

EU Foreign Investment Policy – FDI Screening Mechanism to Advert Genuine Threats or Introducing Hidden Protectionism

ŽAN JAN OPLOTNİK, NOEMIA BESSA VILELA & NATACHA DE JESUS SILVA

Abstract For decades foreign direct investments (FDI) were privilege of companies from advanced economies, which invested in less developed economies and harvesting benefits of such activities. Leading position in capital, technology, managerial skills, etc, allowed them to penetrate markets of high potential but with less skills and lower costs (labour, raw material, etc) and standards (environmental, labour, etc.). Although USA and EU are still the far most advanced economies, adding majority of FDI to world stock and flow, since 2010, China is speeding up more than ever, investing in developed and non-developed economies. Only in Europe, Chinese companies invested more than 30 billion euros yearly in period from 2016 to 2018, comparing only 2 billion in 2010. That trend rised some concerns about Chinese nature of FDI, especially due to some of their peculiarities, noticed by schoolars, politician and domestic companies. In 2019 the EU issues Regulation (EU) 2019/452 that provides a framework for the screening of foreign direct investments and for cooperation.

Ključne besede: • international finance • foreign direct investments • international law • international economy

CORRESPONDENCE ADDRESS: Žan Jan Oplotnik, Ph.D., Professor, University of Maribor, Faculty of Economics and Business, Razlagova ulica 14, 2000 Maribor, Slovenia, email: zan.oplotnik@um.si. Noémia Bessa Vilela, Ph.D. Candidate, Eötvös Loránd University (Budapest), Faculty of Law, Department of Administrative Law, Ph.D. Scholarship holder Portuguese Research Agency ((FCT – Fundação para a ciência e tecnologia), 1053 Budapest, Egyetem tér 1-3. (Hungary), email: nbessavilela@gmail.com. Natacha de Jesus Silva, Professor, Universidade Portucalense Infante D. Henrique, IJP – Portucalense Institute for Legal Research, Rua Dr. Antonio Bernardino de Almeida, Porto, Portugal, email: natachajsilva@uportu.pt.

<https://doi.org/10.4335/2021.9.3> ISBN 978-961-7124-08-8 (PDF)
Available at <http://www.lex-localis.press>.



© The Author(s). Licensee Institute for Local Self-Government Maribor. Distributed under the terms of the Creative Commons Attribution-NonCommercial 4.0 license (<https://creativecommons.org/licenses/by-nc/4.0/>), which permits use, distribution and reproduction for non-commercial purposes, provided the original is properly cited.

1 Introduction

Attracting foreign direct investment (FDI) is a constant concern of national leaders, given the acknowledged importance for the economic growth of countries recipients of FDI (World Bank, 1998). However, while accepting the importance of FDI as a driver of economic growth in recipient countries, its relevance to economic growth in sending countries is less consensual. For years, the growth of foreign capital flow in form of FDI exceeded the growth of world GDP, but a trend was reversed after the emergence of the global crisis of 2008. FDI inflows for 2012 are estimated at 1.3 trillion dollars, a figure 18% lower compared to 2011 (UNCTAD, 2013) and correspond to 2.1% of world GDP. Although booming period of pre-COVID 19 years somehow reestablished willingness of some main economics to invest abroad, many countries started to having doubts if such investments are always beneficial for them. For example, some increasing concerns raised about Chinese FDI that flooded some parts of the world, especially those in Europe and more specific those in form of M&A activities. Some concerns arise due to nature of such investments, since more and more companies that were willing to invest in Europe from China, where government backed or even owned (in the last decade almost 95% of China FDI in EU were in form of M&A and only 5% were green-field investments). Many of such investments were targeting so called “critical infrastructure”¹ and security-related industries or high-tech sectors. Chinese outward FDI expanding rapidly since 2010 due to specific political and economic reasons. A key to China’s ambitions in this context is the program called *China Manufacturing 2025 (CM2025) industrial policy initiative*, launched by Chinese government in 2015 that aims to upgrade China’s industrial base (European Chamber, 2017).

But how and why the traditional EU liberal approach to capital movement and investments was shifting so much. If we look into traditional orthodox view on the benefits of free movement of capital, we can find arguments, like that: “...if the flow of capital is unrestricted, capital can be directed to the places where it can be used most efficiently to generate the best returns, and it is thereby capable of contributing to an efficient squaring of demand and supply of capital within the Community “ (Hindelang, 2009, pg.19).

However, there are multiple reasons behind raising demands that capital flows in terms of M&A and other forms of FDI should be somehow controlled. We have to understand, that situation today is different than decades ago. Especially in the last decades of previous century, main direction of capital flows in forms of FDI were from developed economies to non-developed or developing countries. Benefits were mutual, since underdeveloped economies were lacking capital, technologies and skilled human resources and developed economies were seeking for new markets and profitable investment opportunities. However, situation changed in the last decades, since previously under-developed and developing economies became stronger and more recognizable, especially economies like China, India, and Russia. With accumulated resources, especially financial resources they

become somehow a threat to developed economies through their specific nature that drives their capital investments, like; being latecomers and strategic asset-seekers, due to their unique economic and political system backed by strong government incentives, etc. Developed economies (like EU and USA) became aware of these fragilities and weaknesses which can and should be distinguished from pure protectionism. Scholars are now addressing this topic more than ever, in sense of leaking of sensitive technology and know-how, possible infiltrations, espionage and sabotage in critical infrastructure and high-tech and IT companies, etc (see also Knoerich & Miedtank, 2018, Ufimtseva, 2020, Moran, 2017).

In March 2019, in Brussels, the European Parliament and the Council, signed the FDI Regulation (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 (Warchol, 2020). The Framework Regulation was adopted in April 2019, providing Member States with an enabling framework for reviewing FDI on grounds of security and public policy and increasing cooperation between them and with the European Commission (The Commission).

This Regulation entered into force on the twentieth day following that of its publication in the Official Journal of the European Union and is applicable from October 11, 2020.

Following the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework for screening of foreign direct investments into the European Union (COM/2017/0487 final - 2017/0224 (COD)), dating from September 2017. This new regime sets the minimum standards for Member States' review systems, builds an information sharing link between the 27 member states and the European Commission (EC), and established a formal mechanism for the EC and the Member States to provide feedback on FDI that occurs throughout the European Union. The Framework Regulation was designed to tackle the increasing wave of concerns that was developing all around EU caused by an increasing number of transfers of ownership of EU companies, in Particular, to Chinese Investors. This discomfort relates, mostly, to operations in sensitive and strategic sectors.

Having been taken by surprise by the COVID-19 crisis, several frailties were identified in the EU internal market, having led to the acknowledgment of the importance of building resilience in the health sector and the need to protect EU strategic assets.

The ongoing global coronavirus crisis has highlighted the need for a collective response from the international community to reinforce preparedness for this and future crises. In the 18 months between the enactment of the Regulation and its entry into force, several recommendations have influenced FDI screening regimes across the EU (Cunningham, Dimitrou, & Fosselard, 2020). FDI screening is one of the priorities of the revision of the EU trade policy, launched on 16 June 2020, as, according to Valdis Dombrovskis it is the

launching of “a trade policy review in order to adjust the EU’s approach to the global trade at this critical moment for the global economy.”

2 Foreign Investment Regime

The Framework Regulation (FDI Regulation) sets a legal framework that will enable a more considerable coordination in screening FDI in the European Union. The FDI Regulation does not establish a mandatory screening mechanism to be used at EU level, but rather allows the Member States to adopt their own internal policies that will secure their own national interests, as can be read in point 8 of the preamble of the Regulation. “The framework for the screening of foreign direct investments and for cooperation should provide Member States and the Commission with the means to address risks to security or public order in a comprehensive manner, and to adapt to changing circumstances, while maintaining the necessary flexibility for Member States to screen foreign direct investments on grounds of security and public order taking into account their individual situations and national specificities. The decision on whether to set up a screening mechanism or to screen a particular foreign direct investment remains the sole responsibility of the Member State concerned.”

To date, and according to the last update on the existing list of screening mechanisms notified by Member States, seventeen Member Statesⁱⁱ of the EU and the United Kingdom have adopted different policies for securing their vital national security interests against FDI, ranging from screening procedures to partial or total prohibition of FDI in specific sectors of industry, notably defense (like in Czech Republic, Denmark, Germany, Spain, France, Italy, Latvia, Lithuania, Hungary, Malta, The Netherlands, Austria, Poland Portugal, Romania, Slovenia, Slovakia and Finland). It is expected that soon, most if not all EU Member States will have a screening mechanism in place.

Table 1: Member state screening mechanisms according to Article 3.7. of regulation

Member State	Name of the National Law on screening mechanisms
Czechia	Zákon č. 34/2021 Sb. o prověřování zahraničních investic
Denmark	Lov om krigsmateriel (LBK nr 1004 af 22/10/2012); Lov om kontinentalsoklen og visse rørledningsanlæg på søterritoriet (LBK nr 1189 af 21/09/2018)
Germany	Außenwirtschaftsgesetz [vom 6. Juni 2013 (BGBl. I S. 1482), das zuletzt durch Artikel 4 des Gesetzes vom 20. Juli 2017 (BGBl. I S. 2789) geändert worden ist] §§ 4, 5, 13 und 15; Außenwirtschaftsverordnung [vom 2. August 2013 (BGBl. I S. 2865), die zuletzt durch Artikel 1 der Verordnung vom 27. Februar 2019 (BAnz AT

Member State	Name of the National Law on screening mechanisms
	<p>06.03.2019 V1) geändert worden ist] §§ 55 bis 62 Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung; Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes; Runderlass Außenwirtschaft Nr. 4/2020 Sechzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung vom 26. Oktober 2020; Sechzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung vom 26. Oktober 2020</p>
Spain	<p>Real Decreto 137/1993, de 29 de enero, por el que se aprueba el Reglamento de Armas; Real Decreto 664/1999, de 23 de abril, sobre inversiones exteriores; Ley 19/2003, de 4 de julio, sobre régimen jurídico de los movimientos de capitales y de las transacciones económicas con el exterior y sobre determinadas medidas de prevención del blanqueo de capitales; Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19 Disposición final cuarta; Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19, Disposición transitoria segunda, Disposición final tercera; Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual; Real Decreto-ley 34/2020, de 17 de noviembre, de medidas urgentes de apoyo a la solvencia empresarial y al sector energético, y en materia tributaria. (<i>ver Disposición transitoria única y Disposición final cuarta</i>); <i>Disposición transitoria única</i>-régimen transitorio de suspensión de liberalización de determinadas inversiones extranjeras directas realizadas por residentes de otros países de la Unión Europea y de la Asociación Europea de Libre Comercio; <i>Disposición final cuarta</i> - se modifica la Ley 19/2003, de 4 de julio, sobre régimen jurídico de los movimientos de capitales y de las transacciones económicas con el exterior; Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia (Disposición adicional 9a) Ley 9/2014, de 9 de mayo, General de Telecomunicaciones</p>
France	<p>Code monétaire et financier, Partie législative Livre Ier, Titre V: les relations financières avec l'étranger Articles L.151-1 à L.151-7; Code monétaire et financier Partie réglementaire Livre 1er Titre V: les relations financières avec l'étranger Chapitre Ier : Investissements étrangers soumis à autorisation; Articles R.151-1 à R.153-18 Article R. 151-1 à R. 151-3 Article R. 151-4 Articles R. 151-5 à R. 151-11 Articles R. 151-12 à R. 151-16 Articles R. 151-17 et R. 151-18 Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France; Article L. 233-3 du code de commerce Article L. 430-1 du code de commerce</p>

Member State	Name of the National Law on screening mechanisms
	Article 459 du code des douanes (sanctions pénales)
Italy	<p>Decreto-legge 15 marzo 2012, n. 21 “Norme in materia di 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”;</p> <p>Modifiche alla disciplina dei poteri speciali nei settori di rilevanza strategica disposta dagli artt. 3 e 4-bis del decreto-legge 21 settembre 2019, n. 105, convertito con modificazioni dalla legge 18 novembre 2019, n. 133.;</p> <p>Decreto-Legge 8 aprile 2020, n. 23. “Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali.” Art. 15-16;</p> <p>Decreto della Presidente della Repubblica 19 febbraio 2014, n. 35 “Regolamento per l’individuazione delle procedure per l’attivazione dei poteri speciali nei settori della difesa e della sicurezza nazionale, a norma dell’articolo 1, comma 8, del decreto-legge 15 marzo 2012, n. 21”;</p> <p>Decreto del Presidente della Repubblica 25 marzo 2014, n. 86 “Regolamento per l’individuazione delle procedure per l’attivazione dei poteri speciali nei settori dell’energia, dei trasporti e delle comunicazioni, a norma dell’articolo 2, comma 9, del decreto-legge 15 marzo 2012, n. 21”;</p> <p>Decreto del Presidente della Repubblica 25 marzo 2014, n. 85 “Regolamento per l’individuazione degli attivi di rilevanza strategica nei settori dell’energia, dei trasporti e delle comunicazioni, a norma dell’articolo 2, comma 1, del decreto-legge 15 marzo 2012, n. 21”;</p> <p>Decreto del Presidente del Consiglio dei ministri 6 giugno 2014, n. 108 “Regolamento per l’individuazione delle attività di rilevanza strategica per il sistema di difesa e sicurezza nazionale, a norma dell’articolo 1, comma 1, del decreto-legge 15 marzo 2012, n. 21”;</p> <p>Decreto del Presidente del Consiglio dei ministri 6 agosto 2014 “Individuazione delle modalità organizzative e procedurali per lo svolgimento delle attività propedeutiche all’esercizio dei poteri speciali”;</p> <p>L’articolo 10 ter della legge 18 dicembre 2020, n.176, che ha convertito in decreto-legge 28 ottobre 2020 n.137</p> <p>Decreto del Presidente del Consiglio dei Ministri 179 del 18 dicembre 2020;</p> <p>Decreto del Presidente del Consiglio dei Ministri n.180 del 23 dicembre 2020.</p>
Latvia	<p>Nacionālās drošības likums;</p> <p>Noteikumi par Nacionālās drošības likumā noteiktajai institūcijai iesniedzamo informāciju un darbībām ar informāciju par ārvalstu tiešajiem ieguldījumiem (Noteikumu nosaukums MK 06.10.2020. noteikumu Nr. 622 redakcijā);</p> <p>Ministru kabineta 2017. gada 3. oktobra noteikumi Nr. 606 “Noteikumi par Nacionālās drošības likumā noteiktajai institūcijai iesniedzamo informāciju un darbībām ar informāciju par ārvalstu tiešajiem ieguldījumiem”.</p>

Member State	Name of the National Law on screening mechanisms
Lithuania	<p>Lietuvos Respublikos nacionaliniam saugumui užtikrinti svarbių objektų apsaugos įstatymas, Nr. IX-1132 (nauja redakcija Nr. XIII-992, nuo 2018-01-12);</p> <p>LRV Nutarimas dėl nacionaliniam saugumui užtikrinti svarbių objektų apsaugos koordinavimo komisijos darbo tvarkos aprašo patvirtinimo, Nr. 1540 (nauja redakcija Nr. 266, nuo 2018-03-21)</p> <p>Nutarimas dėl nacionaliniam saugumui užtikrinti svarbių įrenginių ir turto apsaugos zonų nustatymo, Nr. 1252 (nauja redakcija Nr. 746, nuo 2018-07-25);</p> <p>Lietuvos Respublikos nacionaliniam saugumui užtikrinti svarbių objektų apsaugos įstatymo Nr. IX-1132 1, 2, 4, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20 straipsnių, 1, 2, 3, 4 priedų pakeitimo ir Įstatymo papildymo 13-1, 17-1, 19-1 straipsniais ir 5 priedu įstatymas, Nr. XIII-3257;</p> <p>Lietuvos Respublikos Vyriausybės nutarimas "Dėl Lietuvos Respublikos užsienio reikalų ministerijos paskyrimo atlikti funkcijas", Nr. 1072;</p> <p>Dėl Lietuvos Respublikos Vyriausybės 2009 m. lapkričio 25 d. nutarimo Nr. 1540 „Dėl Nacionaliniam saugumui užtikrinti svarbių objektų apsaugos koordinavimo komisijos darbo tvarkos aprašo patvirtinimo“ pakeitimo”, Nr. 1213.</p>
Hungary	<p>2018. évi LVII. törvény a Magyarország biztonsági érdekét sértő külföldi befektetések ellenőrzéséről;</p> <p>246/2018. (XII.17.) Korm. rendelet a Magyarország biztonsági érdekét sértő külföldi befektetések ellenőrzéséről szóló 2018. évi LVII. törvény végrehajtásáról;</p> <p>2020. évi LVIII. törvény a veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készsütségről (85. szakasz, 276. §-292. §);</p> <p>289/2020. (VI. 17.) Korm. Rendelet a magyarországi székhelyű gazdasági társaságok gazdasági célú védelméhez szükséges tevékenységi körök meghatározásáról</p>
Malta	ATT Nru LX tal-2020, 18 ta' Diċembru, 2020
The Netherlands	<p>Elektriciteitswet 1998 (artikel 86f);</p> <p>Regeling melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet; Gaswet (artikel 66e);</p> <p>Regeling melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet; Telecommunicatiewet (hoofdstuk 14a);</p> <p>Besluit ongewenste zeggenschap telecommunicatie</p>
Austria	<p>Außenwirtschaftsgesetz 2011 – AußWG 2011;</p> <p>Investitionskontrollgesetz sowie Änderung des Außenwirtschaftsgesetzes 2011;</p> <p>Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen (Investitionskontrollgesetz – InvKG), StF: BGBl. I Nr. 87/2020 (NR: GP XXVII RV 240 AB 276 S. 45. BR: AB 10376 S. 910.)</p>

Member State	Name of the National Law on screening mechanisms
Poland	Ustawa z dnia 24 lipca 2015 r. o kontroli niektórych inwestycji Dz. U. 2015 poz. 1272 (wraz z późniejszymi zmianami); Rozporządzenie Rady Ministrów z dnia 27 grudnia 2018 r. w sprawie wykazu podmiotów podlegających ochronie Dz. U. 2018 poz. 2524; Ustawa z dnia 19 czerwca 2020 r. o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19 Dz. U. poz. 1086; Ustawa z dnia 24 lipca 2015 r. o kontroli niektórych inwestycji Dz.U. 2020 r. poz. 117, 284 i 1086
Portugal	Decreto-Lei no 138/2014, publicado no Diário da República, 1.a série, N.o 177, 15 de setembro - que estabelece o regime de salvaguarda de ativos estratégicos essenciais para garantir a segurança da defesa e segurança nacional e do aprovisionamento do País em serviços fundamentais para o interesse nacional, nas áreas da energia, dos transportes e comunicações
Romania	Legea nr. 21 din 10 aprilie 1996 a CONCURENȚEI – Republicată Art. 47 (9)-(12)
Slovenia	Zakon o interventnih ukrepih za omilitve in odpravo posledic epidemije COVID-19 (ZIUOOPE), Official Journal No. 80/20 (adopted 29 May 2020, in force as of 31 May 2020)
Slovakia	§ 9a, § 9b, § 9c, § 9d, § 9e of Act No. 45/2011 Coll. on Critical Infrastructure as amended by the Act No. 72/2021 Coll.
Finland	Laki ulkomaalaisten yritysosten seurannasta (172/2012) – amendment 496/2014; Laki eräiden kiinteistönhankintojen luvanvaraisuudesta (470/2019); Laki ulkomaalaisten yritysosten seurannasta (172/2012)

Such mechanisms find its legal basis in the lettering of the Treaty of Functioning of the European Union (TFEU), especially in Article 346/1(b). which concedes each Member State the right to “*take such measures as it considers necessary for the protection of the essential interests of its security that relate to the production of or trade in arms, munitions and war material*” with the proviso that, such measures do not “*adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes*”.

Article 63 TFEU prohibits all restrictions on the freedom of movement of capital and payments between Member States or between Member States and third countries (Kolo & Wälde, 2008) by stating:

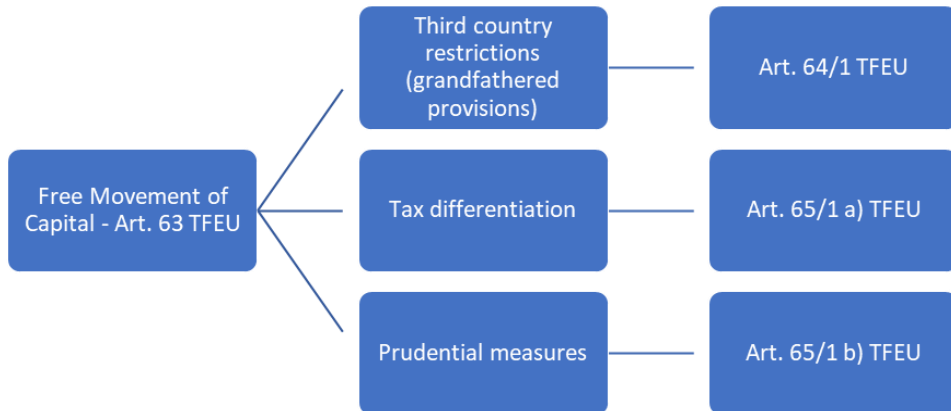
1. within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited; and
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Regardless of the above-cited Article, the TFEU foresees a derogation from the prohibition there it contained. Article 65 brings for derogation from this prohibition; allowing Member States to, as long as grounded on public policy or public security, take the necessary measures.

- 1 The provisions of Article 63 shall be without prejudice to the right of Member States:
 - (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.
 - (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
- 2 The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment, which are compatible with the Treaties.
- 3 The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.
- 4 In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Claiming public policy and public security reasons (Barnard, 2019), while deciding on matters regarding FDI, must not constitute 'a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments' as can be understood by the provisions set forth in Article 63.

Image 1: Overview of Specific Exceptions stipulated in The Treaty regarding Free Movement of Capital



The European Court of Justice, herein after, The Court, has previously ruled on the concept of “*Public security grounds for derogating from the freedom of movement of capital*” namely in Case C-483/99 Judgment of the Court of 4 June 2002, Commission of the European Communities v French Republic, where, alongside with Case C-367/97 Judgement of the Court of 4 June 2002, Commission of the European Communities v Portugal and C-503/99 Judgment of the Court of 4 June 2002, Commission of the European Communities v Kingdom of Belgium, The Court rules on the restrictions set for the acquisition of shares, in relation to the freedom of movement of capital, guaranteed, at the time, by the EC Treaty (Kronenberger, 2003).

In particular, The Court mentions, in paragraph 47 of Case C- 483/99 that: “*In the present case, the objective pursued by the legislation at issue, namely the safeguarding of supplies of petroleum products in the event of a crisis, falls undeniably within the ambit of a legitimate public interest. Indeed, the Court has previously recognised that the public-security considerations which may justify an obstacle to the free movement of goods include the objective of always ensuring a minimum supply of petroleum products [Campus Oil, paragraphs 34 and 35]. The same reasoning applies to obstacles to the free movement of capital, since public security is also one of the grounds of justification referred to in Article 73d(1)(b) of the Treaty.*”

And, in Paragraph 45 of Case C-503/99 by stating that “*The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding*

requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraph 23, and Case C-54/99 Église de Scientologie [2000] ECR I-1335, paragraph 18)."

The Commission, as well as the Member States have established a contact point for the implementation of this Regulation.

2.1 Procedural Aspects of the cooperation Mechanism

According to the Framework Regulation, each Member State keeps sole responsibility for its national security and the right to protect its essential security interests. The Regulation's goal is to ensure a Union-wide coordination and cooperation between Member States and the European Commission.

As a first step, following Article 6 of the FDI Regulation, it is up to the Member States to notify all other 26 Member States and the European Commission of all Foreign Direct Investments that takes place in the territory of the said Member State, which in undergoing screening. Article 6/ 1 advises Member States to include, in the notification, *"a list of Member States whose security or public order is deemed likely to be affected. As part of the notification, and where applicable, the Member State undertaking the screening shall endeavour to indicate whether it considers that the foreign direct investment undergoing screening is likely to fall within the scope of Regulation (EC) No 139/2004"*.

It is provided that (for example in Theodoropoulou & Catrain, 2020), the notification by the Member State to the other Member States and the Commission (Article 9) about Foreign Direct Investments taking place, includes the following information:

- a) the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital of Foreign Direct Investment;
- b) the approximate value of the Foreign Direct Investments;
- c) the products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed;

- d) the Member States in which the foreign investor and the undertaking in which the foreign direct investment is planned or has been completed conduct relevant business operations;
- e) the funding of the investment and its source, on the basis of the best information available to the Member State;
- f) the date when the foreign direct investment is planned to be completed or has been completed.

It follows that the remaining Member States ought to, following Article 6/6, within fifteen calendar days following the receipt of that notice, notify the Member State undertaking the screening of Foreign Direct Investments, if applicable, of their intention to provide comments. Comments provided by the remaining Member States shall not be presented later than thirty-five calendar days after having received the initial notice from the member state. The Member States issuing the comments shall send, simultaneously, its comments to the European Commission (Article 6/2), it is up to the Commission to notify all Member States that comments about planned foreign investment were provided. The Commission has supplementary five days to the Member States when it may issue an opinion addressed to the Member State undertaking the screening (Article 6/7, in fine). The Commission may issue an opinion: (1) irrespective of whether other Member States have provided comments; (2) following comments from other Member States. Such opinion is The Commission shall issue such opinion when at least one third of Member States consider that a FDI that is planned to take place, is likely to affect their security or public order (Article 6/3).

The Member State undertaking the screening shall take into consideration both the opinion of its peers and the Commission's. The Member State is advised to accept the Commission's opinion; choosing not to, it should provide concrete explanation on the grounds that lead to that decision (Article 6/9). Accordingly, the Regulation obliges all Member states to cooperate and share information requested. The Member State undertaking the screening shall give "due consideration" to the comments of the other Member States albeit retaining the final screening decision. The principal instruments of cooperation are mechanisms for notifications and for sharing information on FDI screening among Member States and between Member States and the Commission and the possibility for the Commission to issue non-binding opinions to Member States regarding the screening of concrete FDI projects (Schill, 2019).

The Regulation also foresees Cooperation mechanism in relation to foreign direct investments not undergoing screening, in its Article 7. In this case, as in the case of foreign investments undergoing screening, if likely to affect the security or public order, or in case a Member State holds relevant information in relation to that foreign direct investment, comments shall be provided to the Member State where the FDI is taking place. The Member State providing comments shall send those comments to the

Commission simultaneously, no later than 15 months after the Foreign Direct Investment has been completed (Article 7/ 8, in fine).

3 Special guidelines on the screening of Foreign Direct Investment in the context of the COVID 19 pandemic

Due to the pandemic situation, in March 25, 2020 the European Commission issued a communication providing guidance on the screening of Foreign Direct investment in the COVID-19 pandemic context. The Commission calls on all Member States to develop new and solidify existing screening mechanisms in order to protect “*critical health infrastructure, supply of critical inputs, and other critical sectors.*” (Crane, et al., 2000).

3.1 The EC Communication of March 25, 2020

In 2020, on the 25th of March, in light of the COVID-19 pandemics, the European Commission issued guidelines to harmonize the EU's approach to investment screening in order to protect the EU's critical assets and technologies from potential hostile takeovers and investments by non-EU companies (Berg, Forwood, Schulz, & Vangenechten, 2020). The European Commission has, for as long as one can remember, been concerned about undertakings from those European strategic industries which have been subject to the acquisition by non-European companies (Slawotsky, 2021). There is a special stress in State-Owned enterprises, even though all sorts of undertakings are mentioned (Das, 2021).

The COVID-19 crisis has caused tremendous stress and carries out severe consequences for the market economy of the Union, namely in the field of competition law (Racic, 202). To tackle the threats faced due to the pandemics, the Commission stepped up efforts to intensify the safeguarding of EU undertakings by issuing a “Guidance for Member States concerning FDI 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”

It can be read, in the aforementioned guidelines that “among the possible consequences of the current economic shock is an increased potential risk to strategic industries, in particular but by no means limited to healthcare- related industries.”. The Commission stresses that “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.”.

4 The effectiveness of the FDI screening framework

The Commission's proposal for the Framework Regulation comes to show that the EU is committed to "build an open, sustainable, fair, and rules-based order through international cooperation" and wants to "maintain an open investment environment" (COMMISSION, 2017), the provisions of the Framework Regulation may not suffice to pursue these goals effectively (Gadocha, 2020).

The Framework Regulation does not impose on the Member States the obligation to adopt the screening procedure in their national legislation. For that reason, Commission has stressed that the Member States should not only take into consideration its non-binding opinions, but also commit on their own account to take into consideration the Union's interest while conducting the screening procedure, or in general in their policy making. The Framework Regulation does not impose on the Member States the obligation to adopt the screening procedure in their national legislation.

If, on the one hand, the FDI screening regulation foresees a unified approach to the matter, providing for cooperation mechanisms, its lack of enforceability, on the other hand leaves us to wonder how effective it will actually be (Article 3). As seen above, it is up to the Member States to accept and enforce the "suggestions" of the remaining Member States, and the Commission itself, or to dully justify the reason for failing to acknowledge their "suggestions".

8 Conclusion

The EU legislator has decided merely on the contextual character of the Framework Regulation, having left, at the same time, significant margin of appreciation to the Member States regarding both the adoption of screening mechanisms in the national legislation and the procedural aspects of the screening itself. As seen throughout the work, the different Member States have enacted different laws and mechanisms to in force the Regulation.

Some issues regarding the Member States obligation to fulfil the Treaty obligation, namely dose addressed in articles 4/3 TEU and 207 TFEU may be risen in the future. Issues concerning legal uncertainty, also caused by the duality of criteria, may arise in the process of deciding to invest in the EU.

Legal uncertainty may cause unwillingness to invest in EU, and, in particular, in a specific Member State, given the number of concerns regarding actual profit.

Acknowledgments:

This article is based upon work from COST Action ENTER (CA17119) supported by COST (European Cooperation in Science and Technology) www.cost.eu.

Notes:

ⁱ Critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing and storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure (according to Article 4(1) of the EU Regulation.

ⁱⁱ Available online at: http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (May 7, 2021).

Case Law:

Case C-367/97 Judgement of the Court of 4 June 2002, Commission of the European Communities v Portugal.

Case C-503/99 Judgment of the Court of 4 June 2002, Commission of the European Communities v Kingdom of Belgium.

Case C-483/99 Judgment of the Court of 4 June 2002, Commission of the European Communities v French Republic.

Legal Sources:

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

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.

Consolidated version of the Treaty on European Union.

References:

Barnard, C. (2019) *The Substantive Law of the EU: The Four Freedoms* (6th Edition ed.) (Oxford: Oxford University Press).

Berg, O., Forwood, G., Schulz, A. & Vangenechten, M. (2020, April 1) *COVID-19 – Commission issues guidelines to protect European critical assets from foreign investment*, available at <https://www.whitecase.com/publications/alert/covid-19-commission-issues-guidelines-protect-european-critical-assets-foreign> (July 5, 2021).

Bickenbach, F. & Liu, W.-H. (2018) Chinese Direct Investment in Europe – Challenges for EU FDI Policy, CESifo Forum, 19(4), pp. 15-22.

COMMISSION, E. (2017). Proposal for a Regulation of the European parliament and of the Council establishing a framework for screening of foreign direct investments into the

- European Union. Brussels, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0487> (July 6, 2021).
- Crane, E., Delors, E., MEssent, J., Iodice, F., von Bieberstein, M., Ulmer, M. J., Scassellati-Sforzolini, G., Levy, N., Laprevote, F.-C., Pepper, R. & Bondarenko, K. (2000) *The EU Commission issues guidance on the screening of foreign direct investments in the context of the COVID-19 pandemic*, available at: <https://www.concurrences.com/en/bulletin/news-issues/march-2020/the-eu-commission-issues-guidance-on-the-screening-of-foreign-direct> (July 6, 2021).
- Cuninghame, N., Dimitrou, A. & Fosselard, D. (2020) *The EU Parliament and Council passed a regulation for the screening of foreign direct investments into the Union*, available at <https://www.concurrences.com/en/bulletin/news-issues/october-2020/the-eu-parliament-and-council-passes-a-regulation-for-the-screening-of-foreign> (July 6, 2021).
- Das, A. (2021) Predatory FDI during economic crises: insights from outbound FDI from China and host country responses, *Critical perspectives on international business*, 17(1), pp. 321-341.
- European Chamber of Commerce (2017) *China Manufacturing 2025 – Putting Industrial Policy Ahead of Market Forces*, available at https://www.eurochamber.com.cn/en/press-releases/2532/european_chamber_report_cautions_against_the_negative_aspects_of_china_manufacturing_2025 (July 6, 2021).
- Gadocha, P. M. (2020) Assessing the EU Framework Regulation for the Screening of Foreign Direct Investment—What Is the Effect on Chinese Investors?, *The Chinese Journal of Global Governance*, 6(1), pp. 36-70.
- Hindelang, S. (2009) *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (Oxford: OUP), <https://doi.org/10.1093/acprof:oso/9780199572656.001.0001>.
- Knoerich, J. & Miedtank, T. (2018) The Idiosyncratic Nature of Chinese Foreign Direct Investment in Europe, *CESifo Forum*, 19 (4), 03-08
- Kolo, A. & Wälde, T. (2008) Economic crises, capital transfer restrictions and investor protection under modern investment treaties, *Capital Markets Law Journal*, 3(2), pp. 154-185.
- Kronenberger, V. (2003) He rise of the ‘golden’ age of free movement of capital: A comment on the golden shares judgments of the Court of Justice of the European Communities: Case C-367/98 Commission v. Portuguese Republic; Case C-483/99 Commission v. French Republic and Case C-. *European Business Organization Law Review*, 4(1), pp. 115-135.
- Moran, T. H. (2017) CFIUS and National Security: Challenges for the United States, Opportunities for the European Union, *Peterson Institute for International Economics*, 19 February 2017, available at <https://piie.com/system/files/documents/moran201702draft-c.pdf> (July 6, 2021).
- Racic, I. (202) Competition law in the age of COVID-19, *Anali Pravnog fakulteta u Beogradu*, 68(2), pp. 25-61.
- Schill, S. W. (2019) The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization, *Legal Issues of Economic Integration*, 46(2), pp. 105-128.
- Slawotsky, J. (2021) National Security Exception in an Era of Hegemonic Rivalry: Emerging Impacts on Trade and Investment, In: Chaisse, J., Choukroune, L. & Jusoh, S. (ed) *Handbook of International Investment Law and Policy*, (Singapore: Springer, Singapore), pp. 1-34.
- Theodoropoulou, E. & Catrain, L. (2020) The Foreign Investment Regulation Review: EU Overview, In: C. S. Goldman & M. Koch (eds) *The Foreign Investment Regulation Review - 8th Edition* (The Law Reviews)..

- Ufimtseva, A. (2020) Investigating the impact of state-owned enterprises (SOEs) on the contemporary world order: a case of Chinese SOE investment in the Canadian hydrocarbon sector, *Cambridge Review of International Affairs*, 33(1), pp. 61-80, <https://doi.org/10.1080/09557571.2019.1642849>.
- Warchol, J. (2020) The Birth of the EU Screening Regulation, In: *YSEC Yearbook of Socio-Economic Constitutions* (Springer: Cham), pp. 53-75.