3.3. As a rule, the new screening proceedings are initiated upon notification (Art. 12e sec. 1 LCCI). Only exceptionally, in case of abuse or circumvention, the OCCP may initiate proceedings *ex officio* (Art. 12e sec. 2-3 LCCI). Notification is submitted to the OCCP by – depending on the type of investment – an entity that intends to acquire or achieve significant participation or dominance, the entity controlling it, or, in the case of subsequent acquisition, the protected entity (Art.12f sec. 1-4 LCCI).

The content of a notification is specified in Art. 12g LCCI and includes in particular information on the direct or indirect shareholding of the protected

company and its dominant companies, professional, business or statutory activities of the entity submitting the notification, its capital group and its structure, economic-financial situation, criminal record, ongoing criminal proceedings, previous actions aimed at acquiring shares in commercial companies based in Poland and, eventually, the intentions of the notifier with regard to the protected company. The detailed scope of information depends on whether a given transaction leads to a direct, indirect or subsequent acquisition[14]. The notifier should also provide the information specified in Art. 14d LCCI concerning the ownership structure of the investor and the acquired entity, the approximate value of the investment, the products, services and business activities involved, the Member State where the business is conducted, the source of investment financing and its timing. Submitted documents should support all provided information. In case of any deficiencies, the authority calls the notifier to supplement the notification in not less than seven days (Art. 12h sec. 3 LCCI).

Similar to the case in merger control proceedings, the mere intention to transact is subject to notification. However, in the new investment screening rules, the Polish legislator has explicitly defined the appropriate time for submission, depending on the type of a given transaction (Art. 12f sec. 5-8 LCCI). In any case, the notifier is bound by the standstill obligation and thus should refrain from proceeding with the notified transaction until the OCCP's time limit to issue the final decision has expired (Art. 12h sec.11 LCCI). In practice, the length of the proceedings depends on the circumstances of the case.

The newly introduced investment control proceedings consist of two phases. The first one includes a preliminary examination intended to separate cases into those not necessitating further follow-up control and those requiring such

[14] UOKiK, *Wyjaśnienia proceduralne w sprawie składania Prezesowi UOKiK zawiadomień oraz prowadzenia postępowań objętych zakresem ustawy o kontroli inwestycji* (Procedural clarification on the submission of notifications to the President of UOKiK and the proceedings falling within the scope of the Law on Investment Control), p. 24.

examination[15]. As indicated in the relevant guidelines issued by the OCCP (hereinafter: Guidelines), it is expected that the vast majority of cases should be resolved within the initial stage of the proceedings, which lasts up to 30 working days from either submission of the notification of the initiation of the proceedings by the OCCP. After that time, the OCCP should issue either a decision on the refusal to initiate control proceedings and non-opposition to the transaction or a non-contestable order initiating the second phase control procedure (Art. 12h sec. 5-6 LCCI).

The LCCI does not explicitly list the conditions that oblige the OCCP to end the proceedings at the preliminary stage. However, it does enumerate the prerequisites which constitute the basis for initiating the second stage control proceedings, being either formal deficiencies or the need for further examination of the transaction due to public security or public order (Art. 12h sec. 5 item 2 b LCCI). As confirmed by the OCCP in the Guidelines, the second phase of the proceedings shall only be applied to cases that are likely to cause a threat to public order, public safety, or public health. According to Art. 12h sec. 8 LCCI, this phase should be, as a rule, concluded within 120 days from the initiation of the control proceedings upon a decision either approving or opposing the investigated transaction. Before issuing this decision, the OCCP can request additional information or documents from the notifier but is not obliged to consult the Consultancy Committee as applicable under the Old FDI Law (Art. 12i LCCI). Therefore, the OCCP has been granted discretion in this regard, being, however, constrained by a list of prerequisites that should result in opposing the investment in question. These reasons for a negative screening decision are listed in Art. 12j sec. 1 LCCI which includes, apart from formal obstacles, a threat to public order, security, or health, as well as potential adverse influence of the transaction on projects and programs of EU interest.

As of now, only one screening procedure, namely concerning the acquisition

[15] UOKiK, *Wyjaśnienia proceduralne…* (Procedural clarification…), p. 33-34.

of Odlewnia Zawiercie (foundry) by a Chinese company Meide Group, has been referred to the second phase control procedure. The OCCP concluded that the investment did not pose a threat to public security or public order. Therefore, the proceedings were discontinued, as there were no objections to the transaction [16].

The Authority's decision may be appealed to the Voivodeship (regional) administrative and later (second instance) to the Supreme Administrative Court (Art. 12j sec. 4 LCCI). Appeal should be filed through the OCCP, within 30 days from the receipt of the decision. There has not been any court case regarding the New FDI Law yet.

According to the New FDI Law, the acquisition or achievement of significant participation or dominance carried out without proper notification or despite of issuance of a negative screening decision is, in principle, *ex-lege* null and void (Art. 12 sec. 1 LCCI). In specific circumstances, the legislation provides for a less severe sanction of restricting the voting rights related to the shares in the protected company. This relates to the failure to file a notification in the event of an indirect acquisition, if as a result of actions carried out pursuant to the provisions of the law of a state other than the Republic of Poland, in particular as a result of a merger of companies whose seat is located Poland, or the acquisition of shares in an entity with its registered office outside Poland of an entity with its registered office outside Poland, being an entity which holds a significant stake in a protected entity or a parent entity of a protected entity. This sanction, secondly, will apply in the case of exercising rights from shares of a protected entity acquired as a result of actions described in the first case despite the fact that the OCCP has stated, by way of a decision, that the exercise of the rights is inadmissible of rights from these shares (Art. 12k sec. 2-3 LCCI).

4. As mentioned above, the authority competent to conduct the control

[16] See: decision of the President of the OCCP no. DKK-243/2021.

proceedings under the procedure specified in the New FDI Law aw is the OCCP. At the same time, some entities covered by the new regulations may also be protected under the Old FDI Law, for which the control authority may be one of the relevant ministers. In such a case, however, the legislator has explicitly stated that by way of exception the provisions of the New FDI Law do not apply (Art. 12a sec. 2 of the LCCI) and thus the jurisdiction of the OCCP shall cover only the transactions subject to notification based on the New FDI Law.

The OCCP functions and legally acts through its President, being a central, single-person authority of polish public administration (Art. 29 sec. 1 and 6 of the Competition and Consumer Protection Act of 16 February 2017, hereinafter as: CCPA). Initially, its core competencies were limited to matters directly related to competition and consumer protection, including primarily three main areas: the protection against practices restricting competition, merger control and the protection of the collective interests of consumers[17]. Recent years have witnessed a dynamic growth of the authority's powers and, consequently, the expansion of its position in the state bodies system[18]. With the Polish accession to the European Union, the OCCP has become responsible for state aid control, as well as for the application of the appropriate EU regulations regarding competition policy. Further developments extended the OCCP's powers to the control of contractual provisions as regards their abusiveness and counteracting abuse of contractual advantage in trade in agricultural and food products. Most recently, the OCCP was also granted competencies in the area of excessive delays in commercial transactions. On top of these variegated competencies, the New FDI Law empowered the OCCP to conduct foreign investment screening proceedings.

[17] KOZIK, *Status Prezesa Urzędu Ochrony Konkurencji i Konsumentów w systemie organów państwa* (Status of the President of the Office of Competition and Consumer Protection in the system of state bodies), 2013, p. 124.

[18] WALCZAK, *Rola Prezesa Urzędu Ochrony Konkurencji i Konsumentów w systemie ochrony konkurencji i konsumentów* (The Role of the President of UOKiK in the system of competition and consumer protection), 2018, p. 285.

In 2021 the OCCP issued 988 decisions, 343 of which concerned competition and 645 consumer protection[19]. These tasks were performed with the support of 568 employees.

Recently, the position and independence of the OCCP have become the subject of intense public debate. Although at the European level, the issue of independence of competition authorities has already been brought to attention years ago[20], at the national level, it has only become prominent faced with the need to implement the so-called ECN+ Directive[21]. In place of the previous lack of institutional benchmarks, the Directive sets out a standard of minimum safeguards for the formal independence of competition authorities based on protection from external influences on one side (Art. 4 ECN+) and guarantees of adequate resources on the other (Art. 5 ECN+)[22].

The legitimacy of introducing such formal safeguards in relation to the Polish competition authority is debatable. It is sometimes pointed out that such independence may easily lead to isolation from the administrative state apparatus, reducing the influence of the authority on government policy or legislation[23]. On the other hand, some authors postulate the introduction of even more far-reaching standards. Notwithstanding, as commonly agreed, the Polish regulations in their

[19] UOKiK, *Sprawozdanie z działalności UOKiK – rok 2021* (UOKiK activity report – year 2021), p. 7-9.

[20] VAN DE GRODEN, DE VRIES, *Independent competition authorities in the EU*, 2006, p. 32; MATEUS, *Why Should National Competition Authorities Be Independent and How Should They Be Accountable?*, 2007, p. 17–30.

[21] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, hereinafter: Directive.

[22] MATERNA, *Gwarancje niezależności organu ochrony konkurencji w dyrektywie ECN+ a status Prezesa UOKiK* (Guarantees of the Independence of the National Competition Authority in the Light of the ECN+ Directive and the Status of the Polish Competition Authority), 2019, p. 22.

[23] BŁACHUCKI, *Niezależność organów administracji publicznej na przykładzie ewolucji statusu prawnego Prezesa UOKiK* (Independence of public administration authorities in the example of evolution of the legal status of President of the Office for Competition and Consumer Protection), 2019, p.

current shape do not meet the ENC+ requirements[24]. Given that the President of the OCCP is appointed, supervised and dismissed by the Prime Minister (Art. 29 sec. 1,3 and 4 CCPA), there are significant concerns with regard to his political independence, especially since the law does not specify the grounds for his dismissal[25]. Although the function is, in general, allocated based on open recruitment procedures (Art. 29b-3j CCPA), their true competitiveness, clarity, and transparency are also frequently called into question[26].

Consequently, an amendment to the CCPA[27] was drafted that provides for various instruments aimed at safeguarding the authority's independent status. At present, despite the expiry of the deadline for implementation of the Directive, the legislative process on the project is still pending. The draft proposal does not introduce any fundamental changes regarding the appointment of the President of the OCCP. However, it provides for a 5-year office term and a closed catalog of grounds for earlier termination upon dismissal. Therefore, once appointed official is to be more reluctant to the influence of the Prime Minister. At the same time, the discussed regulations regarding vulnerability to external influence do not apply to persons holding director positions, who in fact often shape the practice of the OCCP. Furthermore, as indicated in the literature, the proposal does not cover a crucial aspect of financial independence of the competition authority[28]. Therefore, it seems that the topic of the position of the OCCP will remain a subject of intensified debate in the upcoming time.

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[24] MATERNA, *Gwarancje niezależności…* (Guarantees of the Independance…), p. 23-24.

[25] STEFANIUK, *Pozycja ustrojowa centralnego organu administracji rządowej w Polsce (na przykładzie Prezesa Ochrony Konkurencji i Konsumentów* (Systemic position of the central organ of government administration in Poland (on the example of the President of the President of the Office of Competition and Consumer Protection), 2010, p. 64-65.

[26] BŁACHUCKI, *Niezależność organów administracji publicznej…* (Independence of public administration authorities…), p. 267; MATERNA, *Gwarancje niezależności…* (Guarantees of the Independance…), p. 24; MARTYNISZYN, BERNATT, *Implementing a Competition Law System – Three Decades of Polish Experience*, 2019, p. 10.

[27] Project amendment of the Council of Ministers no. UC69.

[28] MATERNA, *Gwarancje niezależności…* (Guarantees of the Independance…), p. 25.

5. Against the backdrop of the ever-expanding list of the OCCP's competencies, the New FDI Law raises fundamental questions regarding the "capabilities" of this authority to perform the assigned task.

One could legitimately inquire whether the OCCP is well-equipped to assess the questions which are at the core of FDI screening. While the substantive element of a transaction is obviously a common denominator in both merger control and FDI screening proceedings, these procedures obviously do not to fully align in their goals. In this respect, the question arises as to the interpretation of the public interest premise, referred to in both CCPA and LCCI. As indicated in the literature, the concept of public interest is a general clause that might be assigned various meaning and, as such, requires further specification, depending on the context of its application[29]. With regard to the key competences of the OCCP, the premise of public interest must be perceived through the general objectives enumerated by the legislator, including the protection of competition, entrepreneurs and consumers[30] – regardless of the market to which a given transaction or practices relates. Proper legal actions in this scope are therefore generally undertaken due to the risk of economic harm to a wider range of market participants[31]. At the same time, the public interest determining the objectives and scope of FDI screening appears to have a different nature. The primary purpose of the control mechanisms described above is not only to protect the structure of a given market, but rather to safeguard the national interests determined by specific, strategic sectors of the economy, including in particular public order, public safety, or public health. Due to this "national" component, it is predominantly politically staffed ministries that are charged with these decisions in different jurisdictions – as is the case in the Old FDI Law. In this context, doubts may arise whether the OCCP – despite its experience in

[29] KOHUTEK, *Naruszenie interesu publicznego, a naruszenie konkurencji* (Public interest infringement v. competition infringement), 2010, p. 45-46.
[30] KOHUTEK, *Naruszenie interesu publicznego…* (Public interest infringement…), p. 46.
[31] KOHUTEK, *Naruszenie interesu publicznego…* (Public interest infringement…), p. 54.

examining transactions as such – is also capable of identifying strategic goals and thus assessing certain investments from the state perspective.

The above concerns are further reinforced by the questionable independence of the OCCP and its systemic position as the administrative authority. If one assumes the apolitical, independent character of the OCCP, one could argue that such authority does not bear the political legitimacy to make the call on the issues that are of particular relevance not only to the economy, but also to national health and security. On the other hand, as already mentioned above, under the current legal framework one might as well argue that due to lack of proper independence guarantees, the OCCP is in fact, politically involved and linked to the executive embodied in the Council of Ministers. Although such a link would justify competencies in terms of the decision-making process with regard to strategic entities, at the same time, it would raise serious concerns as to compliance with EU requirements on the position of competition authorities specified in the ECN+ directive. Therefore, the current and future legislative environment calls into question the legitimacy and admissibility of entrusting both competition protection and FDI screening objectives to a single authority.

Another line of inquiry must tackle the issue of proper staffing of the OCCP, with regard to two aspects. First, even if one considers the OCCP abstractly and institutionally capable of making a decision based on the consideration of public order, public safety, or public health, such capabilities would need to be mirrored *in concreto*. Since the skillset suitable for competition law queries, including in particular merger control assessment, varies from the one necessary to screen foreign investments, it might be argued that the proper performance of entrusted tasks would require the OCCP to employ specialized employees. On the other hand, it seems that the general procedural structure and the common themes that arise in both proceedings make employees currently active in the merger control particularly well-equipped to acquire the expertise needed in FDI control. Moreover, such

employees seem even better suited to take up this task than the political staff in the ministries, which might not have had any encounter with assessing the impacts of transactions in their lifetime. Therefore, additional training of the current staff, covering the issues related to FDI screening, seems to be required, but sufficient in this respect.

However, even provided with an appropriate training, further concerns might relate to the number of staff and the issue of workload. As explained above, the competencies of the OCCP continuously expand while its head count does not seem to grow significantly. Although this problem is particularly evident in other areas of activity, including proceedings concerning delays in commercial transactions, with regard to the new competencies of FDI screening, the issue of understaffing should not be considered as significant or urgent. Despite the systemic importance of the FDI screening, the process in question does not in fact involve a significant amount of work, as confirmed by the statistics up-to-date. In 2021 the OCCP conducted nine FDI control proceedings and issued three decisions (compared to 329 merger control proceedings and 300 decisions), including two clearance decisions and one decision to discontinue the proceedings. In the remaining cases, the OCCP deemed the transactions non-notifiable. No prohibition decision has been issued so far. Consequently, the scoping of the New FDI Law seems to keep the administrative burden at a low level. Therefore, significant organizational changes in staffing do not seem necessary.

Given the above, the empowerment of the OCCP to conduct foreign investment screening procedures could efficiently source the expertise harboured by the employees who deal with merger control, provided that individual persons are adequately trained in terms of the diverging screening goals, and a work-overload is being avoided. A separate and insofar ambiguously resolved problem relates to the systemic implications regarding the position and independence of the President of the OCCP as an authority of constantly increasing importance. In view of the

temporary scope of the New FDI Law, as well as the upcoming legislative changes with regard to the independence of the OCCP, it is likely that the aforementioned issue will be eventually addressed in the near future.