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CATTEDRA DI EU SUBSTANTIVE LAW: INTERNAL MARKET AND BEYOND

THE PROTECTION OF EU TECHNOLOGICAL SOVEREIGNTY IN THE AREA OF FOREIGN DIRECT INVESTMENTS: LEGAL CHALLENGES AFTER THE EU REGULATION 452/2019

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Introduction

This dissertation is focused on the evolution of two areas of competence of the European Union that appears to be more and more interwoven in recent time: the rise of European rules on foreign direct investments and the concerns linked to the protection of technological sovereignty in the EU. These areas might seem distinct and distant from each other, but through the enactement of the EU Regulation 452/2019 (henceforth "Screening Regulation") on FDI screening, applicable since October 2020, their close interrelation - with also areas of possible clash - will emerge, together with a reflection on the current limits of EU and Member States in economic sovereignty matters.

There is a growing debate on the relationship between foreign direct investment and technological sovereignty, i.e. a country's ability to exercise control over the production, management and use of technology. In particular, there is concern that excessive dependence on foreign investment may undermine Europe's technological sovereignty and its ability to maintain a competitive position globally. And this concern may also extend to the concept of economic sovereignty of States, as well as of the Union.

An analysis on the evolution of the discipline of foreign direct investments will be carried out, starting with an overview of the discipline in international law and then moving on to the European Union. The relationship between Member States and the EU will be examined and how this allocation of competences has evolved over the years.

In fact, until the entry into force of the Lisbon Treaty, the division of competence between Member States and the European Union on the subject of foreign investments was not entirely clear. The EC Treaty never mentioned foreign investments, making the issue even more complex. And even with the entry into force of the Lisbon Treaty in 2009, in which foreign investments are explicitly referred to, only "direct"

investments are mentioned in Article 207 TFEU, thus excluding certain forms of investments from the EU's competence.[1]

The ambiguity of the EC Treaty on this issue is fully manifested in the international agreements signed by the Union and Member States with third countries. In these agreements, there are no provisions specifying the competence for foreign investments, and there is only a general clause in which the Member States and the EU limit themselves to acting within the limits of their respective competences,[2] without clearly specifying on what legal basis these competences should be based. With the entry into force of the Lisbon Treaty and the new wording of Article 207 TFEU, which brings foreign direct investments under the Common Commercial Policy, an attempt has been made to shed more light on the subject.

Next, it will be analysed how the term foreign direct investment, and the term foreign investor, can be defined both in the light of international law and then European law, and what possible remedies are available for foreign investors in the event that their investment is restricted or blocked by a Member State.

Subsequently, it will be seen how a foreign direct investment is qualified in light of European law, and whether it falls under the discipline of freedom of establishment or free movement of capitals; what is the relationship between these two freedoms, and how foreign direct investments are able to relate to both aspects.

In *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II*, a foreign direct investment is defined as a "*form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control*".[3] This type of foreign direct investment falls within the scope of the free

[1] A. Dimopoulos, *EU Foreign Investment Law*, in *Oxford Scholarship Online* (2011), p. 66.

[2] J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001), pp. 10–13.

[3] Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU:C:2009:559, para. 40; Judgment of the Court of 21 October 2010, Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis, C-81/09, ECLI:EU:C:2010:622, para. 48; similar in Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

movement of capital,[4] thus under Article 63(1) TFEU. Therefore, as investors from third countries fall within the personal scope of the regulation of free movement of capital, they are protected by European law.[5]

However, this regulatory principle is challenged in cases of direct investments with "definite influence", i.e. where investors have a definite influence on the company's decisions and the determination of its activities. The problem arises since this case falls not only under the discipline of free movement of capital, but also under the discipline of freedom of establishment in Article 49 TFEU.

As will be seen, the EU has competence over capital movements, and, as a result, the Union has the power to regulate this area, leaving Member States the possibility to restrict the free movement of capital only in the cases provided for in Articles 64 and 65 TFEU, which are: in the context of taxation of capital at national level, and in the restriction of capital to prevent the infringement of domestic law or for security or general interest reasons.[6] And it is precisely on grounds of security and general interests reasons, that Member States can intervene to protect their technological sovereignty.

At that point, it will be necessary to examine what a possible definition, or rather an interpretation of the concept of technological sovereignty might be. In fact, to date, it is difficult to find a definition that is unanimously agreed upon. As will be seen later, there are two central aspects of this expression: being able to have the autonomy to directly produce the technological elements that are defined as critical, or, having the necessary strength to be able to influence the factors of production of distribution of that technology.

In fact, the crucial point in the technology sphere is that there is currently a strong dependence on behalf of Member States, and, therefore, the European Union, on

[4] Lars S. Otto, *What is a Foreign Direct Investment?,* in S. Hindelang, A. Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020* (Springer 2021), p. 519.

[5] S. Hindelang, *The free movement of capital and foreign direct investment—the scope of protection in EU law,* in Oxford University Press, Oxford (2009), pp. 204-206. In the same way the European Court of Justice. See Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

[6] F. Benyon, *Direct Investment, National Champions and EU Treaty Freedoms* (2010), pp. 32–38.

foreign producers of such technologies, such as the so-called 'Big Tech' companies, which have been defined, not surprisingly, as "key enabling technologies", or critical technologies.

It will be necessary, therefore, to see how the concept of sovereignty, understood in a broad sense, is invoked, both by European leaders and by European institutions, and to what extent the goal of technological sovereignty can be achieved.

There has in fact been a strong stance taken by these actors in recent years, both in relation to the concept of sovereignty, understood as European autonomy towards third countries, and, subsequently, towards the more specific concept of technological sovereignty. Following a number of statements aimed at triggering a "European movement" towards technological sovereignty, Regulation 452 (Screening Regulation) on Foreign Direct Investment was issued in 2019.

The aim of this Regulation is not to harmonise the screening mechanisms that may exist in the Member States' legal systems, but to provide for a mechanism of cooperation between Member States when screening foreign investments.

The key point of the Screening Regulation is that it provides that when carrying out such screening, the Member State must take into account not only, and obviously, its own interests, but also the interests of the other Member States and, therefore, of the EU. The Member States and the Commission, respectively, are allowed to send comments and opinions on the investment being made in another Member State, which has to give "due consideration" to those comments.

Thus, although the Regulation does not require Member States to necessarily adopt a screening mechanism, it is intended to ensure a minimum form of cooperation that is able to protect all Member States when a foreign direct investment is made on European territory.

The Member State will have to assess, specifically, whether the investment transaction "is likely to affect security or public order". And in making this assessment, the Regulation expressly provides, in Article 4, a non-exhaustive list of factors that Member States and the European Commission may take into consideration when screening foreign direct investment, namely the so-called critical technologies and dual

use items ("including artificial intelligence, robotics, semiconductors, cybersecurity, aero space, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies"); supply of critical inputs ("including energy or raw materials, as well as food security"); access to sensitive information ("including personal data, or the ability to control such information"); the freedom and pluralism of the media.

Thus, it emerges from the Regulation the centrality of the technology sphere for national security when an investment is to be made within the Union.

It will be analysed how the Screening Regulation has been implemented at national level, examining the internal screening discipline of some Member States, to then observe how, and if, these mechanisms have changed since the implementation of the Regulation.

The analysis will focus on the Italian system, to see how the powers exercisable by the government in screening have changed over the years, analysing first the "golden shares", subject to the ruling of the Court of Justice and, with the consequent rejection of the discipline, the analysis of the so-called new "golden powers".

In the last chapter, the practical aspects of foreign direct investments in relation to technology will be analysed; first, by examining the Commission's annual report on the implementation of the Screening Regulation, to see how Member States' screening activities have evolved over the now almost three years of the Regulation's enactment.

Subsequently, three practical cases will be analysed in which Member States have intervened to protect their critical infrastructures or critical technologies, from which will arise this problematic interplay between the two macro-areas of foreign direct investments and technological sovereignty, which, so far, have not been subject to rulings by the Court of Justice, but only by national courts.

In conclusion, there are four topics that will be addressed in this dissertation.

The first one is to define what a foreign direct investment is, how the European discipline has evolved in this area, and what is the allocation of competences in this area between Member States and the EU, and what the possible protections for the foreign investor might be once the investment is blocked.

The second, what is meant by the expression technological sovereignty, what is the breadth and boundaries of this expression, and what can be a possible interpretation. Consequently, it will be seen how this expression relates to foreign direct investments, and why this area is decisive in the pursuit of EU and Member States' interests.

Thirdly, it will be examined how these two aspects are applied in practice, and what is the trend not only of foreign direct investments in Europe, but also the trend regarding the increased activity of Member States in screening.

Fourth, and last, is to understand to whom this technological sovereignty belongs, and thus whether to the European Union or to the Member States, and what the possible limitations to the economic sovereignty of States, as well as the EU, might be.

Chapter I – EU's competence over FDIs. European technological sovereignty

This chapter will touch two macro areas of the European Union: foreign direct investment and the concept of European technological sovereignty. These areas might seem distinct and distant from each other, but through Regulation 452/2019 (henceforth "Screening Regulation") on FDI screening, their close interrelation will emerge. The aim of the Regulation in question is not so much to harmonise Member States' screening mechanisms, but more to strengthen cooperation between States and the Commission when an investment is deemed potentially harmful to the economy, security or public order of the state receiving that investment (the nature, purpose and functioning of the Regulation will be addressed in more detail later). It will be seen how such security can be severely undermined by investments in the technology sector, and how, therefore, among the various factors at play, FDI can lead to a shrinking of European and Member State technological sovereignty (a definition of this expression will be pursued later). Therefore, the link between FDI screening and European technological sovereignty is very strong.

Regarding FDI, it will be seen how a European competence in this regard arose, and how, initially, this was an area regulated only at the international level. The European discipline developed from international law. In order to first deal with FDI and its screening within the Screening Regulation, it is necessary to make an excursus on the evolution and development of (European and international) FDI law, as well as the origins and the development of competence in this area.

Subsequently, the topic of European technological sovereignty will be dealt with. It will be examined what is meant by this expression and how it can be declined differently depending on the political, legal, and economic context. In conclusion, it will be seen how European policies are developing around this concept and how it is intertwined with FDI screening.

To understand how FDI can undermine the independence of a Member State or the Union, the flow of foreign direct investment into Europe must be examined, and how it has changed over the years.

Between 2003 and 2016, more than 55,000 FDI projects were carried out in Europe,[7] with a total value of 2,500 billion euros.[8] Most of the foreign direct investments were concentrated in the service sector, with a total value of 1,200 billion euros, while in the manufacturing sector there were investments of around 1,000 billion euros.[9]

Although openness to foreign investment remains central in the European landscape, concerns arise with regard to State Owned Enterprises (SOEs) from third countries, which invest heavily in European companies dealing in "key technologies".[10]

Looking at merger and acquisition transactions between 2003 and 2016, it can be seen that investors came from 124 different countries.[11] Fifty-one per cent of the deals were conducted by US companies, resulting in a large exposure of the European economy to political and economic changes in the US.

The impact of foreign direct investments is extremely positive in the EU in several respects. For instance, foreign companies in Europe in 2014 amounted to 1 per cent of the total number of companies present. Moreover, they contribute 7% for investments in tangible goods, such as in land and capital goods.[12] Foreign companies also contribute in the European supply chain, as well as in exporting new technologies and managerial know-how from their home countries.[13]

However, the flow of foreign direct investment into Europe has decreased dramatically over the past decades. In 1990, 50 per cent of the world's foreign direct investment took place in Europe, whereas in 2014, this has decreased to 20 per cent.[14] The same trend applies to intra-EU investments. In fact, while in 1994 intra-EU FDI amounted to 60

[7] In this case, reference is made to companies belonging to countries outside the Union.

[8] E. R. Sunesen, J. J. Henriksen, *The Economics of FDI Screening in Jacques H.J. Bourgeois (ed), EU framework for foreign direct investment control* (Wolters Kluwer 2020), p. 3.

[9] The remaining investments are of various types. See E. R. Sunesen, J.J. Henriksen, The Economics of FDI Screening, supra n 8, at p 4.

[10] European Commission (2017), Harnessing Globalization.

[11] See E. R. Sunesen, J.J. Henriksen, The Economics of FDI Screening, supra n 8, at p. 6.

[12] See E. R. Sunesen, J.J. Henriksen, The Economics of FDI Screening, supra n 8, at p 7.

[13] Copenhagen Economics (2018), *The World in Europe, Global FDI Flows Towards Europe: Extra-European FDI Towards Europe.*

[14] See E. R. Sunesen, J.J. Henriksen, The Economics of FDI Screening, supra n 8, at p. 8.

per cent of the total, in 2012 the share dropped to 26 per cent.[15] Declining FDI in Europe can lead to damage for the European economy, slowing down its growth and negatively impacting the labour market.

The impact of FDI on the European economy can be extremely positive, but a legal regime that is overly favourable to attracting foreign direct investment can also entail great risks. In 1997, the EU and the US had a similar, rather restrictive legal regime for regulating FDI. Over the following decades, the EU adopted policies to increasingly liberalise the entry of FDI, while the US maintained the same level of closure.[16] A more "open" legal regime may entail more risks, such as takeovers of companies in sensitive sectors, such as technology. From 2008 to 2016, the average investment by a non-European entity in sensitive sectors increased from 128 million to 312 million euros.[17] From Russia, Switzerland, Norway and Kazakhstan come the largest merger and acquisition transactions by State Owned Enterprises (SOEs) in sensitive sectors in the European Union, in the period from 2003 to 2016.[18] While the main target of these transactions are the Netherlands (for 20%), the UK (for 15%) and Germany (for 11%).

In conclusion, although the flow of FDI in Europe has decreased over the past decades, it continues to play a central role in the European economy. The Union, having adopted policies to liberalise this sector, now finds itself having to manage FDI in order to protect the independence and sovereignty of States, as well as of the Union itself, against potential interference by foreign investors in sensitive sectors, such as technology.

[15] Intra-EU investments are FDI from one European country to another European country.

[16] See E. R. Sunesen, J.J. Henriksen, The Economics of FDI Screening, supra n 8, at p. 10.

[17] Copenhagen Economics (2017), *Screening of FDI Towards the EU*.

[18] See E. R. Sunesen, J.J. Henriksen, The Economics of FDI Screening, supra n 8, at p. 15.

1. Definition, origins, and scope of EU Foreign Investment Law

1.1 The origins and influence of foreign investments in international and EU law

The importance of foreign direct investment in the past decades has become increasingly greater. Already since the end of World War II, foreign investments have contributed to global economic development. For instance, from 1980 to 2007, the flow of foreign direct investments increased from 50 billion dollars to 1.9 trillion dollars.[19] The doctrine agrees in attributing foreign investments an important role in the growth of the countries in which they take place, contributing not only to bringing economic capital, which allows the financing or development of national policies, such as welfare, but also bringing financial capital and more generally economic resources, such as machinery and production tools, as well as managerial know-how, which allow technological development for a country's growth.[20]

All these elements allow the host country (host State) to increase productivity and thereby also trade, especially foreign trade, which allows not only a greater engagement with international markets but also to adopt a key position within that same market.[21] In addition, the benefits of foreign investment are mainly in the host State's companies and businesses, impacting on the skills and abilities of local actors, as well as in an increased productivity. The benefits of foreign investments are also reflected in public welfare, offering both new products of higher quality and at lower prices, but also providing more employment opportunities and raising labour standards. The positive

[19] UNCTAD, *World Investment Report (WIR) 2008: Transnational Corporations and the Infrastructure Challenge* (2008), p 1.

[20] T. Moran, *Does Foreign Investment promote development?* (2005), chs. 1, 2, 12, 14; H. Kehal, *Foreign Investment in Developing Countries* (2004); A. Bende-Nabende, *Globalisation, FDI, Regional Integration* (2002), pp 128–181; T. Moran, *Harnessing Foreign Direct Investment for Development: Policies for Developed and Developing Countries* (2006); J. Dunning and S. Lundan, *Multinational Enterprises and the Global Economy* (2008), chs. 11, 14; K. Sauvant and J. Weber (eds), *International Investment Agreements: Key Issues Volume III* (2005), ch. 27.

[21] See A. Dimopoulos, EU Foreign Investment Law, supra n 1, at p. 9.

effects of foreign investments do not only benefit the State in which the investment is made, but also the State from which the investment originates.[22] Several studies have shown that foreign investments foster development and growth, and that the benefits of foreign investments are greater in countries that are already highly developed,[23] as countries with scarce human capital have fewer opportunities and means to take on technologies imported by investors from foreign countries, especially when the development of these technologies is part of a production chain that requires advanced machinery, which is not available in the country in which the investment is made.

Precisely for this reason, one of the downsides of foreign investments is that, in the event of competitive inequality, de facto monopolies can be created by companies with foreign investors who, thanks to their economic, productive and managerial contribution, can lead to the emptying out of local companies (in favour of those in which there is a foreign investment), as well as to an increase in unemployment, due to the lack of competitiveness of local players.[24]

Another potentially negative aspect of foreign investment is the so-called "race to the bottom", i.e. the phenomena of deregulation from States seeking to attract capital, which can lead to a reduction in social, economic and environmental protection that favours foreign investors to the detriment of the local population (such as, for example, measures to reduce the protection of workers' rights).[25]

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[22] T. Moran, *What policies should developing country governments adopt toward outward FDI? Lessons from the experience of developed countries in Sauvant, Mendoza, and Ince (eds), The Rise of TNCs from Emerging Markets: Threat or Opportunity?* (2008), ch. 13; A Kokko, FDI and the structure of home country production in Bora (ed), *Foreign Direct Investment* (2002), pp. 152–167; T. Kenneth, *Competing for Capital: Europe and North America in a Global Era* (2000), pp. 24–33.

[23] UNCTAD, *WIR 1999: FDI and the Challenge of Development* (1999), pp 313–28. UNCTAD, *Investment and Technology Policies for Competitiveness: Review of Successful Country Experiences* (2003); UNCTAD, *WIR 2006*, above n 2, pp. 2–4, 44–5.

[24] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 10.

[25] J. Dunning, S. Lundan, *Multinational Enterprises and the Global Economy* (2008), chs. 10, 17; R Lipsey, 'Home and host country effects of FDI' in Baldwin and Winters (eds), *Challenges to Globalization* (2004), pp 333–82.

Bearing in mind both the positive and negative aspects of foreign investment, most countries have begun to adopt both liberalisation policies, for the attraction of foreign capital, and protectionism policies.[26] In this sense, it should be borne in mind how the measures adopted by various countries can lead to different regulatory balances, with the consequence that there will be countries that manage to attract more capital than others and, in some cases, lead to that "race to the bottom" mentioned earlier. This is why, on an international and European level, the need is beginning to be felt for a unitary discipline that would allow at least minimal regulation of the phenomenon of foreign direct investments.

1.2. The Rise of International norms on foreign investments

In the aftermath of World War II, all countries needed access to capital to revive their domestic economies, and, for this reason, they grasped the importance of international rules regulating the phenomenon of foreign investments.[27] Therefore, the most developed countries began to adopt policies aimed at attracting foreign investments.
The first step towards liberalisation and regulation of foreign investments was taken with the establishment of the European Economic Community (EEC) in 1957, which, with its four fundamental freedoms,[28] including the freedom of establishment and movement of capital, laid the foundation stone for the European integration process. The European project was also taken up at the international level. Indeed, after World War II and the colonial era, many newly independent states felt the need to create a "new world order",[29] so that they could have autonomy of control over their own economy and avoid the economic dominance of past colonial powers. During this period, many states felt that the regulation of foreign investment should be left to

[26] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 10.
[27] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 12.
[28] Free movement of goods, services, capital, and people which will form the common market.
[29] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 13.

individual national laws. This approach led international law to concern itself with the protection of foreign investors as, at the national level (especially in developing countries), it was mainly concerned with nationalising strategic assets for the country.[30] Therefore, through customary international law, it was intended to guarantee "prompt, adequate and effective" compensation in the event that the foreign investor's property was expropriated.[31] This protection under customary international law was much debated by developing countries, which, in fact, argued for the existence of international law of that nature concerning foreign investors. However, developed countries wanted to guarantee at least some procedural guarantees for foreign investors, and in fact, in 1966, the ICSID Convention (Convention on the Settlement of Disputes between States and Nationals of Other States) was concluded, which contributed to the 'legalisation' of disputes concerning foreign investments.[32] In the 1980s, the world market changed dramatically; with the growth of free market economies, the World Bank's focus on foreign investment regulations, China's new "open door policy",[33] and the dissolution of the Soviet Union, led to a trend of very liberal market access, especially by developing countries that began to compete to attract as much capital as possible.[34] This led to an increasing number of International Investment Agreements (IIAs), which tended to be concluded between developing countries and countries with large capital exports, thus introducing new rules on foreign investment.[35]

Parallel to the development of foreign investment rules at the international level, many foreign investment relations between the EU and third countries have increased. As a result of developments in the field of international trade, the EU has replaced the

[30] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 13.

[31] This principle is also known as the "Hull rule", see C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1964); C. Lipson, *Standing Guard, Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985); See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 13.

[32] Despite the ICSID, many developing countries were reluctant to conclude international treaties containing substantial foreign investment norms, see R. Dolzer, C. Schreuer, *Principles of International Investment Law* (2008), pp. 14–17.

[33] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 14.

[34] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 14.

[35] A. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, *38 Virginia JIL 667* (1998).

Member States in the negotiation of international treaties and has thus come to play a central role as an international player, being able, thanks to the powers conferred by the European Treaties regarding EU external relations, to cover a growing number of areas in the field of foreign investments.[36]

The evolution of the regulation of foreign investments goes back to the Lisbon Treaty of 2009, which explicitly gave exclusive competence to the European Union in this field. In order to get to the heart of what the EU's competence in foreign investment is today, it is necessary first to understand the approach taken in the international sphere.

In fact, while within the EU the aim was to ensure a discipline that would allow free access and non-discriminatory treatment of foreign investors,[37] the focus under international law was to protect the private property of foreign investors in third countries. And the issue is precisely around the protection of private property. Unlike international law, the protection of the private property of foreign investors is not an autonomous matter for the EU. This is because, prior to the Lisbon Treaty, where it should be recalled, the Union was given exclusive competence in the matter, the protection in question was to be sought in the principles of EU law. According to current Article 345 TFEU (formerly Article 295 TEC), this provision expresses the Union's neutrality with regard to the property regimes existing in the Member States, but does not exempt them from complying with the fundamental rules of the Union.[38]

The Court of Justice has in fact ruled[39] that the European Union legislator must refer to those principles, which make it possible to identify the scope of protection of private property rights. However, prior to the Lisbon Treaty, there was a lack of uniform regulation at EU level.[40]

With the entry into force of the aforementioned Treaty, broad protection for European investors in the area of private property is finally offered. In fact, Article 17 of the

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[36] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 17.

[37] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2010), pp. 559–591.

[38] Article 345 TFEU: "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."*

[39] Case 4/73 *Nold* [1974] ECR 491; Case C-84/95 *Bosphorus* [1996] ECR I-3953.

[40] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 18.

Charter on Fundamental Rights[41] (which has the same legal effect as the fundamental Treaties) provides for the explicit protection of private property, setting out the cases in which the right in question may be restricted, and thus when, in compliance with Community law, property may be expropriated.[42] In addition, the requirement that the Union is required to enter into the European Convention on Human Rights (ECHR), as set forth in Article 6(2) TEU,[43] it further strengthens the framework for the protection of intra-EU investments from EU and Member States' involvement..[44]

Now, taking into account the (for the time being) short path outlined on the subject of foreign investments in Europe, and the protections that have gradually been added for foreign investors, it must be specified that although the European legislator has made efforts to create a European discipline, the Union has not played (at least initially and, above all, before the entry into force of the Lisbon Treaty) a primary role in the formation of an international framework regulating the phenomenon of foreign investments.[45]

The reason for this initial lack of relevance obviously derives from the very nature of the European Union, which is a supranational organisation with limited competences. The EU, in fact, derives its powers from the "principle of attribution", i.e. those powers that the Member States have decided to transfer to the competence of the Union.[46] Thus,

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[41] Which constitutes a legally binding instrument for Member States, in the same way as the fundamental Treaties, under Article 6(1) TEU.

[42] Article 17 of the Charter on Fundamental Rights provides that: "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."*

[43] Article 6(2) TEU: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*

[44] A. Coban, *Protection of Property Rights within the European Convention on Human Rights* (2004); L. Sermet, *The European Convention on Human Rights and Property Rights* (1998).

[45] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 18

[46] Article 5(1)(2) TEU provides that: "*1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*

the evolution of foreign investments regulation has always depended on the presence, more or less extensive, of a Union's competence. As mentioned earlier, in the period prior to the entry into force of the Lisbon Treaty in 2009, the EC Treaty did not explicitly provide for the competence of the Union to act with third countries. However, the EC Treaty did contain rules on foreign investments, such as the rules on capital movements, establishment, and the Common Commercial Policy (CCP), which allowed the EC to conclude international agreements with third countries in this field.[47] The Lisbon Treaty supplemented the already existing provisions by introducing, for the first time, the concept of foreign investments into primary legislation, expressly mentioning it in the Common Commercial Policy, in Articles 206[48] and 207 TFEU.[49] As mentioned, the Lisbon Treaty did not introduce the concept of foreign investment for the first time. In fact, the EU has tried to combine the various measures on the subject that gave it limited competence, thus managing to expand its powers on the subject more and more, slowly pulling the competence away from the Member States.[50] Initially, the EU started to conclude international treaties in the field of foreign investments, in areas that were not within the competence of the Member States. Using the tools made available by the EC Treaty, the European Community developed a legal framework for foreign investment by concluding IIAs (EU International Investment Agreements), initially covering areas not within the competence of the Member States.

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2. "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

[47] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 19

[48] Article 206 TFEU provides that: "*By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers*."

[49] Article 207 TFEU povides that: "1. *The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. […]"*

[50] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 19

The Commission therefore made the EC's foreign investment policy complementary to that of the Member States, including regulations in areas not covered by BITs (Bilateral Investment Agreements), such as capital movements and investment promotion.[51] After thus extending the Community's competences in the area of, among others, the Common Commercial Policy and the internal market, foreign investment policy has also expanded into other areas of foreign investment regulation, introducing investment-related norms in multilateral agreements, such as the GATS (General Agreement on Trade in Services) and the TRIM (Trade-Related Investment Measures) in the WTO framework.[52] With the enlargement of the Union's sphere of competence, especially thanks to the Lisbon Treaty, and with particular regard to the internal market, the EU has increasingly challenged (albeit indirectly) the powers of the individual Member States in this field, accentuating this internal conflict between the EU and the Member States.[53]

Furthermore, it should be kept in mind that foreign investment norms and policies were strongly influenced by the foreign policy agenda of the EU. This is because Europe's objective was to liberalise and regulate the flow of foreign investment within the EU in order to attract capital and make the internal market more competitive, but also to allow EU investors to have access to third countries' markets. In fact, the objective of access to third country markets is considered fundamental to the EU's external commercial policy, as this allows for greater growth and thus greater competitiveness of European companies in the world.[54]

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[51] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 19.

[52] B. Hoekman, R. Newfarmer, *Preferential Trade Agreements, Investment Disciplines and Investment Flows*, in 5 JWT (2005), pp. 961- 966;See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 19.

[53] Specifically, in two cases, the EU intervened in individual agreements (in this case BITs) concluded by Member States with third countries. In the first case, the Commission intervened to insist that BITs concluded between certain Member States that had just joined the EU and the United States be renegotiated. While in the second case, the Commission initiated infringement proceedings against Austria, Finland, and Sweden for concluding BITs in violation of the EC Treaty. See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 19.

[54] Commission Communication, Global Europe: Competing in the World, Brussels 4.10.2006, COM(2006) 567.

1.3 Definition of foreign investment under EU law

Having, albeit briefly, reconstructed the origin and evolution of foreign direct investments, it is necessary to give a definition of foreign investment. First of all, it should be specified that, prior to the Lisbon Treaty, the term never appeared in the EU's primary legislation.[55] Even if the term is introduced into primary legislation for the first time thanks to Article 207 TFEU, this does not mean that the concept of foreign investment was alien to European law. The absence of this expression can be explained by the Member States' fear of including the notion of foreign investment in the treaties because, at the time, the expression in question was immediately linked to the concept of protection, an area that was considered to be within the competence of the Member States and, therefore, there was no wish to provide a basis for the EU to intervene in that area. In short, Member States were afraid that by including the term "foreign investment", confusion would arise regarding the division of competences between Member States and the EU.[56] However, it should be specified that the absence of the term "foreign investment" does not mean that the EU has remained inactive in the face of this phenomena. On the contrary, by analysing primary and secondary legislation at european level, together with international agreements drafted by the EU, and Reg. 452/2019, a definition of foreign investment can be reconstructed.

The starting point will be Article 207 TFEU, which explicitly mentions foreign investments. However, it only mentions "direct" investments, therefore "portfolio" investments or any other type of investment other than direct investments are not expressly recognised in the TFEU.[57] Parallel and subsequent to Article 207 TFEU, in the same vein, is Reg. 452/2019. Both measures base their definition of foreign direct

[55] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 36.
[56] J. Reiter, *The EU-Mexico Free Trade Agreement: Assessing the EU Approach to Regulatory Issues*, in Sampson, Woolcock *(eds), Regionalism, Multilateralism and Economic Integration* (2003), p 90.
[57] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 36.

investment on the 1988 Capital Movements Directive Nomenclature[58] and the Court of Justice's case law.[59]

In the *Casati*[60] and *Luisi and Carbone*[61] cases of 1981 and 1984 respectively, the Court of Justice ruled that a transfer of financial assets can constitute a capital movement as long as it is "essentially concerned with the investment of funds'.[62] Whereas, in the 2009 case *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II*, the Court of Justice ruled that foreign direct investments is a "*form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control*".[63] It is clear, therefore, that foreign direct investments are movements of capital.

When Directive 88/361 on capital movements expired, the Court of Justice wanted the nomenclature annexed to the directive to be used to determine which transactions constituted a movement of capital. The nomenclature classifies capital movements according to the economic nature of assets and liabilities, confirming that the term 'capital' has the characteristic of being an asset with a certain economic value.[64]

According to the Directive, foreign direct investments are "*Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the*

[58] Directive 88/361/EEC on the implementation of Article 67 of the Treaty [1988] OJ L178/5. The Court of Justice specified that the nomenclature is a non-exhaustive list. See Case C-222/97 *Trummer and Mayer* [1999] ECR I-1678; Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; Case C-463/00 *Commission v Spain* [2003] ECR I-4581; Case C-98/01 *Commission v UK* [2003] ECR I-4641; Case C-174/04 *Commission v Italy* [2005] ECR I-4933.

[59] Case 203/80 *Casati* [1981] ECR 2595; Joined Cases 286/82 & 26/83 *Luisi and Carbone* [1984] ECR 377; Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU:C:2009:559, para. 40; Judgment of the Court of 21 October 2010, Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis, C-81/09, ECLI:EU:C:2010:622, para. 48; Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

[60] Case 203/80 Casati [1981] ECR 2595.

[61] Joined Cases 286/82 &26/83 Luisi and Carbone [1984]. ECR 377.

[62] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 37.

[63] Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU:C:2009:559, para. 40.

[64] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 38.

capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense".[65] Specifically, foreign direct investment constitutes in:

1. *"Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.*[66]
2. *Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.*[67]
3. *Long-term loans with a view to establishing or maintaining lasting economic links.*[68]
4. *Reinvestment of profits with a view to maintaining lasting economic links.*
   A. *Direct investments on national territory by non-residents*
   B. *Direct investments abroad by residents"*[69].

[65] Capital Movements Directive Explanatory Notes on direct investments, first subpara.

[66] The Explanatory Note specified that *"The undertakings mentioned [. . .] include legally independent under- takings (wholly-owned subsidiaries) and branches".*

[67] The Explanatory Note specified that "*As regards those undertakings [...] which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person of another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control."*

[68] The Explanatory Note specified that *"Long-term loans of a participating nature [...] means loans for a period of more than five years which are made for the purpose of establishing or maintaining lasting economic links. The main examples which may be cited are loans granted by a company to its subsidiaries or to companies in which it has a share and loans linked with a profit-sharing arrangement. Loans granted by financial institutions with a view to establishing or maintaining lasting economic links are also included under this heading."*

[69] Capital Movements Directive Nomenclature (I—Direct investments) and Capital Movements Directive Explanatory Notes on direct investments.

1.4 Relationship between free movement of capital and freedom of establishment

Having given a definition of foreign direct investment according to EU primary and secondary legislation, the question of the relationship between freedom of establishment and free movement of capitals, how the two disciplines overlap, and what kind of protection is afforded to the investor, needs to be addressed briefly. As already mentioned, in *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II* a foreign direct investment is defined as a "*form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control*".[70] This type of foreign direct investment falls within the scope of the free movement of capital,[71] thus under Article 63(1) TFEU. Therefore, as investors from third countries fall within the personal scope of the regulation of free movement of capital, they are protected by European law.[72]

However, this regulatory principle is challenged in cases of direct investments with "definite influence", i.e. where investors have a definite influence on the company's decisions and the determination of its activities. The problem arises since this case falls not only under the discipline of free movement of capital, but also under the discipline of freedom of establishment in Article 49 TFEU.[73]

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[70] Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU:C:2009:559, para. 40; Judgment of the Court of 21 October 2010, Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis, C-81/09, ECLI:EU:C:2010:622, para. 48; similar in Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

[71] See Lars S. Otto, *What is a Foreign Direct Investment?*, supra n 4, at p. 519.

[72] S. Hindelang, *The free movement of capital and foreign direct investment—the scope of protection in EU law*. Oxford University Press, Oxford, 2009, pp. 204-206. In the same way the European Court of Justice. See Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

[73]Judgment of the Court of 13 April 2000, C. Baars v. Inspecteur der Belastingdienst Particulieren/ Ondernemingen Gorinchem, C-251/98, ECLI:EU:C:2000:205, paras. 22, 26; see also Judgment of the Court of 12 September 2006, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, C-196/04, ECLI:EU:C:2006:544, para. 31; Judgment of the Court of 13 March 2007, Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, C-524/04, ECLI:EU:C:2007:161, para. 27; Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU: C:2009:559, para. 47;

The problem arises because the European Court of Justice, when examining national legislation on foreign investments, does so by applying the regulatory standard of only one of the two disciplines. According to the recent case law of the Court, in cases of 'definite influence' where national legislation is applicable, it will be examined in light of the freedom of establishment discipline and not the capital one.[74] The consequence, in this case, will be very significant, as in respect of foreign investors, Article 49 TFEU, concerning freedom of establishment, will apply, where they do not fall within the personal scope of the rule, and Article 63(1) TFEU, concerning the free movement of capital, will not apply, where they do.[75] In short, the risk is that due to the non-applicability of the freedom of establishment rules to foreign investors with 'definite influence', these investors will find themselves deprived of protection, as neither discipline would be applicable.[76] Indeed, such an investment falls within the substantial scope of Article 49 TFEU, but not within its personal scope. In turn, the investment falls within the personal scope of Article 63(1) TFEU and, according to the ECJ, also within the substantive scope, with the problem that due to the application of the personal scope of Article 49 TFEU, this would exclude the applicability of the rules on the free movement of capital. In essence, the foreign investment with 'definite influence' falls both under the discipline of capital and partially under the discipline of establishment, but this 'coexistence' between disciplines leads to the exclusion of both, thus leaving the foreign investor unprotected.

Judgment of the Court of 21 October 2010, Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis, C-81/09, ECLI:EU:C:2010:622, para. 47; Judgment of the Court of 19 July 2012, Marianne Scheunemann v Finanzamt Bremerhaven, C-31/11, ECLI:EU: C:2012:481, para. 23; Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 91; Judgment of the Court of 3 September 2020, Vivendi SA v Autorità per le Garanzie nelle Comunicazioni, C-719/18, ECLI:EU:C:2020:627, para. 40.

[74] See Lars S. Otto, *What is a Foreign Direct Investment?*, supra n 4, at p. 520.

[75] Judgment of the Court of 24 May 2007, Winfried L. Holböck v Finanzamt Salzburg-Land, C-157/05, ECLI:EU:C:2007:297, para. 28; Judgment of the Court of 19 July 2012, Marianne Scheunemann v Finanzamt Bremerhaven, C-31/11, ECLI:EU:C:2012:481, para. 33; Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 97.

[76] See Lars S. Otto, *What is a Foreign Direct Investmen?t*, supra n 4, at p. 520

This is precisely what happened in the *Scheunemann* case.[77] The European Court of Justice examined a national measure in Germany concerning tax issues applicable to shareholdings with 'definite influence' in connection with the rules on freedom of establishment. However, in the relevant case, Ms. Scheunemann's shares were held in a third country, with the consequence that her investment did not fall within the personal scope of Article 49 TFEU. The Court, in its judgment, did not even consider a possible application of the free movement of capital - which would have protected the investor - and omitted any assessment of the lack of protection. With the adoption of the Screening Regulation, however, this view regarding investments with "definite influence" has change.

Indeed, in the Regulation's Proposal, the Commission established that foreign direct investments constitute capital movements, falling under Article 63 TFEU. In saying this, the Commission does not make any distinction about investments with or without "definite influence" and therefore, in its view, all forms of foreign direct investment must be protected by the rules on the free movement of capital.[78] The analysis of the Regulation (and the competence for foreign direct investments) will be made later, however, it can be anticipated that the screening mechanism is based on the exclusive competence of the EU in the field of the Common Commercial Policy,[79] based on Article 3(1) TFEU and Article 207 TFEU.[80] In addition, the European Court of Justice ruled on the Free Trade Agreement signed by the European Union and the Republic of Singapore, which entered into force in November 2019, confirming that the EU has exclusive competence in the field of foreign direct investments when it

[77] Judgment of the Court of 19 July 2012, Marianne Scheunemann v Finanzamt Bremerhaven, C-31/11, ECLI:EU:C:2012:481, paras. 17–35.

[78] Proposal for the Regulation, COM(2017) 487 final, 13.9.2017, pp. 4, 28 f.

[79] A different legal basis has also been suggested in addition to the one in the Proposal, namely Articles 64(2) and (3) TFEU. C. Herrmann (2019), *Europarechtliche Fragen der deutschen Investitionskontrolle,in* Zeitschrift für Europarechtliche Studien 22:429–475.

[80] Proposal for the Regulation, COM(2017) 487 final, 13.9.2017, p. 8.

comes to concluding international agreements; renewing and reinforcing, once again, the EU's role in this area.[81]

[81] Opinion procedure 2/15, Free Trade Agreement with Singapore, Opinion of the Court of 16 May 2017, ECLI:EU:C:2017:376, paras. 81 f., 243.

2. EU competence over foreign direct investments

2.1 General principles on EU's competence

As mentioned above, until the entry into force of the Lisbon Treaty, the division of competence between Member States and the European Union on the subject of foreign investments was not entirely clear. The EC Treaty never mentioned foreign investments, making the issue even more complex. And even with the entry into force of the Lisbon Treaty in 2009, in which foreign investments are explicitly referred to, only "direct" investments are mentioned in Article 207 TFEU, thus excluding certain forms of investments from the EU's competence.[82]
The ambiguity of the EC Treaty on this issue is fully manifested in the international agreements signed by the Union and Member States with third countries. In these agreements, there are no provisions specifying the competence for foreign investments, and there is only a general clause in which the Member States and the EU limit themselves to acting within the limits of their respective competences,[83] without clearly specifying on what legal basis these competences should be based. With the entry into force of the Lisbon Treaty and the new wording of Article 207 TFEU, which brings foreign direct investments under the Common Commercial Policy, an attempt has been made to shed more light on the subject.

2.2 Existence and exclusivity of EU competence

The principle of attribution of powers is the foundation of the European Union. Hence, the Union, in order to exercise its powers, must have a legal basis to be found in the Treaties.

[82] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 66
[83] J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (2001), pp 10–13.

This principle is found in Article 5 TEU, and applies to both internal actions within the European Union and external actions outside of it.[84]

The external powers of the EU are found in the primary provisions of European law. Articles 3 and 4 TEU indicate a number of powers vested in the Union and their characteristics.

The starting point for the determination of competence in the field of foreign investments is the Common Commercial Policy (CCP) and Article 217 TFEU, i.e. the reference provision for the negotiation and conclusion of Association Agreements in various fields, including capital movements, monetary union, development and economic, financial, and technical cooperation.[85] Around these two measures, the EU's competence in the field of foreign investments has gradually developed.

The Union's powers may not only be explicit, but also implicit. In fact, prior to Article 216(1) TFEU,[86] the competence to conclude international agreements was attributed to the Union by the European Court of Justice.[87] Articles 216(1) TFEU and 3(2) TFEU codified the case law of the Court of Justice on the existence and exclusivity of the Union's implicit powers.[88] It is necessary to briefly review the Court's jurisprudence on the subject of implied powers, as the drafters, when writing the Treaty, aimed to codify the existing case law.

According to the Court, exclusive powers or competences come into play when the Union adopts secondary legislation in accordance with primary legislation, thus acting within the perimeter, and therefore the powers, that have been conferred by the Member

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[84] A. Dashwood, *The Attribution of External Relations Competence*, in Dashwood, Hillion *(eds), The general law of EC external relations* (2000), ch. 8; Opinion 2/94 (Accession to the ECHR) [1996] ECR I-1759.

[85] Articles 63, 207, 208, 212, 217, and 219 TFEU.

[86] Article 216(1) TFEU: *"The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."*

[87] Case 22/70 Commission v Council (AETR) [1971] ECR 263.

[88] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 68.

States on the basis of the principle of attribution.[89] However, the element of secondary legislation is not necessary for the existence of implied powers. The Court has specified that the Union, which has been granted powers to achieve certain objectives, may also extend its scope of action to the international field when it is necessary for the achievement of that objective.[90] The term "necessity" has been highly debated, as the Court never specified the extent of that term, always leaving it vague, never specifying whether necessity was required only for the existence or also for the exclusivity of the implied powers.[91] Subsequently, the Court specified that the assessment of the existence and exclusivity of implied powers, in relation to the conclusion of international agreements entered into by the European Union, must be undertaken at two separate moments.[92] The Court specified that the concept of necessity must be interpreted in accordance with the Court's own case law and, therefore, the Union's action must be "necessary"[93] to achieve the objectives that are set out in the Treaties, which are the legal basis for the Union's own action. The criterion used by the Court echoes the principle of 'effet utile', that is, the possibility for the Union to take any action to achieve the purpose and objectives laid down in the Treaties.[94] The requirement of necessity must therefore be interpreted in the sense of 'establishing a general parallelism',[95] specifying that the Union's implied external powers are to be found in the Treaties, and that they are not limited to areas of European law where the Union has already legislated.

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[89] Opinion 1/2003 (Lugano Convention) [2006] ECRI-1, para 114.

[90] Opinion 2/91 (*re ILO Convention No 170*) [1993] ECRI-106, para 7.

[91] J. Bourgeois, *External Relations Powers of the European Community*, in *22 Fordham Int'l LJ 149* (1999); M. Klamert, N. Maydell, *Lost in Exclusivity: Implied Non-exclusive External Competences*, in *Community Law in 13 EFA Rev* (2008), pp. 493, 496–502.

[92] Opinion 1/2003 (Lugano Convention) [2006] ECRI-1, para 115.

[93] However, a different interpretation of the concept of necessity has been given by various authors. See M. Klamert, N. Maydell, *Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law in 13 EFA Rev* (2008), pp. 505-507; T. Eilmansberger, Bilateral Investment Treaties and EU Law in 46 CMLR (2008), pp. 383, 390–1.

[94] P. Koutrakos, *EU International Relations Law* (2006), p 124.

[95] P. Eeckhout, *External relations of the European Union: Legal and constitutional foundations* (2004), p. 99.

However, the "parallelism" just outlined does not mean that the external competences of the Union always exist where internal competences as also exist in the same area.[96] Indeed, the doctrine of implied competence cannot be used to extend the Union's powers beyond those that are outlined in the Treaties. Therefore, there is no "parallelism" tout court between internal and external competences. Implicit competences exist only within the limits set by primary law.[97] There is, therefore, a substantive limit to the Union's action.

The analysis of Article 216(1) TFEU, read in conjunction with Article 3(2) TFEU, may give rise to some doubts as to the interpretation of the doctrine of implied powers just given. The risk is that implied competences are seen as always exclusive. The two Articles just mentioned must be interpreted in the light of Opinion 1/2003 cited above.[98] On the existence of implied powers, Article 216 TFEU and Opinion 1/2003 come to the same conclusion: implied powers come into play when it is necessary to achieve the Union's objectives. However, Article 216 TFEU does not specify in detail what the objectives of the Union are, nor does it indicate a legal basis, thus causing an enlargement of the implied powers. Moreover, Article 21 TFEU contains a list of external objectives of the Union, which further fuels the non-specificity of the objectives and leaves more and more room for implied powers.[99] Furthermore, Article 216 TFEU allows the Union to enter into international agreements, which may affect the common rules.

This leads to the conclusion that the Union's power to adopt legislative acts, and that these acts may affect the common rules, is a circumstance that allows the Union to act, when necessary, to achieve the objectives outlined in Union legislation.[100]

Now that the existence and concept of implied powers have been briefly reconstructed, while also mentioning exclusivity, which will be dealt with in the next section, it can

[96] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 69.
[97] Opinion 1/94 [1994] ECRI-5267.
[98] Opinion 1/2003 (Lugano Convention) [2006] ECRI-1.
[99] M. Cremona, *External relations and external competence of the European Union: The emergence of an integrated policy*, in Craig, de Búrca (eds), *The Evolution of EU Law* (2011), pp. 225–226.
[100] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 71.

be concluded that the existence of implied powers considerably expands the Union's competence with regard to foreign investments. Given the Union's wide sphere of competence in the field of foreign investments, it has a regulatory power that allows it to adopt autonomous legislative acts, thanks to the legal basis found in the Treaties, and thanks to the interpretation of the doctrine of implied powers outlined above.[101]

Having just conducted an analysis on the existence of the Union's external competence, it is necessary to elaborate also on the exclusivity or lack thereof of that competence and, therefore, whether it is shared between the Member States and the Union, or whether it is exclusive to the Union. As a preliminary remark, it can be anticipated that both the case law of the Court of Justice and the doctrine are more oriented towards exclusivity.[102]

Generally speaking, it must be said that implied powers as well as expressed powers may be exclusive. With regard to expressed powers, it is primary law that establishes the exclusivity of the Union's competences. In fact, the EC Treaty explicitly determines both the substantive scope of a provision and the exclusivity or non-exclusivity of competences with respect to that provision.[103] The discipline of 'development and economic, financial, and technical cooperation' is of a non-exclusive nature, thus establishing shared competence. However, in other cases, such as with regard to the 'Common Commercial Policy' (CCP), it was the Court of Justice itself that ruled that the Union had exclusive competence in that area.[104] Subsequently, with the introduction of the Lisbon Treaty, Articles 3 to 6 TFEU indicate the nature of the Union's competence in each area mentioned by European primary law. In fact, unlike the EC Treaty, the Lisbon Treaty now attributes exclusive competence to the Union in

[101] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 71.
[102] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 71.
[103] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 71.
[104] Opinion 1/75 [1975] ECR 1355; P. Koutrakos, *EU International Relations Law* (2006), pp. 13–17.

the Common Commercial Policy (CCP),[105] and a shared competence in the internal market.[106]

Turning now to the question of the exclusivity of implied powers, the Court of Justice has ruled on the issue several times in several cases.[107] The Lisbon Treaty attempted to codify in Article 3(2) TFEU the principles established by the case law of the Court of Justice on the criteria for determining implied powers.[108]

The Court formulated two tests to identify Union exclusivity, arguing that there can be two cases of exclusivity, limited or less, depending on the circumstances.[109] The first type of exclusivity arises in cases where common rules have been adopted and implemented and exclusivity is necessary to ensure that autonomous action by some Member States does not affect the common rules.[110] This type of exclusivity, known as "AETR" exclusivity, is nothing more than a form of application of the principle of supremacy of European law,[111] as it is intended to preserve the effectiveness of the 'acquis' and to eliminate conflicts between European and domestic law, as Member

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[105] Article 3(1)I TFEU: "*1. The Union shall have exclusive competence in the following areas: […] I common commercial policy."*

[106] Article 4(1) TFEU: *"1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6."*

[107] AETR and Kramer cases (Joined Cases 3, 4 & 6/76 [1976] ECR 1279), Opinion 1/76 ([1977] ECR 741), Opinion 2/91, Opinion 2/92 ([1995] ECR I-521), Opinion 1/94 [1994] ECRI-5267, Case C-466/98 Commission v UK [2002] ECR I-9427, Case C-467/98 Commission v Denmark [2002] ECR I-9519, Case C-468/98 Commission v Sweden [2002] ECR I-9575, Case C-469/98 Commission v Finland [2002] ECR I-9627, Case C-471/98 Commission v Belgium [2002] ECR I-9681, Case C-472/98 Commission v Luxembourg [2002] ECR I-9741, Case C-975/98 Commission v Austria [2002] ECR I-9797, Case C-976/98 Commission v Germany [2002] ECR I-9855) and Opinion 1/2003 (*Lugano Convention*) [2006] ECRI-1.

[108] J. Wouters, D. Coppens, B. de Meester, *The European Union's External Relations after the Lisbon Treaty*, in Griller, Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008), p 169.

[109] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 72.

[110] P. Koutrakos, *EU International Relations Law* (2006), pp. 84–88, 110–112.

[111] P. Eeckhout, *External relations of the European Union: Legal and constitutional foundations* (2004), pp. 99; Case C-45/07 Commission v Greece [2009] ECR I-701; M. Cremona, *Extending the Reach of the AETR Principle: Comment on Commission v Greece (C-45/07)* (2009) 34 EL Rev 754.

States may enter into international agreements, which are potentially capable of influencing European law, thus creating conflicts.[112]

In fact, the Court specified that Member States may not enter into international agreements in the presence of AETR exclusivity, even if there is no conflict between European law and the agreement that the Member State intends to enter into.[113] This type of exclusivity arises in cases where a certain area has been fully harmonised, i.e. the treatment of third country nationals has been regulated by domestic legislation and the Union has been given the competence to negotiate with third countries. However, the requirement of distortion of the internal market is not sufficient to render the competence exclusive to the Union. In fact, AETR competence arises when the Union and the Member States have shared competence to legislate in a certain area, but the EU has exercised its powers by legislating in that field and, thus, harmonising that area of European law.[114]

The second type of exclusivity arises when it is necessary to pursue the objectives laid down in the Treaties. This second type of exclusivity was cited in Opinion 1/76,[115] which held that the EU had exclusive implied powers to enter into an international agreement, because the international agreement in question was inextricably linked to the internal market objectives laid down in EU primary law. Therefore, the objective in question could not have been effectively pursued without entering into such an international agreement.[116]

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[112] Opinion 1/94 [1994] ECRI-5267, paras 76-8 and 96; P Eeckhout, External relations of the European Union: Legal and constitutional foundations (2004), pp 59-64, 92-94; D. O'Keefe, *Exclusive, Concurrent and Shared Competence in Dashwood and Hillion (eds), The general law of EC external relations* (2000), pp 182–187; R. Holdgaard, *The European Community's Implied External Competence after the Open Skies cases in 8 EFA Rev* (2003), p.365, 383–385.

[113] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 73.

[114] "*Open Skies*" Cases (Case C-466/98 Commission v UK [2002] ECR I-9427, Case C-467/98 Commission v Denmark [2002] ECR I-9519, Case C-468/98 Commission v Sweden [2002] ECR I-9575, Case C-469/98 Commission v Finland [2002] ECR I-9627, Case C-471/98 Commission v Belgium [2002] ECR I-9681, Case C-472/98 Commission v Luxembourg [2002] ECR I-9741, Case C-975/98 Commission v Austria [2002] ECR I-9797, Case C-976/98 Commission v Germany [2002] ECR I-9855).

[115] Opinion 1/76 [1977] ECR 741.

[116] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 73.

In conclusion, the requirement of necessity must be assessed on a case-by-case basis against the internal EU law in relation to the pursuit of the objective laid down in the Treaty. In the event that the only instrument available to achieve that objective is the conclusion of an international treaty, it will be the exclusive competence of the Union to do so.

In conclusion, the requirement of necessity must be assessed on a case-by-case basis against the Union's internal legislation in relation to the pursuit of the objective laid down in the treaty. In the event that the only instrument available to achieve that goal is the conclusion of an international treaty, it will be the exclusive competence of the Union to do so.[117]

2.3 Admission of FDIs in the EU

After analysing the existence of EU competence in the field of foreign investments and, thus, the Common Commercial Policy (CCP), by looking also at implied powers and how they have evolved, the exclusivity in this field of the Union was also examined. Now the Union's competence over the entry and regulation of foreign direct investments will be examined, and how it has evolved from the EC Treaty to the Lisbon Treaty. This chapter will not examine Reg. 452/2019 on the screening of foreign direct investments, which will be dealt with later in a separate chapter.

2.3.1 Freedom of Capitals

As described above, foreign investments fall under the discipline of capital movements traditionally covered by Article 63 TFEU.[118] This Article covers all capital movements

[117] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 73.
[118] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 76.

involving foreign direct investments, which are listed in the above-mentioned nomenclature annexed to the 1988 Capital Directive.[119]

As already mentioned, the EU has competence over capital movements. In the past, freedom over capital was the weakest of the four freedoms that constitute the internal market.

However, this freedom has also been strengthened over time, acquiring direct effect. Thus, the Member States' limitations in this area have been removed.[120] As a result, the Union has the power to regulate this area, leaving Member States the possibility to restrict the free movement of capital only in the cases provided for in Articles 64 and 65 TFEU. Therefore, as a rule, Member States may not adopt measures that may interfere with the free movement of capital. Furthermore, Article 63 TFEU no longer refers to the distinction between intra-EU capital and capital from third countries.[121] The Court of Justice, in fact, has repeatedly specified that Article 63 TFEU applies to all national measures that are "liable to dissuade" or "liable to deter" foreign investors from making a movement of capital.[122]

As mentioned before, Member States may only take measures to restrict the free movement of capital in cases provided for in the Treaty. Article 65 TFEU sets out two cases in which a restriction may be legitimate, namely in the context of taxation of capital at national level and in the restriction of capital to prevent the infringement of domestic law or for security or general interest reasons.[123] However, measures taken by Member States in accordance with Article 65 TFEU will be subject to a so-called "proportionality test" under Article 65(3) TFEU, which states that measures taken by

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[119] Directive 88/361/EEC on the implementation of Article 67 of the Treaty [1988] OJ L178/5.

[120] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 76.

[121] S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: the scope of protection in EU Law* (2009), pp. 197–200.

[122] S. Peers, *Free Movement of Capital: Learning Lessons or Slipping on Split Milk? in Barnard and Scott (eds), The Law of the Single European Market* (2002), p. 345; C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2010), pp 571–573; W. Frenz, *Handbuch Europarecht: Europäische Grundfreiheiten* (2004), pp 1052–64; J. Usher, *Monetary Movements and the Internal Market*, in N. Shuibhne (ed), *Regulating the Internal Market* (2006), pp 193–197; A. Emch, *News from Luxembourg: Is the New EU Investment Law Taking Shape?*, in 9 JWIT (2008), pp. 497, 511–14.

[123] F. Benyon, *Direct Investment, National Champions and EU Treaty Freedoms* (2010), pp. 32–38.

Member States "*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*." In any case, the possibility for Member States to restrict the free movement of capital does not limit the Union's power to regulate capital discipline also at the international level through the conclusion of international agreements.[124]

With respect to the regulation of FDI as part of capital movements, the Union has shared competence with the Member States, as set out in Article 4(2)(a) TFEU.[125] Despite the fact that the exclusivity of the Union may arise in the area of FDI and the free movement of capital when "common rules" are in place, the Member States nevertheless retain great power in regulating the movement of capital at the international level, even though Articles 63 and 65 TFEU severely limit this power.[126]

2.3.2 Freedom of Establishment

The TFEU chapters on free movement of capital and freedom of establishment are both intertwined. The chapter on the free movement of capital not only gives the Union competence in the area of foreign investments, but also influences the initial establishment of foreign investors.[127] Indeed, Articles 64(2) and 65(2) TFEU explicitly refer to the right of establishment. Likewise, Article 49(2) TFEU expressly mentions capital movements. It should be pointed out that the scope of the freedom of establishment is limited to persons belonging to the EU Member States, with the consequence that foreign investors will be excluded from the scope of application of the regulation under consideration. However, if the conditions of initial establishment fall within the scope of the regulation on the free movement of capital, the latter will apply to foreign investors from third countries, extending the competence of the EU in

[124] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 77.
[125] Article 4(2)(a) TFEU: *"Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market".*
[126] D. O'Keefe, P. Twomey (eds), *Legal Issues of the Maastricht Treaty* (1994), pp. 40–58.
[127] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 78.

that area.[128] Thus, the relationship between free movement of capital and freedom of establishment is decisive in determining whether or not Article 63 TFEU is applicable to the establishment of third-country foreign investors.[129]

In order to distinguish which aspects of foreign direct investments fall under which discipline, i.e. that of capital or that of establishment, it is necessary to give the appropriate definitions. Under the establishment of foreign direct investments comes both the regulation of the establishment and management of a company or its subsidiary in the EU, as well as domestic law, which may restrict foreign investors from exercising this right.[130] A movement of capital, on the other hand, has been defined by the case law of the Court of Justice as a transfer of assets that is "*essentially concerned with the investment of funds*".[131] Thus, the free movement of capital is not concerned with the establishment of a direct foreign investment, but only with the transfer of that asset which qualifies as capital.[132] This interpretation can be inferred from the combined provisions of Article 49(2) TFEU and Article 65(2) TFEU, which would appear to conflict.

On the one hand, Article 49(2) TFEU subordinates the application of the chapter on establishment to the regulation of capital movements, on the other hand, Article 65(2) TFEU subordinates its application to the restrictions provided for in the discipline on freedom of establishment.[133] The conflict can be resolved in such a way that the discipline on the free movement of capital does not adversely affect the establishment of a foreign direct investment. Indeed, Article 65(2) TFEU provides that the discipline

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[128] R. Torrent, *Derecho comunitario e Inversiones extranjeras directas: Libre circulacion de los capitales vs Regulacion no discriminatoria del establecimiento. De la golden share a los nuevos Open Skies, in 22 Revista Espanola de Derecho Europeo* (2007), p. 283, 307–308.

[129] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 78.

[130] S. Hindelang, *The EC Treaty's Freedom of Capital Movement as an Instrument of International Investment Law?*, in Reinisch, Knahr (eds*), International Investment Law and Context* (2007), p. 51.

[131] Case 203/80 Casati [1981] ECR 2595, Joined Cases 286/82 &26/83 Luisi and Carbone [1984]. ECR 377.

[132] See R. Torrent, *Derecho comunitario e Inversiones extranjeras directas: Libre circulacion de los capitales vs Regulacion no discriminatoria del establecimiento. De la golden share a los nuevos Open Skies*, supra n 130, pp. 304-306. J. Usher, *Monetary Movements and the Internal Market, in Nic Shuibhne (ed), Regulating the Internal Market* (2006), pp. 204-205.

[133] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 83.

on the movement of capital does not apply to restrictions under the freedom of establishment discipline. On the other hand, Article 49(2) TFEU indicates that harmonisation under the freedom of establishment rules must not deprive restrictions provided for under the rules on the movement of capital of their effectiveness.[134]

In conclusion, Articles 63 and 64(2) TFEU can be used by the EU as a legal basis for action in the area of foreign direct investment. In addition, Article 65(2) TFEU indicates that domestic legislation relating to the establishment of a foreign investment does not fall within the scope of the free movement of capital discipline. Lastly, it should be specified that this interpretation does not mean the exclusion of capital, involving an establishment, from the application of the rules on the free movement of capital.[135]

2.3.2.1 FDI under the "EC Treaty"

The competence of the European Community with regard to the establishment of foreign investments was much debated under the EC Treaty. While the Commission claimed competence in respect of the establishment of investors from third countries, Member States in turn also claimed competence in that area.[136] Opinions 1/94[137] and 2/92[138] played an important role on this issue, although without clarifying who was competent in this area.

The competence for foreign investments in the EC Treaty derives in the first place from Article 133 TEC and, given the incomplete legal basis offered, this was expanded through the so-called "implied powers".

The Common Commercial Policy in Article 133 TEC was considered as the legal basis for the EC to intervene in the establishment of investors from third countries. Due to

[134] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 84.
[135] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 84.
[136] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 85.
[137] Opinion 1/94 [1994] ECR I-5267.
[138] Opinion 2/92 [1995] ECR I-521.

the exclusive nature of the EC's powers under the Common Commercial Policy, a high debate arose as the scope of the CCP was also extended in the field of initial establishment. This led to the two Opinions of the Court of Justice mentioned above, and to the amendment of the EC Treaty by the Intergovernmental Conferences in Amsterdam and Nice.

In Opinion 1/94, the Court held that the establishment of a legal entity under the GATS did not fall under the Common Commercial Policy and, therefore, it was not within the Community's competence to intervene in that area. The Court, in fact, while echoing the Court's earlier ruling on the dynamic nature of the Common Commercial Policy,[139] and stating that GATS cannot be excluded absolutely from the scope of the CCP, specified that commercial matters provided for in the GATS are excluded from the scope of the CCP, thus removing the Community's exclusive competence in this area.[140]

Since the Intergovernmental Conferences in Amsterdam and Nice, the scope of Article 133 has been extended, especially in the area of TEC establishment. For instance, the Community has competence in the conclusion of international agreements in the area of trade in services.[141] Although the Treaty only mentions services in Article 133(5) TEC, it also covers trade in services. Therefore, the Community has competence in regulating the establishment of entities that want to pursue activities in the services sector. Thus, after the Treaty amendments, the Community acquired a legal basis to intervene in the area of the establishment of foreign investors. Although this power was limited to the services sector only, the fact that the Community was expressly granted the power to intervene in this area constituted a first step towards the inclusion of

[139] Opinion 1/78 1978] ECR 2151.

[140] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 85.

[141] M. Cremona, *Balancing Union and Member State interests: Opinion 1/2008, choice of legal basis and the common commercial policy under the Treaty of Lisbon*, in 35 EL Rev (2010), pp. 678, 683–684; M. Cremona, *A Policy of Bits and Pieces? The Common Commercial Policy after Nice*, in 4 CYELS (2001), pp. 61, 69–70; S. Griller, B. Weidel, *External Economic Relations and Foreign Policy in the European Union* (2002), pp 91–93.

establishment and foreign direct investments within the Common Commercial Policy.[142]

As mentioned above, the Union's competence derives in the first instance from Article 133 TEC and, due to the lack of full competence in the area of establishment, this field was extended by the discipline of implied powers.[143] In fact, whereas Article 133 TEC established an express competence of the Community in the establishment of foreign investors in the area of services, the implied powers sought to extend this competence to all sectors of the economy.

Article 43 TEC (now Article 49 TFEU) did not provide for the establishment of foreign investors. In fact, this Article only expressly provides for "*the establishment on nationals of a Member State in the territory of another Member State*". Although the provision is very clear, it was held that Article 43 may give the Community implicit competence with regard to the establishment of third parties within the European Community.[144]

The Court of Justice comes to this conclusion in Opinion 1/94 where it recognises the Community's external competence with regard to the establishment of foreign investors within the European Community in the services sector. However, the Court's ruling will also have effects in the field of establishment in all economic sectors.[145] The EC Treaty confers ambitious powers on the Community to adopt all measures for the integration of the internal market in the area of freedom of establishment. These powers also include the competence to regulate the establishment of third-country nationals.[146] Indeed, Article 44 TEC (now Article 50 TFEU) identifies the areas in which the Community may take action to pursue freedom of establishment, and Article 94 TEC[147]

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[142] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 89.

[143] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 89.

[144] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 90.

[145] Opinion 1/94 [1994] ECR I-5267 para 81.

[146] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 90.

[147] Article 94 TEC: "*The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market*."

(now Article 115 TFEU) States that it is for the Community to harmonise the area of freedom of establishment. This entails the Community's competence to regulate the establishment of European citizens in all economic sectors.[148] However, in order to ensure the functioning of this discipline, the establishment of third parties also had to fall under Community competence. If this had not been the case, the domestic legislation of the Member States could have created a non-homogeneous regulation at Community level of the establishment of third parties, thus preventing Community legislation from being able to guarantee a uniform regulation for economic activities.[149] Therefore, Community competence with regard to the regulation of the establishment of third parties was necessary.

In contrast to the initial establishment, where the Community's competence was found in Article 133 TEC and the implied powers, the regulation of post-establishment is clearer and less controversial. The EC has the competence to regulate foreign investments in its territory, but also the competence to negotiate the post establishment discipline of EU nationals in third countries.[150]

In conclusion, the EC had the competence to regulate initial and post-establishment foreign direct investments. However, although there were several legal bases for the Community to regulate in this area, the Community did not have exclusivity to regulate in all areas. Therefore, room was left for Member States to intervene in this field.

This dualism between the Community and the Member States, caused by the lack of an express provision explicitly allocating competence to the Community or the States, results in partial and incomplete Community regulation of foreign direct investments.[151]

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[148] S. Weatherill, *Supply of and demand for internal market regulation: strategies, preferences and interpretation, in Nic Shuibhne (ed), Regulating the Internal Market* (2006), pp 38–44.

[149] S. Griller, B. Weidel, *External Economic Relations and Foreign Policy in the European Union* (2002), p 80.

[150] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 93.

[151] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 94.

2.3.2.2. FDI under the "Lisbon Treaty"

With the entry into force of the Lisbon Treaty, the European Union was given explicit competence in the field of foreign direct investments, by including them in the Common Commercial Policy. In fact, Articles 206[152] and 207[153] TFEU explicitly refer to foreign direct investments.

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[152] Article 206 TFEU: *"By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."*

[153] Article 207 TFEU: "*1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*
2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.
3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.
The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.
The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.
4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.
For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.
The Council shall also act unanimously for the negotiation and conclusion of agreements:
(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.
5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

It should be specified that the Treaty does not refer to all foreign investments, but only to direct investments, thus excluding portfolio investments[154] from the Common Commercial Policy.[155]

With regard to the substantive content of the EU's competence in the area of foreign direct investment, the powers attributed to the EU in that area do not mean that the EU can intervene in all aspects concerning FDI.[156] Indeed, the establishment of FDI falls under Article 207 TFEU, but other chapters of the TFEU also deal with aspects that relate to FDI. Therefore, the scope of Article 207 TFEU should also be coordinated with the other rules that grant powers in this area. In fact, Article 207(6) TFEU itself provides for limits to the powers conferred on the Union in the field of the Common Commercial Policy.[157]

Issues of initial establishment also fall within the competence of foreign direct investment. In fact, the inclusion of this area in the Common Commercial Policy indicates that the Union's competence in this field is primarily concerned with the market access of foreign investors, thus granting the Union powers to intervene in this regard.[158]

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6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.."

[154] The Court of Justice has described "portfolio investments" as "*the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking*". See Judgment of 28 September 2006, Commission v. Kingdom of the Netherlands Joined cases C-282/04 and C-283/04, ECLI:EU:C:2006:608, para. 19

[155] In addition to portfolio investments, foreign investments in the form of concession contracts are also excluded. This does not mean that portfolio investments and investments in the form of concession contracts are excluded from the external competence of the EU. W. Shan, S Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy* (2010) 21 EJIL pp. 1049, 1064.

[156] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 95.

[157] Article 207(6) TFEU: "*The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."*

[158] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 95.

The broadening of the scope of the Common Commercial Policy, in which, as mentioned, foreign direct investments are now included, makes it necessary to establish a relationship between the internal and external powers of the Union on this topic. Article 133(6) TEC provided for a broader external than internal competence in the field of the Common Commercial Policy.[159] The Lisbon Treaty, in order to avoid this paradox, adopted a slightly different approach in Article 207(6) TFEU. The Article in question provides, in fact, that the powers of the Member States are preserved in those areas in which the Union's competence is entirely excluded.[160] Therefore, Member States are free to act in those areas that have not been harmonised, and therefore do not fall within the competence of the Union. Paragraph 6 provides in fact that the Union may not exercise its powers towards third countries where its competence in the EU internal market is limited. Thus, Member States retain their competence to regulate that particular area of the internal market.[161] The consequence is that the Union, when acting in the field of the Common Commercial Policy with third parties, will be subject to the same internal limitations.

Article 207(6)(2) TFEU again plays a key role in the analysis of the Union's competence in the area of foreign direct investment. Indeed, this paragraph places a

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[159] Article 133(6) TEC: "*An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.*

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300."

[160] Article 207(6) TFEU: "*The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."*

[161] J. Ceyssens, *Towards a common foreign investment policy?—Foreign investment in the European constitution*" (2005) 32 LIEI, p. 279-80; M. Krajewski, *External Trade Law and the Constitutional Treaty: Towards a federal and more democratic common Commercial Policy?* (2005) 42 CMLR, p. 115.

limitation on the Union in regulating the admission and regulation of FDI: the Union's competence is limited where harmonisation is excluded. This means that the EU cannot take advantage of the areas in the Common Commercial Policy to harmonise sectors that are dealt with in other chapters of the Treaty, where harmonisation is not provided for.[162]

[162] See A. Dimopoulos, *EU Foreign Investment Law*, supra n 1, at p. 97.

3. European Technological Sovereignty

The topic of sovereignty has always been at the heart of the political and legal discussion of the European Union, as well as in the international context. The founding principle of the Union lies in Member States ceding a portion of their sovereignty in favour of greater harmonisation of national legal systems. The sharing of sovereignty has led to the establishment of a so-called supranational Community that, by pivoting on the sovereignty of individual States, has opened the debate on the existence or non-existence of European sovereignty, as well as its autonomy.[163]

The debate is therefore about the sovereign nature or otherwise of the Union, leading, in the process, to the question of whether there is a technological sovereignty of the European Union.[164]

Many European politicians and exponents of Union's institutions have spoken out in recent years on the subject of both European sovereignty and the more specific issue of technological sovereignty.[165]

It is necessary, before arriving at a definition of European technological sovereignty, to analyse the broader concept of sovereignty, and how it should be understood both in the light of the individual States and in relation to the European Union, as the Member States and the European Union (and, before the EU, the European Community), are based on the limitation of sovereignty of the States themselves; and it is, therefore, necessary to start by examining the concept of sovereignty. Next, we will move on to the analysis of European technological sovereignty, whether it exists or not, and how it can impact both the individual Member States and the international community.

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[163] Among the key rulings of the European Court of Justice, which laid the foundations for the supranational and primacy nature of the Union, Court of Justice, judgment of 15 July 1964, case 6/64, Costa v. Enel; Court of Justice, judgment of 5 February 1963, case 26/62, Van Gend & Loos.

[164] In doctrine, the term "technological sovereignty" is also often expressed as "digital sovereignty".

[165] Presidency of the French Republic, Initiative pour l'Europe – Speech of Emmanuel Macron pour une Europe souveraine, unie, démocratique, 26 September 2017; European Commission, Press release, European sovereignty: What does it mean to President Juncker?, 12 September 2018, available at ec.europa.eu.

3.1 Between sovereignty and autonomy

One of the first jurist and philosopher to deal with the subject of sovereignty was Jean Bodin, who theorised the concept of sovereignty in the 16th century. Obviously, the theme of "supreme power" has been addressed many times in the past, passing from Roman law, with the expression "*princeps legibus solutus*",[166] to the Middle Ages, where the concept of imperial universalism gave way to an idea of the sovereign no longer linked to the ownership of the imperial dignity.[167] From the twelfth century onwards, a thought evolved that overcame, on the one hand, local powers of feudal matrix and, on the other, the imperialist conception (of both the Empire and the Church), going on to form an entity juridically distinct from those just mentioned; one speaks, therefore, of a 'national State'.[168] Bodin's thought has its origins in this context just described, which theorises sovereignty with two very precise characteristics: supremacy - with respect to citizens and local powers - and independence - from other States, which can be internal or external.

For Bodin, sovereignty is necessary to guarantee social peace, which is achieved through supreme power in the hands of the sovereign; power, therefore, is absolute. If for Bodin, as well as for Hobbes thereafter, sovereignty was absolute in the hands of the monarch, during the 17th century the paradigm changes.[169] Indeed, after the Glorious Revolution of 1688,[170] sovereignty no longer belonged exclusively to the monarch, but was based on the King-Parliament axis. In France, in a similar manner, Rousseau theorised the concept of popular sovereignty; the will of the community is

[166] Expression contained in the Digesta of the Roman jurist Ulpianus.

[167] M. Da Caramanico, *Proemio al Liber constitutionum*, in F. Calasso, *I glossatori e la teoria della sovranità. Studi di diritto comune pubblico*, III ed., Milano, Giuffrè, 1957.

[168] C. Mortati, *Istituzioni di diritto pubblico*, I, Padova, Cedam, 1975, pp. 98 ss.

[169] J. Bodin, *I sei libri dello Stato* (1576), a cura di M. Isnardi, Parente, Torino, Utet, 1964.

[170] King James II of England was overthrown and replaced with William III of Orange and his wife Mary II, daughter of King James II. It was the beginning of a new parliamentary monarchy.

expressed through the law.[171] In this evolution, the concept of sovereignty retains its initial characteristics, namely supremacy and independence.[172]

The concept of independence, as pointed out earlier, implies that the State does not recognise entities superior to it. This conception, product of the 16th century, took concrete form in 1648 with the Treaties of Westphalia, which recognised the plurality of State orders and their equal status; this gave rise to international law, as it identified States as subjects of law.[173] From this conception necessarily derives the reasoning that all State orders are nothing but relative to the absolute one, that is the international order. For Kelsen, in fact, the federal State is to be understood as a separate order from that of its Member States.[174]

The post-World War II period played a fundamental role in overcoming a merely nationalistic view of States up to that time, thus initiating the process of community integration.[175] Obviously, the process of building what is now the European Union is characterised by the transfer of sovereignty from Member States to the supranational body. The European Union, therefore, has challenged the traditional concept of sovereignty, since, as has been described in the doctrine, it constitutes an element of novelty compared to international law organisations and State legal orders.[176] The European Union can be defined - in relation to the concept of sovereignty - as a paradigm of 'solidarity-based sovereignty', in which the EU and State legal systems constitute a single legal experience, articulated according to the division of competences.[177]

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[171] J.J. Rousseau, *Il contratto sociale* (1762), a cura di G. Perticone, Milano, Mursia, 1965.

[172] G. Silvestri, *La parabola della sovranità. Ascesa, declino e trasfigurazione di un concetto*, in Riv. dir. cost., 1996, p. 5 ss.

[173] P. Passaglia, *Sovranità*, in S. Cassese, Dizionario di Diritto Pubblico, Cedam, Roma, p. 5649.

[174] H. Kelsen, *Teoria generale del diritto e dello Stato* (1945), Milano, Comunità, pp. 321 ss.

[175] Remember how the European Coal and Steel Community was set up by the six founding countries (Germany, France, Italy, Netherlands, Belgium, Luxembourg) to prevent one country alone from manufacturing weapons of war for use against other countries.

[176] P. Passaglia, Sovranità, in S. Cassese, *Dizionario di Diritto Pubblico*, Cedam, Roma, p. 5649.

[177] E. Cannizzaro, *Esercizio di competenze e sovranità nell'esperienza giuridica dell'integrazione eruopea*, in *Riv. dir. cost*., 1996, p. 75 ss.

We are currently in what is known as the "sovereignty crisis", caused by the phenomenon of globalisation, which has rendered obsolete the purely national vision of sovereignty, anchored to a State dimension, as it is unsuitable for dealing with the problems of the new society.[178] What happens, therefore, is that sovereignty is shifted from the State to other supra-State bodies (such as, for example, the European Union), and thus there is a split in some cases of formal sovereignty, which remains with the State, from substantial sovereignty, which shifts to other entities.[179]

It is evident, therefore, that the 'original' concept of sovereignty, which had the characteristics of supremacy and independence, is no longer relevant today. As we have seen in the first chapter, the European Union, although not a State, holds competences (in some cases exclusive, in others shared with Member States), which make it de facto holder of those powers that can be traced back to the concept of sovereignty (which, as we have seen, has traits that are dynamic). In any case, as mentioned above, whether it is a matter of substantial or formal sovereignty matters relatively, what is relevant is the autonomy with which the Union can act in the areas in which it has been granted competence. It is no coincidence that, in doctrine, the European Union has also been spoken of as a 'post sovereign' project, in which it is not sovereignty that is the pivotal point of the Union, but rather the rule of law;[180] which, in essence, would mean nothing other than that the law of the European Union itself would become sovereign.[181]

The term sovereignty has been used, as mentioned above, by many European leaders to emphasise the concept of "European Sovereignty". French President Emmanuel Macron, in 2017, defined it as "*our capacity to exist in the world as it currently exists,*

[178] M. R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, Il Mulino, 2000.

[179] P. Passaglia, *Sovranità*, in S. Cassese, *Dizionario di Diritto Pubblico*, Cedam, Roma, p. 5650.

[180] G. De Baere, *European Integration and the Rule of Law in Foreign Policy*, in J. Dickson, P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 363.

[181] F. Jacobs, The Sovereignty of Law: The European Way, Cambridge: Cambridge University Press, 2007.

to defend our values and our interests".[182] Macron specified, in the same speech, how this is still to be built. Similarly, in 2020, speaking about Brexit, he emphasised how the Union can only continue to grow if it is deeply reformed, making it more sovereign and democratic.[183]

These "European sovereign impulses" also come from within the institutions of the Union. In 2018, the President of the European Commission, Jean-Claude Juncker, said that "*geopolitics teaches us that the time has come for European sovereignty, for Europe to take its destiny into its own hands. [...] This belief that 'united we stand taller' is the very essence of what it means to be part of the European Union [...] Sharing sovereignty where we need to makes each of our nation States stronger*".[184] The Commissioner of the Internal Market, Thierry Breton, also commented on this, stating that "Europe must see itself as a political, strategic and sovereign power".[185] It is no coincidence that constant references to European sovereignty, made by both political and institutional leaders, can also be found in official EU documents adopted in the field of technology.[186]

A clear tendency and a rather unified vision on the part of European leaders emerges from these Statements; geopolitical changes and the role of foreign investors play a fundamental role in the security and development of the Union. While it is true that the question of European sovereignty has always sparked great debates, in recent decades the issue has become extremely important. Since its inception, the Union has done nothing but strengthen itself in all respects, especially economically and legally, by

[182] Presidency of the French Republic, Initiative pour l'Europe – Speech of Emmanuel Macron pour une Europe souveraine, unie, démocratique, 26 September 2017, available at www.elysee.fr: "Notre capacité à exister dans le monde actuel pour y défendre nos valeurs et nos intérêts".

[183] Presidency of the French Republic, Plus que jamais nous avons besoin d'Europe. Message by the Prési- dent Emmanuel Macron on Brexit, 31 January 2020, available at www.elysee.fr: "[L]'Europe ne pourra conti- nuer d'avancer que si nous la réformons en profondeur, pour la rendre plus souveraine, plus démocra- tique, plus proche de nos concitoyens et donc plus simple aussi dans son quotidien".

[184] European Commission, Press release, European sovereignty: What does it mean to President Juncker?, 12 September 2018, available at ec.europa.eu.

[185] Tweet by @ThierryBreton of 15 February 2020, available at twitter.com.

[186] Communication COM(2020) 50 final of 29 January 2020 from the Commission, Secure 5G deployment in the EU – Implementing the EU toolbox.

protecting and favouring Member States. If, as emerges from the EU's official documents, there is a need to create and/or strengthen European technological sovereignty, then evidently at this time this 'gap' constitutes a weak point in the Union's development.

The concept of sovereignty began to circulate within the European institutions thanks to the *Van Gend en Loos* and *Costa v. Enel* rulings. The Court of Justice emphasised the idea of the limitation of national sovereignty in favour of a "new legal order".[187] More recently, in another case, the Court of Justice used the term "sovereignty" in the context of the Area of Freedom, Security and Justice; the European Arrest Warrant system aims to go beyond mere cooperation between States, with the aim of creating a supranational legal institution through European legislation.

Thus, the objective of European law has always been to achieve a dual aim: a limitation of national sovereignty and, through this limitation, the construction of the European Union by law. [188]

The pursuit of these objectives, however, cannot be achieved by appropriating the term "sovereignty" to the European Union. Within the individual Member States, the notion of 'sovereignty' denotes the unity of the State and at the same time its diversity from the Member States. On the other side of the coin, the European Union, being a federation of States, with the aim of striking a balance between the unity of all Member States and their diversity, needs a term that can symbolise the unity of the States and, at the same time, the nature of the Union as an entity distinct from the States themselves.[189]

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[187] "*By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves*." Court of Justice, judgment of 15 July 1964, case 6/64, Costa v. Enel, p. 593.

[188] T. Verellen, *European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty*", in *European Papers*, Vol. 5, n. 1, 2020, p. 310.

[189] See T. Verellen, European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty", supra n 206, at p. 310.

The Court of Justice, in its search for a metaphorical term that could symbolise the sovereign function of the Union, used the expression "new legal order".[190] With this term, the Court highlights a difference between State and European law. Indeed, with the Van Gend en Loos judgment, the Court established the cardinal principle that the assessment of the direct effect of a European rule in the legal order of a Member State is a matter for the Court itself, and not for the national court. The Court's aim was to protect and strengthen the autonomy of the European Economic Community from Member States' attempts to instrumentalise the Community institutions in their favour.[191] In fact, in both Van Gend en Loos and Costa, the Court wanted to define the meaning of the "new legal order", emphasising its institutional dimension, which as such enjoys its own autonomy, and that, therefore, since this institution is a benefit to the Member States, these States have limited their sovereignty in order to benefit from it.[192] By the expression "new legal order", the Court concretises the autonomy of the European institutions with respect to the Member States. This autonomy is characterised by the ability of European institutions to take decisions independently, in accordance with the Treaties.[193]

The Court also protected the autonomy of European institutions vis-à-vis the international order. In fact, in the Court's Opinion 2/13, it held that the European Union could not accede to the European Convention of Human Rights under the conditions initially proposed, as they severely limited the ways in which national courts could refer questions concerning the interpretation of European law to the Court of Justice.[194] A similar intervention but with a different outcome is Opinion 1/17, where the Court ruled that CETA in no way threatens the autonomy of European institutions.[195]

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[190] Court of Justice, Judgment of 15 July 1964, case 6/64, Costa v. Enel, p. 593.

[191] See T. Verellen, European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty", supra n 206, at p. 311.

[192] Supra n 208.

[193] See T. Verellen, European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty", supra n 206, at p. 311.

[194] Court of Justice, opinion 2/13 of 18 December 2014.

[195] Court of Justice, opinion 1/17 of 30 April 2019.

Another key passage on the autonomy of the European Union is in the Kadi I judgment. The Court specifies that the principle of autonomy does not only cover the prerogatives of the Court, but embraces all European institutions; it is referred to as the "autonomy of the Union legal system".[196] The principle of autonomy thus denotes not only the Court's ability to autonomously interpret and apply European law, but also the autonomy of the European institutions to act freely (but, as mentioned before, always in compliance with the Treaties). The Union, therefore, must act in defence of its values and principles, and can succeed precisely because of this autonomy.[197] The special feature of the autonomous nature of the Union lies in the fact that it is not recognised as a State in international law. The principles of territorial integrity and non-intervention in the affairs - internal and external - of a State derive from international law, which are recognised in "State sovereignty". The EU, therefore, as it does not have the status of a State, cannot be defined as sovereign under international law. However, at the same time, the Court of Justice, as mentioned above, felt the need to emphasise that the powers vested in the institutions are in fact an exercise of sovereignty. As said before, in the Hobbesian[198] conception of sovereignty there is the internal sovereignty, i.e. the authority of the State to act within a given territory, and the external sovereignty, which emphasises the independence of a State from others, together with the capacity to maintain relations with other subjects of international law.[199] The concept of external sovereignty necessarily implies that the State in question exists, and at the same time is able to act in defence of its principles and values; all this through its capacity to assume obligations.[200] It is evident how there is a strong parallelism

[196] Court of Justice, Judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, Kadi v. Council and Commission, para. 282.

[197] J. Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?*, in M. Cremona (ed.), *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, 2018, p. 291.

[198] And, before him, Bodin

[199] See T. Verellen, *European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty"*, supra n 206, at p. 313.

[200] Permanent Court of International Justice, S.S. Wimbledon (Britain et al. v. Germa- ny), judgment of 17 August 1923, para. 35: "*No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be*

between the concept of the 'new legal order' used by the Court, together with the principle of autonomy, and between the concept of sovereignty - internal and external.[201]

To conclude, there can be two types of sovereignty: a weak and a strong one. The first is nothing more than the will to have a high degree of authority, which is not absolute, and in a federal system such as the European one, it is evident that sovereignty is of this type. It differs from the second type of sovereignty, which is Hobbesian, i.e. internal and external, which is necessarily indivisible and absolute. The European Union, therefore, can be seen as having a weak sovereignty internally,[202] while autonomy can be seen as having a strong sovereignty externally.[203]

If one takes Macron's speech quoted above, in which a European sovereignty is invoked, and compares it to the concept of autonomy examined so far adopted by the Court, it becomes clear which direction the Union wants to take. Europe wants to build an "external sovereignty", and in order to be able to do so, it must first build an "internal" one.[204] In order for the European Union to govern its territories effectively, two things are needed: the ability for EU institutions to take decisions independently of Member States, and secondly, the ability to enforce those decisions against Member States.[205] In order to achieve this, it is necessary to check that the Member States do not engage in activities that could undermine the Union's autonomy in this respect. Obviously, the autonomy of the Union and the Member States is undermined when

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exercised in a certain way. But the right of entering into international engagements is an at- tribute of State sovereignty".

[201] C. Eckes, *The Autonomy of the EU Legal Order, in Europe and the World*, in *A Law Review* (2020), p. 19. Case 181/73, *Haegeman* ECLI:EU:C:1974:41; Opinion 2/13 re EU Accession to the ECHR EU:C:2014:2454; Opinion 1/17, re CETA ECLI:EU:C:2019:341; Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission ECLI:EU:C:2008:461.

[202] Being endowed with primacy, but with the ability to rule only in limited areas.

[203] Indeed, the Court, as mentioned before, in the Kadi I case, places European treaties on a higher level than international law.

[204] C. ECKES, *The Reflexive Relationship Between Internal and External Sovereignty*, in *Irish Journal of European Law* (2015), p. 43.

[205] M. Rhinard, G. Sjöstedt, *The EU as a Global Actor: A New Conceptualisation Four Decades after "Actorness" in Swedish Institute for International Affairs* (2019), p. 6.

there are strong external pressures (i.e. from third countries) that, through their influence, risk bringing values into the European circuit that are not in line with those of the Member States. The greatest form of influence a third country can have on another country is precisely that of foreign direct investments. It is precisely from this external pressure that the Union wants to protect itself, through a screening mechanism - already present in many Member States for some years now - established by European law in Reg. 452/2019. The purpose of the Regulation, in line with what has just been examined, is precisely to make the EU less exposed to pressures that are "external" to the Union, and thus, in other words, to strengthen that external sovereignty that the Union is pursuing.[206]

3.2 Different definitions converging on the same solution?

Over the last few decades, the European Union has become concerned about "'foreign" interference within it, which could undermine the Union's sovereignty, resulting from the growth and development of the technological sphere. It was for this reason that the Union decided it wanted to protect its interests, and thus its sovereignty, in the area of technology, thereby bringing the discussion to the concept of "technological sovereignty".[207]

This can be interpreted, rather than defined (since, as seen, there is no unanimous definition of the concept of technological sovereignty), as "*the strategic autonomy and independent capacity for action of individual polities in domains affected by technologies, as guaranteed by a variety of technology, industrial and security policy instruments, and/or their control over technological developments and the deployment of technologies*".[208] A practical example can be the GDPR (General Data Protection

[206] A. Orenstein, R.D. Kelemen, *Trojan Horses in EU Foreign Policy: Europe's Hybrid Foreign Policy in Journal of Common Market Studies*, (2017), p. 87.

[207] M. Varju, *The protection of technology sovereignty in the EU: policy, powers and the legal reality, in European Law Review* (2022), 47(4), pp. 568-583.

[208] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 568.

Regulation), which gives an autonomous capacity to control access to and use of data, as well as the protection of privacy rights, within the territory of the EU.

The EU's objective to protect its technological sovereignty is complex as it lacks express competence. Indeed, in order to be able to intervene in this area, the EU has to make use of its competences in the socio-economic field, which are also limited. Therefore, when the EU intends to intervene in the field of technological sovereignty, it must do so by relying on that base, for example, by exploiting security issues related to technological dependence.[209]

The EU has competence to intervene in the regulation of the technology market and, as mentioned, can also intervene in security issues (thanks to Articles 72 and 346 TFEU).[210] However, the EU, when intervening in the area of technology sovereignty, must respect the actions taken by Member States to protect national security. The natural consequence of this premise is that the EU, in order to build European technological sovereignty, must necessarily work together with the Member States.[211]

Common European elements denoting the concept of technological sovereignty are: the strategic autonomy of States; and the ability to influence and control the development and/or distribution of technology.[212]

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[209] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 568.

[210] The topic will be discussed in more detail further on. Article 72 TFEU: "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."; Article 345 TFEU: "*1. The provisions of the Treaties shall not preclude the application of the following rules:*
(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply."

[211] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 569.

[212] S. Couture and S. Toupin, *What Does the Notion of 'Sovereignty' Mean When Referring to the Digital?* (2019) 21 New Media and Society, pp. 2305–2307.

In doctrine, the different definitions of technological sovereignty have been divided into two macro-groups, which, in themselves, contain different notions.[213]

The first group can be qualified as "central notions", while the second as "substantive notions".

Within the first group, the first notion emphasises the autonomy and independence of action on the part of States, in which the achievement of certain objectives in the field of innovation and industry plays a fundamental role, as well as in the development of policies in the technological sphere that also have socio-economic implications, thanks to the use of advanced technologies. According to this view, the high level of protection of personal data, along with national security, from "external" technological threats is also relevant.[214]

A second view, again within the first group, focuses on the element of territoriality. This conception values autonomy of control in a given territory and aims to eliminate technological dependence on other States.[215]

The last of the notions in this first group analyses technological sovereignty from an "external" point of view. This, in fact, values not so much the autonomy or dependence of a given State as the ability of the Union to export or set certain quality and/or production standards[216] in the production and distribution chain of technological elements, as well as the regulation of trade in the technological sphere.[217]

All these three different visions find a point of contact in self-determination and economic sovereignty.[218]

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[213] M. Varju, *The protection of technology sovereignty in the EU*: policy, powers and the legal reality, in European Law Review (2022), 47(4).

[214] Couture, Toupin, *What Does the Notion of 'Sovereignty' Mean When Referring to the Digital?* (2019) 21 New Media and Society 2305, 2310–2312.

[215] Couture, Toupin, "*What Does the Notion of 'Sovereignty' Mean When Referring to the Digital?*" (2019) 21 New Media and Society 2305, 2310–2312; Edler, *Technology Sovereignty* (2020), pp.10–11. M. Bauer and F. Erixon, *Europe's Quest for Technology Sovereignty: Opportunities and Pitfalls* (ECIPE Occasional Paper 02/2020), pp.4 and 28.

[216] It has been referred to in doctrine as the "Brussels effect". Mirela Mărcuț, Evaluating the EU's role as a global actor in the digital space, ROMANIAN JOURNAL OF EUROPEAN AFFAIRS, Vol. 20, No. 2, December 2020.

[217] Bauer and Erixon, *Europe's Quest for Technology Sovereignty* (2020), p.6.

[218] Bauer and Erixon, *Europe's Quest for Technology Sovereignty* (2020), p.7; Edler, *Technology*

The definitions within the second group, on the other hand, focus on concrete strategic independence[219] and self-determination in the field of technology.[220] The definitions within this group focus not so much on the influence and control of technologies, but on the concrete availability of having the tools - both know-how and materials - to be able to produce - even potentially - key technologies. To be able to do this, it is necessary to have researchers and experts in the field of technology; without these elements, true technological sovereignty will never be attainable.[221] Furthermore, what emerges from the definitions in this second group is that strategic autonomy depends on the strength of industrial policies and successful investment in research and development in the field of innovation and technology.[222] Following the line of definitions in this second group, in fact, the mere possibility of control and/or influence (i.e. the typical elements of the first group) over technological elements or processes is not sufficient to achieve sovereignty in this field. States must also diversify in investments, management, and production, as well as in control, in order to guarantee industrial and socio-economic policies that can strengthen technological sovereignty, especially in the future.[223]

Another necessary element, according to the definitions in the second group, is the security and adaptability of technological infrastructures and systems.[224] Therefore, information and communication systems, which make up so-called technological infrastructures, must be protected, secure and have protection systems in the event of a system crisis. The protection of these infrastructures and systems by States is the

Sovereignty (2020), p.2; *Technological Sovereignty: Methodology and Recommendations* (VDE-Verband der Elektrotechnik Elektronik und Informationstechnik e.V. Position Paper 2021), pp.4-5.

[219] Such as, for example, in the fields of human resources, industry and technology.

[220] Edler, *Technology Sovereignty* (2020), p.12; *Technological Sovereignty: Methodology and Recommendations* (VDE-Verband der Elektrotechnik Elektronik und Informationstechnik e.V. Position Paper 2021), pp.12–13.

[221] Bauer, Erixon, *Europe's Quest for Technology Sovereignty* (2020), p.14.

[222] Edler, *Technology Sovereignty* (2020), p.4; *Technological Sovereignty: Methodology and Recommendations* (VDE-Verband der Elektrotechnik Elektronik und Informationstechnik e.V. Position Paper 2021 p 5.

[223] Edler, *Technology Sovereignty* (2020), p.4.

[224] Bauer and Erixon, *Europe's Quest for Technology Sovereignty* (2020), pp. 26-27; Edler, *Technology Sovereignty* (2020), p.6.

foundation on which the State itself, or the European Union, then goes on to build technological sovereignty; by guaranteeing the protection of these systems, both the economy and national security are protected.[225]

Beyond the definition one wishes to adopt, an indicator of what the demands for technological sovereignty are emerges from national and European policies.[226] The main concerns arise in relation to the security of computer and technological data, and national security in the case of technological dependence on third countries.[227] Indeed, technology security risks, such as in the case of communication or information systems, expose the national security of one or more States to numerous threats.[228]

As the supply chain related to the technology sector is highly globalised, this, on the one hand, can ensure constant worldwide supply of products and services, but on the other hand, exposes those who are supplied when the supply chain no longer functions as it should, thus affecting the technological sovereignty of the State(s) involved.[229] This is why it would be desirable for production and/or procurement policies for technological elements to be carried out by the European Union itself or at least by third countries that share European values. In fact, the EU has begun to move in this direction, insisting on policies that make the Union recognised as a reliable supplier, especially in relation to an approach aimed at giving centrality to the human aspect and the protection of rights in the technology sector.[230]

3.3 EU's policies regarding Technological sovereignty

We start talking about European technological sovereignty in 2018, in the "State of the

[225] Edler, *Technology Sovereignty* (2020), p.12.

[226] Edler, *Technology Sovereignty* (2020), p.15; Bauer and Erixon, *Europe's Quest for Technology Sovereignty* (2020), p.2.

[227] *Technological Sovereignty: Methodology and Recommendations* (VDE-Verband der Elektrotechnik Elektronik und Informationstechnik e.V. Position Paper 2021), p.4.

[228] T. Maurer et al, "*Technological Sovereignty: Missing the Point?*", in M. Maybaum et al (eds), Architectures in Cyberspace (NATO CCD COE Publications, 2015), p.53.

[229] Edler, *Technology Sovereignty* (2020), p.8.

[230] Bauer and Erixon, *Europe's Quest for Technology Sovereignty* (2020), p.9.

Union" address, which focuses on the broader concept of European sovereignty.[231] The idea is to achieve that strategic autonomy mentioned earlier, while at the same time maintaining forms of multilateralism in relations with third countries, which can, however, allow the Union to unilaterally develop areas such as technology, with the possibility of then benefiting from them collectively.[232] In 2019, European Commission President Ursula von der Leyen expressed how technological sovereignty should play a central role in the digital transformation strategy within the European economy.[233] The same document also mentions the approach to "critical technologies areas", which are not defined in any way;[234] however, the text shows that the Union's industrial policies must lead to technological self-determination in the EU.[235]

Then, in 2020, the concept of sovereignty was used in Germany to introduce the concept of technological and industrial autonomy in the EU, as well as "self-reliance" in strategic sectors.[236] The German government's document also shows the intention to invest in the development and protection of "key technological infrastructures", along with the safeguarding of digital infrastructure security.[237]

At European level, again in 2020, the European Commission published the Communication on Shaping Europe's digital future, in which it States that "*European technological sovereignty starts from ensuring the integrity and resilience of our data*

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[231] Commission, "State of the Union 2018: The Hour of European Sovereignty", available at: https://ec.europa.eu/info/sites/info/files/soteu2018-speech_en_0.pdf, p.5.

[232] Commission, "State of the Union 2018: The Hour of European Sovereignty", available at: https://ec.europa.eu/info/sites/info/files/soteu2018-speech_en_0.pdf, p.5.

[233] Ursula von der Leyen, "Political Guidelines for the Next European Commission 2019-2024", available at: https://op.europa.eu/en/publication-detail/-/publication/62e534f4-62c1-11ea-b735-01aa75ed71a1, p.13.

[234] Ursula von der Leyen, "Political Guidelines for the Next European Commission 2019-2024", available at: https://op.europa.eu/en/publication-detail/-/publication/62e534f4-62c1-11ea-b735-01aa75ed71a1, p.13.

[235] Ursula von der Leyen, "Political Guidelines for the Next European Commission 2019-2024", available at: https://op.europa.eu/en/publication-detail/-/publication/62e534f4-62c1-11ea-b735-01aa75ed71a1, p.13.

[236] "Together for Europe's recovery. Programme for Germany's Presidency of the Council of the European Union", available at: https://www.eu2020.de/eu2020-en/programme, pp.6 and 8.

[237] "Together for Europe's recovery. Programme for Germany's Presidency of the Council of the European Union", available at: https://www.eu2020.de/eu2020-en/programme, p. 8.

infrastructure, networks and communications. It requires creating the right conditions for Europe to develop and deploy its own key capacities, thereby reducing our dependency on other parts of the globe for the most crucial technologies. Europe's ability to define its own rules and values in the digital age will be reinforced by such capacities".[238]

At the substantive level, what the Commission wants to achieve, in addition to the security of its own digital infrastructure, is technological autonomy, through economic and industrial policies in line with European values, respect for the European consumer policy and the global competitiveness of the European economy, all while safeguarding European political identity.[239] In the document in question, the issue of security in digital technology is only addressed in relation to cybersecurity.[240] In addition to the aspect of the strategic and technological autonomy of the Union, the document also reveals the intention to influence the development and distribution of digital technologies, imposing the preferences of the Union itself. The aim, therefore, is to leave the European technology market open to actors from third countries, but at the same time to subject this access to respect for European values and rules and, not least, to ensure that EU policies are aimed at protecting the European interest.[241]

In 2020, the Commission again emphasised the aspect of 'self-determination' also in the field of Artificial Intelligence (AI), in the "White Paper on Artificial Intelligence - A European Approach to Excellence and Trust".[242] In the paper, the importance of technology as a parallel factor to those of the Union's competitiveness in economic, global leadership and public security terms emerges.[243] Also in this paper, published in parallel with the "European strategy on data", the importance of establishing a

[238] Commission, "Shaping Europe's Digital Future" COM(2020) 67 final, point 2.
[239] Commission, "Shaping Europe's Digital Future" COM(2020) 67 final, point 2; See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 572.
[240] Commission, "Shaping Europe's Digital Future" COM(2020) 67 final, point 2.
[241] Commission, "Shaping Europe's Digital Future" COM(2020) 67 final, point 2
[242] Commission, "White Paper on Artifical Intelligence – A European Approach to Excellence and Trust" COM(2020) 65 final.
[243] Commission, "White Paper on Artifical Intelligence – A European Approach to Excellence and Trust" COM(2020) 65 final, pp. 1-3.

"*human-focused approach to governing the data economy*" is emphasised,[244] which is therefore based on fundamental values and rights; all this to safeguard data sovereignty.[245]

Another key element in the discussion on technological sovereignty is 5G. The Commission believes that the 5G network is a fundamental driver of European society, and plays a major role in the strategic autonomy for the Union's economy, and for the influence the EU can have in the world.[246] Furthermore, the development of 5G technology is crucial for safeguarding the EU from foreign attacks. The possible risks related to cybersecurity are not only those understood in the narrow sense, such as "technical' risks, but also those understood in a broader sense, i.e. the 'overall risk of influence by a third country"[247] of a provider of technology products or services.[248] The 5G Toolbox refers to the division of competences between Member States and the European Union, especially in relation to national security. It is emphasised that close cooperation between the EU and Member States is necessary to ensure the security and

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[244] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 572.

[245] Commission, "A European Strategy for Data" COM(2020)66 final, point 3.

[246] Commission, "Cybersecurity of 5G Networks" COM(2019) 2335 final, rec.1–7.

[247] Cybersecurity of 5G COM(2019) 2335 final, rec.19–20.

[248] The 'Report on 5G Networks Risk Assessment' identifies possible cybersecurity threat actors: "*Non-Adversary/ Accidental: Non-adverserial/accidental threats manifest themselves as events that result from human error, natural phenomena, and systems failures. Individual hacker: Individual hackers represent amateur criminal or hobbyist hackers driven by financial motivation or a desire for notoriety. Hacktivist group: This threat actor has a political agenda. Their goal is to either create public attacks that help them*

distribute propaganda, or to cause damage to organizations they are opposed to. The ultimate goal is to find a way to benefit their cause or gain awareness for their issue. Organised crime group: Organised crime groups are motivated by financial gain. Insider: In the context of the security of 5G networks an insider threat refers to an insider working within a mobile network operator, or a mobile network's supplier. An insider may work for an organised crime group, a hacktivist group or a State actor, but individual motivations are not excluded. State actor or State-backed actor: The motivations of this category of attacker are primarily political. Other possible actors: Cyber- terrorists and corporate entities: Cyber terrorists are motivated by political aims and are likely to have very similar capabilities as an organised crime group.

Corporate entities may seek to gain competitive advantage in the technological area through Intellectual Property (IP) theft, theft of sensitive commercial data or by causing reputational or operational damage to their global competitors through cyberattacks." Commission, "Report on 5G Networks Risk Assessment"

use of technologies in Europe.[249] Member States, in their assessment of the implementation of the 5G Toolbox, pointed out that the protection of technological sovereignty depends on the willingness and preparedness of individual national governments to move in the same direction.[250]

In conclusion, the Union is seeking the protection of European technological sovereignty. This starts with broader concepts of sovereignty (also understood as strategic autonomy), such as economic or industrial sovereignty, and the maintenance and reinforcement of global geopolitical influence, and then arrives at the protection of technological sovereignty through policies aimed at safeguarding the security of information and technology systems and infrastructures, along with the security of both the European and national economies. The Union also wants to strengthen European values and rights in the field of technology. The task the Union has set itself, however, is not certain to be achieved; this is because the EU operates under what has been called a "socio-economic mandate",[251] which is instead required to adopt 'sovereign' policies. As mentioned before in relation to 5G technology, coordination between Member States and the EU is required in order to be able to implement and protect it, so that their respective competences can be integrated.

3.4 Finding a legal basis for EU's Tech sovereignty

3.4.1 EU competence and security

There are no competences specifically mentioned for the area of technological sovereignty, which is why an action covering different areas of EU competences is

[249] "Secure 5G Deployment in the EU—Implementing the EU Toolbox" COM(2020) 50 final, pp.7, 9–10 and 12.

[250] Commission, Report on Member States' Progress in Implementing the EU Toolbox on 5G Cybersecurity, available at: https://digital-strategy.ec.europa.eu/en/library/report-member-States-progress-implementing-eu-toolbox-5g-cybersecurity.

[251] See M. Varju, The protection of technology sovereignty in the EU, supra n 225, at p. 573.

required to intervene in this area.[252] For this reason, when policies are to be adopted to address the issue of technological sovereignty, they must be based on a specific competence attributed to the Union. While on the one hand it is possible to "glue" together different competences within the Union, on the other hand, the EU suffers from a lack of competence in the area of public and national security with regard to the issue of technological sovereignty.[253] Although the EU possesses sufficient powers to regulate the market in the technology sector, it does not have enough to be able to manage autonomously (i.e. without the intervention of the Member States) the risks related to the security of the distribution of these technologies, thus limiting the possibility of the EU being recognised as a global player in the tech sector.[254]

The Treaties are very clear; in fact, Article 4(2) TEU expressly States that the area of national security is under the competence of the individual Member States. The same Article also requires the EU to respect the essential functions of the States, including that of guaranteeing the integrity of the territory of the State itself, 'maintaining law and order and safeguarding national security'. In addition, there are possibilities for Member States to derogate on security-related issues. Article 346 TFEU, in fact, recognised as a general derogation, provides that States may derogate in cases of protection of certain national interests when their security is at risk. There are also derogations for specific public security reasons, such as in the area of the Area of Freedom, Security and Justice, for which the EU has express competence to regulate the European security aspects. However, Article 72 TFEU provides that EU action must not affect national policies for the maintenance of law and order and internal security.[255]

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[252] R.A. Wessel, "Cybersecurity in the European Union: Resilience through Regulation?", in E. Conde, Z. Yaneva and M. Scopelliti (eds), Routledge Handbook of EU Security Law and Policy (Abingdon: Routledge, 2019), p.287.

[253] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 574.

[254] R.A. Wessel, "Cybersecurity in the European Union: Resilience through Regulation?", in E. Conde, Z. Yaneva and M. Scopelliti (eds), Routledge Handbook of EU Security Law and Policy (Abingdon: Routledge, 2019), p. 290.

[255] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at pp. 574-575.

It should be specified that the derogations provided for in Articles 72 and 346 TFEU do not confer absolute powers on Member States, as policies adopted for security matters are still subject to the control of European law.[256] Looking at Article 2 TFEU, it seems rather unlikely that the competences attributed to Member States in the above-mentioned derogations constitute exclusive powers for national governments. Compared to the previously mentioned derogations, the nature of the security clause in Article 4(2) TEU is more complicated to establish, as its wording is different from the other two.[257] However, there may be similarities with Articles 72 and 346 TEU.

The provision under examination falls between Article 4(1) TEU and Article 5 TEU, which mentions the principle of conferral, which jointly stipulate that when a certain power has been conferred upon the Union, Member States must observe the obligations arising from the exercise of those powers.[258] Therefore, the derogation in Article 4(2) TEU cannot be applied in those cases where powers have been conferred upon the Union in those areas that may affect national security. By the same means, there is no absolute guarantee that the Union's intervention cannot also touch on aspects of national security of individual Member States.[259] What this Article States is that there is an obligation for the Union, when exercising its powers, to recognise that the task of protecting national security falls under the responsibility of the Member States, and to verify that the States are able to fulfil this task.[260]

If the ECJ's jurisprudence is examined, it again confirms that the measures just mentioned do not confer exclusive competence on Member States for matters of national security. In Commission v Portugal, the ECJ ruled that "*although it is for Member States to take the appropriate measures to ensure law and order on their*

[256] P. Koutrakos, "*Public Security Exceptions and EU Free Movement Law*", in P. Koutrakos, N. Nic Shuibhne and P. Syrpis (eds), Exceptions from EU Free Movement Law (Oxford: Bloomsbury-Hart, 2016), p. 190.

[257] De Witte, "*Exclusive Member State Competences*", in The Division of Competences Between the EU and the Member States (2017), p. 70.

[258] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p.575.

[259] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p.575.

[260] De Witte, *Exclusive Member State Competences*, in *The Division of Competences Between the EU and the Member States* (2017), pp.70–71.

territory and their internal and external security", this does not mean that the measures taken "*fall outside the scope of European Union law*".[261] The clauses provided for do not exclude the exercise of powers by the Union in security matters, nor do they provide for general exceptions in favour of Member States.[262] The Court specified that Member States may intervene in relation to a national security interest in "exceptional and clearly defined cases".[263] With specific regard to the derogation under Article 4(2) TEU, the case law specified in Commisison v Hungary that Member States may derogate from their obligations under European law.[264] However, a prerequisite for the exercise of such a derogation is that the only way to achieve the protection of national security is to breach a measure of European law.[265] Furthermore, the Court specified, with reference to the derogations provided for in the Treaties, that "*the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law.*"[266]

The case law on Article 346 TFEU established restrictive conditions for the exercise of the derogation provided for. Indeed, Member States must interpret the measure in question restrictively, i.e. they must not act beyond what is necessary.[267] The Court further specified that the use by national governments of Article 346 TFEU cannot absolutely exempt them from their obligations under European law.[268] Indeed, the Member State's exemption, as anticipated, must be limited to what is strictly necessary for the protection of national security or defence.[269] In fact, the Court has specified

[261] Commission v Portugal (C-38/06) EU:C:2010:108 at [62].
[262] Supra n 279.
[263] Supra n 279
[264] Commission v Hungary (C-808/18) EU:C:2020:1029 at [262].
[265] Supra n 282, at [262]: "*As regards, more specifically, Article 4(2) TEU, Hungary has not shown that, in the light of that situation, effectively safeguarding the essential State functions to which that provision refers, such as that of protecting national security, could not be carried out other than by derogating from Directive 2008/115."*
[266] La Quadrature du Net v Premier ministre (C-511/18 and C-512/18) EU:C:2020:791; [2021] 1 C.M.L.R. 31 at [99].
[267] Commission v Austria (C-187/16) EU:C:2018:194 at [78].
[268] Supra n 285, at [76].
[269] Insinööritoimisto InsTiimi (C-615/10) EU:C:2012:324 at [39]–[42].

that in those cases where the security implications are uncertain, relating to a given situation, the Member State may not avail itself of the derogation under examination.[270] In *Alexander Dory v Germany*, the Court ruled that even in those cases where there are "interests of public security or national defence" in matters of military organisation, European law may still be applicable.[271] Specifying, however, that in cases where the national government acts to protect "territorial security", the Member State may enjoy immunity from European law and its obligations.[272]

Article 72 TFEU has also been interpreted in a similar manner. Member States that make use of Article 72 to avoid the application of legislative measures adopted under Title V TFEU are subject to control by European law.[273] The Member State must prove that the deviation from European law is necessary to maintain security and law and order within the country. Generic references to security issues relating to public order are not permitted by the Court of Justice.[274]

Returning to Article 4(2) TEU, it has been examined by the Court of Justice in several cases; these concerned the interpretation of European directives on "electronic communications" adopted on the basis of internal market competences. One of the questions put to the Court was whether the regulatory scope of the directives covered national measures taken by Member States to protect internal security.[275] The Court ruled in *La Quadrature du Net,* "*that responsibility corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests in society and encompasses the prevention and punishment of activities capable of seriously destabilising 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*."[276] Similar to the Court's findings for Articles 72 and

[270] Supra note 287.
[271] Alexander Dory v Germany (C-186/01) EU:C:2003:146; [2003] 2 C.M.L.R. 26 at [30].
[272] Alexander Dory (C-186/01) EU:C:2003:146 at [37]–[39].
[273] See M. Varju, The protection of technology sovereignty in the EU, supra n 225, at p. 576.
[274] Commission v Hungary (C-808/18) EU:C:2020:1029 at [126].
[275] See M. Varju, The protection of technology sovereignty in the EU, supra n 225, at p. 577.
[276] La Quadrature du Net (C-511/18 and C-512/18) EU:C:2020:791 at [135]. Privacy International v

346 TFEU, the Member State, in order to claim the application of the derogation for the interest in maintaining national security, must consider that there is "*sufficiently serious ground for considering that the Member State concerned is confronted with a serious threat [...] to national security which is shown to be genuine and present or foreseeable*."[277]

3.4.2 Internal market and security

The European Union, as mentioned earlier, thanks to the competence attributed to it to regulate the internal market, is able to adopt measures to intervene with regard to the security of the technological/digital market.[278] In fact, Article 114 TFEU allows the EU to adopt measures aimed at eliminating contrasts between the Member States' legal systems that prevent the exercise of fundamental economic freedoms and that create competitive distortions in the market between States.[279] Indeed, although European law rules out the possibility that Article 114 TFEU[280] can be used for "general" market regulation measures, it is permissible for measures aimed at regulating the internal market to have secondary or additional effects to those pursued directly.[281] The Court of Justice has in fact ruled that the introduction of European environmental standards

Secretary of State for Foreign and Commonwealth Affairs (C-623/17) EU:C:2020:790; [2021] 1 C.M.L.R. 30 at [75].

[277] La Quadrature du Net (C-511/18 and C-512/18) EU:C:2020:791 at [137].

[278] Regulation 2019/881 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification (Cybersecurity Act) [2019] OJ L151/15 and Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union (NIS Directive) [2016] OJ L194/1. See M. Varju, The protection of technology sovereignty in the EU, supra n 225, at p. 578.

[279] See M. Varju, The protection of technology sovereignty in the EU, supra n 225, at p. 578.

[280] Germany v Parliament and Council (C-376/98) EU:C:2000:544; [2000] 3 C.M.L.R. 1175 at [83].

[281] S. Weatherill, *Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation*, in *Regulating the Internal Market* (2006), p.52, and S. Weatherill, *Why Harmonise?*, in T. Tridimas, P. Nebbia (eds), *European Union for the Twenty-First Century: Rethinking the New Legal Order* (Oxford: Hart Publishing, 2004), pp.17–18. Commission v Council (C-338/01) EU:C:2004:253 at [55].

in the internal market was justified, as the divergences between national regulations had a direct impact on industrial production costs, creating a distortion in the internal market, and it was therefore necessary to harmonise this area.[282]

It must be specified, however, that interventions relating to the security of the internal market adopted through Article 114 TFEU are subject to limitation by European law. In addition to the limitation mentioned above, the Court of Justice wanted to emphasise that interventions aimed at regulating the internal market must target those divergences between national laws that prevent the establishment or the functioning of the internal market.[283] In the Tobacco Advertising I case, the Court specified that while potentially every national measure aimed at regulating its own market may lead to a distortion of competition in the European internal market, not all measures are relevant to the market itself. For example, national measures that merely bring 'an advantage in terms of economies of scale and increase in profits' may not be seen as a harmful distortion of the internal market.[284] Conversely, those divergences between national laws that have a direct impact on local production costs, and which do not allow for a level playing field within the EU, may be harmonised through Article 114 TFEU.[285]

The jurisprudence of the European Court of Justice has made it clear that Article 114 TFEU can be used to regulate safety issues relating to the European market. Some cases in particular concerned various directives adopted by the EU on the circulation, distribution and possession of civil firearms between Member States.[286] Risks relating to the internal security of the Union justified the adoption of these directives. In the Buhagiar case, the Court held that security and safety were two characteristics closely inherent to the arms market and that, therefore, the EU had no choice but to intervene also in the area of security in order to ensure effective integration between Member

[282] Commission v Council (C-300/89) EU:C:1991:244; 1993] 3 C.M.L.R. 359 at [11]–[13].

[283] Commission v Council (C-300/89) EU:C:1991:244 at [11]–[13]. Czech Republic v Parliament and Council (C-482/17) EU:C:2019:1035; [2020] 2 C.M.L.R. 16 at [34].

[284] Germany v Parliament and Council (C-376/98) at [107]–[109].

[285] Germany v Parliament and Council (C-376/98) at [107]–[109].

[286] Directive 91/477 on control of the acquisition and possession of weapons [1991] OJ L256/51. Directive 2017/853 amending Council Directive 91/477 on control of the acquisition and possession of weapons [2017] OJ L137/22.

State markets.[287] In fact, the subsequent amendment to the original directive in the firearms sector, which set limits on the purchase and possession of weapons, was deemed legitimate by the Court, as the Union acted within its prerogatives to regulate the internal market.[288]

The Court followed a similar approach to the above in determining whether the EU Cybersecurity Act, adopted through the instrument offered by Article 114 TFEU, was lawful or not. The purpose of the act in question is to increase the protection of computer systems in Europe from possible security risks through the supervision and control of the 'European Agency for Cybersecurity' (ENISA).[289] The ECJ ruled that the integration of the relevant markets in the sector required the introduction of common European cybersecurity requirements, as the technology market, characterised by its volatility and high security risks, was placed in a precarious security situation due to the increased divergence in the regulation of national markets by the Member States.[290] The creation of ENISA within the internal market was considered legitimate as the EU was acting through its competences to regulate the market, and the only way to ensure the effective implementation of the measures taken in the area of computer system security was through the establishment of the Agency.[291]

It follows from this case law that it is possible for the Union to regulate aspects of market security as a side effect of internal market regulation. For this reason, Article 114 TFEU cannot be used to regulate security aspects that are not related to the integration of national technological markets with the internal market.[292] Measures that only concern public or national security aspects, which have no effect whatsoever

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[287] R. (on the application of Buhagiar) v Minister for Justice (C-267/16) EU:C:2018:26; [2018] 2 C.M.L.R. 30 at [52].

[288] Czech Republic v Parliament and Council (C-482/17) EU:C:2019:1035 at [36]–[57].

[289] Regulation 2019/881.

[290] United Kingdom v Parliament and Council (C-217/04) EU:C:2006:279; [2006] 3 C.M.L.R. 2 at [61]–[63].

[291] United Kingdom v Parliament and Council (C-217/04) at [48]–[55], [57] and [60].

[292] In fact, as in the case of the implementation of the EU Cybersecurity Act, this was deemed legitimate because it was motivated by “socio-economic” reasons, and not (directly) by security reasons, Wessel, "Cybersecurity in the European Union: Resilience through Regulation?", in Routledge Handbook of EU Security Law and Policy (2019), p. 292.

on trade between Member States (and thus on movement within the internal market), would not be legitimate under Article 114 TFEU.[293]

For this Article to be applicable, there must be an objective connection between the security issue to be addressed and the functioning of the internal market.

3.4.3 Security under Title V TFEU

Thanks to Title V TFEU, which covers the Area of Freedom, Security and Justice, the Union has the power to adopt measures relating to cooperation between national judges and law enforcement authorities, and between national authorities and the relevant responsible European agency.[294] The Articles contained in Title V allow the Union to intervene in specific circumstances; therefore, they do not grant absolute powers to the EU to intervene in security matters. However, as confirmed by the jurisprudence of the Court of Justice, the competences attributed to the Union in the area of Freedom, Security and Justice allow it to intervene in internal security matters when linked to a specific policy action contained in Title V TFEU.[295] For instance, Article 72 TFEU, analysed above, falls within the competences contained in Title V.

The existing case law on the use of Title V does not give too much guidance for its application in the field of the protection of European technological sovereignty. The Court has ruled that the Union may introduce security requirements when it has to regulate aspects that fall within the policy area of Title V. In the *Schwarz* case, the Court had to determine whether the Union was entitled to intervene and regulate security aspects and to introduce a regulation concerning biometric facial control for passports and travel documents. In the specific case, it was not clear whether the measure adopted by the EU also covered passports of European citizens. The Court not only ruled that the EU had the competence to adopt measures affecting all passports,

[293] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 580.
[294] Articles 74, 77, 78, 79, 82, 85, 87, 88 TFEU.
[295] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 581.

including European passports, but also recognised that the modalities of such control also extended to the introduction of security requirements and biometric checks because, without these elements, effective control of passports and travel documents would not be possible.[296]

In another judgement, the Court ruled that in cases where the objectives of European norms do not concern specific issues, such as security, justice and institutional cooperation, covered by Title V, such measures cannot be adopted through the legal basis of Title V.[297]

With respect to the analysis of the Court's jurisprudence so far, some general conclusions can be drawn.

The EU can use Title V as a legal basis to intervene on security issues, as long as the aspect dealt with is closely related and relevant to a policy action under the Area of Freedom, Security and Justice.[298] However, in those cases in which the security issue relates to broader and more general aspects than those covered by Title V, such as, for example, the area of European technological sovereignty, the Title in question does not seem to be the most appropriate one to regulate such cases.[299] However, what emerges from the EU-Tanzania case,[300] in which the question was whether the measures adopted actually fell under the Common Foreign and Security Policy (CFSP), or whether they should be adopted under Title V TFEU, the Court, while admitting that some aspects did fall under Title V, ruled that the measure in question concerned "compliance with the principles of the rule of law and human rights, as well as respect for human dignity". Therefore, in light of Article 21 TEU, which regulates the objectives of EU external action, the Court ruled that the measure in question fell under CFSP.[301] Thus, the Court

[296] Schwarz v Stadt Bochum (C-291/12) EU:C:2013:670; [2014] 2 C.M.L.R. 5 at [16]–[18]. Staatssecretaris van Justitie en Veiligheid v A (C-70/18) EU:C:2019:823 at [47].

[297] Commission v Parliament and Council (C-43/12) EU:C:2014:298 at [42]–[49].

[298] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p. 582.

[299] See M. Varju, *The protection of technology sovereignty in the EU*, supra n 225, at p.582.

[300] Which concerns a transfer agreement relating to the transfer of persons suspected of having committed acts of piracy against Tanzania, which provides that in such circumstances the persons involved will be tried before the Tanzanian legal system.

[301] Parliament v Council (C-363/14) EU:C:2016:435; [2017] 1 C.M.L.R. 10 at [47].

did not take too much care to carry out a scrupulous assessment of which security-related matters fall under Title V TFEU or under other policy areas.

To conclude, the EU, in a context of great geopolitical change, in various respects, including economic, social, and public health, has found itself having to change in turn, attempting to build and strengthen its technological sovereignty. If, as has emerged from this analysis, there has been a desire to safeguard technological sovereignty in Europe, at the same time there have also been gaps in the Union's competences in this area. As we have seen, many areas of this sector fall within the area of 'security', which, except in a few cases, tends to fall within the competence of the individual Member States. It is clear, therefore, that the EU needs to acquire more powers if it is to become a "complete" global player.

Chapter II - Regulation 452/2019 – Screening mechanisms in national legislation with a focus of the Italian regime

1. Structure of Regulation 452/2019

1.1 The political, institutional and legislative path towards the Screening Regulation

In order to better understand how foreign direct investment screening mechanisms work, it is necessary to give the political, economic and legal background that led to the enactment of Regulation 452/2019.

From a political point of view, motivations vary depending on the actor or institution involved.[302] For instance, Member States highly value the economic contribution that foreign investments can bring; therefore, they fear that excessive screening may undermine the entry of capital flow and investments.[303] Others, on the other hand, emphasise social interests and their protection.[304] The discussion among stakeholders focuses mainly on four issues.

The two crucial points concern the following doubts: if the current screening system (i.e. the one in the Screening Regulation) is able to intercept the needs of the EU and Member States with respect to foreign investors; and, if not, if the EU and Member States have sufficient flexibility to supplement and improve the current system. The discussion, thus, revolves around whether the EU and Member States can meet these needs, while protecting the Union, with respect to foreign investors.

[302] Commission, European Parliament, Council of the European Union; Member States.

[303] R. Bismuth, *Reading between the lines of the EU regulation establishing a framework for screening FDI into the Union, in* J.H.J. Bourgeois (ed), *EU framework for foreign direct investment control. Kluwer Law International, Alphen aan den Rijn*, pp. 103–114 (2020).

[304] J. Velten, *Screening Foreign Direct Investment in the EU,* in *EYIEL Monographs - Studies in European and International Economic Law* 26 (2022), p. 12.

The four needs of the Union are those related to: competition; reciprocity; harmful investor; private information.

1.1.1 EU's four concerns: competition; reciprocity; harmful investor; private information

With respect to the first issue, namely competition, the EU's concern, which led to the enactment of the screening mechanism, is that without it foreign investors may distort the market. The concern is that they would not be subject to the same competition rules as European investors, as, for example, in the area of state aid.[305] Indeed, foreign investors would have a competitive advantage over European investors, who are subject to stricter competition law, such as that on public undertakings in Article 106 TFEU, and on the prohibition of state aid in Article 107 TFEU. This concern mainly regards State Owned Enterprises (SOEs), as well as private companies receiving public funding.[306]

The competition concerns manifest themselves in two separate stages. In the first stage, the concern relates to the enterprise itself investing in Europe. In case of public funding, such a business would have a huge competitive advantage over European companies. For example, it would have much more capital at its disposal to invest in the target company in Europe, performing a transaction that, if outside the competition law

[305] Parliament, "Report on the Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (COM (2017) 487)" A8-0198/2018, amendment 44; Commission, "Welcoming Foreign Direct Investment while Protecting Essential Interests" (Communication) COM (2017) 494 final, p. 5.

[306] On this topic, see D. Gallo, *The Rise of Sovereign Wealth Funds (SWFs) and the Protection of Public Interest(s): The Need for a Greater External and Internal Action of the European Union,* in *European Business Law Review, Volume 17, issue 4* (2016), pp. 459-485; S. Miroudot, A. Ragoussis, *Actors in the international investment scenario: objectives, performance and advantages of affiliates of state-owned enterprises and sovereign wealth funds, in R. Echandi, P. Sauvé (eds,) Prospects in International Investment Law and Policy: World Trade Forum. Cambridge University Press, Cambridge* (2013), pp. 51–72.

framework applicable to European entities, could not have been performed. This leads not only to other investors not being able to carry out that transaction, but also to a distortion in the allocation of resources.[307]

Problems also arise in the post-investment phase. In fact, the foreign investor, to whom the discipline of Articles 106 and 107 TFEU does not apply, would be able to offer a competitive advantage to the target company that it would not have been able to acquire under normal conditions.[308]

The risk, therefore, is that competition rules wouldn't apply to foreign investors; in order to prevent a distortion of the market, caused by a greater capital disposal of those investors, Member States should intervene in those economic sectors, so to support undertakings operating in that field. Therefore, businesses that have been privatised will have to be nationalised again or subjected to monopoly rules in order to protect them. The economic benefits of privatisation would then be nullified.

To overcome this problem, Member States could implement the screening mechanism only in respect of those foreign investors that have received public funding.

The above-mentioned competition aspects mainly concern foreign investors that come from countries that have a government with a strong presence in the private economy, with an interventionist approach towards companies, such as Russia, China, Qatar, Kuwait and the United Arab Emirates.[309] These countries, in fact, do not have a domestic discipline for restricted competition as much as the European one in Articles 106 and 107 TFEU.[310]

The second need that the EU and Member States want to address is the "reciprocity" towards foreign investors. In fact, the EU is less inclined to open up to investors from foreign countries that do not allow Member States and the EU itself to invest in that

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[307] Commission, "White Paper on Levelling the Playing Field as regards Foreign Subsidies" COM (2020) 253 final, p. 7.

[308] J. Velten, *Screening Foreign Direct Investment in the EU, EYIEL Monographs – Studies, in European and International Economic Law* 26 (2022), p. 14.

[309] Commission, "*Foreign Direct Investment in the EU: Following up on the Commission Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests*" of 13 September 2017" (Commission Staff Working Document) SWD (2019) 108 final, pp. 56–57.

[310] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 14.

market and, in such cases, may decide to take countermeasures. This constitutes a barrier mainly by not allowing FDI entry and, even in the case of investment already made within the Union, by not providing protection for foreign investment within the European market.[311] Such concerns arise with regard to those countries that, as mentioned, do not allow the same reciprocity to the Union but, by contrast, have increased the flow of investment into Europe.[312]

This aspect is linked to the screening of FDI in that the EU, in order to remedy this unequal treatment, could carry out a restricted screening proportionally to that carried out by the country of origin of the foreign investor vis-à-vis the EU and the Member States. Second, such a screening could give the EU more leverage vis-à-vis those countries with more restricted market access, thus leading them to adopt policies aimed at a more favourable treatment of the European investor.[313]

The third concern about FDI relates to those cases where investments made by foreign entities are detrimental to the assets and interests of the EU and Member States. Such an investment would give the investor the power to influence the target company, being able, in that case, to impose measures on the target company's business according to the investor's own interests. This does not necessarily mean that the investor goes against the interests of the company, but there could be another party behind the investor, such as the government of the country from which the investment comes. The harm that could arise could be either qualitative or quantitative of certain products or services, or a harmful impact directly on the production chain.[314]

Another type of harm could arise when the target company decides to transfer important assets (such as technology assets) to the investor's home state. Such damage would not only be limited to purely material assets, but also to know-how and trade secrets. Such a transaction would deprive the Member State, and the Union itself, of a decisive asset. Not only that, that asset could then be used against the Union's own

[311] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 15.
[312] Consider China, Russia, Brazil and India.
[313] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 15.
[314] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 15.

interest. In the latter case, it could exploit the asset to impose its own interest, or that of a third party, to the detriment of the Union itself, for example by disrupting the electricity supplies of the target company of the foreign direct investment.[315]

This scenario raises four concerns within the Union and the Member States. The first is that the investor may gain some degree of control over the target company, and then make decisions in its own interest (and to the possible detriment of those of the Union). The second concern is that the investment may damage the assets of Member States.

The third concerns the presence behind the investor of state-owned enterprises or other investors in any way influenced by a state. Investors from certain states follow non-commercial interests, which are contrary to the objectives and interests of the Union,[316] e.g. Russia, China, Kuwait and Qatar.[317]

The fourth issue that arises with respect to the "harmful investor" is that of the EU and Member States eventually blocking the investment, because it goes against the interests and protection of the Union. Characteristic of a free economy is that the interests of private actors may not coincide with those of public actors. In some cases, such as the one under scrutiny, i.e. the screening mechanism, such investments must be prevented in order to protect the public interest. Such an intervention, which is exceptional in its nature, is carried out when the investor's objective can potentially have very severe consequences, especially when it concerns "sensitive assets".[318]

The most complicated aspect is precisely the definition of "sensitive asset" that could lead to screening and blocking of the investment. When does the investment go against the public interest of the Union or a Member State?

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[315] European Union and its Member States—Certain Measures Relating to the Energy Sector, Panel Report (10 August 2018) WT/DS476/R, WTO Online Database doc no 18-5025, para. 7.1172.

[316] Commission, COM (2017) 240 final (n. 9), p. 15.

[317] J. Wübbeke et al, *Made in China 2025: the making of a high-tech superpower and the consequences for industrial countries*, in *MERICS Papers on China 2.* (2016) https://merics.org/de/studie/ made-china-2025-0. Accessed 2 Feb 2022.

[318] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 16.

In order to better understand this expression, it must be applied to three sectors: defence, "critical" and technological infrastructure, and finally strategic infrastructure.[319]

With respect to the defence sector, it is supposed to empower the State to defend itself against external threats. Likewise, a State could exploit its defence sector to go against the interests of the Union and the Member States. Therefore, not only weapons, ammunition and other war material are relevant here, but also goods, services and intellectual property rights (both for civil and military use), including so-called "dual use products".[320]

A second reading of "sensitive assets" relates to "critical infrastructure, technology and inputs", which have been defined as "*an asset, system or part thereof . . . 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*".[321] The main aspect of this definition of "sensitive sectors" is, therefore, the focus on protecting vital, existing societal functions. The sectors in which these are typically found are information regarding technology, health, telecommunications, finance and insurance, water, electricity and food.[322]

Finally, the third definition of "sensitive assets", the broadest of the three, concerns "strategic infrastructure, technology and inputs". So-called "key enabling technologies" would fall under this definition.[323] The term "strategic" recalls the

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[319] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 17.

[320] "*All items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices*". 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 (Dual-use Regulation) [2009] OJ L 134/1, art 2 point 1.

[321] Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (Critical Infrastructure Directive) [2008] OJ L 345/75, art 2(a).

[322] German Act on the German Federal Office for Information Security (Gesetz über das Bundesamt für Sicherheit in der Informationstechnik) s 2(10).

[323] Parliament, "Building an Ambitious EU Industrial Strategy as a Strategic Priority for Growth, Employment and Innovation in Europe" (Resolution) 2017/2732 (RSP), para. 20; Commission, COM (2017) 494 final (n. 4), pp. 7, 11.

concept of "strategic autonomy" mentioned earlier, i.e. the Union's ability to determine its own interests and priorities, take decisions autonomously and be able to set standards also at international level.[324] This concept of autonomy finds its main application in the Common Security and Defence Policy, but is also finding application in other areas. The Commission stated in the New Industrial Strategy that "*Europe's strategic autonomy is about reducing dependence on others for things we need the most: critical materials and technologies, food, infrastructure, security and other strategic areas. They also provide Europe's industry with an opportunity to develop its own markets, products and services which boost competitiveness*".[325]

The Commission has included energy, digital, telecommunications, transport and space as strategic areas.[326] Some Member States, however, have broadened the scope of this definition to include "*technical knowledge that represents a significant advance over the status quo and has a major potential for innovation*".[327] Both visions go beyond the definition of "sensitive sectors" just given by the Commission and Member States respectively, go beyond the definition given by the "defence sector" and, in addition, the one given by Member States also goes beyond the definition of "critical infrastructure, technology and inputs". Therefore, the focus on sensitive assets is not so much the protection of vital, existing societal functions, but the protection of that asset for geopolitical, economic and industrial reasons that look to the long term, so that the strategic autonomy of the Union can be preserved.[328]

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[324] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 18.

[325] Commission, 'A New Industrial Strategy for Europe' (Communication) COM (2020) 102 final, p. 13.

[326] Commission, SWD (2019) 108 final (n. 8), pp. 7, 11; Commission, COM (2020) 102 final (n. 26), pp. 13, 14. Commission, 'Guidance to the Member States concerning Foreign Direct Investment and Free Movement of Capital from Third Countries, and the Protection of Europe's Strategic Assets, ahead of the Application of Regulation (EU) 2019/452 (FDI Screening Regulation)' (Communication) COM (2020) 1981 final, 1, Annex, pp. 1, 3.

[327] France, Germany, Italy (2017b) European investment policy: a common approach to investment control. Paris, Berlin, Rome.

[328] B. Lippert , N. von Ondarza, V. Perthes, *European strategic autonomy: actors, issues, conflicts of interests,* in *SWP research paper 4* (2019), pp. 23-25.

The notion of "strategic asset" should not be confused with that of "strategic FDI". This second term expresses the concern that the investor may take non-commercial decisions on the target company, but on the basis of political motivations.[329] Thus, "strategic FDI" does not refer to a specific harm that the investment may cause, but increases the risk to a Union or Member State interest. For example, an investment made by a foreign entity in the production of ammunition for firearms constitutes a risk as it could then be to the detriment of the Union, for example, by transferring know-how to the investor's home state.[330]

To conclude this brief section on the three of the four Union concerns regarding FDI screening, it is interesting to note that the European Parliament's proposal to add "strategic infrastructure", "technology" and "EU autonomy" as screening factors in Reg. 452/2019 was rejected the first time it was proposed.[331] However, on June 2022, the Council of the European Union and the European Parliament reached a political agreement on the Regulation on foreign subsidies distorting the internal market.[332]

The last of the four concerns of the Union vis-à-vis foreign investors relates to the possibility that such actor(s) may come into possession of private information, such as personal data held by the target company. The risk, also in this case, is that such data could be transferred to the investor's home country, with the risk of no longer being able to maintain control and protection over the data of European citizens, and use them against their interest. The danger would concern access to so-called "sensitive personal data", which are defined in Article 9(1) of the GDPR.[333] This article prohibits the processing of "genetic data, biometric data for the purpose of uniquely identifying a

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[329] J. Wübbeke et al, *Made in China 2025: the making of a high-tech superpower and the consequences for industrial countries* in *MERICS Papers on China 2.* (2016) https://merics.org/de/studie/ made-china-2025-0. Accessed 2 Feb 2022

[330] Commission, "White Paper on Levelling the Playing Field as regards Foreign Subsidies" COM (2020) 253 final, p. 7.

[331] Parliament, A8-0198/2018 (n. 4), amendments 39–41.

[332] Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (COM(2021)0223 – C9-0167/2021 – 2021/0114(COD))

[333] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L 119/1.

natural person, data concerning health or data concerning a natural person's sex life or sexual orientation".

This concern is very close to that of the "harmful investor", yet it enjoys its own autonomy. In the first, in fact, there is a specific interest of the investor in acquiring certain data, as in the telecommunications or health sectors. The second type, namely that of private information, includes data that could be transferred as an effect of the investment. And in case the country of origin does not adopt the same safeguards within the EU, those data could be used to the detriment of the EU itself.[334]

To conclude, the EU and Member States have four concerns regarding the foreign investor: competition, reciprocity, harmful investor and private information. There are some countries towards which more caution should be exercised, such as Russia, China, Brazil, the United Arab Emirates and India. The FDI screening mechanism becomes effective when Member States are able to intercept these requirements.

1.1.2 Negotiating positions of the Parties before the adoption of the Screening Regulation

The legislative framework of FDI screening was strongly influenced by Member States; about half of them had a screening mechanism in their national legislation, even before the adoption of Reg. 452/2019.[335] However, there were substantial differences between the various mechanisms, especially with regard to which investors it should apply, which investments and in which sector. The reasons for screening were essentially public security and public order interests.[336]

With the increasing risks related to investments by third parties, coupled with uncertainty about the division of competences in the case of a large-scale screening, the need was felt to bring the discussion to the European level. Despite this need, the

[334] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 21.
[335] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 34.
[336] Commission, COM (2017) 494 final (n. 4), p. 7.

EU was initially hesitant to harmonise this area. This hesitation was mainly due to two factors, namely the benefits that a high investment flow can bring, together with an open EU investment policy. Also at the political level, Member States had divergent views on this issue.

The impasse was unblocked by three Member States (Germany, France and Italy) which, thanks to the drafting of two joint letters, first led the discussion among European stakeholders and then found a consensus at European level to adopt common measures in the area of FDIs.[337] Despite this consensus, there were still some conflicting positions in restricting investments by foreign players, such as the Commission, the European Parliament and the Council. Not all shared concerns about foreign investors to the same extent. Similarly, some Member States were not enthusiastic about this approach, as they highly valued the benefits of foreign investment and feared that the inflow of capital would be reduced by the introduction of a Europe-wide screening mechanism.[338]

With these different approaches and visions in mind, the Commission proposed the Screening Regulation[339] and later the Foreign Subsidies Regulation Proposal.[340]

If in the latter the idea was to adopt a screening mechanism at European level, in the former the rationale is to leave the power to decide on a possible screening to Member States; it would be possible for Member States to carry out screening for reasons of "security and public order", which would be additional to the criteria already existing within national systems and not binding.[341]

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[337] France, Germany, Italy (2017b) European investment policy: a common approach to investment control. Paris, Berlin, Rome.

[338] R. Bismuth, "*Reading between the lines of the EU regulation establishing a framework for screening FDI into the Union" in Bourgeois JHJ (ed) EU framework for foreign direct investment control. Kluwer Law International, Alphen aan den Rijn* (2020), pp. 103–114.

[339] Commission, COM (2017) 487 final (n. 30).

[340] Commission, "Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market" COM (2021) 223 final. The final text of the Regulation was adopted by the Parliament and the Council on November 2022; the Regulation entered into force on 12 January 2023, Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (2022) OJ L330/1

[341] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 34.

Both the Screening Regulation and the Foreign Subsidies regulation Proposal will be analysed in more detail.

1.1.2.1 Screening Regulation

Regulation 452 was adopted on 19 March 2019 and, after several amendments by the Parliament and the Council were passed, became operative on 11 October 2020.[342]
Due to the different discordant positions,[343] the Reg. had to find a compromise between the different instances, thus leaving much room for Member States to adopt their own positions on the subject of FDI. Basically, the Reg. instead of giving a mandate to the Union to intervene in the case of screening, however, gives two elements that can contribute to the harmonisation of this area.
The first of these elements is a compulsory communication mechanism between the Commission and the Member States in the event of an FDI screening at national level. Thanks to this element, in absence of full harmonisation, it is nevertheless intended to strive for the broadest possible cooperation between Member States and Commission. In this way, it is intended to ensure that when an FDI is carried out in a Member State, that State also takes the interests of the Commission and the other Member States into consideration.[344] The minimum objective, in any case, is to ensure a form of constant communication between the various actors involved; whether the receiving Member State takes the interests of the stakeholders into consideration is left to its own will.[345]

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[342] 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 (Screening Regulation) [2019] OJ L 79/I/1.
[343] A. Moberg, S. Hindelang, *The art of casting political dissent in law: the EU's framework for the screening of foreign direct investment*, in *Common Mark Law Rev 57* (2020) pp. 1427–1460.
[344] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 36.
[345] In fact, the Member State receiving the investment only has to give "due consideration" to the comments made by the other Member States and the Commission's opinion, see Articles 6(9), 7(7) Screening Regulation; JHJ. Bourgeois, E. Malathouni, *The EU regulation on screening foreign direct investment: another piece of the puzzle*, in Bourgeois JHJ (ed), *EU framework for foreign direct investment control. Kluwer Law International, Alphen aan den Rijn* (2020), pp. 182-185.

The second element concerns the introduction of a "harmonised option",[346] i.e. to intervene for reasons of "security and public order", in addition to those already existing. The key point of the discussion remains that in each case it is the Member State that has to decide for itself whether it wants to adopt a screening mechanism in the first place and, if so, which type to adopt.[347] Currently, the Reg. offers Member State four options.

The first option for Member States is not to adopt an FDI screening mechanism in the first place. The second and third options, on the other hand, are provided for directly by Recital (4) and Article 1(2) of the Regulation. Member States may respectively decide to adopt the screening mechanism on grounds of "public policy or public security" as understood by Article 65(1)(b) TFEU,[348] or on grounds of "essential security interests" as understood by Article 346(1)(b) TFEU.[349] Therefore, should the Member State decide to adopt a screening mechanism on either of these grounds, it would not be affected by the framework set out in the Screening Regulation.[350]

The fourth option, and the novelty introduced by the Regulation, allows the Member State to adopt the screening mechanism on the basis that the FDI is "likely to affect security or public order". This is new because it goes beyond the grounds of "public policy or public security" and "essential security interests" as understood by Articles 65(1)(b) and 346(1)(b) TFEU.

Should Member States opt for the latter type of screening, the Screening Regulation provides for additional substantive requirements. Article 3 of the Regulation lays down minimum formal requirements for a transparent and reliable screening mechanism. For

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[346] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 36.

[347] Recital (8) of the Screening Regulation states: "*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.*"

[348] Recital (4) Screening Regulation.

[349] Article 1(2) Screening Regulation: "*This Regulation is without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU*".

[350] See J. Velten, Screening Foreign Direct Investment in the EU, supra n 322, at p. 37.

example, the mechanism must not discriminate between foreign investors; transparent time frames must apply; and decisions must be appealable through the courts.[351]

The Regulation does not give a definition of the requirement "likely to affect security or public order". However, Article 4 offers some clarification in this respect.

In para. 1 a non-exhaustive list of interests that qualify as "security or public order" is listed: critical infrastructures ("whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure"); critical technologies and dual use items ("including artificial intelligence, robotics, semiconductors, cybersecurity, aero space, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies"); supply of critical inputs ("including energy or raw materials, as well as food security"); access to sensitive information ("including personal data, or the ability to control such information"); the freedom and pluralism of the media.[352] It should be noted that the European Parliament's proposal to add so-called "strategic assets" was rejected.[353]

In para. 2, however, factors are taken into account that can be assessed when the FDI is "likely to affect security or public order". Given the risk that a national government may be behind a foreign investor, the main factor to be assessed is "*whether the foreign investor is directly or indirectly controlled by the government . . . of a third country, including through ownership structure or significant funding*".[354]

Although the topic of the functioning of the screening mechanism provided for in the Regulation will be dealt with later, it can be anticipated that two years after the adoption of the Regulation, the Commission stated that 18 of the 27 member countries currently have a screening mechanism in their national legislation. Of the missing nine, seven

[351] Articles 3(2), (3), (5) Screening Regulation.

[352] Article 4(1) Screening Regulation.

[353] Parliament, "Report on the Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (COM (2017) 487)" A8-0198/2018, amendments 39, 40.

[354] Article 4(2)(c) Screening Regulation.

countries are holding consultations or have started a legislative process leading to the adoption of a new mechanism. Cyprus and Bulgaria have not taken any kind of initiative, thus choosing the first of the four options.[355] Germany amended its screening mechanism in light of the Regulation, which was initially based on "public order or security" grounds,[356] and has now introduced the Regulation's "likely to affect" formula.[357]

Despite the introduction of the new wording "security or public order", the general approach by Member States seems to remain unchanged. Indeed, the power to adopt a screening mechanism remains in the hands of the individual Member States and, at the same time, these mechanisms revolve around the concept of security and public order.[358]

1.1.2.2. Foreign subsidies Regulation

1.1.2.2.1. The main elements of the Proposal and the recent enactment of the Regulation

A little over a year after the adoption of Reg. 452/2019 for FDIs screening, the Commission intended to propose a further tool to support Member States, with the publication of the "White paper on levelling the playing field as regards foreign subsidies",[359] which subsequently led to the Foreign Subsidies Regulation Proposal. The new element that the Commission wanted to introduce was to focus the FDI

[355] Commission, "Second Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2022) 433 final, p. 9.

[356] Furthermore, Germany had to interpret this formula in relation to the wording 'public security or public order' as provided for in Articles 36, 52(1) e 65(1)(b) TFEU. Foreign Trade and Payments Act, s 4(1), subparas. 4 as adopted before its amendment on 17 July 2020.

[357] Foreign Trade and Payments Act, ss 4(1), subparas. 4 and 4a, and 5(2); Foreign Trade and Payments Ordinance, s 55(1) and (1b).

[358] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 38.

[359] Commission, "White Paper on Levelling the Playing Field as regards Foreign Subsidies" COM (2020) 253 final.

screening mechanism on a more competition-oriented criterion, which is substantially more specific than the "security or public order" criterion of the Screening Regulation. The notion of foreign subsides is given in the Proposal itself: "*a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries*." Therefore, a foreign subsidy may be paid to an undertaking established in the territory of the EU, within the meaning of Article 54(1) TFEU, in particular by means of acquisitions of such undertakings or their participations in an EU bidding process.[360]

The main focus of the Proposal concerns competition aspects, as mentioned above; the aim is to prevent foreign subsidies from distorting the market.[361] Although, at the same time, the Proposal admits that some market distortions are necessary to benefit from the increased flow of investments, and such a trade-off was referred to in the White Paper as the "EU interest test".[362] According to this test, when intervening to protect the market, certain positive elements can be taken into account, "such as creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience".[363]

Specifically, the Proposal foresees three modules to intervene in cases of possible market distortions due to foreign subsidies.

The first module provides that the Commission may impose redressive measures in cases where a foreign subsidy may distort the internal market.[364] Such measures may take the form, for example, of dissolving the merger that has been facilitated by the foreign subsidy, or through the repayment of that subsidy.[365]

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[360] Commission, "Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market" COM (2021) 223 final, article 1(2), sentence 2.
[361] COM (2021) 223 final, see supra n 378, Articles 3 and 4.
[362] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 39.
[363] Commission, "White Paper on Levelling the Playing Field as regards Foreign Subsidies" COM (2020) 253 final, p. 17.
[364] COM (2021) 223 final, see supra n 378, Article 6.
[365] COM (2021) 223 final, see supra n 378, Article 6(3)(g)(h).

The second and third modules are based on the first, but provide for specific situations of intervention, i.e. concentrations and public procurement processes. The second module intends to introduce a new FDI screening system in case of partial acquisitions of European targets, made through foreign subsidies.[366] In this respect, the Proposal contains many notions from the EU Merger Regulation, such as the term "concentrations".[367] Following these notions, this second module would not apply to all FDIs, but only with respect to those that give "decisive influence" over the target.[368] If the concentration exceeds a certain threshold of turnover or subsidy amount, it must be notified to the Commission.[369] At that point, the Commission may initiate an ex ante investigation, and then either give the FDI the green light, subject it to certain conditions, or block it.[370]

The last module concerns public procurement. The contracting authority may exclude a bidder in the procurement process if it has received a foreign subsidy that distorts the market.[371]

In conclusion, the Proposal offers more tools than FDI screening to intercept Member State and EU competition concerns. Furthermore, the Proposal could help solve the reciprocity problem. The three modules just mentioned could make the entry of FDI into the EU more complicated but, at the same time, would give the Union and Member States more leverage in international negotiations to obtain more favourable conditions for European investors.[372]

After an analysis of the Screening Regulation and the Foreign Subsidies Regulation Proposal, three conclusions can be drawn. The Proposal shows how the discussion around FDI screening is still evolving. Second, despite the Commission's efforts, screening is essentially left to the will of Member States. Thirdly, the Screening

[366] COM (2021) 223 final, see supra n 378, pp. 22, 29.
[367] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation) [2004] OJ L 24/1.
[368] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 40.
[369] COM (2021) 223 final, see supra n 378, Articles 19(1) and 18(3).
[370] COM (2021) 223 final, see supra n 378, Articles 23 and 24(3).
[371] COM (2021) 223 final, see supra n 378, Articles 26-32.
[372] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 40.

Regulation has added a new screening criterion to the existing ones, although it should be noted that it still seems very similar to the former.
On 13 January 2023, the Foreign Subsidies Regulation entered into force.[373]

1.1.2.3 Foreign direct investments and foreign investor

Before the screening mechanism can be examined in detail, it is necessary to focus on the concept of FDI and foreign investor according to the Screening Regulation and, in a broader way, under EU law. On the evolution of these notions and their origins, see the first chapter of this work, where the two concepts are analysed starting from international law.
The first analysis concerns the concept of "direct" in FDI. It refers to the level of control that the investor acquires over the asset. FDI is defined in Article 2(1) of the Screening Regulation 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*".[374] The last sentence ("including investments which enable effective participation in the management or control of a company carrying out an economic activity") makes specific reference to M&A transactions, so as to intercept two of the four concerns of the EU and the Member States, namely the "harmful investor" and "private information".[375]
The Regulation recalls definitions of FDI that have long existed in European law.

[373] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L 330.
[374] Screening Regulation, see supra n 360, Article 2(1).
[375] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 42.

In this sense, it is necessary to proceed by taking Article 63(1) TFEU and the exclusive competences of the Union in the area of the Common Commercial Policy (CCP) as a reference, and then go on to analyse the secondary legislation in the light of the former.

The Capital Movement Directive offers the same defining elements of "lasting and direct links" and "effective participation" in "management or control".[376] The definition given by the Capital Movement Directive is valid both for FDI that fall under capital movements within the meaning of Article 63(1) TFEU,[377] and for that area of the Common Commercial Policy (CCP) for which the Union has exclusive competence.[378]

In some Free Trade Agreements (FTAs) concluded by the Union, the term "establishment" is used instead of the term FDI.[379]

Finally, the definitions given by the International Monetary Fund and the OECD are also very similar,[380] with the only limitation being the 10% of the voting rights held by the investor required to establish an effective participation.[381]

Thus, various legal (and economic) sources apply a definition similar to that given by the Screening Regulation.

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[376] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [on the former European Communities Treaty] (Capital Movement Directive) [1988] OJ L 178/5, Annex I, Explanatory notes: "*Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity*."

[377] Case C-446/04 Test Claimants in the FII Group Litigation [2006] EU:C:2006: 774, para. 179; Case C-560/13 Wagner-Raith [2015] EU:C:2015:347, para. 23.

[378] Opinion 2/15 EU-Singapore Free Trade Agreement [2017] EU:C:2017:376, para. 80.

[379] Article 8.2.1(f) EU-Vietnam FTA ("*with a view to establishing or maintaining lasting economic links*"). Even in CETA there is reference to the concept of "establishment", however no definition is given; Articles 8.4–8.8 CETA.

[380] OECD defines FDI as follows: "*Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise*".

[381] OECD, Benchmark Definition of Foreign Direct Investment (n. 48), paras. 11, 117.

Turning to the definition of "foreign", this depends on the intended purpose of the definition. For example, if it is viewed from an economy's balance of payments point of view, the inflow of capital from the domestic economy of another country is emphasised. According to the OECD definition, for example, investment is foreign when it is made "*by a resident enterprise in one economy ... in an enterprise ... that is resident in another economy*".[382]

From the perspective of European law, on the other hand, the focus is not on the capital per se, but on the foreignness of the investor, as demonstrated by the harmful investor and private information concern, where the concern is that foreign investors may have influence over domestic assets.[383] Thus, in this case, FDI is such when the investor is foreign. Often, however, the foreign investor is not a natural person, but a legal person (or similarly legally organised).

The Screening Regulation adopts a formal and legal criterion for determining whether an investor is foreign. First, Article 2(1) defines FDIs as a direct investment made by a foreign investor.[384] Next, in Article 2(2), the foreign investor is defined as "*a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment*". In para. 7 of the same article it is specified that "undertaking of a third country" means an undertaking constituted or otherwise organised under the laws of a third country". Thus, the foreign element, according to the Regulation, depends on where the registered office of the undertaking is located (the so-called legal organisation option).[385]

In doctrine, however, alternatives for defining whether an investor is foreign or not have been found.[386] On the one hand, it can be labelled as foreign based on the location of the office, central administration or principal place of business (the establishment

[382] See OECD, supra n 399, at para. 117.

[383] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 44.

[384] Art 2(1) Screening Regulation: "*foreign direct investment" means 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*".

[385] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 44.

[386] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 45.

option criterion).[387] On the other hand, the investor may be foreign based on the nationality of those who have control over the investor (control option).[388] All these different criteria respond to different needs that go to intercept certain risks that the Union and the Member States want to resolve with regard to foreign investors.

The establishment option aims to prevent the foreign investor from being influenced by the government of the investor's home country. This, in fact, has the option of providing public funds to the investor. The same applies to the legal organisation option, a criterion adopted by the Screening Regulation; if the company is incorporated under a foreign law, it will be subject to the laws of that country and thus also under that influence.[389] Both options thus aim to intercept three different concerns.

First, avoiding market distortions through state aid. Second, the government of the home country may influence the FDI and the target business to pursue its own interests, which may be contrary to those of the Member States and the EU (this is always referred to as harmful investor concern). Third and last concern is the issue of private information that, thanks to the FDI, could be transferred to the investor's home country, as such data could potentially no longer be protected in the same degree. Moreover, again with regard to the establishment option, the intention is to prevent know-how at the disposal of the target company from being transferred abroad.

The control option, on the other hand, wants to take care of those cases in which the company is the recipient of multiple subsidies. According to a first interpretation, it is necessary to look at who is immediately behind the investor.[390] If a company, and not a natural person, is behind the investor, then the criteria mentioned above must be adopted to determine whether or not he is a foreigner. A second and more complex

[387] These different criteria can also define an EU company within the meaning of the freedom of establishment (Articles 49(1) and 54(1) TFEU).

[388] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 45.

[389] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 45.

[390] Article XXVIII(m) (ii), (n) GATS; similarly, Art 8.1 CETA.

interpretation, on the other hand, traces the entire chain of control behind the investor. This second interpretation tends to be very rarely applied.[391]

Thus, the three options just examined go to the concerns of the EU and Member States with regard to foreign investors. In order to best define the concept of "foreign", it is necessary to combine the three different options. The doctrine has therefore given this definition of foreign direct investment: Foreign direct investment is a direct investment by an investor who:

(i) is constituted or otherwise organised under the laws of a third country;

(ii) has its registered office, central administration, or principal place of business in a third country;

or

(iii) is ultimately controlled by at least one person of a third country.[392]

In order to define the concept of control in the last subparagraph, Article 2(36) of Directive 2009/73/EC may be of assistance. In order to prevent European security in the energy sector from being jeopardised by the investor's interests, the directive in question provided that an authorisation must be given to gas transmission operators that are "controlled" by persons from third countries. The same rationale can be applied in the field of FDI screening. Article 2(36) of Directive 2009/73/EC reads: "*[C]ontrol" means any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by*

(a) ownership or the right to use all or part of the assets of an undertaking; or

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking".

[391] 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 (Recast) [2008] OJ L 293/3, arts 4(f), 2(9); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94, arts 11(1)–(3), 2(36).

[392] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 46.

Thanks to this combined interpretation of the three different options, the definition just given of foreign investor makes it possible to intercept all of the Member States" concerns.

Moreover, this definition covers two different scenarios with respect to how FDI is organised. In the first scenario, the company carrying out the FDI is incorporated in its home country, has its registered seat and central administration in its home country and does not carry out substantial business operations within the EU. In this case, the foreign investor may qualify as such under the legal organisation or establishment options.[393] In the second scenario, on the other hand, the enterprise wishing to carry out the FDI transaction has been set up exclusively for that purpose, directly in compliance with the domestic law of a Member State (also known in doctrine as a "special purpose vehicle"). Even if incorporated within the EU, and with central administration in a Member State, the company is in reality controlled by an entity from a third country. This scenario would therefore only fall within the definition given by the control option. In both scenarios, it may happen that the government of a third state is directly behind the investor.[394]

1.2 FDI Screening mechanism

As mentioned above, Member States are free to decide whether or not to adopt a screening mechanism for FDI in matters of security or public order.[395] However, should they decide to adopt it, it is European law that sets the governing principles.

Screening rules and procedures must be transparent and non-discriminatory. Member States must establish in advance what circumstances trigger the investment control, what are the control criteria and what procedural rules are to be followed. It should also

[393] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 46.

[394] See J. Velten, *Screening Foreign Direct Investment in the EU*, supra n 322, at p. 46.

[395] Article 3(1) Screening Regulation: "*In accordance with this Regulation, Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order*."

be specified, as already mentioned, that the national control mechanism must ensure that the Member State takes into account the opinion of the Commission and of the other States. The foreign investor must also be given the opportunity to appeal against the decision taken by the national authority.[396]

In this way, European law seeks to ensure that administrative control systems respect certain minimum standards, so that legal certainty and respect for the principle of legality can be guaranteed.[397] This is intended to ensure that the national interests of the Member States are safeguarded, even if effective protection appears limited in the face of such broad and indeterminate expressions as "security and public order".[398]

Although only the cooperation between Member States and the Commission is specifically regulated, economic operators, civil society organisations and social partners may also participate in the procedure, as well as trade unions, which may provide information to Member States when the latter carry out the screening.[399]

The guarantee of protection applies, however, only with respect to investors and target companies, and not also to competing operators and investors. The interest protected is in fact only that of national security, and not of the industry.[400]

In any case, European law does not impose any kind of specification as to the organisational set-up that Member States adopt to screen FDI. Neither adequate personal and financial resources nor forms of separation between politics and administration are required.[401]

Article 4 of the Screening Regulation, as mentioned before, sets out a non-exhaustive list[402] of factors that may be taken into account by Member States and the Commission

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[396] Screening Regulation, see supra n 360, Article 3.

[397] Recital (7), Regulation (EU) n. 452/2019.

[398] T.M. Hagemeyer, *Access to legal redress in an EU investment screening mechanism*, in *VerfBlog* (2019).

[399] Recital (14), Regulation (EU) n. 452/2019.

[400] Although it has been pointed out in doctrine that this approach may vary from one Member State to another (such as in France, where active legitimacy tends to be extended), 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 1* (2019), p. 10.

[401] See G. Napolitano, Il regolamento sul controllo degli investimenti esteri diretti, supra n 418, at p. 10.

[402] The non-exhaustiveness of the list is specified by Recital (12) of the Regulation.

in order to assess whether an investment may harm the security or public order of the EU or a Member State. Recital 9 of the Regulation makes it clear that the intention is to cover "a broad range of investments".[403]

Turning now to the screening mechanism, it is mainly based on cooperation through administrative procedures operating on different institutional levels. The type of cooperation changes depending on whether the direct investment is screened by Member States or not.[404]

In the first case, the Member State is obliged to notify the Commission and the other Member States, as soon as possible, of all foreign investments that are screened.[405] In this there will be two different procedures. The national one, which will be initiated by the foreign investor, who will have to notify the government authority of the transaction; the supranational one, which will be initiated ex officio by the Member State, which will notify the Commission and the Member States.[406] The notification may be of two types: simple, i.e. merely the forwarding of the notification received from the government by the foreign investor; or qualified, which concerns an assessment by the competent national authority of the possible transnational effects of the investment. This assessment may also include a list of Member States whose security or public order would be compromised. Finally, the Member State must assess whether the screened investment falls within the scope of the EU merger control framework.[407]

There are several pieces of information that must be contained in the notification to the Commission. They are listed in Article 9 of the Screening Regulation:

[403] For the list of factors, see above.

[404] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti*, supra n 418, at p. 12.

[405] Article 6, Screening Regulation, supra n 360.

[406] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti*, *supra* n 418, at p. 12.

[407] M. D'Alberti, *Il golden power in Italia: norme ed equilibri, in G. NAPOLITANO, Foreign Direct Investment Screening, il Mulino* (2019), pp. 87-88.

"*(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;*

(b) the approximate value of the foreign direct investment;

(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".[408]

Once the notification has been sent, a sub-phase of the procedure opens, which can be either horizontal (i.e. the comments of the other Member States) or vertical (the opinion of the Commission).

Horizontally, Article 6 of the Screening Regulation provides that Member States may intervene to carry out two different types of cooperation. The first type of intervention is carried out in the event that the Member State considers that the investment being screened may have a negative impact on security or public order and, in such a case, it will send its observations to the State carrying out the screening. The second type of intervention, on the other hand, takes place when the Member State has information relevant to the screening State.[409] This intervention, of the "cooperative" type (and not "defensive", as in the first), aims to provide as much information as possible to the State concerned, and follows the Recital (16) of the Screening Regulation, namely to "cooperate and assist each other".[410] These comments are not only transmitted between Member States, but also to the Commission.

[408] Article 9, Screening Regulation, supra n 360.

[409] Article 6, Screening Regulation, supra n 360.

[410] Recital (16), Screening Regulation, supra n 360.

The Commission's intervention is the same as that of the Member States. It is of two types. In the first case, the Commission will intervene to give its opinion if it considers that the investment under scrutiny may harm the security or public order of one or more Member States. In this case, the Commission may also intervene in place of the Member State concerned. In the second case, there will be a "collaborative" intervention, as the Commission may have relevant information that may be of assistance to the Member State carrying out the control.[411]

In both cases, the Commission adopts an opinion stating the reasons for the possible dangerousness of the investment and transmits it to the Member State carrying out the control; it also comments on the observations of the other Member States. Finally, the Commission's opinion is notified not only to the proceeding Member State but also to the other Member States.[412]

Comments and opinions must be transmitted within a reasonable time, in any case not exceeding 35 days from the notification by the Member State carrying out the screening.[413] During this period the proceedings do not remain suspended; the national competent authority will carry out an investigation with the information available to it. At that point, comments and opinions may supplement the assessment already carried out at national level. The Regulation stipulates in para. 5 of Article 6 that comments and opinions must be "duly justified".[414] The proceeding State "shall give due consideration to the comments of the other Member States and to the opinion of the Commission".[415] Therefore, if the State carrying out the inspection decides to depart from those comments and opinions, it must state the reasons in its reasoning. In such a case, Member States and the Commission have no power vis-à-vis the proceeding State, since, as stated above, only the foreign investor is entitled to appeal against the decision on the inspection.[416] The submitting State may protect itself by activating its

[411] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 13.
[412] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 13.
[413] Article 6(7), Screening Regulation, supra n 360.
[414] Article 6(5), Screening Regulation, supra n 360.
[415] Article 7(7), Screening Regulation, supra n 360.
[416] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 14.

own screening mechanism in the event that the investment in question may affect its safety, but only to the extent of the transnational effects that the investment made may cause.[417] In the event that the proceeding State departs from the Commission's opinion, the Commission may initiate infringement proceedings if the reason given by the State concerned is not adequately substantiated.

In cases where the investment is not subject to State control, cooperation between Member States and the Commission operates differently. The possibility for Member States to submit comments (of a "defensive" or merely "cooperative" nature) to the State in which the investment is made is again proposed.[418] The difference from the cases examined so far lies in the fact that there is no screening mechanism at national level and that, therefore, the investment may already have been made and finalised. In such cases, the investment may be challenged if remedies are provided for in bilateral and multilateral investment treaties.[419]

In similar circumstances, the Commission may also adopt an opinion. However, this option becomes an obligation in the event that at least one third of the Member States consider that the investment in question could harm security or public order.

A particular aspect of this circumstance is that even in this case the State in which the investment is made "shall give due consideration" to the comments of the other Member States and the opinion of the Commission. The question therefore arises as to how the State receiving the investment can give due consideration to the comments of other stakeholders in the absence of a national screening mechanism. It is ruled out that the State must adopt atypical screening regulations,[420] given Recital (17) of the Screening Regulation, according to which in the event that there is no domestic screening mechanism, the State in question will take the comments and opinions into

[417] What happens in practice is that the other Member States potentially affected by the effects of the investment also activate their own internal screening mechanism in parallel, see See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p.14.

[418] Article 7, Screening Regulation, supra n 360

[419] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 14.

[420] Atypical in that there is no screening mechanism in national law.

account in "its broader policy-making, in line with its duty of sincere cooperation laid down in Article 4(3) TEU".[421]

A further form of enhanced vertical cooperation is envisaged in the event that the FDI may harm projects or programmes of European interest.[422] In this case, the Commission may adopt an opinion with respect to the Member State in which the investment will be made.[423] Projects or programmes of European interest qualify as projects or programmes that include a significant share of European funds, or that are governed by European legislation, because they concern critical or technological infrastructure or other elements essential to security or public order. The Annex to the Screening regulation indicates what these projects and programmes are: European GNSS programmes (Galileo & EGNOS); Copernicus; Horizon 2020; Trans-European Networks for Transport (TEN-T); Trans-European Networks for Energy (TEN-E); Trans-European Networks for Telecommunications; European Defence Industrial Development Programme; Permanent structured cooperation (PESCO).[424] With respect to these areas, the Member State must "take utmost account of the opinion received from the Commission", either through specific national measures or through "its broader policy-making".[425] If the Member State departs from the Commission's opinion, it must adequately justify it. Thus, cooperation in this case is much stronger than in previous cases, resulting in a quasi "co-decision".[426]

If mainly the level of cooperation is ensured on a procedural level, the organisational indications are much more limited. The Screening Regulation provides that Member States and the Commission must set up so-called "contact points" for the implementation of the framework, and they must set up an encrypted and secure system

[421] Recital (17), Screening Regulation, supra n 360.

[422] Article 8, Screening Regulation, supra n 360.

[423] The Commission may also adopt the opinion on the basis of the general competence conferred by Article 288 TFEU.

[424] Annex, List of projects or programmes of Union interest referred to in Article 8(3), Screening Regulation, supra n 360.

[425] Recital (19), Screening Regulation, supra n 360.

[426] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 15.

that is suitable for the exchange of information.[427] Unlike Article 11 of the Screening Regulation, it is the Recital (27) which provides that the "contact points" "should be appropriately placed within the respective administration, and should have the qualified staff and the powers necessary to perform their functions under the coordination mechanism and to ensure a proper handling of confidential information".[428]

In addition, the expert group on the control of FDI has the task of advising the Commission to discuss and improve the functioning of the control mechanisms. The Commission has to submit an annual report to the European Parliament;[429] the same obligation also applies to Member States. It should be specified, however, that there is no obligation to publish the individual decisions taken by the Commission and Member States; it is sufficient to give a general overview of the number and progress of operations carried out. In this way, one can protect both the confidential information given by investors and the assessments made by the competent national authority, which intervenes in very sensitive areas, such as security.[430]

Finally, such cooperation does not only operate at European level. In fact, the Screening Regulation provides that the Commission and Member States also cooperate with third States on FDI issues.

In conclusion, the regulation is intended to bring about a higher level of European harmonisation in the field of FDIs, in particular by supplementing European administrative cooperation. The Regulation identifies a very broad sphere of areas in which investment may be screened, and demarcates a very clear line between private and public foreign investment, in that the latter is subject to a negative presumption.[431] Moreover, unlike the Chinese and US screening mechanisms, the European one is based on the principle of legality and good administration. Through these mechanisms,

[427] Article 11, Screening Regulation, supra n 360.
[428] Recital (27), Screening Regulation, supra n 360.
[429] Recital (32), Screening Regulation, supra n 360.
[430] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 16.
[431] See G. Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti, supra* n 418, at p. 16.

European harmonisation is further strengthened, and it does so in an area, that of security, which is very critical for all Member States.

1.2.1 Ex post screening mechanism

So far, the screening discipline of a FDI before it has been finalised in a Member State has been analysed. The Regulation also provides for a screening discipline after the FDI has been carried out. Indeed, the security risks associated with an investment may be long-lasting. Therefore, an ex-post screening decision may take place either by taking into account what happens after the investment is made, or through a new risk assessment.[432]

This type of screening can take place in several ways.

Within 15 months after the finalisation of the investment, if the transaction has not been screened by the national authority, Member States can send comments and the Commission can adopt an opinion.[433] This applies both to screenings carried out before the finalisation of the investment and afterwards. The Regulation offers no further guidance in this respect.[434]

Another case of ex post investment screening relates to those cases where there has been a change in the business owner or a change in the key characteristics of the foreign investor that the Member State takes into account when assessing whether the investment in question poses a risk to security or public order.[435] Such changes may also occur after the 15-month period. In such cases, Member States and the Commission may not intervene with comments and opinions, but the Regulation does

[432] Judgment of the Court of 8 November 2012, European Commission v Hellenic Republic, C 244/11, ECLI:EU:C:2012:694, para. 71,

[433] Article 7(8), Screening Regulation, supra n 360. However, comments and opinions cannot be issued with regard to FDI completed before 10 April 2019 according to Article 7(10).

[434] Lars S. Otto, What is a Foreign Direct Investment?, in S. Hindelang, A. Moberg (eds), YSEC Yearbook of Socio-Economic Constitutions 2020 (Springer 2021), p. 553.

[435] Recital (11), Screening Regulation, supra n 360.

not preclude the national authority concerned from triggering a screening for such a transaction. Moreover, the Regulation does not exclude that the Member State may carry out an ex post screening for reasons other than a change of ownership or on the changed characteristics of the foreign investor.[436]

The third case in which an ex post screening may take place concerns the case in which an investor, who has already acquired a share in the company, acquires another share in the same company. The screening mechanism would apply to the second transaction and, therefore, would not appear to be an ex post screening. However, as in the case examined above, with the second acquisition, the first one is also called into question (thus operating ex post).[437]

In conclusion, an ex post screening mechanism would allow the Union and the Member States to better protect security and the internal market. However, such a mechanism may conflict with the investor's interest in having certainty of the acquisition transaction. Such certainty expressly emerges in Recital 21 of the Screening Regulation.[438] Moreover, the protection of legitimate expectations is itself a principle of European law.[439] Therefore, ex post screening must be balanced on the one hand, with the rights of the foreign investor and, on the other hand, with the protections provided for the target companies.

[436] See L.S. Otto, *What is a Foreign Direct Investment?*, *supra* note 452, at p. 553.

[437] See L.S. Otto, *What is a Foreign Direct Investment?*, *supra* note 452, at p. 554.

[438] "*In order to provide greater certainty for investors, Member States should have the possibility to make comments and the Commission should have the possibility to issue an opinion in relation to completed investments not undergoing screening for a period limited to 15 months after the completion of the foreign direct investment. The cooperation mechanism should not apply to foreign direct investments completed before 10 April 2019*."

[439] Judgment of the Court of 20 September 1990, Commission of the European Communities v Federal Republic of Germany, C-5/89, ECLI:EU:C:1990:320, para. 13.

1.3 Anti-circumvention clause of the EU Screening Regulation

The Screening Regulation provides in Article 3(6) that "*Member States which have a screening mechanism in place shall maintain, amend or adopt measures necessary to identify and prevent circumvention of their screening mechanisms and screening decisions.*" Furthermore, the Regulation specifies that such measures are to be taken with regard to investments made within the Union that have artificial arrangements at the base of the transactions that do not reflect the economic reality of the operation itself, and that aims to circumvent Member States' screening mechanisms.[440] The interpretation given in doctrine to this clause (which turns out to be very broad) is that the purpose of the Regulation is to intercept those transactions that qualify as "illegitimate constructions", which aim to avoid FDI screening.[441]

Therefore, if this interpretation is followed, the conclusion can be reached that so-called indirect investments that are genuine and legitimate cannot be qualified as transactions circumventing the screening discipline.[442]

The clause in question should therefore be interpreted according to Recital 10 of the Screening Regulation "*artificial arrangements that do not reflect economic reality*".

The risk, however, is that Member States decide to prematurely read the investors" behaviour as circumvention. And this risk is reinforced by the lack of a common regulation of the concept of third country investments, and the still uncertain boundaries of the clause under scrutiny. Thus, one Member State might interpret investor strategies as circumvention while another would not.[443]

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[440] Recital 10 of the Screening Regulation: *"Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU.*"

[441] See L.S. Otto, *What is a Foreign Direct Investment?*, supra note 452, at p. 555.

[442] See L.S. Otto, *What is a Foreign Direct Investment?*, supra note 452, at p. 555.

[443] W. Bayer, J. Schmidt, *BB-Gesetzgebungs- und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2018/19 – Teil II in Betriebs-Berater 38* (2019), p. 2187.

Recital 10 and Article 3(6) of the Screening Regulation reflect the jurisprudence of the Court of Justice in relation to national anti-tax avoidance legislation cases concerning "*wholly artificial arrangements which do not reflect economic reality"*[444] *and which instead have the objective of "circumventing the application of the legislation of the Member State".*[445] *The Court specified that: "If checking those factors leads to the finding that the [undertaking in question] is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that [undertaking in question] must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a "letterbox" or "front" subsidiary*".[446]

The Screening Regulation, through the above-mentioned rules, codifies this case law. Article 3(6) of the regulation must be interpreted according to the principle underlying the Regulation itself, namely that the screening mechanism constitutes a restriction to the fundamental freedom of capital movement. Therefore, the scope of the anti-circumvention clause has to be clearly delineated, because it extends the scope of the screening mechanisms and thus, consequently, restricts direct investments more.[447] For the sake of clarity, therefore, the clause in recital 10 of the screening regulation must be interpreted along the same lines as the case law of the Court of Justice on the concept of "wholly artificial arrangements". Member States must therefore follow this line of interpretation when they intend to activate the screening mechanism, thus providing more certainty for foreign investors.[448]

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[444] Judgment of the Court of 12 September 2006, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, C-196/04, ECLI:EU:C:2006:544, para. 55; Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU:C:2009:559, paras. 89, 92.

[445] Judgment of the Court of 12 September 2006, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, C-196/04, ECLI:EU:C:2006:544, para. 51.

[446] Supra n 463, at para. 68.

[447] See L.S. Otto, *What is a Foreign Direct Investment?*, supra note 452, at p. 556.

[448] See L.S. Otto, *What is a Foreign Direct Investment?*, supra note 452, at p. 556.

1.4 Restriction on the market – What protection do foreign investors have?

A brief analysis is now made concerning the protection and possible remedies for foreign investors in the event that their investment is restricted or blocked by a Member State. In order to proceed in this direction, it is necessary to see how the protection in question has evolved in relation to the free movement of capital, the case law on the movement of capital and, finally, whether and how this protection has changed with the introduction of the Screening Regulation.

As already mentioned, in *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II* a foreign direct investment is defined as a "*form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively in its management and control*".[449] This type of foreign direct investment falls within the scope of the free movement of capital,[450] thus under Article 63(1) TFEU. Therefore, as investors from third countries fall within the personal scope of the regulation of free movement of capital, they are protected by European law.[451]

However, this regulatory principle is challenged in cases of direct investments with "definite influence", i.e. where investors have a definite influence on the company's decisions and the determination of its activities. The problem arises since this case falls not only under the discipline of free movement of capital, but also under the discipline of freedom of establishment in Article 49 TFEU.[452]

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[449] Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU:C:2009:559, para. 40; Judgment of the Court of 21 October 2010, Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis, C-81/09, ECLI:EU:C:2010:622, para. 48; similar in Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

[450] See L.S. Otto, *What is a Foreign Direct Investment?*, supra note 452, at p. 519.

[451] S Hindelang, *The free movement of capital and foreign direct investment—the scope of protection in EU law*. Oxford University Press, Oxford, 2009, pp. 204-206. In the same way the European Court of Justice. See Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 102.

[452]Judgment of the Court of 13 April 2000, C Baars v Inspecteur der Belastingdienst Particulieren/ Ondernemingen Gorinchem, C-251/98, ECLI:EU:C:2000:205, paras. 22, 26; see also Judgment of the Court of 12 September 2006, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, C-196/04, ECLI:EU:C:2006:544, para. 31; Judgment of the Court

The problem arises because the European Court of Justice, when examining national legislation on foreign investments, does so by applying the regulatory standard of only one of the two disciplines. According to the recent case law of the Court, in cases of "definite influence" where national legislation is applicable, it will be examined in light of the freedom of establishment discipline and not the capital one.[453] The consequence, in this case, will be very significant, as in respect of foreign investors, Article 49 TFEU, concerning freedom of establishment, will apply, where they do not fall within the personal scope of the rule, and Article 63(1) TFEU, concerning the free movement of capital, will not apply, where they do.[454] In short, the risk is that due to the non-applicability of the freedom of establishment rules to foreign investors with "definite influence", these investors will find themselves deprived of protection, as neither discipline would be applicable.[455] Indeed, such an investment falls within the substantial scope of Article 49 TFEU, but not within its personal scope. In turn, the investment falls within the personal scope of Article 63(1) TFEU and, according to the ECJ, also within the substantive scope, with the problem that due to the application of the personal scope of Article 49 TFEU, this would exclude the applicability of the rules on the free movement of capital. In essence, the foreign investment with "definite influence" falls both under the discipline of capital and partially under the discipline of

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of 13 March 2007, Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, C-524/04, ECLI:EU:C:2007:161, para. 27; Judgment of the Court of 17 September 2009, Glaxo Wellcome GmbH & Co. KG v Finanzamt München II, C-182/08, ECLI:EU: C:2009:559, para. 47; Judgment of the Court of 21 October 2010, Idrima Tipou AE v Ipourgos Tipou kai Meson Mazikis Enimerosis, C-81/09, ECLI:EU:C:2010:622, para. 47; Judgment of the Court of 19 July 2012, Marianne Scheunemann v Finanzamt Bremerhaven, C-31/11, ECLI:EU: C:2012:481, para. 23; Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 91; Judgment of the Court of 3 September 2020, Vivendi SA v Autorità per le Garanzie nelle Comunicazioni, C-719/18, ECLI:EU:C:2020:627, para. 40.

[453] See L.S. Otto, *What is a Foreign Direct Investment?,* supra n 452, at p. 520.

[454] Judgment of the Court of 24 May 2007, Winfried L. Holböck v Finanzamt Salzburg-Land, C-157/05, ECLI:EU:C:2007:297, para. 28; Judgment of the Court of 19 July 2012, Marianne Scheunemann v Finanzamt Bremerhaven, C-31/11, ECLI:EU:C:2012:481, para. 33; Judgment of the Court of 13 November 2012, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C-35/11, ECLI:EU:C:2012:707, para. 97.

[455] See L.S. Otto, *What is a Foreign Direct Investment*?, supra n 452, at p. 520.

establishment, but this "coexistence" between disciplines leads to the exclusion of both, thus leaving the foreign investor unprotected.

This is precisely what happened in the *Scheunemann* case.[456] The European Court of Justice examined a national measure in Germany concerning tax issues applicable to shareholdings with "definite influence" in connection with the rules on freedom of establishment. However, in the relevant case, Ms. Scheunemann's shares were held in a third country, with the consequence that her investment did not fall within the personal scope of Article 49 TFEU. The Court, in its judgment, did not even consider a possible application of the free movement of capital - which would have protected the investor - and omitted any assessment of the lack of protection. With the adoption of the screening Regulation, however, this view regarding investments with "definite influence" is changing.

Indeed, in the Regulation's Proposal, the Commission established that foreign direct investments constitute capital movements, falling under Article 63 TFEU. In saying this, the Commission does not make any distinction about investments with or without "definite influence" and therefore, in its view, all forms of foreign direct investment must be protected by the rules on the free movement of capital.[457]

Indeed, if a closer look is taken at the Guidance to Screening Regulation,[458] the Commission points out that the European Screening Regulation is in line with the freedom of capital movement. It does not emerge from the Commission's intentions that FDIs should lose the protection given by the freedom of capital in Article 63 TFEU.[459]

There are several arguments that could support the avoidance of this gap in foreign investor protection. First of all, the ECJ could distinguish the investor protection in FDI screening from previous case law; thus, there would be no need to overrule its own decisions. European jurisprudence already lacks a clear distinction in the applicability

[456] Judgment of the Court of 19 July 2012, Marianne Scheunemann v Finanzamt Bremerhaven, C-31/11, ECLI:EU:C:2012:481, paras. 17–35.

[457] Proposal for the Regulation, COM(2017) 487 final, 13.9.2017, pp. 4, 28 f.

[458] FDI Screening Regulation Guidance, C(2020) 1981 final, OJ C 99 I/4 f of 26.3.2020.

[459] See L.S. Otto, *What is a Foreign Direct Investment?*, supra n 452, at p. 522.

of capital or establishment rules; therefore, such an approach would facilitate the creation of a clearer general rule.[460]

Second argument, the Screening Regulation regulates a whole policy area. This makes a quantitative and qualitative difference to past case law. If, in national cases, where the question is whether the freedom of capitals or the freedom of establishment rules should be applied to the specific case, a gap in protection may also be admissible in abstract, in the Screening Regulation (where Article 63(1) TFEU applies in full), which instead covers a general aspect of European law, such a gap would not be admissible.[461]

Third argument, it would be paradoxical that a portfolio investment would be protected under Article 63(1) TFEU, and that the much more intense FDI would not be protected.[462]

Fourth, and last argument, it is not clear how Article 49 TFEU could exclude the application of Article 63(1) TFEU.[463]

In addition to the protection offered by the framework of free movement of capital, FDIs are protected by EU economic fundamental rights. And this type of protection can be particularly effective if the Court of Justice denies the protection of the free movement of capital rules to FDI with "definite influence".[464]

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[460] S. Hindelang, *Die steuerliche Behandlung drittstaatlicher Dividenden und die europäischen Grundfreiheiten – Die teilweise (Wieder-)Eröffnung des Schutzbereiches der Kapitalverkehrsfreiheit für Dividenden aus drittstaatlichen Direktinvestitionen – zugleich eine Besprechung des Urteils in der Rechtssache Test Claimants in the FII Group Litigation II, Internationales Steuerrecht 3* (2013), p. 77.

[461] See L.S. Otto, *What is a Foreign Direct Investment?*, supra n 452, at p. 522.

[462] S. Hindelang, T.M. Hagemeyer, *Enemy at the Gates? Die aktuellen Änderungen der Investitionsprüfvorschriften in der Außenwirtschaftsverordnung im Lichte des Unionsrechts, in Europäische Zeitschrift für Wirtschaftsrecht* 28(22) (2017) p. 886.

[463] It should be recalled that Article 49 is not applicable in its personal scope in cases of third country direct invetsments, see S. Hindelang, *Die steuerliche Behandlung drittstaatlicher Dividenden und die europäischen Grundfreiheiten – Die teilweise (Wieder-)Eröffnung des Schutzbereiches der Kapitalverkehrsfreiheit für Dividenden aus drittstaatlichen Direktinvestitionen – zugleich eine Besprechung des Urteils in der Rechtssache Test Claimants in the FII Group Litigation II, Internationales Steuerrecht 3* (2013), p. 80; S. Hindelang, T.M. Hagemeyer, *Enemy at the Gates? Die aktuellen Änderungen der Investitionsprüfvorschriften in der Außenwirtschaftsverordnung im Lichte des Unionsrechts in Europäische Zeitschrift für Wirtschaftsrecht* 28(22) (2017) p. 885.

[464] See L.S. Otto, *What is a Foreign Direct Investment?*, supra n 452, at p. 522..

Economic fundamental freedoms, provided for in Articles 15 to 17 of the EU Charter of Fundamental Rights, provide protection for FDIs. The application of the Screening Regulation is subject to compliance with the Charter of Fundamental Rights, as set out in Article 51(1) of the Charter.[465] Although Member States enjoy great discretion in their screening activities, they must comply with the Charter.[466]

The protection that most concerns the foreign investor is Article 16 CFR.[467] This provision provides for the "freedom to conduct a business", which, however, does not constitute an absolute freedom, and must be analysed by virtue of its social function.[468] Therefore, this freedom may be reviewed and subject to intervention by the Member State for reasons of public interest. The protection offered by Article 16 is therefore not very robust, as the case law of the Court of Justice has also shown.[469] This is not surprising; economic freedoms are protected "strongly" in European law by fundamental freedoms, which have more substantial characteristics than those just

[465] Charter of Fundamental Rights of the European Union [2000] OJ C 346/1, Article 51(1): "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers*."; Cf. Judgment of the Court of 26 February 2013, Åklagaren v Hans Åkerberg Fransson, C-617/10, ECLI:EU:C:2013:105, para. 21; Judgment of the Court of 26 September 2013, Texdata Software GmbH, C-418/11, ECLI:EU:C:2013:588, para. 73; Judgment of the Court of 16 May 2017, Berlioz Investment Fund SA v Directeur de l'administration des contributions directes, C-682/15, ECLI: EU:C:2017:373, para. 49.

[466] Cf. Judgment of the Court of 26 February 2013, Åklagaren v Hans Åkerberg Fransson, C-617/10, ECLI:EU:C:2013:105, para. 19; Judgment of the Court of 26 September 2013, Texdata Software GmbH, C-418/11, ECLI:EU:C:2013:588, para. 72.

[467] Charter of Fundamental Rights of the European Union [2000] OJ C 346/1, Article 16: "*The freedom to conduct a business in accordance with Community law and national laws and practices is recognised."*

[468] Judgment of the Court of 6 September 2012, Deutsches Weintor eG v Land Rheinland-Pfalz, C-544/10, ECLI:EU:C:2012:526, para. 54; Judgment of the Court of 22 January 2013, Sky Österreich GmbH v Österreichischer Rundfunk, C-283/11, ECLI:EU:C:2013:28, para. 45.

[469] P. Oliver, *What purpose does Article 16 of the charter serve?, in U. Bernitz , X. Groussot, F. Schulyok (eds) General principles of EU law and European private law. Kluwer Law International, Alphen aan den Rijn* (2013), pp. 281–300; X. Groussot, G.T. Pétursson, J. Pierce "*Weak right, strong Court – the freedom to conduct business and the EU Charter of Fundamental Rights" in S. Douglas-Scott, N. Hatzis (eds) Research handbook on EU law and human rights. Edward Elgar Publishing, Cheltenham* (2017), pp. 326–344.

mentioned in the Charter of Fundamental Rights.[470] Here, too, the need to protect foreign investments through the application of the freedom of capital movement again emerges.

2. Implementation in national legislation

The brief analysis that follows, aims to give a very brief general overview of the relationship between the domestic screening mechanisms present in some Member States, and how, and if, the implementation of the EU Screening Regulation has changed Member States' domestic legal framework with regards to FDIs. Subsequently, the screening mechanism in Italy will be examined in depth, how the domestic discipline has evolved in recent years, and the relationship that exists today between the Italian "golden powers" and the EU Screening Regulation. In particular, with respect to the Italian discipline, it will be examined how the technological aspects of the EU Screening Regulation have been implemented. Specifically, it will be seen how Article 4 of the Regulation was implemented, which mentions a non-exhaustive list of factors that may be taken into consideration by the Member States and the Commission during the screening activity, such as, for example, critical infrastructures and critical technologies.[471]

Prior to the introduction of the EU Screening Regulation, only 13 Member States had a domestic FDI screening mechanism.[472] Although the domestic mechanisms are in some cases very heterogeneous, they all have one thing in common: the search for the right balance in the relationship between internal security and the attraction of foreign capital. As will be seen, some countries have adopted a screening mechanism that has already been found to be in line with the minimum requirements of the EU Screening

[470] See L.S. Otto, *What is a Foreign Direct Investment?*, supra n 452, at p. 523.

[471] Such as artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnology and biotechnology, and access to sensitive information.

[472] To date, 18 Member States have adopted a screening mechanism.

Regulation. While others, despite having formally adopted an internal discipline, will have to make changes to comply with the Regulation. Finally, some States, although they have not formally adopted an FDI screening mechanism, nevertheless have rules in their domestic law that allow them to intervene in certain cases, either directly on the foreign investor or on the target company.

2.1 Overall outlook on single Member States

At the end of 2018, Germany and France significantly tightened their respective FDI screening disciplines, extending the areas of control and lowering the percentages of voting rights ownership that the investor must acquire from the target company in order to trigger control over the FDI. The trend, therefore, in line with all other Member States, is towards greater protection of their national economy through more intensive screening of FDIs.

Screening mechanisms vary from country to country.

Traditionally, countries like France and Germany have always had an "open" regime towards foreign investors. However, later on, after several takeovers of German and French companies, mainly by Chinese state-owned enterprises, a growing European concern about security of economic and public order arose. This concern is most evident in the national legal systems of Germany and France, where stricter controls for foreign investors have been introduced.[473]

In Germany, for example, there is an attempt to make its market attractive in order to encourage the inflow of FDIs. In fact, according to the UNCTAD World Investment Prospects Survey, Germany is the most attractive business location on the European continent.[474] German regulation is transparent and consistent with international standards, with the result that foreign investors are treated on an equal footing with

[473] P. Stompfe, *Foreign Investment Screening in Germany and France, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 80.

[474] UNCTAD (2018) World Investment Report 2018, p. 20.

domestic investors when it comes to investment incentives; foreign investors can fully rely on the German legal system.[475] Moreover, Germany has one of the largest networks of bilateral investment treaties in the world (BITs).[476] However, as two sides of the same coin, thanks to this strong attractiveness things changed with the wave of takeovers of German companies by Chinese sovereign wealth funds; Germany, which felt that the nature of these investments could be detrimental to public and economic security and order, took countermeasures by tightening the screening of foreign investments in its country.[477]

Among the various changes in the FDI screening discipline in Germany, the German government made particular changes in December 2018, lowering to 10% the percentage of voting rights acquired by the investor in the target company sufficient to trigger a FDI screening; this requirement applies to the target company operating in the "military and encryption" sectors, and companies in the critical infrastructure sector.[478]

The strong investment attractiveness typical of the German market is also shared by France. In fact, Article L 151-1 of the French Monetary and Financial Code (code monétaire et financier, MFC) states that "financial relations between France and abroad are free". This principle also emerges empirically, since the inflow of FDI has increased from USD 35 billion to USD 50 billion from 2016 to 2017.[479] However, this principle of financial freedom vis-à-vis FDI is subject to certain exceptions, necessary to guarantee "national interests", such as public security, public policy and national defence.

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[475] U.S. Department of State (2018) Investment Climate Statements, Report on Germany. https://www.state.gov/e/eb/rls/othr/ics/2018/eur/281587.htm. Accessed 1 June 2019.

[476] P. Stompfe, *Die Gestaltung und Sicherung internationaler Investor-Staat-Verträge in der arabischen Welt am Beispiel Libyens und Katars*, *Nomos, Baden-Baden* (2017), p. 228.

[477] W. Reinhardt, A. Pelster, Stärkere Kontrolle von ausländischen Investitionen - Zu den Änderungen von AWG und AWV in Neue Zeitschrift für Gesellschaftsrecht (2009), p. 444; K. Hasselbach, K. Peters, Entwicklung des Übernahmerechts 2016/2017 (2017), pp. 1348 et seq.; BDI (2019) Investitionskontrollen in Deutschland und Europa of 19 February 2019. https://bdi.eu/artikel/news/investitionskontrollen-in-deutschland-und-europa/.

[478] The definition of "critical infrastructure" in Germany is given by the "*Gesetz über das Bundesamt für Sicherheit in der Informationstechnik".*

[479] UNCTAD (2018) World Investment Report 2018, p. 20.

French legislation on the control of FDI distinguishes those transactions that require a simple "declaration", from those that require "prior approval" for the transaction to take place, by the public body in charge, which varies according to the sector in which the investment would take place. The first category, i.e. those requiring only a declaration, includes investments made in so-called "non-sensitive sectors";[480] the second category, on the other hand, includes FDIs made in "sensitive" or "extra-sensitive" sectors.[481]

Initially, the screening of FDI was limited to only a few sectors, such as gambling, weapons, weapons equipment, cryptology and private security services. However, after a long series of amendments to the French ad Monetary Financial Code (MFC), the sectors screened have increased.[482]

With the introduction of the Screening Regulation at European level, no particular changes were made to the screening mechanisms in Germany and France. It should be noted that the Screening Regulation creates a framework for Member States to screen FDI for reasons of security and public order, and that the Regulation does not oblige Member States to adopt a mandatory screening mechanism, nor does it provide for substantive or procedural requirements. It only provides for minimum common requirements for all Member State screening mechanisms (where they exist).

Germany ends up with a screening mechanism that is substantially in line with the Regulation and, taking Article 3(1) of the Regulation into consideration,[483] does not

[480] Non-sensitive sectors pursuant to Art. R 152-4 MFC, inter alia, include: "(i) creation or extension of activity of a French company held directly or indirectly by foreign companies or nonresident individuals when they amount to at least 1.5 million Euros; (ii) real estate property acquisitions in France by foreign investors when they amount to at least 1.5 million Euros; (iii) acquisitions of agricultural lands giving rise to wine exploitation; (iv) liquidation of direct foreign investments in France; and (v) realization of operations submitted to prior authorization by the French Ministry".

[481] B. Charrière-Bournazel, *Pitfalls in private M&A in France* (2014), p. 72.

[482] Decree No. 2014-479 dated 14 May 2014, Decree No. 2018-1057 dated 29 November 2018 and Decree No. 2019-486 dated May 2019.

[483] Article 3(1), Screening Regulation, see supra n 360: "*In accordance with this Regulation, Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order*."

have to make any particular changes to its domestic rules in order to comply with the Regulation.[484]

In principle, the same conclusion can also be reached with respect to the French screening regime. However, two amendments might be necessary: the introduction of a discipline preventing the circumvention of the screening mechanism; and the extension of the "scrutiny" period necessary to comply with the deadlines set by the Screening Regulation for the exchange of information between the Member States and the Commission concerning the transaction under scrutiny, and to allow the latter two to issue comments and opinions respectively.[485]

We now turn to the analysis of the screening system of another country, Greece, which is characterised by a very liberal approach to the inflow of foreign direct investments. Foreign companies can easily access this market, and only in some cases encounter difficulties in gaining access, mainly for reasons related to investments that may jeopardise sectors that are considered crucial to national interests. Greece (but also, for example, Spain) has an approach that is defined in doctrine as "favor collocationi", which borrows the expression "favor contractus" from international commercial law,[486] which emphasises the State's desire to limit the access of foreign investors to its domestic market as little as possible, and therefore only when these investments undermine industrial sectors defined as "crucial".[487]

Greece's peculiarity is that it has no domestic screening mechanism.[488] Despite this apparent shortcoming, the Greek government has adopted instruments that are effective

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[484] P. Stompfe, *Foreign Investment Screening in Germany and France, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 112.

[485] See supra n 491.

[486] B. Keller, *Reading the CISG in favor of the contract: "Favor Contractus" in C.B. Andersen, U.G. Schroeter (eds) Sharing international commercial law across national boundaries: Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday* (2018) pp. 247–266.

[487] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 118.

[488] However, as revealed in the Commission's Second Annual Report on FDI screening in the EU, Greece "[h]ad a consultative or legislative process expected to result in the adoption of a new mechanism". Commission, "Second Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2022) 433 final, p. 9.

in monitoring foreign investments entering the State. These tools, although formally lacking a screening mechanism, nevertheless provide a complete picture of investments that are made in Greek territory.[489] For example, one of the "tools" of the Greek legal system is Law 4399 of 2016, entitled "Institutional framework for establishing Private Investment Aid schemes for the country's regional and economic development - Establishing the Development Council and other provisions".[490] This legislation represents one of the major incentives for economic activities in Greece, such as the exemption from paying income tax or the granting of a fixed corporate income tax rate.[491] Each transaction that wishes to pass through these incentives is assessed by the public body competent for the sector in which the investment is made; the assessment must be made within 30 days.[492] Should the assessment of the transaction be positive, and thus the investment receive state aid, this investment "shall be checked during their implementation, upon completion and commissioning of the investment".[493] Therefore, the Greek government has the possibility to monitor those FDI that fall under state aid in cases where Law 4399 of 2016 applies, and such investment monitoring takes place throughout the duration of the investment activity.[494]

The absence of a formal screening mechanism is indicative of Greece's willingness to have an open approach to foreign investment, which is seen as a necessary tool for economic development (especially following the economic crises faced by Greece in recent decades).[495]

[489] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 119.
[490] Published in the Government Gazette of the Hellenic Republic, 22 June 2016, no. 117.
[491] Published in the Government Gazette of the Hellenic Republic, 22 June 2016, no. 117, Article 10.
[492] Article 14(B)(6), Law 4384/2016 (Gov. Gaz. 78, Vol. A).
[493] Article 16(1), Law 4384/2016 (Gov. Gaz. 78, Vol. A).
[494] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 120.
[495] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 122.

This attraction to foreign capital is also shared by Hungary, which saw FDI inflows in 2017 of USD 2492 billion.[496] Hungary has recently adopted, through Law LVII of 2018 and Government Decree 246/2018, a mechanism for screening FDI for national security reasons, in economic sectors defined as "sensitive". This mechanism tends to be in line with the minimum requirements of the EU Screening Regulation, however, it does not include rules on the protection of "sensitive information". Moreover, at the time the Hungarian State regulation was being adopted, the draft version of the EU Screening Regulation was already public; thus, Hungary treats the EU, the EEA, and Switzerland as a single market for FDI screening purposes.[497] Despite many points of contact between the Hungarian legislation and the Screening Regulation, there are differences. For example, Law LVII expands the territorial scope of the screening mechanism beyond the EU to include natural and legal persons from EEA countries and Switzerland. Moreover, the Hungarian domestic legislation contains an anti-circumvention clause in the definition of foreign investors; with the consequence that investors from EU, EEA or Switzerland may be deemed as "foreign" by the Hungarian authorities if they are controlled by entities from countries other than those just mentioned.[498] Lastly, while the EU Screening Regulation's definition of FDI covers a variety of ways in which investments can be made (provided that there is a "lasting and direct link" between the foreign investor and the local economic entity) and does not restrict the economic sectors in which foreign investors can operate in the European territory, Law LVII restricts the market more in these respects.[499]

The Nordic countries, namely Sweden, Denmark and Finland, have heterogeneous domestic screening mechanisms.

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[496] S. Gáspár-Szilágyi, *Foreign Investment Screening in Hungary and Romania, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 188.

[497] S. Gáspár-Szilágyi, *Foreign Investment Screening in Hungary and Romania, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 204.

[498] S. Gáspár-Szilágyi, *Foreign Investment Screening in Hungary and Romania, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 204.

[499] For further detail see S. Gáspár-Szilágyi, *Foreign Investment Screening in Hungary and Romania, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 187-207.

To date, the only country of that has a screening mechanism for foreign investments, out of the three just mentioned, is Finland; however, in order to best implement the Screening Regulation, the domestic framework will have to be updated.[500]

Sweden does not formally have an FDI screening mechanism.[501] However, the "Protective Security Act" allows the government to intervene in cases where a company holds information that is relevant to the internal security of the country. A 2018 government report opened the door to the extension of the Protective Security Act, so that it could empower the government to intervene in cases of the transfer of a company holding sensitive security-related information to a new owner.[502] The proposal only mentions the security of the nation, and not the "strategic security of society" or the "security or public order" expressed in the Screening Regulation.

Denmark, like Sweden, has no formal screening mechanism. However, it has adopted the Prime Minister's Security Circular, which, similar to the Swedish Protective Security Act, focuses on "classified information". The Circular is concerned with covering certain areas with specific rules, e.g. screening in the areas of war material production, cyber-security, financial transactions, gas and electricity.

2.2 Screening mechanism in Italy

The Italian discipline concerning the attribution of special powers to the government in the investment sector has evolved significantly in recent decades. This topic is linked to the issue of public intervention by the State in the economy and, in particular, in

[500] J. Hallberg,, *Foreign Investment Screening in Finland, Norway, Sweden and Denmark, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 209.

[501] However, as revealed in the Commission's Second Annual Report on FDI screening in the EU, Sweden "[h]ad a consultative or legislative process expected to result in the adoption of a new mechanism". Commission, "Second Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2022) 433 final, p. 9.

[502] J. Hallberg,, *Foreign Investment Screening in Finland, Norway, Sweden and Denmark, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 210.

strategic sectors,[503] thus potentially giving rise to an "investor State" in these areas. The regulatory framework over the years has taken into account several factors for the protection of its enterprises and thus of the market: a partially protectionist approach to regulating the economy, a neo-liberal vision regarding the free movement of capital, mixed with a public coordinative control of the market, fuelled, especially in recent years, by an increase in foreign investments in critical sectors of the economy.[504]

In the early 1990s, the powers given to the government were intended to soften the period of privatisation of companies that were controlled by the State, such as in the energy and telecommunications service provision sectors.[505] Article 2 of Law Decree no. 332/1994 granted the Minister of the Treasury (now the Ministry of the Economy) the possibility of using special powers in respect of companies with shares operating in strategic sectors.[506] The nature of these powers were: to veto the acquisition of a significant number of shares in the target company and the conclusion of shareholders' agreements representing more than one-twentieth of the shares conferring voting rights; to veto shareholders' meeting resolutions concerning the dissolution of the company, mergers, changes to the company's objects, etc.; the possibility of appointing a number of directors not exceeding one-fourth of the entire board.[507] The aim of the

[503] As, for example, in the telecommunications sector, "Telecom", one of the biggest, if not the biggest company in Italy operating in this sector, was privatised in the 1990s.

[504] A. Gemmi, *La golden power come potere amministrativo. Primi spunti per uno studio sui poteri speciali e sul loro rafforzamento in 1 PA Persona e Amministrazione* (2020), pp. 381–420.

[505] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 190.

[506] F. Riganti, *I golden powers italiani tra «vecchie» privatizzazioni e «nuova» disciplina emergenziale in 4 Nuove Leggi Civ. Comm. 867* (2020).

[507] F. Riganti, *I golden powers italiani tra «vecchie» privatizzazioni e «nuova» disciplina emergenziale in 4 Nuove Leggi Civ. Comm. 867* (2020). Article 2, Law Decree no. 332/1994, published in *Gazzetta Ufficiale Serie Generale n. 177 del 30-07-1994*: "*1. Tra le societa' controllate direttamente o indirettamente dallo Stato operanti nel settore della difesa, dei trasporti, delle telecomunicazioni, delle fonti di energia, e degli altri pubblici servizi, sono individuate con decreto del Presidente del Consiglio dei Ministri, adottato su proposta del Ministro del tesoro, d'intesa con i Ministri del bilancio e della programmazione economica e dell'industria, del commercio e dell'artigianato, nonche' con i Ministri competenti per settore, previa comunicazione alle competenti commissioni parlamentari, quelle nei cui statuti, prima di ogni atto che determini la perdita del controllo, deve essere introdotta con deliberazione dell'assemblea straordinaria una clausola che attribuisca al Ministro del tesoro la titolarita' di uno o piu' dei seguenti poteri speciali da esercitare d'intesa con il Ministro del bilancio*

e della programmazione economica e con il Ministro dell'industria, del commercio e dell'artigianato, ((tenuto conto degli obiettivi nazionali di politica economica e industriale:

a) gradimento da rilasciarsi espressamente all'assunzione, da parte dei soggetti nei confronti dei quali opera il limite al possesso azionario di cui all'Articolo 3, di partecipazioni rilevanti, per tali intendendosi quelle che rappresentano almeno la ventesima parte del capitale sociale rappresentato da azioni con diritto di voto nelle assemblee ordinarie o la percentuale minore fissata dal Ministro del tesoro con proprio decreto. Il gradimento deve essere espresso entro sessanta giorni dalla data della comunicazione che deve essere effettuata dagli amministratori al momento della richiesta di iscrizione nel libro soci. Fino al rilascio del gradimento e comunque dopo l'inutile decorso del termine, il cessionario non puo' esercitare i diritti di voto e comunque quelli aventi contenuto diverso da quello patrimoniale, connessi alle azioni che rappresentano la partecipazione rilevante. In caso di rifiuto del gradimento o di inutile decorso del termine, il cessionario dovra' cedere le stesse azioni entro un anno. In caso di mancata ottemperanza il tribunale, su richiesta del Ministro del tesoro, ordina la vendita delle azioni che rappresentano la partecipazione rilevante secondo le procedure di cui all'Articolo 2359-bis del codice civile;

b) gradimento da rilasciarsi espressamente, quale condizione di validita', alla conclusione di patti o accordi di cui all'Articolo 10, comma 4, della legge 18 febbraio 1992, n. 149, come sostituito dall'Articolo 7, comma 1, lettera b), del presente decreto, nel caso in cui vi sia rappresentata almeno la ventesima parte del capitale sociale costituito da azioni con diritto di voto nell'assemblea ordinaria o la percentuale minore fissata dal Ministro del tesoro con proprio decreto. Fino al rilascio del gradimento e comunque dopo l'inutile decorso del termine, i soci aderenti al patto non possono esercitare il diritto di voto e comunque quelli aventi contenuto diverso da quello patrimoniale. Ai fini del rilascio del gradimento la Consob informa il Ministro del tesoro dei patti e degli accordi rilevanti ai sensi del presente Articolo di cui abbia avuto comunicazione in base al citato Articolo 10, comma 4, della legge n. 149 del 1992. Il potere di gradimento deve essere esercitato entro sessanta giorni dalla data della comunicazione effettuata dalla Consob. In caso di rifiuto di gradimento o di inutile decorso del termine, gli accordi sono ((inefficaci. Qualora dal comportamento in assemblea dei soci sindacali si desuma il mantenimento degli impegni assunti con l'adesione ai patti di cui al citato Articolo 10, comma 4, della legge n. 149 del 1992, le delibere assunte con il voto determinante dei soci stessi sono impugnabili;

c) veto all'adozione delle delibere di scioglimento della societa', di trasferimento dell'azienda, di fusione, di scissione, di trasferimento della sede sociale all'estero, di cambiamento dell'oggetto sociale, di modifica dello statuto che sopprimono o modificano i poteri di cui al presente Articolo;

d) nomina di almeno un amministratore o di un numero di amministratori non superiore ad un quarto dei membri del consiglio e di un sindaco.

1-bis. Il contenuto della clausola che attribuisce i poteri speciali è individuato con decreto del Ministro del tesoro, di concerto con i Ministri del bilancio e della programmazione economica, e dell'industria, del commercio e dell'artigianato.

2. Ai soci dissenzienti dalle deliberazioni che introducono i poteri speciali di cui al comma 1, lettera c), spetta il diritto di recesso ai sensi dell'Articolo 2437 del codice civile.

3. Le disposizioni del presente Articolo si applicano anche alle societa' controllate, direttamente o indirettamente da enti pubblici, anche territoriali ed economici, operanti nel settore dei trasporti e degli altri servizi pubblici e individuate con provvedimento dell'ente pubblico partecipante, al quale verranno riservati altresì i poteri previsti al comma 1.“

Decree was to address issues that other European companies were experiencing in their privatisation processes of companies that were previously controlled by the State. The discipline outlined in Law decree no. 332/1994 attributed powers to the Italian government that were referred to as "golden shares" (an expression borrowed from Great Britain), which drew on the French model of attribution of special powers.[508] The French system had introduced (and Italy subsequently followed the same approach) the criterion of "national interest" to guide the exercise of special powers. This expression was not subsequently better specified, so much so that some doubts arose as to the concrete purpose of these powers, which were envisaged for "strategic" enterprises.[509] The Italian "golden shares" regime clashed with European law, so significantly that Italy was subjected to several infringement proceedings and preliminary rulings before the ECJ.[510] Generally, European law does not prohibit "golden shares", given that in light of Article 345 TFEU Member States may preserve their regulatory framework concerning the regulation of property rights.[511] However, the granting of special powers to the national government could potentially lead to a clash with the fundamental freedoms of the European single market, in particular the freedom of capital movements (Article 63 TFEU) and freedom of establishment (Article 49 TFEU).[512]

The Commission has repeatedly challenged the "golden shares" before the Court of Justice, which, on several occasions, has established the limits and criteria for the use of special powers by the national government so as to comply with European law.[513]

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[508] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 190.

[509] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 190.

[510] T. Szabados, *Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union in 16(5) Ger. L.J. 1099–1130* (2015).

[511] Article 345 TFEU: "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*."

[512] CJEU, C-58/99, Commission v. Italy.

[513] T. Papadopoulos, *Screening of Foreign Direct Investments Through European Company Law in S. Hindelang, A. Moberg, A Common European Law on Investment Screening - YSEC Yearbook of Socio-Economic Constitutions* (Springer 2020), pp. 677–723.

The Court of Justice, comparing golden shares with Articles 63 and 49 TFEU, ruled that such special powers would only concern the use of a share within the company that would allow the government to obtain influence over the company. In such cases, excessive government discretion could discourage investors from establishing themselves in the Member State.[514] The jurisprudence of the Court of Justice establishes that there is a violation of the Treaties in those cases in which the government was given excessive discretionary power, which consequently led to legal uncertainty and a lack of transparency. According to the Court, special powers must be activated for the protection of interests that must be established in advance, and decisions taken in this regard must be adequately and clearly reasoned.[515]

The Court of Justice has ruled that the activation of Article 63 TFEU, with respect to the exercise of "golden shares", is not necessary when the freedom of establishment of Article 49 TFEU has been violated; the former will only be taken into account by the Court when the exercise of the latter has not been hindered.[516] However, shifting the focus to the freedom of establishment instead of the freedom of capital has led to a focus no longer on the investment per se, but on the investment aimed at strategic capital shares. Thus, the discipline of "golden shares" has evolved into a genuine screening mechanism for foreign investment.[517]

In recent years, the ECJ's approach has been far from homogeneous, as it has oscillated between freedom of establishment and capital movement disciplines when examining the discipline of "golden shares".[518] This oscillation is due to the two different ways in

[514] CJEU, C-326/07, Commission v. Italy; C-367/98, Commission v. Portugal.

[515] T. Szabados, *Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union in 16(5) Ger. L.J. 1099–1130* (2015); F. Riganti, *I golden powers italiani tra «vecchie» privatizzazioni e «nuova» disciplina emergenziale in 4 Nuove Leggi Civ. Comm. 867* (2020); F. Bassan, *Dalla golden share al golden power: il cambio di paradigma europeo nell'intervento dello Stato sull'economia in 1 Studi sull'Integrazione Europea* (2014), pp. 57-80.

[516] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 191.

[517] D. Gallo, *The CJEU vis-à-vis EU and Non-EU Investors, Between National and European Solidarity: Golden Shares, Sovereign Investment and Socio-Economic Protectionism Under Free Movement Rules in LUISS Working Paper no. 3/2014* (2014).

[518] Cases C-171/08, Commission v. Portugal; C-543/08, Commission v. Portugal; C-212/09 Commission v. Portugal, which examined the "golden shares" framework in light of the free movement of capital.

which the discipline of "golden shares" can be interpreted, i.e., on the one hand, an instrument capable of intervening in cases in which a private party controls sectors deputed to the provision of services of general interest; and, on the other hand, "golden shares" can be seen as a derogation to the fundamental freedoms of the European market, which must be justified and interpreted restrictively.[519]

In Italy, after a series of infringement proceedings, the regulatory framework on "golden shares" was amended.

From the discipline of "golden shares" came, in fact, the discipline of "golden powers" with Law Decree 21/2012 (converted into Law no. 56/2012). The aim was to provide more objective criteria for the use of "golden powers" in strategic sectors. Whereas with the system of "golden shares" the focus was on intervention in those sectors in which the government had an asset, i.e., state-owned, previously State-owned or private enterprises, with the system of "golden powers" this distinction no longer operates; the regulatory framework of "golden powers" allows for intervention against all types of economic operators.[520]

The sectors in which these powers can be exercised are "defence" and "national security".[521] The strategic sectors were initially defined through the DPCM (Decree of the President of the Council of Ministers) no. 253/2012, subsequently amended by DPCM no. 129/2013. However, by Presidential Decree no. 108/2014, the government established a discipline for the determination of strategic sectors of the economy.[522] This discipline essentially provides for the obligation for companies operating in

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While case C-244/11, Commission v. Greece focused on freedom of establishment, favouring the approach already followed in C-326/07, Commission v. Italy.

[519] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 191.

[520] F. Riganti, *I golden powers italiani tra «vecchie» privatizzazioni e «nuova» disciplina emergenziale in 4 Nuove Leggi Civ. Comm. 867* (2020); F. Bassan, *Dalla golden share al golden power: il cambio di paradigma europeo nell'intervento dello Stato sull'economia in 1 Studi sull'Integrazione Europea* (2014), pp. 57-80. Inoltre, il governo può intervenire anche rispetto ad operazioni intra-EU, see R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 4.

[521] Article 1, Law Decree no. 21/2012.

[522] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 191.

strategic sectors to notify the government of decisions taken by the shareholders' meeting or administrative bodies, as well as the possible acquisition of shares in the company in question.[523] In case of an acquisition, notification becomes mandatory

[523] Article 1(4)(5), Law Decree no. 21/2012: "*4. Ai fini dell'esercizio del potere di veto di cui al comma 1, lettera b), l'impresa notifica alla Presidenza del Consiglio dei Ministri una informativa completa sulla delibera o sull'atto da adottare in modo da consentire il tempestivo esercizio del potere di veto. Dalla notifica non deriva per la Presidenza del Consiglio dei Ministri ne' per l'impresa l'obbligo di notifica al pubblico ai sensi dell'Articolo 114 del decreto legislativo 24 febbraio 1998, n. 58. Entro quindici giorni dalla notifica il Presidente del Consiglio dei Ministri comunica l'eventuale veto. Qualora si renda necessario richiedere informazioni all'impresa, tale termine e' sospeso, per una sola volta, fino al ricevimento delle informazioni richieste, che sono rese entro il termine di dieci giorni. Le richieste di informazioni successive alla prima non sospendono i termini. Decorsi i predetti termini l'operazione puo' essere effettuata. Il potere di cui al presente comma e' esercitato nella forma di imposizione di specifiche prescrizioni o condizioni ogniqualvolta cio' sia sufficiente ad assicurare la tutela degli interessi essenziali della difesa e della sicurezza nazionale. Le delibere o gli atti adottati in violazione del presente comma sono nulli. Il Governo puo' altresi' ingiungere alla societa' e all'eventuale controparte di ripristinare a proprie spese la situazione anteriore. Salvo che il fatto costituisca reato, chiunque non osservi le disposizioni di cui al presente comma, oltre alla revoca della relativa autorizzazione, e' soggetto a una sanzione amministrativa pecuniaria fino al doppio del valore dell'operazione e comunque non inferiore all'uno per cento del fatturato cumulato realizzato dalle imprese coinvolte nell'ultimo esercizio per il quale sia stato approvato il bilancio.*

5. Chiunque acquisisce una partecipazione ai sensi del comma 1, lettere a) e c), notifica l'acquisizione entro dieci giorni alla Presidenza del Consiglio dei Ministri, trasmettendo nel contempo le informazioni necessarie, comprensive di descrizione generale del progetto di acquisizione, dell'acquirente e del suo ambito di operativita', per le valutazioni di cui al comma 3. Nel caso in cui l'acquisizione abbia a oggetto azioni di una societa' ammessa alla

negoziazione nei mercati regolamentati, la notifica deve essere effettuata qualora l'acquirente venga a detenere, a seguito dell'acquisizione, una partecipazione superiore alla soglia prevista dall'Articolo 120, comma 2, del decreto legislativo 24 febbraio 1998, n. 58, e sono successivamente notificate le acquisizioni al superamento delle soglie del 3 per cento, 5 per cento, 10 per cento, 15 per cento, 20 per cento e 25 per cento. Il potere di imporre specifiche condizioni di cui al comma 1, lettera a), o di opporsi all'acquisto ai sensi del comma 1, lettera c), e' esercitato entro quindici giorni dalla data della notifica. Qualora si renda

necessario richiedere informazioni all'acquirente, tale termine e' sospeso, per una sola volta, fino al ricevimento delle informazioni richieste, che sono rese entro il termine di dieci giorni. Eventuali richieste di informazioni successive alla prima non sospendono i termini, decorsi i quali l'acquisto puo' essere effettuato. Fino alla notifica e, successivamente, comunque fino alla decorrenza del termine per l'imposizione di condizioni o per l'esercizio del potere di opposizione, i diritti di voto e comunque quelli aventi contenuto diverso da quello patrimoniale, connessi alle azioni che rappresentano la partecipazione rilevante, sono sospesi. Salvo che il fatto costituisca reato, chiunque non osservi le condizioni di cui al comma 1, lettera a), e' soggetto a una sanzione amministrativa pecuniaria fino al doppio del valore dell'operazione e comunque non inferiore all'uno per cento del fatturato realizzato in ciascuna impresa nell'ultimo esercizio chiuso anteriormente all'operazione. In caso di esercizio del potere di opposizione il cessionario non può esercitare i diritti di voto e comunque

when it involves a purchase of more than 3% of the total shares.[524] The government then makes its investigation, and must reach an assessment within fifteen days of the notification, but if it needs more time to gather more information about the transaction, that period is suspended.[525] The government can then exercise a veto power over the transaction that changes the structure of the target company (acquisition, demerger, change in corporate purpose, etc.), or it can impose conditions to ensure the security of supplies, security of information, technology transfers, etc.; it can also prevent other parties, other than the Italian government, from acquiring shares in the company such that they obtain so many voting rights that they are capable of endangering national security and defence.[526]

Article 2 of Decree-Law no. 21/2012 provides for measures similar to those in Article 1, to be applied in the energy, transport and telecommunications sectors. Decisions relating to acquisitions, demergers, changes in corporate purpose, etc. must be notified within ten days to the Prime Minister's Office,[527] a deadline that may be extended for a further ten days if it is necessary to acquire further information for the final assessment.[528] The government's decision on whether to exercise its right of veto on

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quelli aventi contenuto diverso da quello patrimoniale, connessi alle azioni che rappresentano la partecipazione rilevante e dovrà cedere le stesse azioni entro un anno. In caso di mancata ottemperanza il tribunale, su richiesta della Presidenza del Consiglio dei Ministri, ordina la vendita delle suddette azioni secondo le procedure di cui all'Articolo 2359-ter del codice civile. Le deliberazioni assembleari eventualmente adottate con il voto determinante di tali azioni sono nulle."

[524] Article 1(5), Law Decree no. 21/2012.

[525] Article 1(4)(5), Law Decree no. 21/2012.

[526] Article 1, Law Decree no. 21/2012.

[527] Article 2(2), Law Decree no. 21/2012: "*Qualsiasi delibera, atto o operazione […] che abbia per effetto modifiche della titolarità, del controllo o della disponibilità degli attivi medesimi o il cambiamento della loro destinazione, comprese le delibere dell'assemblea o degli organi di amministrazione aventi ad oggetto la fusione o la scissione della società, il trasferimento all'estero della sede sociale, il mutamento dell'oggetto sociale, lo scioglimento della società, la modifica di clausole statutarie [. . .] il trasferimento dell'azienda o di rami di essa in cui siano compresi detti attivi o l'assegnazione degli stessi a titolo di garanzia, è notificato, entro dieci giorni e comunque prima che vi sia data attuazione, alla Presidenza del Consiglio dei Ministri dalla società stessa.[…]*"

[528] Article 2(4), Law Decree 21/2012: *"[…] Entro quindici giorni dalla notifica, il Presidente del Consiglio dei Ministri comunica l'eventuale veto. Qualora si renda necessario richiedere informazioni alla società, tale termine è sospeso, per una sola volta, fino al ricevimento delle informazioni richieste, che sono rese entro il termine di dieci giorni. Le richieste di informazioni successive alla prima non*

the transaction must be made within fifteen days of the notification. In addition, the Decree-Law stipulates that the foreign (i.e. non-EU) investor must notify the Prime Minister's Office within ten days of the transaction.[529]

Should the investment prove to be detrimental to a public interest in the energy, telecommunications or transport sectors, Article 2(6) of the Decree provides that the Council of Ministers may make the investment in question subject to compliance with certain guarantees, such that those interests can be protected. In any case, if the government considers that it cannot protect the public interest with such guarantees, it may block the entire investment. The threat is assessed in relation to the same criteria as in Article 1(3) of the Decree, i.e. that it may cause serious injury to essential defence and national security interests, and this assessment must be made "on the basis of objective criteria".[530] Furthermore, Article 2(7) requires the State to respect the

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sospendono i termini. Fino alla notifica e comunque fino al decorso dei termini previsti dal presente comma è sospesa l'efficacia della delibera, dell'atto o dell'operazione rilevante. Decorsi i termini previsti dal presente comma l'operazione può essere effettuata. Il potere di veto [. . .] è espresso nella forma di imposizione di specifiche prescrizioni o condizioni ogniqualvolta ciò sia sufficiente ad assicurare la tutela degli interessi pubblici [...]. Le delibere o gli atti o le operazioni adottati o attuati in violazione del presente comma sono nulli. Il Governo può altresì ingiungere alla società e all'eventuale controparte di ripristinare a proprie spese la situazione anteriore.[…]"

[529] Article 2(5), Law Decree no. 21/2012: "*L'acquisto a qualsiasi titolo da parte di un soggetto esterno all'Unione europea di partecipazioni in società che detengono gli attivi individuati come strategici ai sensi del comma 1, di rilevanza tale da determinare l'insediamento stabile dell'acquirente in ragione dell'assunzione del controllo della società la cui partecipazione è oggetto dell'acquisto, ai sensi dell'Articolo 2359 del codice civile e del decreto legislativo 24 febbraio 1998, n. 58, e' notificato entro dieci giorni alla Presidenza del Consiglio dei Ministri, unitamente ad ogni informazione utile alla descrizione generale del progetto di acquisizione, dell'acquirente e del suo ambito di operatività. Per soggetto esterno all'Unione europea si intende qualsiasi persona fisica o giuridica, che non abbia la residenza, la dimora abituale, la sede legale o dell'amministrazione ovvero il centro di attività principale in uno Stato membro dell'Unione europea o dello Spazio economico europeo o che non sia comunque ivi stabilito.*"

[530] Article 1(3), Law Decree no. 21/2012: "*Al fine di valutare la minaccia effettiva di grave pregiudizio per gli interessi essenziali della difesa e della sicurezza nazionale, derivante dall'acquisto delle partecipazioni di cui alle lettere a) e c) del comma 1, il Governo, nel rispetto dei principi di proporzionalita' e ragionevolezza, considera, alla luce della potenziale influenza dell'acquirente sulla societa', anche in ragione della entita' della partecipazione acquisita: a) l'adeguatezza, tenuto conto anche delle modalita' di finanziamento dell'acquisizione, della capacita' economica, finanziaria, tecnica e organizzativa dell'acquirente nonche' del progetto industriale rispetto alla regolare prosecuzione delle*

principle of non-discrimination.[531] This provision of non-discrimination is a unique feature of the screening mechanisms of southern European countries. In fact, it constitutes an additional protection for foreign investors, over and above those already present in the 178 BITs (Bilateral Investment Treaties) and FTAs (Free Trade Agreements) signed by Italy, which provide for most favoured nation treatment (MFN) and national treatment standards; these provisions oblige Italy to treat foreign investors no less favourably than domestic investors. The MFN clauses in the BITs in rare cases provide for exceptions for reasons relating to the protection of the public interest.[532] However, Article 2(7) of the Decree allows the Italian government to intervene in the investment if it may harm a national interest or pose a risk to public order and national security. In such a case, the foreign investor, who is frustrated by the application of the "golden powers", could file for an investment arbitration against Italy, on the basis of the MFN clauses provided for in the BITs.[533]

The new "golden power" discipline has found a synthesis between national and European interests, integrating them, so as to pursue the protection of the internal market.[534]

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attivita', al mantenimento del patrimonio tecnologico, anche con riferimento alle attivita' strategiche chiave, alla sicurezza e alla continuita' degli approvvigionamenti, oltre che alla corretta e puntuale esecuzione degli obblighi contrattuali assunti nei confronti di pubbliche amministrazioni, direttamente o indirettamente, dalla societa' le cui partecipazioni sono oggetto di acquisizione, con specifico riguardo ai rapporti relativi alla difesa nazionale, all'ordine pubblico e alla sicurezza nazionale; b) l'esistenza, tenuto conto anche delle posizioni ufficiali dell'Unione europea, di motivi oggettivi che facciano ritenere possibile la sussistenza di legami fra l'acquirente e paesi terzi che non riconoscono i principi di democrazia o dello Stato di diritto, che non rispettano le norme del diritto internazionale o che hanno assunto comportamenti a rischio nei confronti della comunita' internazionale desunti dalla natura delle loro alleanze o hanno rapporti con organizzazioni criminali o terroristiche o con soggetti ad essi comunque collegati."

[531] Article 2(7), Law Decree no. 21/2012: "*I poteri speciali di cui ai commi 3 e 6 sono esercitati esclusivamente sulla base di criteri oggettivi e non discriminatori.[…]*"

[532] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 135.

[533] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 135.

[534] G. Sabatino, *The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis in European Company Law Journal 18, no. 6* (2021), p. 192.

2.2.1. Novelties introduced by Decree-Law No. 21/2022

In March 2022, a new Decree-Law was published,[535] which amended the previous discipline.[536] With the new Decree-Law, a coordination was made between the two hypotheses that could give rise to two separate notifications even at a distance of time (as, for example, in the case where an acquisition transaction is carried out, but only months later the new controlling shareholder makes a change in the governance of the company); this circumstance could cause the duplication of proceedings for the same transaction, making them inefficient.[537] The Decree now requires that the notification take place "where possible", and must be made by both the acquiring company and the target company. The simultaneous notification reduces both the administrative burden on companies and makes it possible to impose requirements directly on the acquiring and target companies.[538]

Prior to the enactment of Decree-Law No. 21/2022, the scope of "golden powers" was extended by Decree-Law No. 23/2020, in view of the COVID-19 emergency, in order to strengthen the securities market and the crisis market for companies, as they are particularly exposed to possible takeover attempts by foreign companies. Decree-Law No. 23/2020 extended the regulations to these fields until 31 December 2022:

a) Intra-EU transactions in the case of the acquisition of control of shareholdings in companies holding strategic assets "*of such importance as to determine the permanent establishment of the acquirer by reason of the assumption of control*

[535] Which was converted into law on may of the same year, Legge 20 maggio 2022, n. 51, Conversione in legge, con modificazioni, del decreto-legge 21 marzo 2022, n. 21, recante misure urgenti per contrastare gli effetti economici e umanitari della crisi ucraina. (22G00061) (GU Serie Generale n.117 del 20-05-2022).

[536] Decreto-Legge 21 marzo 2022, n. 21 Misure urgenti per contrastare gli effetti economici e umanitari della crisi ucraina. (22G00032) (GU n.67 del 21-3-2022).

[537] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 5.

[538] Supra n 555.

of the company whose shareholding is the object of the acquisition" of assets falling within the sectors referred to in Article 2 of Decree-Law No. 21/2012.[539]

b) "*as well as acquisitions of shareholdings, by foreign entities not belonging to the European Union, that attribute a share of the voting rights or of the capital equal to at least 10 per cent, taking into account the shares or quotas already directly or indirectly held, and the total value of the investment is equal to or greater than EUR 1 million, and acquisitions that determine the exceeding of the thresholds of 15%, 20%, 25% and 50% are also notified*".[540]

At this stage, the EU Commission issued guidelines to support Member States in the use of golden powers to avoid a loss of critical technological resources in the epidemiological phase. The Commission calls on Member States to "*[m]ake full use already now of its FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework*".[541]

With Decree-Law No. 21/2022, these transitional provisions were transformed into full regime provisions. In particular, the extension mainly concerned purchase transactions by intra-EU entities in the energy, communications, transport, health, agri-food and financial sectors, including credit and insurance, with effect from 1/1/2023.[542] In such

[539] Article 15, 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, nonchè interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali. (20G00043) (GU Serie Generale n.94 del 08-04-2020); R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 7.

[540] Article 15, Decreto-Legge 8 aprile 2020, n. 23.

[541] Communication From The Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) (2020/C 99 I/01), p. 2; Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, Coordinated economic response to the covid-19 outbreak COM(2020) 112 final.

[542] Article 25, Decreto-Legge 21 marzo 2022, n. 21 Misure urgenti per contrastare gli effetti economici e umanitari della crisi ucraina. (22G00032) (GU Serie Generale n.67 del 21-03-2022).

cases, the notification obligation is also incumbent on European entities (including those resident in Italy), thus highlighting the absence of discriminatory profiles between national and European companies.[543]

Finally, the Decree has introduced a provision on the supply of critical raw materials, which incorporates a notification obligation for the export of such raw materials (which will be identified by a subsequent Decree); for the time being, "ferrous waste, also not originating in Italy" has been qualified in this sense.[544]

2.3. Relationship between golden powers and the EU Screening Regulation

The relationship between golden powers and Reg. 452/2019 is evident as the control and limitation of foreign direct investment passes through the activation of golden powers.[545] According to the report on information policy for security, covering the year 2020, by the Italian Intelligence (DIS, AISE, AISI), the activation of golden powers occurred 38 times in multiple sectors, with 341 notifications made to the government (in 2019 there were 83 notifications made).[546]

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[543] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 7.

[544] Article 30, Decreto-Legge 21 marzo 2022, n. 21: "*Con decreto del Presidente del consiglio dei Ministri, su proposta del Ministero dello sviluppo economico e del Ministero degli affari esteri e della cooperazione internazionale, sulla base della rilevanza per l'interesse nazionale e del pregiudizio che deriverebbe dall'operazione, anche in relazione alla necessità di approvvigionamento di filiere produttive strategiche, sono individuate, le materie prime critiche, per le quali le operazioni di esportazione al di fuori dell'Unione europea sono soggette alla procedura di notifica di cui al comma 2. I rottami ferrosi, anche non originari dell'Italia, costituiscono materie prime critiche e la loro esportazione è soggetta all'obbligo di notifica di cui al comma 2."*

2. Le imprese italiane o stabilite in Italia che intendono esportare, direttamente o indirettamente, fuori dall'Unione europea le materie prime critiche individuate ai sensi del comma 1 o i rottami ferrosi di cui al medesimo comma 1 hanno l'obbligo di notificare, almeno dieci giorni prima dell'avvio dell'operazione, al Ministero dello sviluppo economico e al Ministero degli affari esteri e della cooperazione internazionale una informativa completa dell'operazione".

[545] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 205.

[546] https://www.sicurezzanazionale.gov.it/sisr.nsf/wp-content/uploads/2021/02/RELAZIONE-ANNUALE-2020.pdf, p. 48.

The use of golden powers in the tech sector was seen recently when the Draghi government, not deeming the imposition of prescriptions and conditions sufficient, blocked the acquisition of a majority stake of the Milan-based company LPE in the semiconductor sector for the manufacture of chips by the Chinese company Shenzen.[547]
The peculiarity of the introduction of the EU Screening Regulation in the Italian legal system lies in the fact that, on the one hand, like other countries, the application of the golden powers was extended to those sectors that are subject to the Regulation's discipline, on the other hand, Italy was the only one to introduce two novelties: it provided that the golden powers are also applicable to the banking sector and, the second novelty, that the golden powers are also exercisable vis-à-vis EU investors, as well as non-EU investors.
In connection with this extension of powers, three different issues arise. The first of these revolves around whether or not the Italian legislation can adopt a "double binary", i.e. a discipline less favourable to non-EU investors than to intra-EU investors.[548] This possibility is admitted. Indeed, in doctrine,[549] the positive answer to this question emerges from the Guidelines of the Commission to the Member States of March 2020, in which it is made explicit that "restrictions on the movement of capital to and from third countries take place in a different legal context compared to restrictions to intra-EU capital movement";[550] according to the Commission's Guidance "under the Treaty additional grounds of justification may be acceptable in the case of restrictions on transactions involving third countries. The permissible grounds of

[547] F. de Bortoli, *Golden power, la LPE e la difesa del made in Italy (non solo dai cinesi)*, in Corriere della Sera, L'Economia, 20 April 2021; C. FOTINA, *Tlc, energia, finanza: così il «golden power» del Governo Draghi*, in Il Sole 24 Ore, 3 September 2021.
[548] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 206.
[549]Supra n 566.
[550] Communication from the 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" (2020/C 99 I/01), point 4.

justification may also be interpreted more broadly".[551] Thus, the exceptions expressed in the treaties, i.e. security and public order, as well as overriding requirements of jurisprudential origin, may be interpreted more restrictively and strictly with regard to non-EU investors than with regard to European investors.[552]

Prior to the Commission's guideline, this distinction between EU and non-EU foreign direct investment was missing.[553] At most, this distinction had emerged in other areas of European law,[554] such as tax law, where such a demarcation has always operated.[555]

The second problem concerns the possibility that a State, such as Italy, may also apply golden powers to EU investors. This problem seems to be resolved in a positive way, since the notification obligation provided for by the golden power discipline, which is also imposed on EU subjects regarding operations of acquisition of shareholdings that are able to determine the control of a company established on Italian territory, is not in conflict with European law.[556] It is permissible insofar as it is intended to prevent hostile takeovers in strategic companies in the country; and the discipline was deemed proportionate insofar as it was initially valid until 31 December 2022, which was therefore temporary in nature. However, with Law Decree no. 228/2022, the term of the measure was extended. It would be interesting to see whether and how, as a result of this extension, these provisions, which are also applicable to EU investors, could still be deemed proportional. As already stated in literature, this measure was deemed proportional because, due to the economic crisis since COVID-19, this impacted some Member States more than others, thus requiring the hardest hit countries to intervene

[551] Communication from the 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" (2020/C 99 I/01), point 4.

[552] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 206.

[553] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, *supra* n 566, at p. 206.

[554] D. Gallo, *On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments*, in *European Papers*, 2016, p. 823 ss., pp. 844 and 845; H. SCHWEITZER, Sovereign Wealth Funds, pp. 103-108.

[555] Judgment of the Court of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04, ECLI:EU:C:2006:774, para. 170; Judgment of the Court of 20 May 2008, Orange European Smallcap Fund, C-194/06, ECLI:EU:C:2008:289, para. 89.

[556] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, *supra* n 566, at p. 207.

more to restrict access to their capital markets.[557] And such interventions remain necessary to protect strategic sectors, and not merely to hinder and discourage intra-EU foreign direct investments.[558] Therefore, even with the prolongation of these measures, it does not seem as if they could conflict with European law in the immediate future, as the effects of the economic crisis will linger on.

The third and final issue concerns the applicability of golden powers to the banking sector. In particular, the nature of the interests that can be invoked by the State to exercise these powers, both with respect to EU and non-EU investments, is problematic.[559] As specified by the EU Screening Regulation itself, the list "of factors that may affect security or public order" is "non-exhaustive",[560] there is however always an invocable interest, i.e. financial stability; a factor that can be inferred from the Commission's practice and EU case law (even if not related to the subject of golden powers).[561]

The meaning to be attributed to this expression is still uncertain, as a clear notion is lacking in EU case law.[562] One possible argument that could exclude the applicability of the financial stability justification in the banking sector, when exercising golden powers, could be that the Court of Justice, in its established case law, denies that economic reasons, such as mere industrial development, can be invoked by a Member State to restrict trade in goods, capital, workers and services.[563] This argument would therefore follow the "doctrine of non-economic considerations", which provides that only for non-economic reasons can trade be restricted.[564] It should be specified,

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[557] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, *supra* n 566, at p. 207.

[558] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri, supra* n 566, at p. 207.

[559] 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), pp. 26-54.; A. Sacco Ginevri, *Golden powers e banche nella prospettiva del diritto dell'economia, in Rivista della Regolazione dei mercati* (2021), p. 55.

[560] Recital 12, EU Screening Regulation.

[561] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, *supra* n 566, at p. 208.

[562] D. Gallo, *Corte di giustizia UE, golden shares e investimenti sovrani, in Diritto del commercio internazionale* (2013), p. 917.

[563] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, *supra* n 566, at p. 208.

[564] Judgments of the Court of Justice of 27 February 2019, Case C-563/17, Associação Peço a Palavra, ECLI:EU:C:2019:144, paragraph 70; Judgments of the Court of Justice of 8 July 2010, Case C-171/08,

however, that even if the objective of financial stability is not mentioned by the Court of Justice in its case law, at the same time the EU judges refer to the concept of 'financial interest' of the State mentioned in Commission v. Portugal, on the subject of freedom of movement and golden shares, in order to exclude its legitimacy under European law.[565]

However, the two concepts of financial stability and financial interest should not be overlapped.[566] The latter, in fact, is not prevented from being applied to the banking sector in the context of golden power. What the jurisprudence prescribes, in fact, is a prohibition with regard to purely economic objectives, which are thus disengaged from further purposes, i.e. of general interest. This principle was recognised in the Essent case, where in the field of free movement of capital and privatisation, the EU judges specified that "purely economic reasons cannot constitute overriding reasons in the general interest capable of justifying a limitation of a fundamental freedom guaranteed by the Treaties" and that, however, such a justification is legitimate "if it is dictated by economic reasons pursuing a general interest objective".[567] Financial stability, therefore, has an intermediate economic nature in that it is instrumental to the ultimate

Commission v. Portugal, ECLI:EU:C:2010:412, paragraph 52; Judgments of the Court of Justice of 6 June 2000, Case C-35/98, Verkooijen, ECLI:EU:C:2000:294, paragraphs 47 and 48; Judgments of the Court of Justice of 29 April 1999, Case C-224/97, Ciola, ECLI:EU:C:1999: 212, paragraph 17; Judgments of the Court of Justice of 5 June 1997, Case C-398/95, Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion (SETTG), ECLI:EU:C:1997:282, paragraph 23; Judgments of the Court of Justice of 30 November 1995, Case C- 55/94, Gebhard, ECLI:EU:C:1995:411, paragraph 37; Judgments of the Court of Justice of 26 April 1998, Case 352/85, Bond van Adverteerders, ECLI:EU:C:1988:196, paragraph 34; Judgments of the Court of Justice of 25 July 1991, Case C-288/89, Collectieve Antennevoorziening Gouda, ECLI:EU:C:1991:323, paragraph 11; Judgments of the Court of Justice of 7 February 1984, Case 238/82, Duphar, ECLI:EU:C:1984:45, paragraph 23; Judgments of the Court of Justice of 9 June 1982, Case 95/81, Commission v. Italy, ECLI:EU:C:1982:216, paragraph 27; Judgments of the Court of Justice of 19 December 1961, Case 7/61, Commission v. Italy, ECLI:EU:C:1961:31, point D.

[565] Judgment of the Court of Justice of 4 June 2002, Case C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326, point 52.

[566] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, *supra* n 566, at p. 209.

[567] Judgment of the Court of Justice of 22 October 2013, Case C- 105/12, Essent, ECLI:EU:C:2013:677, paragraphs 51, 52.

objective of ensuring that the essential services provided by Italian financial institutions can be adequately provided for the benefit of the community.[568]

Therefore, the concept of financial stability cannot be interpreted by national authorities in such a way as to make it instrumental to the objective of supporting the economic system, but must instead be interpreted in relation to the activities carried out by banks, intended as "an essential source of funding for companies active in the various markets".[569]

And this argument is confirmed by the Commission's 2020 Guidance, which specifies that restrictive measures may be taken to address threats to financial stability".[570] The Commission explicitly mentions the statement of former European Commissioner Jonathan Hill, on financial stability, financial services and the single capital market, in relation to the controls imposed by Greek authorities on capitals.[571] In the statement, it is expressed that Member States may adopt measures relating to capital movements that are justified on grounds of public policy or public security, and that, according to the case law of the Court of Justice, additional measures may also be introduced that are motivated by other requirements, such as those of overriding reasons of general public interest, which, if they are applied, are for the shortest possible period.[572] Therefore, again with regard to the Greek banking context, it constitutes a stability in the financial system and thus a matter of public interest, which justifies the temporary application of restrictions on capital flows.

In addition to the brief reference made by the Commission to Jonathan Hill's statement, what is relevant is that the Commission refers to the objective of financial stability

[568] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri, supra* n 566, at p. 210.

[569] Judgment of the Court of Justice of 19 July 2016, Case C-526/14, Kotnik, ECLI:EU:C:2016:570, paragraph 50.

[570] Communication from the 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" (2020/C 99 I/01), point 4.

[571] Statement on behalf of the European Commission by Jonathan Hill on the capital controls imposed by the Greek authorities, 29 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/statement_15_5271.

[572] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri, supra* n 566, at p. 211.

immediately after mentioning the possibility of being able to restrict the capital market with regard to companies providing public services.[573]

2.3.1. Extension of the golden powers discipline to technological innovation and new assets

Decree Law No. 21/2012 has been profoundly innovated over the years, especially as a result of major changes in the technological sphere. In fact, specific rules were introduced for the technological sphere and, in particular, for 5G.[574] The starting point in this respect is Article 4 of the EU Screening Regulation, which lists the technological factors and critical infrastructures that Member States must take into account when carrying out screening activities.

DPCM no. 179/2020 identified for the first time the goods and services of national interest in the areas indicated in Article 4 of the EU Screening Regulation; Decree-Law No. 21/2022 introduced, in addition to the innovations briefly examined above, the obligation to notify an annual plan in relation to 5G technologies, replacing the previously existing obligation to notify individual acquisitions of goods and services.[575]

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[573] See D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri, supra* n 566, at p. 211.

[574] Article 1-bis of Decree-Law no. 12/2012, subsequently amended by Decree-Law no. 105/2019 and, most recently, by Decree-Law No. 23/2020.

[575] Article 28 para.1, point 2, Law Decree no. 21/2022: *"[L]e imprese che, anche attraverso contratti o accordi, intendano acquisire, a qualsiasi titolo, beni o servizi relativi alla progettazione, alla realizzazione, alla manutenzione e alla gestione delle attività di cui al comma 1, ovvero componenti ad alta intensità tecnologica funzionali alla predetta realizzazione o gestione, notificano, prima di procedere alla predetta acquisizione, alla Presidenza del Consiglio dei ministri un piano annuale nel quale sono contenuti: il settore interessato dalla notifica; dettagliati dati identificativi del soggetto notificante; il programma di acquisti; dettagliati dati identificativi dei relativi, anche potenziali, fornitori; ((descrizione)) dei beni, dei servizi e delle componenti ad alta intensità tecnologica funzionali alla progettazione, alla realizzazione, alla manutenzione e alla gestione delle attività di cui al comma 1; un'informativa completa sui contratti in corso e sulle prospettive di sviluppo della rete 5G, ovvero degli ulteriori sistemi e attivi di cui al comma 1; ogni ulteriore informazione funzionale a fornire un dettagliato quadro delle modalità di sviluppo dei sistemi di digitalizzazione del notificante, nonchè dell'esatto adempimento alle condizioni e alle prescrizioni imposte a seguito di precedenti notifiche; un'informativa completa relativa alle eventuali comunicazioni effettuate ai*

Thus, with the new provisions, a broadening of the objective scope of the golden power emerges, which is oriented towards new technologies and "new" goods.[576] It should be specified that before 2022, national rules did not refer to the "technological" provisions of Reg. 452/2019.

The importance of technological innovation emerges from Article 4(b) of the EU Screening Regulation where, merely by way of example, artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnology and biotechnology and, in Article 4(d), access to sensitive information are mentioned. Initially, the Italian legislator referred directly to Article 4 of the EU Screening Regulation and, subsequently, defined them with DPCM no. 179/2020.[577]

It should be specified that the constant evolution of technology, of the socio-economic and geopolitical reality, does not make it easy to identify the strategic nature of an asset and its suitability to affect the vital interests of the state. By way of example, suffice it to think of the centrality acquired by the energy sector following the Ukrainian conflict, or the relevance of other sectors, such as that of semiconductors.[578] This makes it

sensi dell'Articolo 1, comma 6, lettera a), del decreto-legge n. 105 del 2019, convertito, con modificazioni, dalla legge n. 133 del 2019, ai fini dello svolgimento delle verifiche di sicurezza da parte del Centro di valutazione e certificazione nazionale (CVCN), inclusiva dell'esito della valutazione, ove disponibile, e delle relative prescrizioni, qualora imposte. Con uno dei decreti di cui al comma 1, possono altresi' essere individuati ulteriori contenuti del piano annuale, eventuali ulteriori criteri e modalita' con cui procedere alla notifica del medesimo piano, oltre ad eventuali tipologie di attivita' escluse dall'obbligo di notifica, anche in considerazione delle ridotte dimensioni dell'operazione. (Il piano di cui al presente comma include altresi' l'informativa completa sui contratti o sugli accordi relativi ai servizi di comunicazione elettronica a banda larga basati sulla tecnologia 5G gia' autorizzati, in relazione ai quali resta ferma l'efficacia dei provvedimenti autorizzativi già adottati)."

[576] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 16; A. Sacco Ginevri, *L'espansione dei golden powers fra sovranismo e globalizzazione in RTDE I* (2019), p. 162.

[577] Decreto del Presidente del Consiglio dei Ministri 18 dicembre 2020, n. 179, Regolamento per l'individuazione dei beni e dei rapporti di interesse nazionale nei settori di cui all'Articolo 4, paragrafo 1, del regolamento (UE) 2019/452 del Parlamento europeo e del Consiglio, del 19 marzo 2019, a norma dell'Articolo 2, comma 1-ter, del decreto-legge 15 marzo 2012, n. 21, convertito, con modificazioni, dalla legge 11 maggio 2012, n. 56. (20G00199) (GU Serie Generale n.322 del 30-12-2020).

[578] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 16.

difficult for the public administration to carry out investigations. Finding the balance between the national interest and the legitimate expectations of private parties (together with the calculability of the effects of economic decisions) is not easy.

However, in some cases, it is the very nature of the asset that is critical (in re ipsa), such as, for example, blockchain-based technologies;[579] in other cases, however, the identification of the criticality of an asset is linked to the exceeding of a given dimensional threshold (therefore, if the given threshold is exceeded, there is a notification obligation). The dimensional parameter applies in the energy, water, health, financial, credit and insurance sectors, access and control of data and sensitive information.[580] The competent authorities in these sectors will therefore not be able to exercise golden power in the event that the activities carried out by companies fall below the size limits, just as there will be no notification obligation for the economic operator. If, on the other hand, the transaction exceeds the size threshold, there will be an obligation to notify; however, a further assessment will be necessary to determine the strategic relevance of the activity. Therefore, exceeding the size threshold does not render the use of golden powers automatic.[581]

Finally, in other cases, it will be necessary to conduct a factual investigation to assess the criticality of the asset. This is the case for digital technologies relating to payment systems and services, electronic money and money transfer.[582] Only at the end of this

[579] The Italian legislator expressly states this in Article 9(1)(h), DPCM no. 179/2020: "In the field of artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnology and biotechnology, the goods and relationships referred to in Article 1 are the following technologies, including the related intellectual property rights: [...] h) the "distributed ledger-based technologies" (blockchain) referred to in the aforementioned Article 8-ter of Decree-Law No. 135 of 2018[...]."

[580] In Article 6 of DPCM no. 179/2020, on the subject of sensitive data and information, a distinction is made between information described by the first paragraph (in which case an examination must be carried out as to whether or not the data are critical), and information described by the second paragraph, in which a presumption of strategic relevance operates if the information processed exceeds the data of at least three hundred thousand natural persons or entities.

[581] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 17.

[582] The introduction of a specific golden power discipline with respect to financial infrastructures, including the financial market sector, credit and insurance, is a novelty in Europe, see 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, Fascicolo 1* (2021), p. 31.

assessment will it be possible to determine whether the prerequisites for the exercise of golden power are met.[583]

Finally, Decree-Law No. 22/2019 amended Article 1-bis of Decree-Law No. 21/2012, inserting a new case of the exercise of golden power, concerning the stipulation of contracts or agreements having as their object the purchase of goods or services relating to the design, implementation, maintenance and operation of networks for broadband electronic communication services based on 5G technology.[584] The aim was to update the golden power framework on technological aspects that may involve national security risks.

Unlike the corporate-type transactions covered by Articles 1 and 2 of Decree-Law 21/2012, the new rule provides for the notification of contractual (and not corporate) transactions where the counterparty is an economic operator established in a State outside the EU.

The aim, therefore, is to ensure greater cyber security. This extension of golden power made it possible to intervene in a sector that had several critical security issues.[585]

With Article 28 of Decree-Law No. 21/2022, the content of the golden power regime applicable to 5G technology was again innovated, by amending Article 1-bis of Decree-Law No. 21/2012. The following innovations were introduced:

a) The scope of application of the discipline was further extended, no longer limited to broadband electronic communication services based on 5G technology, but extended to additional services, goods relations, activities and

[583] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 17.

[584] Article 1, Law Decree no. 22/2019, Misure urgenti per assicurare sicurezza, stabilità finanziaria e integrità dei mercati, nonchè tutela della salute e della libertà di soggiorno dei cittadini italiani e di quelli del Regno Unito, in caso di recesso di quest'ultimo dall'Unione europea. (19G00032) (GU Serie Generale n.71 del 25-03-2019).

[585] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 21.

technologies relevant to cybersecurity, including those related to cloud technology;[586]

b) The notification of an annual plan containing the procurement programme, current contracts, list of suppliers and additional elements required by primary legislation;[587]

c) Approval (with the possible imposition of prescriptions) or rejection of the plan (with the exercise of the power of veto) is made by Decree of the President of the Council of Ministers after deliberation by the Council of Ministers;[588]

d) The time limit for the approval of the plan is thirty days, with a possible extension of twenty days, and an additional extension of twenty days in the event that technical investigations are necessary, with a possible suspension of ten days for preliminary investigation against the notifier, plus a further twenty days in the event of preliminary investigation against third parties;[589]

e) The plan may be updated in the course of the year, subject to notification to the Presidency of the Council of Ministers;[590]

f) The following criteria shall be used to assess the approval or rejection of the plan: the protection of national defence and security interests; the presence of elements indicating the presence of vulnerability factors that could compromise the security of the networks and the data included therein, identified through the principles and guidelines drawn up at international and European level (e.g. the "Toolbox for 5G security" developed by the European Commission);[591]

g) The provision of administrative fines (up to 3% of the turnover of the notifying party) in the event of non-compliance with the notification obligation and non-

[586] Article 28 para. 1, point 2, Law Decree no. 21/2022.
[587] Article 28 para. 1, point 2, Law Decree no. 21/2022.
[588] Article 28 para. 1, point 3, Law Decree no. 21/2022.
[589] Article 28 para. 1, point 3, Law Decree no. 21/2022.
[590] Article 28 para. 1, point 3, Law Decree no. 21/2022.
[591] Article 28 para. 1, point 4, Law Decree no. 21/2022.

compliance with the requirements. In the event of failure to submit the annual plan, examination of the plan may be initiated ex officio;[592]

h) A different composition of the coordination group for the exercise of the golden power is provided for, which is composed of "*representatives of the Presidency of the Council of Ministers, the Ministry of Economic Development, the Ministry of the Economy and Finance, the Ministry of the Interior, the Ministry of Defence, the Ministry of Foreign Affairs and International Cooperation, the Minister for Technological Innovation and Digital Transition, where provided for, as well as representatives of the National Cyber Security Agency. The coordination group also avails itself of the National Assessment and Certification Centre (CVCN) and of the technical articulations of the Ministries of the Interior and Defence, for the technical assessments of the documentation relating to the annual plan referred to in paragraph 2, and to its possible updates, preparatory to the exercise of the special powers and relating to the assets and components of high technological intensity functional to the design, implementation, maintenance and management of the activities referred to in paragraph 1 as well as to other possible vulnerability factors that could compromise the integrity and security of the networks, of the data passing through them or of the systems*";[593]

i) The plan is implemented by a special Committee, composed of one or more representatives of the Presidency of the Council of Ministers, the Ministry of Economic Development, the Ministry of Defence, the Ministry for Technological Innovation and Digital Transition, or, if not appointed, of the structure of the Presidency of the Council of Ministers responsible for technological innovation and digitalisation, and the National Cybersecurity Agency. The committee is in charge of: monitoring; periodically verifying compliance with the prescriptions set forth in the order for the exercise of special powers; analysing the adequacy of the prescriptions; adopting measures

[592] Article 28 para. 1, point 5, Law Decree no. 21/2022.
[593] Article 28 para. 1, point 6, Law Decree no. 21/2022.

for the implementation of the same prescriptions. In the event of non-compliance with the prescriptions set forth in the plan, the Committee shall report it to the Coordination Group, which may propose to the Council of Ministers the application of sanctions, the revocation or amendment of the authorisation measure and the prohibition to carry out the activity;[594]

j) A transitional rule is introduced: initially, the annual plan shall include a full disclosure of the contracts or agreements already authorised on the subject of 5G, and the proceedings under examination by the Coordination Group shall be declared extinct and the relevant examination shall be carried out when the annual plan is assessed.[595]

At the end of this brief overview of the "golden power" framework in Italy, a few conclusions can be drawn.

The first, is that with the introduction of the new Decree-Law No. 21/2022, many of the questions that have arisen over the past few years have been answered. Extending the scope of the golden powers, especially to intra-EU transactions, can have advantages and risks. The advantage is that of having operations involving strategic assets for the country under control, especially in an economic and geopolitical context that has been strongly influenced by the pandemic and the conflict in Ukraine.[596] The risk is that the discipline of golden powers could be interpreted as a dirigiste instrument of the markets, i.e. to decide who should be the owner of certain assets, and not merely to verify whether or not the transaction in question is compatible with national interests. The aim is to avoid a clash between the market and national interests.[597] The interest must be that of a well-functioning market that is attractive to the investor.

[594] Article 28 para. 1, point 7, Law Decree no. 21/2022.
[595] Article 28(2), Law Decree no. 21/2022.
[596] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 27.
[597] R. Chieppa, *La nuova disciplina del golden power dopo le modifiche del decreto-legge n. 21 del 2022 e della legge di conversione 20 maggio 2022, n. 51 in Federalismi.it* (2022), p. 27.

The regulation of golden powers (which, it should be recalled, is not an industrial policy instrument) must adapt to changes in the socio-economic context and, at the same time, maintain its exceptional character.

Furthermore, it would seem that the special powers granted to the government (especially after the new Decree-Law No. 21/2022) create a strong oversight in the investment enviroment. However, upon closer inspection, it emerges that the powers conferred allow for intervention to mitigate possible risks and potentially direct threats to the national interests of the State. In addition, the Italian legislator's focus on the interests of the Union manifests a desire to open up the market as much as possible to foreign investors, without, however, jeopardising national and Union interests. Therefore, just like France and Germany, it does not appear that the Italian screening mechanism could conflict with the EU Screening Regulation.[598]

In conclusion, it can be said that the extension of the ratione materiae scope of Italian golden powers to safeguard strategic sectors is in line with both the EU Screening Regulation and EU law in general.[599] And, in particular, it is so with respect to both intra-EU and extra-EU investors; however, in the former case, the exceptionality is legitimised by the temporary nature of the measures and the exceptional nature of the COVID-19 economic crisis. The discussion on golden powers, which evolved from an exceptional instrument focused on a limited number of sectors, to a discretionary instrument in the hands of the government, thus shifting the focus to the expansion of these powers. In fact, it has been suggested in literature that, should this broadening of the golden powers crystallise even once the COVID-19 crisis has been overcome, what happened in the matter of golden shares, thus before the introduction of golden powers, could easily happen again. Hence, infringement proceedings and rulings by the Court of Justice.[600]

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[598] P. Vargiu, *Foreign Investment Screening in Italy, Spain, Portugal and Greece, in S. Hindelang, A. Moberg, YSEC Yearbook of Socio-Economic Constitutions 2020* (2021), p. 136.

[599] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 212.

[600] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 212.

3. The Screening Regulation as a tool to enforce technological sovereignty

This chapter analysed the Screening Regulation, how it was implemented at national level, and how the technological aspects of the Regulation were also carried over to the national level (specifically in the case of Italy). There were different negotiating positions, both of the Member States and of the European institutions. The discussion of an EU FDI screening measure revolved around four topics: the issue of competition, which could lead to a distortion of the internal market; the issue of so-called “reciprocity", i.e. differential treatment for investments made in a foreign State, which, however, does not in turn guarantee the same European standards when a European subject wants to make an investment in that foreign State; the "harmful investor", i.e. the danger that the investor may collect valuable data and know-how (especially in critical sectors, such as those of national security that can be linked to technological aspects) in order to transfer them to his home country; and, finally, that private information, such as personal data, may be transferred abroad. With the Screening Regulation, the aim was to find a solution to these problems, which could thus best protect the Union and the Member States.

The adoption and subsequent implementation of the Regulation took place differently throughout the Union, depending on whether the Member State already had d screening mechanism provided for in its national law, or as in the case of Greece, where there was no formal mechanism, but there was a substantial one. In particular, we have seen how the Italian discipline has evolved from the "golden shares", rejected by the EU Court of Justice, to the "golden power", and how the Italian legislator has taken Article 4 of the Screening Regulation as a reference for the exercise of screening activities in the technology sector (with DPCM no. 179/2020), and then introduced additional procedural requirements, relating to the notification obligations of the foreign investor, in the technology field (with Law Decree no. 21/2022).

At the end of this analysis, it emerges that, in the area of technology, the European Union is still in the midst of an evolutionary process of “technological sovereignty”. In

fact, at the level of sovereignty in the investment sector, it can be said to still belong to the Member States. It is, in fact, the national authority that exercises control and any subsequent restrictions on investment. The actor exercising this sovereignty is the State, despite the fact that the sphere of investment is attracted by Article 207 TFEU (examined above), which gives the Union exclusive competence in the area of the Common Commercial Policy (CCP).[601] Despite the great powers in the hands of the individual Member States in this area, with the Screening Regulation the EU wanted to lay the foundations for greater cooperation between national authorities, in order to take into consideration not only the interests of the individual Member States, but of the entire European Union.

[601] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 195.

Chapter III – EU Technological Sovereignty in practice

With this last chapter, the aim is to demonstrate through practical cases the connection between foreign direct investments, technological sovereignty, and the EU Screening Regulation. The main objective is to go to explore how, in specific cases, national authorities have invoked the concepts of national security related to the technological sphere, which are directly present in the Screening Regulation.

First and based on the above research's aim, the Commission's second Report on the implementation of the Screening Mechanism at the European level will be analyzed, and then three cases will be examined,[602] which differ from each other, but all have in common issues concerning the technological domain, and how they are significant to safeguard Member States' national security.

Of these three cases, the first concerns the Chinese telecommunications company Huwaei, which, as will be seen below, adopted a trade policy that focused heavily on investments to be made in Europe. It will be analysed how some Member States decided to act, as a preventive measure, therefore even before Huawei made investments on European soil, to try to protect their national security from possible threats that the Chinese giant could cause. Therefore, it will be analysed how different national legal systems have adapted to possible threats to their own internal security from technology players.

The next two cases, namely the one concerning the company LPE S.pA., which operates in the semiconductor sector, and the Syngenta case, will be analysed in terms of the measures taken by the competent authorities in Italy in the exercise of golden power.

Specifically, thanks to the Commission's Report, it will be seen what the trend of foreign direct investments in Europe are, how Member States have adapted to these trends, through the implementation or not of a screening mechanism, and whether and

[602] Second Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2022) 433 final; First Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2021) 714 final.

how the cooperation between Member States, as expressly provided for in Regulation 452/2019, is working. With respect to practical cases, the Huawei case, which involved prior activation by Member States in relation to the Chinese tech giant even before the investment was made, will be analyzed. In the Syngenta case, which deals with an acquisition in Italy in the agri-food sector, with strong implications in the technology sphere as well, be seen below; it will be seen on what grounds the Italian government decided to veto the transaction and what reasoning the national courts gave in upholding that veto. In conclusion, it will be seen how in the same way in the LPE case the Italian government acted to protect security and public order, in relation to the acquisition of the semiconductor-producing company LPE.

Although there has been a decrease in the flow of FDIs in recent years, there were 414 notifications made to the Commission in 2021. A high percentage of the notified transactions were closed without a request for further information. However, the delays required by Phase 2 together with the high percentage of transactions triggering notification in numbers of Member States leads to the conclusion that there is still room for improvement in the Screening Regulation.[603] It has been proposed, in this respect, to introduce simplified procedures (as in the EU Merger Regulation),[604] which could relieve administrations of those cases that trigger notification but are to be regarded as inelegible or self-evidently do not raise any concerns.

Another relevant point is the visibility that screening mechanisms must have vis-à-vis foreign investors. Indeed, while the procedural timeframes for notifications and opinions, the sectors to which the Regulation applies, the requirements triggering notification, and other elements are very divergent among Member States, the Commission can encourage more harmonisation, but has limited powers as this remains the prerogative of individual Member States. Therefore, reducing the sectors and

[603] J. Modrall, *Second Commission FDI Report Reflects Consolidation of Eu Framework, in Kluwer Competition Law Blog* (2022), available at https://competitionlawblog.kluwercompetitionlaw.com/2022/09/06/second-commission-fdi-report-reflects-consolidation-of-eu-framework/.

[604] See J. Modrall, *Second Commission FDI Report Reflects Consolidation of Eu Framework, supra* n 621.

systematising the list of sensitive sectors, and providing more guidance and visibility of past proceedings and how they were decided at the substantive level, would also allow foreign investors to act more consciously.[605]

1. First and Second annual Report on the screening of foreign direct investments into the Union

Article 5 of the EU Screening Regulation stipulates that by March 31 each year, Member States must send the Commission an annual Report for the previous year, where they must account for information about FDIs in their territory.[606] In addition to information on FDIs, Member States must Report information about the application of their screening mechanism.[607] At the same time, the Commission must publish an annual Report about the implementation of the Screening Regulation, and send it to the European Parliament and Council.[608]

At the beginning of 2023, two annual Reports of the Commission on the implementation of screening mechanisms are available, covering the year 2020 and 2021. The second annual Report, published on September 1, 2022, will be examined to get a general overview of FDI in the EU, both at the level of investments made and the

[605] T. Kuhn, O. Berg, M. Israel, K. Kelliher, *The EU Releases its Second Annual FDI report showing increased momentum in FDI regulation and screening in the EU27, in White&Case website* (2022), available at https://www.whitecase.com/insight-alert/eu-releases-its-second-annual-fdi-report-showing-increased-momentum-fdi-regulation.

[606] Article 5(1) Screening Regulation, see supra n 360: "*1. By 31 March of each year, Member States shall submit to the Commission an annual Report covering the preceding calendar year, which shall include aggregated information on foreign direct investments that took place in their territory, on the basis of information available to them, as well as aggregated information on the requests received from other Member States pursuant to Articles 6(6) and 7(5)*."

[607] Article 5(2), Screening Regulation, see supra n 360: "*2. For each Reporting period, Member States that maintain screening mechanisms shall, in addition to the information referred to in paragraph 1, provide aggregated information on the application of their screening mechanisms.*"

[608] Article 5(3), Screening Regulation, see supra n 360: "*3. The Commission shall provide an annual Report on the implementation of this Regulation to the European Parliament and to the Council. That Report shall be made public."*

origin of investors, as well as in which and how many cases Member States have intervened, and the sectors most involved at the level of investments and interventions.[609]

The Report is based on Reports from the 27 Member States, and is divided into four chapters: trends and figures for FDI into the Union; legislative developments in Member States; FDI screening activities by Member States; EU cooperation mechanism on FDI screening.[610]

The first chapter shows that in 2021 the flow of FDI in the world began to regrow, after slowdowns due to the COVID-19 pandemic in 2020. In 2021, FDI in the world amounted to 1.5 trillion euros (+52% compared to 2020, and +11% compared to 2019).[611] FDI carried out in 2021 in the EU amounted to 117 billion euros, or 8% of the world total, which is 31% less than in 2020 and 68% less than in 2019.[612] The countries that have seen the largest decrease in FDI input are Ireland, Germany, Luxembourg and the Netherlands. However, at the same time, the number of M&A transactions in the EU increased in 2021; in fact, the number of acquisitions and greenfield investments increased by 32% and 12% respectively when compared to 2020.[613]

The number of transactions has increased over the past years (2015-2021), with an average of 2100 acquisitions and 3200 greenfield investments in the past five years.[614] The top foreign investor is the United States, with 32.3 percent of acquisitions and 39.4 percent greenfield investments; this is followed by the UK with 25.6 percent and 20.9 percent, respectively. Of particular note are the figures for China and Japan, which

[609] Second Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2022) 433 final; First Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2021) 714 final.
[610] COM (2022) 433 final, p. 1.
[611] COM (2022) 433 final, p. 2; OECD FDI IN FIGURES, April 2022.
[612] See supra n 629, p. 2.
[613] Pitchbook, Global M&A Report, 2021.
[614] COM (2022) 433 final, p. 3.

remain below the levels of investments made in 2020: China, especially, with 2.3 percent of acquisitions and 6 percent of greenfield investments.[615]

Although there has been a positive outlook for 2022, the conflict in Ukraine has changed that outlook; the economic effects of rising energy and raw materials prices, and the prolonged economic repercussions of supply chain disruptions, especially for raw materials and critical technologies, are affecting dealmaking in the EU.[616]

In any case, the number of deals that had EU businesses as targets saw a rebound in 2021 compared to deals made in 2020. Germany, with a 16.4 percent share of all acquisitions made during 2021 by foreign investors, was the top destination in Europe for investment with a 20 percent increase in deals made compared to 2020.[617] Following this, the other countries with a high percentage of investments were Spain, France, and the Netherlands with 13.8%, 10.7%, and 10.5%, respectively. notably, in 2021, Spain was the country in the EU that received the most greenfield investments, with 22.2% of the total; followed by France and Germany with 12.7% and 11.1%, respectively. The only countries in which there was a decrease in greenfield Investments were Germany and Italy compared to the deals made in 2020.[618]

Turning now to the Report's chapter on the overview of the implementation of individual Member States' screening mechanisms, it can be seen that these mechanisms have been strongly influenced by the pandemic and global supply chain issues, which have manifested the most critical issues in key industrial sectors such as healthcare, energy and technology. For this reason, many EU Member States have adopted new screening mechanisms or updated existing ones. In 2021 alone, three Member States adopted new screening mechanisms,[619] and six Member States modified existing ones.[620] In contrast, in late 2021, seven Member States began a consultative or

[615] See supra n 632.
[616] COM (2022) 433 final, p. 4.
[617] COM (2022) 433 final, p. 5.
[618] COM (2022) 433 final, p. 8.
[619] Czechia, Denmark, Slovakia.
[620] France, Germany, Hungary, Italy, Latvia, Lithuania.

legislative process to adopt a new national screening mechanism.[621] As of today, 25 of the 27 Member States of the European Union have either adopted a foreign direct investment screening mechanism, modified existing mechanisms, or have started a consultative legislative process to adopt a new screening mechanism within their national law.[622]

Most of the changes made at the national level for the screening mechanism revolved around three themes: first, updating the screening procedures, expanding the sectors covered by the screening mechanism regulations, and extending the validity of the national screening mechanisms. In France, for example, the percentages relating to foreign investment such as to trigger investment screening were lowered. In Germany, on the other hand, procedural innovations have been introduced and, most notably, 16 new sectors covered by the screening mechanism related to emerging and sensitive technologies have been added.[623] Similarly, as reviewed in the second chapter, Italy extended the scope of Golden Powers and consequently the national screening mechanism related to foreign investment.

Turning to the third chapter of the Report on the foreign direct investment screening activities of individual Member States, it is reiterated, as mentioned in the second chapter, that the EU Screening Regulation establishes a mechanism of cooperation between the European Commission and Member States with regard to foreign direct investment screening. However, decisions on approving or conditioning or blocking heterodirected investment remains the prerogative of the Member State.

In 2021, there was a considerable increase in applications for approval at the national level. Article 5 of the Screening Regulation, which provides for the Member State's Reporting obligations to the Commission, produced 1563 cases of authorization and *ex officio* requests in 2021.[624] Of the total number of authorization requests, 29% of the cases were formally screened and that, therefore, saw an increase from 20% in 2020.[625]

[621] Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg, Sweden.
[622] COM (2022) 433 final, p. 9.
[623] See supra n 640.
[624] COM (2022) 433 final, p. 11.
[625] See supra n 642.

This increase in screenings compared to the previous year shows an increased attention of national governments about investments that can be classified as potentially critical. The remaining 71 percent of requests were assessed as ineligible or simply not representing a danger for the security and public order of Member States.[626]

The number of requests for authorization is unevenly distributed throughout the European Union. In fact, only four Member States cover 70 percent of all permit applications in 2021. Of all cases that had a screening form, and for which, therefore, Member States took a decision 73% were authorized without the imposition of further conditions; therefore, no further action was required of the foreign investor.[627] However, in 23 percent of cases, Member States' decisions about applying for authorization saw the imposition of conditions on the foreign investor, such as, for example, certain actions that the foreign investor had to take, such as giving certain assurances or other requests before the investment could be approved.[628]

Finally, in only one percent of the cases was the foreign investment blocked by the competent national authority, while for the remaining 3 percent of the cases the foreign investor as a result of the investment control withdrew from the transaction.[629]

The last chapter of the Report deals with cooperation among Member States related to screening mechanisms. In 2021, 13 Member States submitted a total of 414 notifications to the Commission in compliance with Article 6 Screening Regulation. In 2020, there were only 11 Member States that made such notifications.[630] Approximately eighty-five percent of all notifications were made by 5 Member States namely Austria, France, Germany, Italy, and Spain.[631] The largest number of transactions were made in the ICT (Information and Communication Technologies), Manufactoring, Financial activities, Wholesale and Retail sectors.

[626] COM (2022) 433 final, p. 11.
[627] COM (2022) 433 final, p. 12.
[628] See supra n 645.
[629] See supra n 645.
[630] https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.
[631] COM (2022) 433 final, p. 14.

The largest number of transactions had a value of less than 500 million euros, while 34 percent of the transaction had a value of more than 500 million euros.[632]

As anticipated in the previous chapter, Screening Regulation provides two phases in screening a foreign direct investment. Out of the 414 cases that were notified, 86% were closed by the Commission in phase 1, while in 11% of the cases, the second phase was proceeded with the request for further information from the target Member State of the foreign direct investment. The remaining 3 percent of cases, at the time the Report was published were still taking place either in phase one or phase two.[633]

The major sectors in which the screening was carried out i.e. ICT and manufacturing the transactions were mainly targeting critical or technological infrastructure, such as, for example, defense, aerospace, energy, healthcare and semiconductor equipment. Defense and aerospace alone come to cover 45 percent of all notifications made in 2021.[634] This data highlights the centrality of the technological sphere when it comes to the screening of foreign investments. It could be assumed, in fact, that when screening for investments made in these sectors, Member States and the Commission took into consideration the factors indicated in Article 4 of the Screening Regulation, i.e. critical infrastructures;[635] critical technologies; supply of critical inputs, including energy or raw materials, as well as food security; access to sensitive information. Therefore, it emerges that in order to protect security and public order, action must necessarily be taken against those investments that have as their object operations in the tech sector. And thus, the conclusion could be reached that Member States, together with the European Union, are trying to protect their technological sovereignty.

Nine Member States took part for 47 cases that entered the second phase. For all cases entering the second phase, the average duration for sending the required information to the Member State receiving the investment was 22 days, while in the first Report it was

[632] The transaction with the lowest value was €1, while the one with the highest value ranged from €29 billion to €31 billion.

[633] COM (2022) 433 final, p. 16.

[634] COM (2022) 433 final, p. 17.

[635] COM (2022) 433 final, p. 19.

31 days; the range is between three and 101 days, while in the first Report the range was between two and days.

With respect to the origin of the foreign investor in the 414 cases that were Reported to the Commission in 2021, the top 5 countries of investors were the United States, United Kingdom, China Cayman Islands, and Canada. Investors from Russia amounted to 1.5% of cases and from Belarus 0.2% of cases.[636]

One particular finding relates to Article 7 of the Screening Regulation, which allows the Commission to conduct an *ex officio* screening of the investment regardless of whether or not there is a screening mechanism within the Member State receiving that investment. In the 2022 Report, covering the year 2021, unlike in 2022, the commission did not make use of Article 7. Instead, in relation to the views adopted by the Commission, pursuant to Articles 6, 7, or 8 of the Regulation, these views remain confidential pursuant to Article 10 of the same Regulation; therefore, the second Report does not include any data about the adoption of these views by the Commission.[637]

The conclusion of the Report is that the development of screening mechanisms cooperation works very well. Of the 414 cases notified in 2021, 86% of them were closed in phase one, with only eleven per 100 of the cases ending in phase two and 3% of the cases resulting in the adoption of an opinion by the Commission. The second finding that emerges in the Report is that there has been greater diversification at the level of screening among Member States: in fact, while in the first Report four Member States account for 86.5 percent of the screening activity in the Commission' s second Report that percentage drops to 70 percent. Another point of particular relevance that emerges from the Report, and that in most cases the screening was carried out for investments made in the areas indicated by Article 4 of the Screening Regulation, namely critical technological infrastructure and dual use items and access sensitive information as well as control by foreign State governments of the foreign investor.[638]

[636] COM (2022) 433 final, p. 18.
[637] COM (2022) 433 final, p. 19.
[638] COM (2022) 433 final, p. 19.

In addition, the Report specifies the consolidation of European policy, which is defined as essential for the protection of the security and public order of the European Union. In fact, the establishment of the cooperation of screening mechanisms related to foreign direct investment among Member States their continuous improvement, together with the continuous development of cooperation mechanisms at the European level, as well as cooperation with other international partners, such as the United States through the Trade Technology Council working Group on FDI, has enabled the European Union to consolidate the basis for a screening mechanism system at the European level.[639]

2. Case studies

Three practical cases will now be addressed. As already anticipated, in the Huawei case, it will be analysed how some Member States acted pre-emptively, making changes to their regulatory framework following Huawei's intentions to invest in European territory. Subsequently, it will be analysed how golden powers were used in the LPE S.p.A. and Syngenta cases in Italy.
It should be noted that the Court of Justice has not yet had the opportunity to decide on Screening Regulation issues; therefore, only national cases will be examined.

2.1 Huawei

What emerges from what has been said so far, both in relation to the Report's data, and with respect to the definition of technological sovereignty given above, and also with respect to the national legislation of individual Member States, as well as the policies of the European Union, is that the evolution of golden powers or, more generally, of screening mechanisms relating to foreign direct investments, is due to changes that

[639] Second Annual Report on the screening of foreign direct investments into the Union" (Report) COM (2022) 433 final, p. 20.

reverberate from the economy to the law. In fact, rather than an autonomous initiative of the legislator, it is more a matter of providing answers to the needs and demands of citizens who claim further specific protection.[640] And this phenomenon relates, for example, to what has happened on a global level with reference to Chinese expansion in the telecommunications sector.

We speak, in fact, of the telephone company Huawei, which, in 2018 explicitly declared during a conference held in Italy, that it wanted to give a boost to European and sustainable digitalisation.[641] Vincent Pang, President of Huawei's Western Europe Region, stated that thanks to the development of cloud systems and artificial intelligence and the fifth-generation Internet network (5G), the moment seemed propitious to create a smart and digital Europe.[642]

The effect of these declarations alerted the United States, which began to exert pressure on the institutions of the Union to prevent the Chinese giant from gaining control of the new technological network. 5G entails an improvement in telecommunications systems. Through this, it will also be possible to remotely control not only telephones and homes but also drones, control systems, and armaments.[643] The concern lies mainly in the special regime of public presence of Chinese companies, and how this is particularly intrusive, since national law requires every private company to set up mechanisms to allow the Chinese Communist Party to participate in business.[644] The demands made by the United States immediately triggered a response at European level, which reacted in different ways.

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[640] 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, Anno XXXIV Fasc. 2* (2020), p. 578.

[641] In November 2018, an event was held in Rome organized by Huawei entitled "*For a digitAll Intelligent future",* in https://www.huawei.com/minisite/huaweiconnecteurope/ index.html.

[642] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 579.

[643] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 579.

[644] Article 19 of the PRC Company Law: "*In a company, an organization of the Communist Party of China shall be established to carry out the activities of the party in accordance with the charter of the Communist Party of China. The company shall provide the necessary conditions for the activities of the party organization*".

The first Member State to react was France with the proposal to amend Loi Pacte,[645] to hold back Huawei's expansion. The aim of the amendment was to introduce a preventive authorisation regime for all companies that had expressed an interest in installing or using radio equipment located on French territory.[646] The provision would

[645] Pacte stands for Plan d'action pour la croissance et la trasnformation des enterprises, or the action plan for business growth and transformation.

[646] "*Après l'article 55 ter Insérer un article additionnel ainsi rédigé: I. - Après la section 6 du chapitre II du titre Ier du livre II du code des postes et des communications électroniques est ajoutée une section 7, ainsi rédigée: « Section 7 » Régime d'autorisation préalable de l'exploitation des équipements de réseaux radioélectriques. « Art. L. 34-11 - I. - Est soumise à une autorisation du Premier ministre, destinée à préserver les intérêts de la défense et de la sécurité nationale, l'exploitation sur le territoire national des appareils, à savoir tous dispositifs matériels ou logiciels, permettant de connecter les équipements de clients au réseau radioélec- trique mobile, qui par leurs fonctions présentent un risque pour l'intégrité, la sécurité et la continuité de l'exploitation du réseau, à l'exclusion des appareils installés chez les clients, par les opérateurs mentionnés aux articles L. 1332-1 et L. 1332-2 du code de la défense ainsi désignés en vertu de leur activité d'exploitant, direct ou par l'intermédiaire de tiers fournisseurs, d'un réseau de communications électroniques ouvert au public. « Le Premier ministre publie et tient à jour une liste des dispositifs soumis au régime d'autorisation prévu à l'alinéa précédent. « II. Sauf si elle est refusée en application de l'article L. 34-11-2 du présent code, l'autorisation est octroyée pour un ou plusieurs modèles et une ou plusieurs versions de dispositifs matériels ou logiciels, ainsi que pour un périmètre géographique précisés par l'opérateur dans son dossier de demande d'autorisation, pour une durée maximale de huit ans. « Art. L. 34-11-1 - Le renouvel- lement de l'autorisation prévue à l'article L. 34-11 peut être sollicité par son bénéficiaire, au minimum deux mois avant l'expiration de l'autorisation initiale. « Les modalités de l'autorisa- tion, la composition du dossier de demande d'autorisation et du dossier de demande de renouvellement sont fixées par décret. « Art. L. 34-11-2-. Le Premier ministre refuse par décision motivée l'octroi de l'autorisation s'il estime, après examen de la demande, qu'il existe un risque sérieux d'atteinte aux intérêts de la défense et de la sécurité nationale en raison de ce que le respect des règles mentionnées aux a), b) et e) du I de l'article L. 33-1, en particulier l'intégrité, la sécurité et la continuité de l'exploitation des réseaux et services de communications électro- niques, n'est pas garanti. « Le Premier ministre peut prendre en considération, pour l'apprécia- tion de ces critères, les modalités de déploiement et d'exploitation mis en place par l'opérateur, et le fait que l'opérateur ou ses prestataires, y compris par sous-traitance, soit ou non sous le contrôle ou soumis à des actes d'ingérence d'un État non membre de l'Union européenne. « Art. L. 34-11-3 - I. - Si l'exploitation des appareils mentionnés au I de l'article L. 34-11 est réalisée en France sans autorisation préalable, le Premier ministre peut enjoindre à l'opérateur de déposer une demande d'autorisation, ou de renouvellement, ou de faire rétablir à ses frais la situation antérieure, dans un délai qu'il fixe. « Ces injonctions ne peuvent intervenir qu'après que l'opérateur a été mis en demeure de présenter des observations dans un délai de quinze jours, sauf en cas d'urgence, de circonstances exceptionnelles ou d'atteinte imminente à la sécurité nationale. « II.- Est nul tout engagement, convention ou clause contractuelle prévoyant l'exploi- tation des appareils mentionnés au I de l'article L. 34-11, lorsque cette activité n'a pas fait l'objet de l'autorisation préalable exigée sur le fondement du même article L. 34-11 ou d'une régula- risation dans les délais impartis. » II. - Le chapitre V du titre Ier du livre II du code des postes et des communications électroniques est ainsi modifié: 1° Après*

therefore bring under the control of the executive power all situations that could potentially compromise public order and national security. The nature of this amendment echoed the fears surrounding 5G technology, which was perceived as a disruptive tool that could undermine the integrity, reliability and security of communications.[647] However, the amendment was not approved, as it was wrecked in Parliament. This was because the parliamentary institutions complained that the government was taking away the time it needed to carry out its functions of studying and investigating the interests at stake, so as to be able to pass a law that was fairer for citizens. Thus, using purely procedural arguments, France avoided addressing the issue of 5G technology.[648]

If one goes to Germany, on the other hand, from the outset, and thus since October 2018, the German government has said that it would not take any steps to exclude Huawei from public tenders relating to the construction of an infrastructure network necessary for 5G throughout the country. In fact, State Secretary Guenter Krings, in response to MEP Katharina Droege, specified how there was no legal basis on which to ground the exclusion of the Beijing company, although admitting that national security was strongly intertwined with that of the telecommunications sector, and how,

l'article L. 39-1, il est inséré un article L. 39-1-1 ainsi rédigé:« Art. L. 39-1-1 - Est puni d'un an d'emprisonnement et de 150 000 euros d'amende le fait: « 1° D'exploiter des appareils mentionnés à l'article L. 34-11 sans autorisation préalable; « 2° De ne pas exécuter — totalement ou partiellement — les injonctions prises sur le fondement du I de l'article L. 34-11-3. » 2° À l'article L. 39-6, les références: « aux articles L. 39 et L. 39-1 » sont remplacées par les références: « aux articles L. 39, L. 39-1 et L. 39-1-1 »; 3° Au premier alinéa de l'article L. 39-10, après la référence: « L. 39-1 », est insérée la référence: « L. 39-1-1 ». III. - Le I est applicable à l'exploitation des appareils, mentionnés à l'article L. 34-11 du code des postes et des communications électroniques, installés depuis le 1er février 2019. Les opérateurs qui exploitent des appareils soumis à autorisation, en vertu de l'article L. 34-11 du code de postes et de télécommunications électroniques, à la date d'entrée en vigueur de la loi disposent d'un délai de deux mois pour déposer la demande d'autorisation préalable prévue à ce même article". See. http:// www.senat.fr/amendements/2018-2019/255/Amdt_874.html.

[647] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei*, *supra* n 658, at p. 581.

[648] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei*, *supra* n 658, at p. 581.

therefore, the administration was following the matter closely.[649] In fact, after these declarations, the German executive began a process for the preparation of greater instruments of control of the infrastructure network; it cannot be said, however, that Germany has aligned itself with France, nor, at the same time, that it has taken an attitude perfectly in line with the will of the United States.[650] In fact, Germany has leaned towards the non-exclusion of Huawei, not only for reasons of political expediency, but also in terms of economic convenience. What has emerged, and what telecommunications experts have warned about, is the high cost of excluding Huawei from German networks, since the Chinese technology giant registered the highest number of patents of any company in 2017. This is why German institutions have turned towards a more active monitoring of this sector. And, if monitoring precedes regulation, at that time the Bundesnetzagentur - BnetzA (i.e. the Telecommunications Regulatory Authority in Germany) assumed greater centrality. A centrality that emerges from the issuing of the same so-called "security catalogue" in March 2019, in which economic operators are required to comply with requirements, such as, for example, that of the impossibility of using components from a single supplier for the production of electronic equipment and the need to employ qualified personnel for the infrastructure and network monitoring operations.[651]

With this measure, the BNetzA will decide over all networks and all service providers, regardless of their nationality. The rationale behind this measure is not only to adapt supervision to technological developments, but also to update security requirements.

Thus, Germany, and, as will be seen below, Italy as well, did not oppose the Chinese operator; rather, they opted for the preparation of a regulatory framework that is valid for all market players and not limited to non-EU companies.

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[649] See. D. Heide-S. Scheuer, *Sorge um Datensicherheit — Berlin erwägt, Huawei beim Netzausbau auszusperren, in Handelsblatt* (2019).

[650] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 583.

[651] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 583.

As for Italy, it did not remain inert to the turmoil generated by the Huawei case, being the first among Member States to take action in the technology-intensive sector and, in particular, for 5G.[652] In fact, with Decree-Law No. 22/2019, the government broadened the scope of the discipline on special powers, qualifying services based on fifth-generation Internet technology as being of strategic interest for the defence and national security system.[653] In light of the new legislation, Article 1-*bis* was added to Decree-Law no. 21 of 2012, the aim of which is to neutralise any improper use of the new telecommunications technology.[654] The provision, as mentioned above, requires that the government be notified of the conclusion of contracts or agreements for the purchase of goods or services relating to the design, implementation, maintenance and management of the new networks; as well as the conclusion of contracts or agreements for the acquisition of technology-intensive components functional to the aforementioned implementation or management, when subjects from outside EU are involved.[655] According to the conditions set by the objective criteria of the golden power legislation in Italy, the executive can exercise veto power or impose certain

[652] G See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei*, *supra* n 658, at p. 584; Article 1 Law Decree no. 22/2019: "*Costituiscono, ai fini dell'esercizio dei poteri [speciali] attività di rilevanza strategica per il sistema di difesa e sicurezza nazionale i servizi di comunicazione elettronica a banda larga basati sulla tecnologia 5G."*

[653] D. Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, in I Post di AISDUE IV (2022), p. 200; 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, Fascicolo 1* (2021), p. 31.

[654] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei*, *supra* n 658, at p. 584.

[655] Article 1(3) Law Decree no. 22/2019: "*Per le finalità di cui al comma 2, per soggetto esterno all'Unione europea si intende: 1) qualsiasi persona fisica o persona giuridica, che non abbia la residenza, la dimora abituale, la sede legale o dell'amministrazione ovvero il centro di attività principale in uno Stato membro dell'Unione europea o dello Spazio economico europeo o che non sia comunque ivi stabilito; 2) qualsiasi persona giuridica che abbia stabilito la sede legale o dell'amministrazione o il centro di attività principale in uno Stato membro dell'Unione europea o dello Spazio economico europeo oche sia comunque ivi stabilito, e che risulti controllato direttamente o indirettamente da una persona fisica o da una persona giuridica di cui al n. 1); 3) qualsiasi persona fisica o persona giuridica che abbia stabilito la residenza, la dimora abituale, la sede legale o dell'amministrazione o il centro di attività principale in uno Stato membro dell'Unione europea o dello Spazio economico europeo o che sia comunque ivi stabilito, al fine di eludere l'applicazione della disciplina di cui al presente articolo*".

conditions to protect the sector in which the investment is made. Italy's merit, in this case, was to introduce a framework for foreign direct investments that could guarantee the protection of national security.[656] It is interesting to note how the evolution of the Italian golden power discipline parallels the European jurisprudential movement and anticipates European legislation. In this regard, mention should be made of Decree-Law No. 105 of 2019 on the delimitation of the cybersecurity perimeter, which also introduced the addition of the necessary arrangements to bring the Italian golden power discipline in line with Regulation 452/2019.[657] As previously mentioned, among the main changes are those relating to the regulation of special powers in strategic sectors, and the deadline for the exercise of special government powers has been lengthened, along with the concomitant enrichment of the disclosures made by companies holding strategic assets; in addition, the notification requirements for the exercise of golden powers have been integrated; finally, the framework of special powers has been amended with regard to 5G technology. In any case, the changes that were made to the Italian regulatory framework relating to the screening of foreign direct investments did not disrupt the national legislative framework; this demonstrates the fact that the Italian framework anticipated the lines that will later be drawn by the Screening Regulation.[658] Another peculiar aspect of the Italian golden power framework, which has already been discussed above, is that the scope, initially extended only until 31 December 2020, has now been structurally applied also to all intra-EU transactions.[659]

So far, the response of some Member States has been analysed in relation to the potential danger that the Chinese giant Huawei could have caused to the national security of individual Member States and the Union. As mentioned, the EU itself has also acted with respect to the proposals made by the Chinese operator. In fact, the

[656] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 585.
[657] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 585.
[658] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 586.
[659] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 586.

Union's objective in the European Council of 22 March 2019 and, subsequently, in the EU-China summit, rather than closing the doors to Huawei, took the opportunity to direct the Chinese operator's vision towards the values of the European Union, such as, for instance, the single market, whose focus is on the service economy; or, industrial policy, with a focus on artificial intelligence; and, finally, digital policy, which should adapt to an era of digital transformation to the data economy.[660] The industrial sector in particular includes digital physical infrastructure, and the system of fifth-generation networks is regarded as crucial. It is recalled, by the way, how in order to complete the digital single market, as well as to support innovation in all sectors, the EU Directive 2018/1972, establishing the electronic communications code, has been approved, which stipulates that all Member States in 2020 will allocate the frequencies necessary for the introduction of the 5G network.[661] In order for the European Union to remain an industrial power, the Council mandated the Commission to adopt as a matter of urgency the Regulation for the screening of foreign direct investments, establishing a European framework for the screening of foreign investments and therefore, preparatory to a golden power regulation at European level.[662]

2.2. Psp Verisem Luxemburg Holding S.à R.L – Syngenta

The present case concerns the exercise of the government's power to veto a corporate acquisition, which took place in Italy, pursuant to Decree-Law no. 21 of 2012. In particular, on 19 October 2021, the Presidency of the Council of Ministers, through the adoption of a decree, vetoed the acquisition by the Swiss company "Syngenta Crop Protection AG" of the entire share capital of the Dutch company "Verisem B.V." and

[660] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 588.
[661] Directive 1972/2018 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.
[662] See G. Scarchillo, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei, supra* n 658, at p. 588.

its subsidiaries, including those based in Italy. Syngenta Crop Protection AG is one of the four main business units comprising the corporate group headed by the Swiss company Syngenta AG, which is in turn controlled by the Chinese multinational ChemChina, a State-Owned Enterprise of the People's Republic of China. The Syngenta Group is active in the field of agriculture, in which it is one of the world's largest players, with interests in more than 100 countries.[663]

The Dutch company Verisem B.V. controls, directly or indirectly, five companies based in Italy, all active in the seed sector. The share capital of Verisem B.V. is wholly owned by PSP Verisem Luxemburg Holding S.à r.l., a company incorporated under Luxembourg law, which in turn is controlled by a US private equity fund.

The purpose of the transaction was the acquisition by Syngenta Crop Protection AG of Verisem B.V. (held by PSP Verisem Luxemburg S.à r.l.). The transaction had been correctly notified by the two companies concerned to the Presidency of the Council of Ministers in July 2021.[664] Following the preliminary investigation coordinated by the Ministry of Agriculture, Food and Forestry Policies, the case reached the Presidency of the Council of Ministers, which decided on 19 October 2021 not to authorise the transaction.

According to the Italian Government, the takeover operation carried out by Syngenta AG in respect of the target companies, all of which are controlled by Psp Verisem Luxemburg Holding S.à. r.l., was likely to result in the acquisition of the "information assets held by the group about national suppliers of precision mechanics for agriculture and agricultural companies interacting with the Italian company". With this expression, the Italian Government considered that it had identified the strategic assets, relevant in terms of critical inputs, production technologies and information possessed, that justified the veto of the transaction.[665]

[663] Consiglio di Stato, Sez. IV, 9/1/2023 n. 289, N. 00289/2023REG.PROV.COLL. N. 05813/2022 REG.RIC., point 1.2.

[664] See Cons. di Stato, supra n 68, at point 1.5.

[665] Tar Roma Lazio N. 04486/2022.

At that point, PSP company Verisem Luzemburg Holdings S.à r.l. (hereinafter Verisem), appealed to the Judicial Administrative Court in Italy (the *Tribunale Amministrativo Regionale*) against the decision of the Presidency of the Council of Ministers, putting forward four arguments against that decision.

First of all, Verisem claims that the necessary conditions for the government to exercise the power of veto are not met. In particular, it manifests the absence of the strategic nature of the activities of the Italian companies of the Verisem group and, in any event, the structural inability of the relevant acquisition to determine an "*exceptional situation, not governed by national and European legislation in the sector, of threat of serious prejudice to public interests relating to the safety of the operation of networks and plants and the continuity of supplies*" in the agri-food sector.[666] In particular, according to Verisem, the lack of strategic nature is found in five points (i) the Italian companies of the group hold a share of the national seed market of only 1%; (ii) the companies do not carry out any seed production, nor development and research activities, limiting themselves to the wholesale marketing and distribution of seeds produced by third parties; (iii) they do not hold intellectual property rights; (iv) the companies do not own the land where the seeds are grown; (v) finally, the companies work mainly in the hobby market of which they hold no more than 20-25% at the national level.[667]

A further argument of Verisem is that there is a lack of adequate motivation to justify the decision to exercise the veto power with respect to the findings of the investigation. In fact, the coordination group had declared itself favourable to the operation with recommendations and, similarly, the Department of Information for Security (DIS) had also expressed itself favourably, although requiring the imposition of some prescriptions. Moreover, the proposal for the final decision formalised by the Ministry of Agriculture, Food and Forestry suggested recommendations or prescriptions but, and

[666] Article 2(3) Law Decree no. 21/2012.

[667] See Cons. di Stato, supra n 68, at point 2 (a1).

this is the criticism levelled by Verisem, no one mentioned the exercise of the power of veto at all.[668]

Verisem also complains about the erroneous reference to articles six and nine of DPCM number 179 of 2020, which, it is recalled, identifies assets and relations of national interest in the areas referred to in Article 4(1) of Regulation (EU) 2019/452; the company argues that the reference to these articles is erroneous because the companies in the group do not carry out critical data collection activities, nor do they deal with artificial intelligence or critical technologies, such as machine learning.[669]

The conclusion of the Regional Administrative Court was to reject the appeal brought by Verisem. In fact, the administrative judge states that the measure is an expression of a very broad discretion due to the nature of the protected interests, pertaining to national security. It would be, therefore, an act of high administration, as such reviewable by the administrative judge within the narrow limits of the existence of a manifest illogicality that, in this case, is not found. Moreover, in the judgement of the Regional Administrative Court, it is specified how the measure of the Presidency of the Council of Ministers concerning the exercise of the power of veto, was articulately motivated, given that "*the relevant strategic assets were identified in terms of critical production factors, production technologies and information possessed*". Moreover, "*in the preliminary investigation phase, the task of the coordination group, which avails itself of the participatory contribution of the administrations involved, supported by the Department of Public Security, as well as of the participatory contribution of the subjects interested in the acquisition operation, is that of gathering the elements of technical evaluation to be submitted to the Council of Ministers in collegial phase, which is not, therefore, bound or, in any case, required to adopt a reinforced motivation in the event that different proposals are formulated in the preliminary investigation phase with respect to the exercise of the veto power*".[670]

[668] See Cons. di Stato, supra n 68, at point 2 (a1).
[669] See Cons. di Stato, supra n 68, at point 2(c).
[670] See Cons. di Stato, supra n 68, at point 3.1 (a-b).

Following the Regional Administrative Court's decision to reject Verisem's petitions, the company appealed to the Consiglio di Stato (Council of State) and re-proposed the arguments it had already put forward in the first instance proceedings.

The Council of State's decision, and the arguments put forward by the judges, start by recalling the applicable legislation, referring first to European legislation and then to national legislation.[671]

After recalling the applicable regulatory framework, both at the EU and national level, the Council of State also reported on the various stages of the preliminary investigation concerning the exercise of veto power by the Italian Government.

First, it is reported that in the final meeting of the Coordination Group, the Ministry of Agriculture, in its capacity as the Administration in charge of the preliminary investigation, proposed "the non-exercise of special powers", adding, however, that "*in view of the strategic nature of the assets involved and the programmatic nature of certain commitments made by the notifying companies, it is necessary to ensure that they are monitored*": the Ministry, therefore, "*proposes to include in the resolution not to exercise special powers a recommendation, addressed to the acquiring company, to ensure that it acts in a manner consistent with the commitments undertaken at the time of notification and during the course of the proceedings*". The Department of Information for Security, in the final meeting of the Coordination Group, "highlights the criticalities and risks related to the nature of the transaction" and "proposes, as an alternative, to exercise the special powers, through the imposition of specific prescriptions aimed at maintaining the contractual relationships and preserving the activity of Suba Seeds Company S.p.A. in Italy".

Also on the basis of the remarks of the Secretary General of the Presidency of the Council of Ministers, according to which, on the one hand, "the recommendations proposed by the responsible Ministry are similar to actual prescriptions", on the other

[671] The provisions recalled in the EU Screening Regulation were: Recitals (2)(3)(6)(8)(11)(12)(13); Articles 2,3 and 4. In the national legal system, the following provisions were recalled: Decree-Law No. 21 of 15 March 2012, Article 2; D.P.C.M. No. 179 of 18 December 2020; Presidential Decree No. 86 of 25 March 2014.

hand, however, "*the Council of Ministers, when examining the measure, may decide to change the nature of the recommendations, transforming them into an exercise of the special powers with prescriptions*" - the Coordination Group agrees with the proposal of the Ministry of Agriculture not to exercise the special powers, with the formulation of specific recommendations to the purchasing company, subject to monitoring.

Consequently, the Ministry of Agriculture, in transmitting to the PCM, in a note dated 11 October 2021, the results of the preliminary investigation phase, proposes the "non-exercise of the special powers", albeit providing that "*the purchaser shall transmit to the Government a periodic Report monitoring the transaction, in order to allow the verification of compliance with the same*".

However, in the memo to the Minister in view of the Council of Ministers, the alternative proposal of the exercise of special powers is also vented, by means of the formulation of "special prescriptions", specified in detail.

Therefore, during the Council of Ministers meeting of 19.10.2021, the Minister of Agriculture undoubtedly proposes "the exercise of the powers, expressing willingness to discuss the option between prescriptions or veto", the latter option then chosen by the Council, at the end of the discussion.[672]

The judges came to the conclusion that the contrast manifested by Verisem, regarding the non-existence of the veto measure and the preliminary investigation, did not exist.[673]

In fact, in the context of the work of the Coordination Group, the Ministry of Agriculture identifies the transaction as "strategic" (it expressly mentions, in particular, the "strategic nature of the assets involved") and qualifies as fundamental the commitments made pro futuro by the purchaser, which, precisely because they are structurally "programmatic", need to be punctually verified.

The Ministry, therefore, while proposing the non-exercise of special powers, expresses its awareness of the delicacy of the issue, both in terms of the subject matter of the transaction and the qualifying nature of the commitments assumed by the purchaser at

[672] See Cons. di Stato, supra n 68, at point 10.1-10.6.

[673] See Cons. di Stato, supra n 68, at point 11.

the time of notification (which were then further enriched during the preliminary investigation). The Coordination Group agrees with the ministerial approach.

In the consequent formal proposal addressed to the Presidency of the Council of Ministers, the Ministry of Agriculture considers that the conditions for the exercise of special powers do not exist, in light of the "punctual discipline" national legislation of the seed sector ("which provides for a rigorous system of supervision and control"); of the fact that the "Italian targets use" seeds "in the public domain" (except for only 63 vegetable varieties, of which the company Royal Seeds is a breeder), "do not carry out significant research and varietal constitution", operate "in a rather differentiated context", hold "a marginal role in the professional market" national, "do not hold specific genetic material" and have a "consolidated turnover . .. far below the thresholds of strategic relevance generally identified in sectors subject to the golden power"; of the "stringent and significant" commitments undertaken by the purchaser.

The Ministry, however, precisely in consideration of the fact that "*the declarations and commitments of the purchaser at the time of notification and during the course of the proceeding, as specified above, assume relevance as the basis for this preliminary conclusion ... proposes that provision be made for the purchaser to transmit to the Government a periodic Report monitoring the transaction, in order to allow verification of compliance therewith*".

The objective data gathered by the Group during the preliminary investigation therefore identifies a transaction pertaining to a declaredly "sensitive" matter, in respect of which, nevertheless, the need for the exercise of special powers is ruled out in view of the various profiles specifically enumerated.

Moreover, at first, the Ministry of Agriculture represents to the Minister the possible alternative of imposing not mere recommendations, but far more incisive prescriptions; then, in the Council of Ministers, the Minister undoubtedly proposes the exercise of the powers, in the milder form of assent with prescriptions or in the harsher form of a ban. This significant preliminary climax in this case, on the one hand, testifies to the far from the monolithic and univocal outcome of the preliminary investigation itself, and

on the other, moreover, attests, per tabulas, to the perceived delicacy of the issue already during the preliminary investigation phase.

Even leaving aside such considerations, however, the College observes in general terms that, in the procedure of the exercise of special powers, what legally distinguishes the decisional phase from the preliminary investigation phase is precisely the activity of evaluating the factual substratum acquired in the record.[674]

At this point, the Council of State recalls how the golden power discipline provides for a two-phase procedure.

It provides, in fact, for a first phase of a purely investigative nature aimed at the acquisition of all relevant factual data in order to reconstruct and frame the transaction in an analytical as well as systemic key, for the benefit of the subsequent final assessment: this phase, which Presidential Decree No. 86 of 2014 significantly defines as "preparatory activity to the exercise of special powers", is taken care of by a special Coordination Group, composed of senior management personnel of the Prime Minister's Office and of the various Ministries concerned.

The second phase, namely decision-making, is instead the exclusive prerogative of the Council of Ministers.[675]

This second phase - entrusted, not by chance, to the highest body of political direction of the State and not to executive personnel - assumes a marked and very broad discretionary profile: indeed, it does indeed start from the factual data acquired during the preliminary investigation, but, in the context of a collegial assessment of the issue in which the political summits of all the State Administrations intervene, it faces, frames and qualifies the operation within the broader political posture of the State, not only from an economic and financial perspective, but in a more global strategic sense.

The Council of Ministers, in essence, does not limit itself to an atomistic, punctiform and, so to speak, "accounting" and anodyne reconnaissance of the specific characteristics of the operation, but looks at it in the context of the general aims of national policy, weighing its impact both on the economic-productive structure of the

[674] See Cons. di Stato, supra n 68, at point 11-12.

[675] See Cons. di Stato, supra n 68, at point 14.

socio-economic sector concerned, and on the broader structure of the national economy, and finally on international relations and the country's overall political-strategic positioning in the international arena.[676]

Moreover, it is EU law itself that authorizes such a broad spectrum of assessments (see the aforementioned provisions of EU Regulation No. 452 of 2019 of the European Parliament and of the Council of 19 March 2019).[677]

Ultimately, therefore, in the specific procedure at issue the infringement with the preliminary investigation is structurally marginal, as it is limited to the macroscopic cases in which the Council affirms facts contradicted by the preliminary investigation or, on the contrary, denies facts found at the preliminary stage.[678]

Obviously, this does not lead to a kind of arbitrary decision-making by the Council, which, on the contrary, must be based on a coherent argumentative process based on the criteria laid down by law.

In the present case, the decisive factor is the fact that the purchaser is indirectly (but unequivocally) an expression of the Government of the People's Republic of China, a circumstance duly highlighted by the Council and legally relevant under both EU law (Regulation No. 452 of 2019, Recitals 13 and Article 4) and national law (see Decree-Law No. 21 of 2012, Article 2(6)).[679]

The Council, in particular, noted that: for the People's Republic of China, a State with a planned economy, the food sector is clearly a strategic objective, in which it is therefore reasonable to believe that the country's (powerful) economic, financial and political-diplomatic energies are authoritatively channelled, guided and directed the companies of the Verisem Group are active in this sector, are technologically advanced ("in particular, it appears from the stakeholders' Report and the Assosementi hearing that the Italian companies of the Verisem Group are highly qualified in seed multiplication, an ictu oculi activity that is extremely delicate, sensitive and

[676] See Cons. di Stato, supra n 68, at point 14.1.
[677] See Cons. di Stato, supra n 68, at point 14.2.
[678] See Cons. di Stato, supra n 68, at point 14.3.
[679] See Cons. di Stato, supra n 68, at point 15.1.

'strategic');[680] and although they do not directly produce the seeds but enter into contracts with Italian farmers for this purpose, it is clear that contractually they can affect the national agri-food chain, influencing it to an appreciable extent according to their changing needs, evidently dictated, in the final analysis, by the (political) will of the Beijing Government.[681]

In this regard, the judges noted that: the appreciation of the strategic nature of an operation in relation to the national interest by the Council of Ministers has highly discretionary features, given that the concept of national interest itself is not a prius, i.e. an objective datum pre-existing in nature, but a posterius, i.e. the result of political assessments and options;[682] such appreciation, precisely because it concerns a profile of principle such as the strategic one, is carried out by the Council of Ministers in the context of a broad geopolitical assessment projected to future scenarios and can legitimately be aimed not only at protecting national instances, but also at not favouring the needs and aims of States considered (not only hostile, but also simply) competitors or with which, in any case, relations may prospectively present problematic profiles; more generally, the ascription of "strategic importance for the national interest" to the "goods and relations" involved by a notified operation, for the purpose of verifying the existence of a "*possible prejudice to the security and . .. to the continuity of supplies*" (see Decree-Law No. 21 of 2012, Article 2, Paragraph 1-ter), has already been operated upstream by Prime Ministerial Decree No. 179 of 2020, which, as far as it is of interest here, provides as follows:

i) qualifies "economic activities of strategic importance ... economic activities that are essential for the maintenance of society's vital functions", which are certainly those of the agri-food sector, fundamental to man's very physical existence;

[680] See Cons. di Stato, supra n 68, at point 15.1.
[681] See Cons. di Stato, supra n 68, at point 15.2.
[682] See Cons. di Stato, supra n 68, at point 15.3

ii) with specific reference to the agri-food sector, qualifies as strategic "the supply of critical production factors of the food chain", which certainly are seeds, the essential basis of all agricultural cultivation.[683]

This last expression does not present the intolerable profile of vagueness and indefiniteness complained of by the company Verisem in its appeal against the decision of the Regional Administrative Tribunal at first instance, if one bears in mind the purpose of the legislation (primary and secondary) on the subject of golden power, which is to provide a deliberately wide-meshed discipline in order not to harness - and, therefore, to weaken - the protection constituted by the use of the power of the same name.[684]

The power of golden power, in fact, represents the ultimate guarantee of the national interest in the specific economic macro-areas taken into consideration; as such, and precisely because it is dictated to protect the fundamental ("strategic") interests of the national community as discretely appreciated by the Council of Ministers, it requires an equally broad, elastic, flexible and inclusive regulatory foundation, which allows for the maximum and most effective protection of the (very significant) underlying interests: In this specific perspective, any charge of vagueness and generality is excluded.[685]

Conversely, it is the primary legislation itself that states that: "to determine whether a foreign investment may affect security or public order ... it is possible to take into consideration" the fact that "the buyer is directly or indirectly controlled by the public administration, including state bodies or armed forces, of a country outside the European Union" (see Decree-Law No. 21 of 2012, art. 2, paragraph 6);[686] "the Government shall consider, having regard to the nature of the transaction ... the existence, also taking into account the official positions of the European Union, of objective reasons to believe that there may be links between the acquirer and third

[683] See Cons. di Stato, supra n 68, at point 15.3
[684] See Cons. di Stato, supra n 68, at point 16.
[685] See Cons. di Stato, supra n 68, at point 16.1.
[686] See Cons. di Stato, supra n 68, at point 17.

countries that do not recognise the principles of democracy or the rule of law", as well as "the suitability of the structure resulting from the legal act or transaction ... to guarantee ... security and continuity of supply" (see Decree-Law No. 21 of 2012, Article 2, paragraph 7).[687]

In the light of these precise legislative coordinates, in consideration of the impact that the transaction could have on "critical production factors of the food chain" (such as seeds and the contractual freedom of national agricultural producers) and of the fact that the acquiring company is traceable to the government of a country outside the European Union and characterised by a form of government different from western ones, the Council of Ministers found the existence of an "*exceptional situation, not governed by national and European sector regulations, of threat of serious prejudice to public interests relating to the security and continuity of supplies*", to which the primary legislation (cf. Decree-Law No. 21 of 2012, Article 2, paragraph 3) subordinates the exercise of golden power powers in the form of a veto to the transaction.[688]

Such deliberation is not affected by the flaw in the function identified by the appellant, given that the Council of Ministers decided, in the exercise of its broad discretion - as the highest political body in the country - to provide particularly incisive protection to the national agri-food sector, on the one hand by protecting the information, technological, scientific and contractual assets possessed by the national agri-food sector, on the other hand by protecting the information, technological, scientific and contractual assets possessed by the national agri-food sector, as well as by the national agri-food sector itself, scientific and contractual heritage possessed, in the seed sector, by the Italian targets (in particular, by the company Suba Seeds), on the other hand and specularly preventing that, thanks to the acquisition, the company Syngenta (and, on its behalf, the Chinese Government), by integrating its supply chain, could increase its capacity potential in an area that is also declared strategic for the People's Republic (see the Report submitted by the parties on 02.08.2021, p. 8, where it is stated that "*the*

[687] See Cons. di Stato, supra n 68, at point 17.
[688] See Cons. di Stato, supra n 68, at point 18.

strategic rationale of the Transaction is represented by the relevance of the global customer segment that Verisem addresses for Syngenta").[689]

The Council of Ministers, in particular, intended to prevent that, thanks to the acquisition, the Chinese Government could turn the production potential of the Italian targets (in particular, of Suba Seeds) to the advantage of its domestic market, through, inter alia, the "*remodulation of the priorities and timing of the production agenda of Italian farms*", the "*delocalisation of decision-making points outside the national borders*", the "*change of the business model*", "*the acceleration of the standardisation process in seed production*", all hypotheses that cannot be excluded in the future.[690]

As already specified, as part of the procedure under Decree-Law no. 21 of 2012, the Council of Ministers is the decision-making body delegated, on the basis of the factual results of the preliminary investigation (and not also of the evaluations and proposals made by the Coordination Group or by the responsible Ministry), to make a broad prospective assessment of the scenario, aimed on the one hand at protecting the country from possible prospectively significant risk factors, and on the other hand and at the same time to stem initiatives of potentially dangerous third countries or for which, however, a particularly prudent geopolitical engagement is deemed appropriate.[691]

On the other hand, the same evaluation of strategic nature does not constitute an objective and, so to speak, irrefutable datum deriving from the characteristics of the operation in itself considered atomistically, but represents the result of a highly discretional weighting, so that an operation that does not present macroscopically extraordinary intrinsic profiles in itself may well be qualified as "strategic" and capable of determining "an exceptional situation" that cannot otherwise be faced: otherwise said, the same operation may or may not be strategic depending also on the subjects involved, not only on the characteristics of the asset and the target company.[692]

[689] See Cons. di Stato, supra n 68, at point 18.1.
[690] See Cons. di Stato, supra n 68, at point 18.2.
[691] See Cons. di Stato, supra n 68, at point 18.3.
[692] See Cons. di Stato, supra n 68, at point 18.4.

On the other hand, the control of a national economic operator by a third State outside the European Union and with which there are no formal and binding alliance ties (think, in primis, of that arising from the NATO Treaty) means that the operation is not ascribable only to the market and to the related industrial policy logic, but inescapably also involves considerations of international policy and security, ultimately aimed at preserving not only the proper functioning of the national market, endangered by the presence of a longa manus operator of a foreign State, but the very effectiveness of the supreme constitutional principle set forth in Art. 1, paragraph 2 ("Sovereignty belongs to the people"), potentially vulnerable by acquisitions of assets fundamental to the national community by foreign States which, in the Government's view, do not provide sufficient guarantees as to their use.[693]

The full appropriateness of the reasons relating to the protection of the agri-food sector to support ex se the measure makes it unnecessary to examine the objections raised by the appellant Verisem to the other two reasons set out in the measure, relating to the profiles of "data collection" and "machine learning technologies".[694]

The judges of the Council of State also state that the national legislation set forth in Decree-Law No. 21 of 2012 complies with European Union law, which, as seen, leaves ample room for the national legislator (see Recitals 8 and 12 of the Screening Regulation) and qualifies as a "relevant factor" for the purposes of the exercise of the powers of golden power the control of the purchaser by the government of a third country outside the European Union (Recital 13 and Article 4 of the above-mentioned Regulation).[695]

Returning to the case at hand, it cannot even be noted that the multinational ChemChina already controls an important Italian company active in the automotive sector. The exercise of golden power powers, in fact, follows a current consideration of the

[693] See Cons. di Stato, supra n 68, at point 18.5.
[694] See Cons. di Stato, supra n 68, at point 19.
[695] See Cons. di Stato, supra n 68, at point 20.

international political framework (structurally evolving) and is modulated on the basis of the specific economic sector concerned and its specific strategic "sensitivity".[696]

Nor is there a breach of the principle of proportionality, as complained of by the appellant Verisem.

Indeed, the measure clearly indicates the reasons that allow the estimation of the constitutive insufficiency of the imposition of prescriptions, which not only would not prevent the completion of the transaction, but moreover would produce "*pecuniary and/or obligatory effects ... of complex feasibility in the event of non-compliance by the Chinese addressee*".[697]

Such a reasoning - based on the overriding need to prevent the completion of the transaction - appears logical, given that the imposition of requirements, albeit stringent, would not only allow the completion of the acquisition, but, moreover, would be objectively difficult to implement, given the sovereign nature of the substantial holder of control of the acquiring company (i.e. the Chinese Government).[698]

Therefore, on this ground, the Consiglio di Stato dismisses Verisem's appeal against the exercise of veto powers by the Italian Government in respect of the purchase transaction.

2.3. LPE S.p.A.

Another case of particular relevance concerns an Italian semiconductor manufacturing company, LPE S.p.A., located in the province of Milan, which has been described as "an Italian stronghold in the high-tech sector, decisive for the supply chains of several huge industries as well as for developments in military security".[699] In particular, the company in question produces "wafers", which are used in arsenic-manufactured

[696] See Cons. di Stato, supra n 68, at point 21.
[697] See Cons. di Stato, supra n 68, at point 22.1
[698] See Cons. di Stato, supra n 68, at point 22.2.
[699] Il Sole 24 Ore, "Golden power, primo veto sui cinesi," April 9, 2021.

chips.[700] It designs epitaxial reactors that "allow a first chemical and thermal treatment for silicon, making it ready for chip manufacturing".[701]

The company in question, which was originally family-owned, supplied epitaxial reactors to Sgs ("Società generale semiconduttori"). Later, the company merged with Litotecnica, a company that specialised in the production of freeze dryers for the pharmaceutical industry. In 2021, LPE had 50 employees and a profit of approximately EUR 7 million in 2019.[702] One of LPE's main customers is the Italian-French company STMicrolelectronics NV (STM); however, 60% of LPE's production is for the Chinese market. It should also be noted that LPE holds shares in Ascatron AB and Kiselkarbid AB, which are both Swedish companies; in addition to these, LPE also holds shares in some British companies.[703]

These figures show that LPE is one of the Italian companies that has become increasingly important in the global chip market over time. In particular, the chip sector is of such great importance to the international market that there is currently a certain complexity in procuring semiconductors, which are necessary for the operation of chips; and this focus on semiconductors has also been discussed at the European level.[704]

In fact, semiconductors are considered as "critical products".[705] The European Union only has a 10% share of the global semiconductor market. EU Member States rely on suppliers from third countries, such as Taiwan and Singapore, which have the most

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[700] F. Bechis, "*Stop shopping cinese. Così Draghi e Giorgetti difendono i microchip*," Formiche.net, April 9, 2021.

[701] A. Brambilla, D. Lepido, "*China Targeted Milan Semiconductor Firm Before Draghi's Veto*", Bloomberg, April 9, 2021.

[702] Supra n 719.

[703] Supra n 719.

[704] D. Michaels, S. Woo, "*EU seeks to doubleshare of world chip market by 2030 in "Digital sovereignty" drive: Bloc pledges more than 150 bilion euros to bolster technological independence*", The Wall Street Journal Online, 9 March 2021; Commission Communication, A Chips Act for Europe, COM(2022) 45 final.

[705] S. Poli, D. Gallo, *Enhancing the European technological sovereignty: The Foreign Investment Screening Regulation as a means to protect critical infrastructures and critical technologies in the European Union. The Foreign Investment Screening Regulation as a means to protect and enhance the European technological sovereignty*, (forthcoming).

advanced chips.[706] Precisely in an attempt to intervene in the semiconductor sector, the Commission has proposed the adoption of the EU Chips Act,[707] which aims to make the European Union strategically autonomous with regard to critical technologies.[708] In fact, with this act, the European Union wants to support the actions taken by Member States in the process of improving innovation and adjusting the semiconductor industry to structural changes and to speed up the production of these goods.[709]

Semiconductors, therefore, are crucial components of artificial intelligence tools and fifth-generation (5G) technology. In this context, Italy "plays an active role (...) and hosts several highly specialised entities, which have integrated into semiconductors productive chains in different ways".[710]

The importance of semiconductors has also grown more during the pandemic when the market for these has seen a major crisis. Chips, in fact, are crucial in the automotive sector, and, as a result of the global lockdown, and the shutdown of the automobile market, the demand for chips was reduced and, therefore, the semiconductor supply chain was damaged. At the same time, due to the high production of computers, for which semiconductors are crucial for their operation, and the current recovery of the automotive market with the end of the lockdown, it is very complicated to meet the demand in the semiconductor market.

In this economic and geopolitical context, the Italian government, in March 2021, blocked the acquisition of 70% of the share capital of LPE by the Chinese investor "Shenzen investment holdings co".[711] The Chinese company, which had notified the transaction in December 2020, was seen by the Italian government as an operation that could undermine national security on the basis of three factors: (i) LPE's use of

[706] See S. Poli, D. Gallo, *Enhancing the European technological sovereignty*, *supra* n 723.

[707] Proposal for a Regulation of the European parliament and of the council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act), COM (2022) 46.

[708] See S. Poli, D. Gallo, *Enhancing the European technological sovereignty*, *supra* n 723.

[709] See S. Poli, D. Gallo, *Enhancing the European technological sovereignty*, *supra* n 723.

[710] V. Maccari, "*Il made in Italy dei chip. Eccellenze di nicchia in un mercato globale*", Affari & Finanza (June 28, 2021).

[711] F. de Bortoli, *Golden power, la LPE e la difesa del made in Italy (non solo dai cinesi)*, in Corriere della Sera, L'Economia, 20 april 2021; C. FOTINA, *Tlc, energia, finanza: così il «golden power» del Governo Draghi*, in Il Sole 24 Ore, 3 settembre 2021.

elements that were only available to a few competitors in the market;[712] (ii) a clause in the shareholding agreement that provided for the Chinese investor to become LPE's main customer and, therefore, allowing "Shenzen" to determine LPE's strategy as majority shareholder;[713] and (iii) the potential dual use of LPE's technology, as this technology could be applied in the military field.[714]

Pursuant to Article 2 of Decree-Law No. 21 of 2012, which, as mentioned earlier, refers to Article 4 of the EU Screening Regulation and, in particular, the semiconductor sector, the Italian government acted to veto the transaction, as it was "unsuitable to assure security and continuity of supply".[715] In particular, Italian Prime Minister in 2021, Mario Draghi, specified in a press conference how the LPE acquisition transaction had to be blocked, thus exercising the golden powers, as the "shortage of semiconductors led many automotive companies to slow down production last year, so that became a strategic sector".[716]

The Italian government's exercise of its veto power is strongly reminiscent of European legislation on the screening of foreign direct investment. In fact, the veto of the operation was also preceded by the concerns of other Member States, such as Sweden and the Netherlands, and also following the opinion of the European Commission, thus recalling the very expression of the Screening Regulation that the operation could "undermine the security of more than one Member State".[717]

It is therefore clear that the Italian government, both in the Syngenta case and in the LPE case, acted to protect national security. And it did so by applying the golden power discipline which, it should be remembered, had been extended by express decree to the technological sphere (Law Decree no. 189/2020), and how this decree expressly refers to the EU Screening Regulation (in Article 4 of the Regulation). The LPE case, moreover, shows how the cooperation mechanism at European level was functional for

[712] Supra n 719.
[713] Ibid.
[714] Ibid.
[715] Ibid.
[716] Ibid.
[717] Milano Finanza, *Timori Ue nel veto su Lpe*, April 10, 2021.

the Italian government to reach a more informed decision, thanks to the help, in addition to the Commission's opinion, of the comments of the other Member States (Sweden and the Netherlands).

3. A first appraisal of the problematic interplay between FDIs and technological sovereignty

Three practical cases were analysed to see how the problematic relationship between foreign direct investments and technological sovereignty has played out at the European level.

More specifically, in the absence of Court of Justice rulings on the matter, the Huawei case was examined, where it was seen how some Member States intervened following declarations by the Chinese telecommunications giant that it wanted to contribute to the digitalisation of the EU. Member States felt (first France and Italy, and then Germany) that they had to be cautious about possible investments in such a sensitive sector as telecommunications, but more generally in technology, so as to be able to protect their critical infrastructures and critical technologies.

Similarly, with the Syngenta and LPE S.p.A. cases, it was seen that the Italian government intervened in blocking the completion of a foreign investment on Italian territory. In particular, in the judgments of the TAR and the Council of State in the Syngenta case, it was seen how the Italian government acted to protect its own critical infrastructures, invoking Article 4 of the Screening Regulation.

Thus, a close correlation emerges between the two areas of foreign direct investments and technological sovereignty. As seen in the Commission's second annual report on the implementation of the Screening Regulation in the Member States, the inflow of foreign investment has decreased over the past few years, especially following the economic crises triggered by the COVID-19 pandemic and the Ukrainian conflict. But despite this decrease, the number of notifications made to the Commission increased

in the second year of implementation of the Regulation. This shows how Member States' attention is increasing in the area of technology to protect security and public order. It will be interesting to see how the trend will develop in the coming years, how numerous and potentially "hard" national government interventions against foreign investors will be. But above all, how much scope national governments will have in exercising screening powers in the future, since, as happened to Italy in 2007, the Court of Justice rejected the discipline of “golden shares”.

Conclusions

The aim of this dissertation was to see how the concept of technological sovereignty can be declined within the European Union in relation to the area of foreign direct investment.

As far apart as these two macro areas may seem, they are actually very intertwined. As has been seen, the phenomenon of foreign direct investment stretches back significantly, i.e. from the post-World War II period, when many countries that were in economic difficulties tried to attract foreign capital.

The regulation of foreign direct investment stems first and foremost from international law, where attempts were made to find compromises between countries that wanted greater guarantees for foreign investors, such as the protection of private property, in order to avoid possible expropriation by the State receiving the investment, and countries that were less concerned with this aspect.

Therefore, the EC, and later the EU, began to regulate foreign direct investments by starting from international law.

Initially, by concluding international agreements, and thus acting mainly in those areas where there was no Member States' exclusive competence, and later by beginning to take over some competences in this area, over which the Member States had no powers.

The scope of competence in foreign direct investments by the European Union can be found in the Common Commercial Policy which, with the Lisbon Treaty, expressly introduces the term foreign investment, in Article 207 TFEU.

Regarding the protection, and possible remedies, for foreign investors, as seen, thanks to the introduction of the Screening Regulation, the distinction between foreign direct investments with "definite influence" or not has been lost, an element that contributed to confusion as to the applicability of the pertinent provisions, i.e. those of free movement of capitals or freedom of establishment. With the Regulation, in fact, this distinction no longer seems to operate.

Indeed, in the Regulation's Proposal, the Commission established that foreign direct investments constitute capital movements, falling under Article 63 TFEU. In saying this, the Commission does not make any distinction about investments with or without "definite influence" and therefore, in its view, all forms of foreign direct investment must be protected by the rules on the free movement of capital.[718] In addition to the protection offered by the framework of free movement of capital, FDIs are protected by EU economic fundamental rights. And this type of protection can be particularly effective if the Court of Justice denies the protection of the free movement of capital rules to FDI with "definite influence".[719]

As shown, however, the power to decide whether or not to block foreign direct investment lies exclusively with the Member State receiving such investment. Member States intervene, as seen, when an investment may undermine security or public order. In particular, as seen above, such dangers arise mainly in the technology sectors, where, as seen, numerous "Big Tech" companies operate. Technological sovereignty is an expression that still struggles to find a clear and precise definition, but above all one that is unanimously shared. In fact, the breadth of this concept certainly makes its boundaries uncertain to this day.

This expression can be interpreted, rather than defined (since, as seen, there is no unanimous definition of the concept of technological sovereignty), as "*the strategic autonomy and independent capacity for action of individual polities in domains affected by technologies, as guaranteed by a variety of technology, industrial and security policy instruments, and/or their control over technological developments and the deployment of technologies*".[720]

In this respect, there are two common European elements denoting the concept of technological sovereignty: the strategic autonomy of States; and the ability to influence and control the development and/or distribution of technology.

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[718] Proposal for the Regulation, COM(2017) 487 final, 13.9.2017, pp. 4, 28 f.

[719] Lars S. Otto, *What is a Foreign Direct Investment*?, in S. Hindelang, A. Moberg *(eds), YSEC Yearbook of Socio-Economic Constitutions 2020 (Springer 2021),* p. 522.

[720] M. Varju, *The protection of technology sovereignty in the EU: policy, powers and the legal reality*, in *European Law Review* (2022), 47(4), p. 568.

The political nature of the technological sphere lies in the very nature of the concept of globalisation. This is because what occurs is that a State is hardly in a position to produce, or have the control, or have the capital, to be able to autonomously develop those technologies that are deemed critical for its own country. Necessarily, therefore, States seek the raw materials, or the know-how necessary to be able to produce such technologies. And it is precisely this dependence, whether on foreign countries or foreign entities, that can result in a lack of autonomy in managing these technologies or the elements needed to produce them.

And it is precisely on the concept of autonomy that European political leaders, as well as institutional leaders, have wanted to bring to political attention, so as to make the European Union more autonomous, and thus more sovereign, in having the control, or influence over production factors in other countries, in order to be able to independently produce those technological elements defined as critical. Regulation 452/2019 provides for a mechanism of European cooperation in the screening of foreign direct investments.

In fact, the Screening Regulation provides for a system of cooperation between Member States and the European Commission, which allows for comments and opinions to be made when a Member State screens a foreign direct investment. The aim of this Regulation is not to harmonise screening mechanisms between Member States, nor to oblige Member States to adopt a screening mechanism. To date, 25 of the 27 Member States have already adopted a screening mechanism or have started a legislative consultation process to adopt a screening mechanism. There are some countries, such as Italy, Germany, and France, which had already adopted a screening mechanism before the Regulation came into force and did not have to make any particular changes in their domestic legislation with the entry of the Regulation. On the other hand, there are some Member States, such as Greece, which, although not having adopted a formal screening mechanism, have a "substantial" one in their legislation. In any case, there has been no shortage of rulings by the Court of Justice in recent years in relation to the powers Member State governments have used in screening foreign direct investment. This is the case of Italy, which had its domestic framework of so-

called “golden shares” rejected. Following this ruling, Italy changed its internal discipline concerning the powers that the government can exercise during screening, deciding whether or not to block the investment, or to accept the investment but imposing requirements on the investor or asking him for guarantees, establishing the so-called “golden powers”, which, once established, were found to be in line with the Screening Regulation, once it was published.

As seen, however, since the implementation of the Screening Regulation, the Court of Justice didn’t have the chance to rule on controversies related to foreign direct investments.

The aim of the Regulation is to create cooperation between Member States that, when screening, and thus when making an assessment of the criticality of the investment, take into consideration not only the interests of the State making the assessment but also those of the other Member States and of the European Union.

In the factors that Member States and the Commission may take into consideration during the screening process, Article 4 of the Regulation expressly provides for the so-called critical technologies and dual use items ("including artificial intelligence, robotics, semiconductors, cybersecurity, aero space, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies"); supply of critical inputs ("including energy or raw materials, as well as food security"); access to sensitive information ("including personal data, or the ability to control such information"); the freedom and pluralism of the media.

Therefore, it emerges from the Regulation itself that the technological sphere is a central factor in protecting security and public order in the Member States and, therefore, the EU. And it, therefore, demonstrates how even at the legislative level there is an attempt to implement what has been said by the various European and institutional leaders on the concept of the sovereignty of the European Union understood in a broader way, and understood as the concept of technological sovereignty specifically.

And, to see how the concept of technological sovereignty has been combined with foreign direct investment, three practical cases were analysed.

The case of Huawei, the Chinese telecommunications giant, which had announced in 2017 its intention to contribute to the further digitalisation of the European Union, was examined. And it was seen how some Member States reacted to such declarations. In particular, France and Italy, which sought to protect themselves from any hostile takeover by the Chinese company Huawei, and how, conversely, Germany had initially adopted a more open approach to any investment by the Chinese giant. In the Huawei case, therefore, it was seen how Member States sought to protect themselves even before the investment was made in a very sensitive area of technology, such as 5G, which is a critical infrastructure and a critical technology for Member States.

And these States have intervened precisely to try to maintain that autonomy, or sovereignty, in the area of technology. In the next two practical cases, however, namely the Syngenta case and the LPE S.p.A. case, it was seen how the Italian government exercised its golden powers to protect national security.

In fact, in the Syngenta case, where the object of the transaction was the acquisition of the subsidiaries headed by PSP Verisem Luxemburg Holding S.à r.l., which operated in the agro-food sector, the Italian government, in vetoing the transaction, considered that the investment was being made in a sector critical to security and public order. In fact, the Council of State, in not overruling the Government's veto, referred in its reasoning to Article 4 of the Screening Regulation in which, as already mentioned, critical infrastructures and critical technologies are mentioned among the factors that Member States may take into consideration during screening.

In the “LPE S.p.A.” case, similarly, the government decided to prohibit the acquisition by the Chinese company “Shenzen investment holdings co” of the semiconductor manufacturing company LPE based in the province of Milan.

At the end of this analysis, also thanks to the data reported in the Commission's second annual report on the implementation of the Screening Regulation in the Member States, several conclusions can be drawn.

The first, is that despite the fact that the flow of foreign direct investment in the European Union has decreased in recent years, mainly due to the economic crises that Member States have been facing in the last period, such as the one caused by the

COVID-19 pandemic, or the economic crisis caused by the conflict in Ukraine, the notifications made to the European Commission have increased in the second year of the Screening Regulation's implementation. And, if the factors set out in Article 4 of the Regulation are considered, i.e., which Member States and the Commission may take into account when assessing whether an investment "is likely to affect security or public order", it emerges that Member States want to protect themselves against operations that may compromise their autonomy or sovereignty in the field of technology. Therefore, as technology evolves, such as in the fields of artificial intelligence and 5G, we can expect ever greater attention to be paid to those investments made in these sectors, and thus ever greater attention by national governments, and the Commission, to protect technological sovereignty.

The second, and final conclusion that can be reached, revolves around the concept of technological sovereignty itself. In fact, from the analysis carried out so far, starting with the evolution of the regulatory process in the field of foreign direct investment, and then examining the doctrinal debate on the definition of

technological sovereignty, and from the synthesis of these two aspects in practical cases, the question to whom this technological sovereignty really belongs remains difficult to answer.

In fact, while there is a common European effort in attempting to harmonise the technological sector, and thus trying to endow the Union itself with greater autonomy in the production or influence on the production of technological elements or in the control of the same, at the same time the power to intervene to protect security and public order lies with the Member States. In fact, as we have seen, only the Member State can authorise, block, or impose requirements and/or guarantees on the investment operation carried out on its territory. If, on the one hand, the EU is trying to strengthen cooperation between Member States in taking into account the interests of the Union itself, this does not constitute an obligation towards the Member State that is carrying out such an evaluation. While the EU is trying to strengthen cooperation between Member States in taking into account the interests of the Union itself, this does not constitute an obligation for the Member State that wants to approve the investment,

despite the fact that other States may raise criticisms. Thus, the EU is in the midst of an evolutionary process that will take some time before it can fully define itself as sovereign in the field of technology.

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