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THE EU FDI SCREENING MECHANISM: PROCEDURAL AND SUBSTANTIVE LAW ASPECTS.
EU AND COMPARATIVE LAW ASSESSMENT.

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INTRODUCTION

This dissertation tries to reconstruct the procedural aspects, as well as the main critical profiles, of the European foreign direct investment (FDI) screening mechanism and its interactions and mutual influences existing with the control mechanisms of two World giants: China and United States.

The creation of an internal, single, borderless market has been one of the main objectives pursued at the European level over the years. This goal has been implemented in practice mainly through the search for a balance within the relationship between openness and competition. These two concepts are reflected in the so called free movement of capital (Article 63 (1) of the Treaty on the Functioning of the European Union ("TFEU")) and the freedom of establishment (Article 49 of the TFEU) which represent the cornerstones of the internal market in the area of cross-border entrepreneurship and especially of investment.

Since the formation of the European Community, foreign investment protection and European integration have followed parallel paths: investment law has been a matter that States regulated by International Law instruments, mostly by the conclusion of bilateral international agreements, while European Law has been concerned with regulating the emergence and development of the internal market among its Members States. Indeed, the negotiation of the Treaty of Rome in 1957 did not provide for the conferral on the nascent European Economic Community ("EEC") of competence over foreign direct investment. Therefore it was not until 2007, with the Lisbon Treaty, that the European Union was granted express competence over foreign direct investment. The reasons behind this expansion of competence were dictated by the fact that the European Union has long assumed the role of a global player, both for inbound and outbound investments to third Countries; moreover, the awareness that the regulation of international trade and that of foreign direct investment are intimately linked has emerged with increasing evidence, both in practice and in doctrine. Moreover, with specific regard to the concept of "foreign investment", this shift of competence has resulted in the need to distinguish between the notion of FDI in the rules of the internal market (establishment and movement of capital) and the notion that the EU would have chosen to adopt, under the CCP (Common Commercial Policy) posed by Article 207 of the TFEU, in investment protection treaties with economic organizations or third Countries.

Nowadays, however, the Union is objectively at the mercy of a period marked by unprecedented global challenges that is part of an international landscape where rivalries and interdependencies between major powers are becoming increasingly unwieldy due to rapidly evolving trade and investment relations used for purposes with exclusively strategic implications. In this context, the adoption of Regulation (EU) 2019/452 ("the Regulation" or "Screening Regulation"), which was approved on 19 March 2019 and entered into force on 11 October 2020, expresses the position of the European Union as a compact, open but careful front in the face of new foreign investments taking over the European regional system. The Regulation is expressly without prejudice to the exclusive competence of Member States for national security and their right to protect their essential security interests, and it can be analyzed from two main perspectives: (I) its scope of establishing a framework for the control of foreign investment in the Union, as well as the establishment of a European control mechanism characterized by the participation of the Commission and (II) the creation of a cooperation mechanisms on the horizontal level between Member States and on the vertical level between Member States and the European Commission.

The foreign investment control procedure thus stands as a juncture in the delicate balancing between two tendentially opposing interests of the first order in the contemporary World: the interest in not discouraging the inflow of capital from abroad and the interest in protecting sensitive domestic sectors from foreign interference on the grounds of security and public order. While some try to value the economic advantages of FDI, others rather emphasize the risks FDI poses to certain societal interests. In any case, however, concerns vis-à-vis FDI in the EU have been rising and the screening of FDI has been identified as a key policy response. Therefore, despite the ambitious tenor of this initiative, a careful analysis cannot ignore considerations inherent in such risks related to this system.

To begin with, in the light of new global challenges the concept of security, traditionally confined to the field of defense, seems to have transcended its boundaries, now being frequently invoked to justify - more generically - the European Union's response to such upheavals. In this regard, comes to the fore the issue of the repercussions that the expansion of powers in the hands of the European Commission (in the terms discussed in detail below) may have in the sense of undermining national sovereignty prerogatives, as well as on the process of European integration.

Moreover, although FDI has fully asserted its decisive position in the revitalization of the economy, there are numerous concerns regarding the maintaining of Europe's competitiveness in World markets and preventing distortions to the single European market that could be caused by competitors benefiting from foreign financing through State aid. These issues, therefore, have brought to light the need to balance competition law with public interests.

A more recent issue is, instead, digitization. The latter is leading to a redefinition of global technological and economic leadership: the economies that forged the industrial age are now threatened by nascent economies that welcome and encourage new and rapidly evolving digital solutions and services. An example of such concerns are cybersecurity and related critical infrastructure which, due to their level of interconnectedness and interdependence of infrastructure and technologies, become a matter of strategic importance and therefore considered in the same way as a foreign direct investment operating in strategic sectors.

The EU is therefore seeking a so-called "strategic autonomy" as a necessary measure to respond to global challenges, called upon to ensure the security of the Union as well as individual Member States. In this context, the power of Countries such as the United States and some European Countries is challenged especially by China. The EU views China as a "strategic competitor" and the proliferation of investments that actually conceal political ends directed at the acquisition of strategic infrastructure have made the European control system increasingly stringent and sometimes almost "tiptoeing" a fine line between safeguarding national security and protectionism. In this fight against Chinese expansion, the EU seems to have found in the United States an ally with which to share the same concerns. Indeed, both systems consider China's foreign investments as the weaponization of State-backed and have adopted similar policy goals to deal with the Chinese "emergency".

Hence, in order to return an overall picture of the topic, it was decided to structure the work into three chapters.

The first one will devote its first three sections to a historical-legal examination of the evolution of the European approach in the field of investment and trade in general: it will shed light on the freedoms of capital movement and establishment meant as cornerstones of the European internal market, the role of the European Community at the time of privatizations in the 1990s will be analyzed and, finally, it will come to talk about the "golden share" focusing on the case of the United Kingdom and France as the walkers of this instrument in the European scenario. Then, by adopting a progressive approach, the concept of FDI and foreign investor will be introduced paying particular attention to its intersection with the said freedoms, the changes that have occurred since the advent of the Screening Regulation and the position of doctrine and jurisprudence in this regard. In addition, legislative changes before and after the Lisbon Treaty will also be analyzed in this context. At this point, having traced the contours of this chaste subject, it will be possible to enter the heart of this analysis by devoting the last two sections of the chapter exclusively to the Screening Regulation and the evolution of the European approach in the light of such innovation.

After having dealt with procedural aspects, the second chapter will focus on the main implications that the adoption of the Regulation has generated. To this end, space will be given to more critical considerations in light of these first two years since the Regulation's implementation. It will investigate, in particular, the implications that the expansion of powers in the hands of the European Commission may have in terms of national sovereignty prerogatives dwelling on the Hungarian case that can be considered emblematic in order to understand the criticalities that the system seems to reveal; subsequently, the focus will be shifted to the topic of competition using the relationship between foreign subsidies and FDI as a key narrative. In addition, with the intention of providing an even more current scope to the entire work, the matter of the technological revolution following the rise of the fifth-generation wireless network will be addressed.

Finally, the third and last chapter will move the analysis beyond the European borders and towards East. To this end, it will be partly devoted to analyzing the Chinese approach to foreign investment, its influences on the EU system and the EU response to the challenges it posed. Then it will also investigate the evolution of the American screening system by highlighting its points of interaction and the probable influence on the European model. In substance, a general reflection will be provided that will embrace peculiarities and criticalities of these models, trying to propose not only a mere comparison but providing a critical analysis keeping the European system and the relationship with Member States as the focal benchmark.

<u>CHAPTER I</u> – THE SCREENING OF FOREIGN DIRECT INVESTMENT (FDI) IN THE EU LAW

In an effort to address the subject by providing a broad introductory framework on account of what will be examined also in the following chapters, the present one will devote its first three sections to a historical-legal examination of the evolution of the European approach in the field of investment and trade in general: it will shed light on the freedoms of capital movement and establishment meant as cornerstones of the European internal market, the role of the European Community at the time of privatizations in the 1990s will be analyzed and, finally, it will come to talk about the "golden share" focusing on the case of the United Kingdom and France as the walkers of this instrument in the European scenario.

At this point, and always adopting a progressive approach, the concept of FDI and foreign investor will be introduced paying particular attention to its intersection with the said freedoms, the changes that have occurred since the advent of the Regulation and the position of doctrine and jurisprudence in this regard. In addition, legislative changes before and after the Lisbon Treaty will also be analyzed in this context.

At this point, having traced the contours of this chaste subject, it will be possible to enter the heart of this analysis by devoting the last two sections of the chapter exclusively to the Screening Regulation and the evolution of the European approach in the light of such innovation.

1. The freedoms of capital movement and establishment as cornerstones of the European internal market in the investment area

The creation of an internal, single, borderless market has been one of the main objectives pursued at the European level over the years. This goal has been implemented in practice mainly through the so-called fundamental freedoms *i.e.*, freedom of movement of goods, persons, services and capital. The single market, in fact, has been defined as a "mixture of two concepts, openness and competition"[1], where the former is reflected in the aforementioned freedoms and, in particular among them, the free movement of capital (Article 63 (1) of the Treaty on the Functioning of the European Union ("TFEU")) and the freedom of establishment (Article 49 of the TFEU) represent the cornerstones of the internal market in the area of cross-border entrepreneurship and especially of investment. Both fundamental freedoms as of today enjoy direct effect[2] and are no longer limited to the mere prohibition of discrimination, but entail a general prohibition of any kind of restriction of those economic activities that have as their objective integration into the economy of another Member State of the EU for a certain period of time.[3]

Freedom of establishment is aimed at the protection of the European citizens having the nationality of one of the Member States, as well as companies and enterprises placed on an equal footing with them.[4] By contrast, for the purposes of the protection arising from the free movement of capital, the owner (or recipient of capital) may also be a national of another Country. Consequently, since the latter fundamental freedom is not limited only to intra-EU economic processes, but comprises also those economic processes involving non-EU States, direct investments from the latter will in principle fall within the applicative scope of the free movement of capital. In fact, national and European investment control systems make recurrent reference to "capital investments" and these are mentioned several times in the TFEU, starting with Article 63. On the basis of the rules contained in the Treaties, it is practically excluded for the individual Member States to unilaterally erect barriers to the movement of capital vis-à-vis third Countries, and the hesitation of the Court of Justice in providing Member States with a broader arsenal of justifications in their relations with other countries reinforces this.[5]

The term "restriction", as it appears in Article 63 TFEU and Article 49 TFEU, refers

[1] See Mario Monti, *Single European Market, Regulation and Competition*, AGCM, available at the link: https://www.agcm.it/dotcmsDOC/temi-e-problemi/tpES01S3.PDF.
[2] For freedom of establishment refer to *Reyners v. Belgium* of 21 June 1974, case C-2/74; while for the free movement of capital this effect is recognized following the Maastricht Treaty in *Lucas Emilio Sanz de Lera and others* of 14 December 1995, Joined Cases C-163/94, C-165/94 and C-250/9 (*1995 I-04821).*
[3] See Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 15-19 (2022).
[4] See Article 49 (1) and Article 54 (1) TFEU.
[5] See *supra* at 3.

to a broad spectrum of measures and, for the purpose of protection guaranteed by treaties, even those which involve even a minor restrictive effect on the applicable freedom become relevant. The restrictive measures considered are those imposed by Member States acting in the capacity of public authority *e.g.*, a state-guaranteed golden share to a private energy supplier, or a regulation prohibiting the acquisition by persons resident in a Member State of debt securities issued abroad.[6]

Capital investment refers to any kind of economic transfer, independent of a provision of services or movement of goods, in the form of financial and tangible assets, for financing or investment purposes.[7] The exact meaning of the terminology used has not been defined specifically, except by a nomenclature in the annex of the "Capital Liberalization Directive"[8], which in any case does not purport to be exhaustive. Nevertheless, what can be gleaned from Article 64 TFEU is that this notion should include "direct investment". Although for the purposes of the free movement of capital, unlike the other fundamental freedoms, the origin of the investment does not assume relevance, it is still a precondition for benefiting from the protection recognized by Art 63 TFEU that capital movements take place in a cross-border context i.e., that they extend beyond the borders of a Member State[9] This freedom assumes decisive importance in the EU internal market as it is fundamental for an open, integrated, competitive and effective financial market and financial services structure throughout Europe.[10]

A distinction has to be made between two possible forms of capital investment *i.e.*, between portfolio investments and direct investments. While their distinction in practice is not always straightforward, the general dividing line lies in the circumstance that, while portfolio investments pursue short-term investment purposes, direct investments pursue the objective of establishing or maintaining control of a company or at least exercising

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[6] *Ibidem*. Moreover, for further discussion see Louis Vogel, *EU Competition Law Applicable to Distribution Agreements: Review of 2011 and Outlook for 2012*, Journal of European Competition Law & Practice 3.3 (2012).

[7] See Stefan Korte, *Exploring the Possibilities and Limits of the EU and Member States to Set Up an Investment Screening Mechanism in the Light of Union Law*, YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS) 435-465 (2021).

[8] See Council Directive of 24 June 1988 *for the implementation of Article 67 of the Treaty*, 88/361/EEC (*OJ L 178, 8.7.1988,* p. 5-18).

[9] See how the text of Article 63 (1) TFEU refers to "*capital movements between Member States, as well as between Member States and third countries*".

[10] See *supra* at 3.

some level of influence in it.[11] In practice, in order to overcome potential interpretive obstacles to the classification of the investment in the specific case, thresholds of 10-15 percent are often adopted as the relevant shareholding thresholds, however, this remains a criterion to be adopted taking into account all possible recurring case-by-case specificities. Indeed, the possible differences arising from the structure of the company in the different national systems, prevent the possibility of relying exclusively on a single criterion such as the one mentioned.[12]

The distinction between portfolio investments and direct investments is particularly relevant, the latter generally being given a higher level of attention by national control systems, especially if they involve the possibility of exerting influence in companies operating in sectors deemed to be of strategic importance.[13]

Notwithstanding what has been said above about the relevance of the free movement of capital, direct investments also fall within the scope of freedom of establishment, the latter covering any self-employed economic activity aimed at carrying out a permanent activity on a stable and continuous basis in another Member State. The reason for this relevance lies in the fact that in the event that the investor wishes to invest in a company for the purpose of exercising influence in it, then such investor must be deemed to be aiming at the exercise of a permanent self-employed activity at the seat of the company.[14] The influence referred to in the present case is to be understood as "definite influence", defined by the Court of Justice as "the holding by a national of a Member State, in the capital of a company established in another Member State, of such a shareholding as to give him definite influence over the decisions of that company and to enable him to direct its activities",[15] which does not, however, imply that the holding of a majority shareholding in the capital of the company is necessary.[16]

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[11]Despite the lack of a definition of "direct investment" in the treaties, Council Directive 88/361 EEC defines these in the explanatory notes as "Investments of any kind made by natural persons, commercial, industrial or financial enterprises having the purpose of establishing or maintaining lasting and direct links between the lender and the entrepreneur or enterprise to which such funds are allocated for the exercise of an economic activity. This notion should therefore be understood in a broad sense".

[12] See *supra* at 4. Compared to this approach is the one followed by the Court of Justice in *EV v. Finanzamt Lippstadt* of 20 September 2018, Case C-685/16 (*OJ C 408, 12.11.2018, p. 9–10)*

[13] *Ibidem.*

[14] See CJEU *European Communities v. Hellenic Republic* of 21 September 1989, Case C-68/88 (*1989 - 02965).*

[15] See CJEU *Commission v. Italian Republic* of 26 March 2009, Case C-326/07 (*2009 I-02291).*

[16] See *supra* at 3.

Based on the elements required for the applicability of the described fundamental freedoms, it is worth noting that in practice there are several possible arrangements in which both could be applied to the same circumstance. This appears to be particularly true in cases where the investment is directed to the establishment of a company or the acquisition of its control. For this reason, given the functional nature of free movement of capital, it can be argued that one rule supersedes the application of another rule as part of a true exclusivity between provisions. As a result, it is possible to detect in the case law of the Court of Justice on the relationship between freedom of establishment and free movement of capital, a tendency of the Court to give freedom of establishment priority over free movement of capital, reasoning that a violation of the latter will be established only after verifying the absence of a violation of freedom of establishment.[17] However, despite the possibility that both fundamental freedoms are to be called into question, it is always necessary to take into account the impossibility of applying freedom of establishment to protect investors from third states.[18]

For the purposes of examining about the possibilities of justification for restrictions on the free movement of capital and freedom of establishment, it is important to distinguish between discriminatory measures - identified as such because of the provision of a distinction between foreign and domestic subjects to which different treatment regimes correspond - and non-discriminatory measures. Article 65 TFEU for freedom of movement of capital and Art 52 TFEU for freedom of establishment, provide that discriminatory measures must be justified on grounds of public policy or public security; other measures, on the other hand, must be justified in light of overriding reasons of general interest. Regardless of the discriminatory or non-discriminatory nature of the measure, a restriction on the freedom of movement of capital or establishment will always have to be proportionate i.e., the measure must be suitable for achieving the objective for which it is intended and must not go beyond what is necessary for that purpose, this constituting, among the available alternatives, the one involving the least degree of

[17] See Wolfgang Schön, *Free Movement of Capital and Freedom of Establishment*, 17 European Business Organization Law Review 3, 229-260 (2016); despite the described tendency of the Court of Justice to prioritize the free movement of capital, mirror cases in favor of freedom of establishment can be found in the case law. An important example is provided by the case *Commission v. Italy*, C-326/07.
[18] See *supra* at 3.

restrictiveness. Finally, it will be possible to justify a restriction on fundamental freedoms through the so-called "rule of reason test" of jurisprudential elaboration by the Court of Justice.[19]

A further consideration to be made for the sake of clarity is on the differences between freedom to provide services and freedom of establishment. The necessity of the specification is due to the commonality of several characteristics *i.e.,* (I) they are not applicable in the case of non-EU investors, (II) they require the exercise of an economic activity, and (III) they require the crossing of a border of a Member State; for this reason their distinction is not always easy to resolve in practice. The difference is to be found in two main factors pivoting on whether or not there is (I) a stable infrastructure (II) for a continuous exercise of the economic activity taken into account; in case of an affirmative answer it will have to be concluded for the relevance of the freedom of establishment.[20] The mentioned distinction between participation on a temporary or permanent basis also becomes relevant as the same also characterizes the relationship between Art 49 TFEU and Art 63 TFEU. For the permanent nature of direct investments, freedom of establishment will be applicable, while in the case of portfolio investments and, more generally, investments that do not involve control, freedom to provide services[21] or free movement of capital will be relevant.[22]

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[19] See *supra* at 4. See also Hirsch Ballin, Ernst, at al., *European variations as a key to cooperation - Research for Policy,* 55 (2020). The authors point out how the rule of reason doctrine introduced by the Court in relation to all fundamental freedoms has been consistently applied over the years. This doctrine states that restrictions on freedom of movement may be justified, by way of exception, if they are intended to meet urgent needs in the public interest that have not already been explicitly provided for in the Treaty. In its jurisprudence, however, the Court of Justice recognizes that although a Member State may safeguard such public interests, the national measure will be considered valid only in the absence of European harmonization legislation that already takes such interests into account and from the fact that the measure meets the proportionality requirement. Consequently, a Member State must be able to demonstrate that a national measure is both appropriate and necessary to safeguard the interest it invokes, and thus does not go beyond what is necessary for that purpose.

[20] From a practical perspective, the Court of Justice provided further clarification in *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* of 30 November 1995, Case C- 55/94 (*1995 I-04165)* stating that "*the temporary nature of the provision of services, provided for in the third paragraph of Article 60 of the EC Treaty, must be assessed by taking into account the duration, frequency, periodicity and continuity of the provision of services*".

[21] *Ibidem*

[22] See *supra* at 3. See also *Commission of the European Communities v Italian Republic* of 26 March 2009, Case C-326/07 (*2009 I-02291).*

2. The changing in national economy: the role of the European Community in the privatization process

In order to fully understand the topic of the European screening mechanism, I believe it useful to broaden the lens on the scenario of the national economy at the time of privatization and the role of the European Community ("EC") in these processes. In this context, the role of the State in the sector of the national economy is analyzed and, specifically, its approach with regard to foreign investments made on the relevant territory through the "taking" measures, *i.e.* measures of nationalization or expropriation of foreign investments.[23]

The succession of political and economic events within the national systems of individual Countries led to the emergence of different state models characterized by the varying degree of interference that can be exercised in strategic sectors of the economy. In this context, initially there emerged the hypotheses of nationalization or expropriation of foreign investment by the host State and, later, the processes of privatization of entities aimed at providing strategic public services by virtue of the fact that a private type of management favors the flow of foreign investment into the relevant territory.

The phenomena included within "nationalization" have in common the goal of achieving the creation or acquisition by the State of services or industries that provide certain economic activities for the benefit of the community. In Western countries such activities, reserved exclusively for the State, concerned the areas of basic services: the State became the owner, either directly or through public law bodies, of companies and everything necessary to provide such services[24].

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[23] In the matter of the treatment of foreign investments, in fact, the problem of the internationalist regulation of expropriations and other restrictive measures of foreigners' property, rights and interests should be framed. For more on the subject, see Gian Luigi Tosato, *A recent debate on the subject of nationalizations and expropriations of foreign property in public international law*, Journal of International Law 178 (1973); C. De Visscher, *Théories et réalités en droit international public*, 219-220 (Paris: 1970); Georg Schwarzenberger, *Foreign investments and international law*, 32 The modern law review 6, 714-716 (1969). Available at the link https://www.jstor.org/stable/pdf/1093662.pdf?refreqid=excelsior%3Aea9d0e982f3630c78c0189baf51767b0; Peggy Guggenheim, *Traité de droit international public* 1, 334-335, (Géneve: 1953).

[24] See Giuseppe Bottaro, *Nationalizations and International Politics*, 69 The Politico 2, 339-373 (2004). It specifies that the spread of the term "nationalization" occurred only at the beginning of the twentieth century to refer to "that generalized process of expropriation undertaken by the Soviet Union, after the Bolshevik

In the context of nationalization, according to the perspective of the international framework on the protection of foreign investment, the right of the host State to take so-called taking measures is relevant; in particular, these measures are put in place by the host State in order to nationalize or expropriate the foreign investment operated in the relevant territory.

However, with respect to the adoption of such taking measures, the most pregnant issue is reflected in the circumstance that such activities have often been accompanied by insufficient compensation to the foreign investor targeted by the measure. Consequently, taking into account the critical issues that may arise in cases of adoption of taking measures by a host State of a given foreign investment, there was no delay in abandoning this system of nationalization and moving in the direction of its evolution, namely the system of privatization[25]. Thus, there is a change in the role of the State from "entrepreneur" to "regulator," *i.e.*, from a direct exerciser of activities aimed at rendering public, as well as strategic, services, it becomes a simple controller of compliance with national interests and market rules by privatized enterprises that have assumed the role of providing the same services.

In this context, the impulse of the then European Community to its Member States was a key reason for the activation of a system of privatization of certain strategic sectors of the economy. In fact, the EC has traditionally been a promoter of cross-border competition and free movement of capital within the single market.[26] In privatization

revolution, whose objective was to transform the entire production process and the totality of economic activities from private to public. This was all within the framework of a doctrine, the Marxist doctrine, which took the abolition of private property and the consequent socialization of the means of production." The author points out that, unlike in the Soviet region and in some less developed countries, the nationalizations that took place in Western countries, including Italy, are characterized in that they involved only certain sectors of the economy, and not the entire economic system. The sectors affected, in particular, included those deemed to be of common interest and of primary importance to the life of civil society..

[25] See Sabino Cassese, Public Enterprises after Privatizations, 35 State and Market, 235- 248 (1992), argues that nationalization and privatization do not represent two opposite processes, but rather "privatizations should be considered part of a process of transformation of public enterprises." In this sense, one can speak of "evolution" of the system.

On the phenomenon of privatization, Sabino Cassese, *Le privatizzazioni: arretramento o riorganizzazione dello Stato*, Rivista di diritto pubblico comparator 538 (1996), points out that "at the end of our century, privatizations have acquired a previously unknown importance".

[26] "The refinement of the internal market , on the one hand, and, on the other, the respect of competition rules impose, on the part of EU Member States, the elimination of limits to private economic initiative and obstacles to intra-EU trade, both 'classic' manifestations of public intervention in the economy", Daniele Gallo, *Golden shares and the transformation of public/private devide: critical issues, developments and*

processes, the EC has authored numerous directives aimed at liberalizing markets related to services of general interest under the principles of open markets, free cross-border competition and free movement of capital within the single market[27].

However, in the Community context it is more correct to speak of liberalization rather than privatization. In fact, it can be said that the Community took a very neutral approach with regard to the implementation of privatization understood as the divestment of public holdings within the Member States. In contrast, the Community's main objective was to abolish national special rights that restricted the entry of new entrants into market sectors. Such Community impulses oriented toward liberalization of sectors related to essential public services were gradually taken up by the Member States with the limitation of the existing monopolistic regime on these sectors.

As for the legal basis of this process, it can be traced back to the Treaty of Rome [28] in the part where it establishes the four fundamental freedoms for the integral realization of the single European market, pillars that are identified with the free movement of persons, goods, services and capital, respectively. In addition, alongside these freedoms are also put in place those related to competition and, in particular, the application of the prohibitions on State aid, in order to achieve the realization of contestable markets in the public utilities sectors without the implementation of forms, direct or indirect, of subsidies to public or private companies such as to distort competition[29].

perspectives in EU law between internal markets and extra-EU investments, L'Unione europea a vent'anni da Maastricht, verso nuove regole, 177-232 (Naples: 2013).

[27] The first liberalization Directives were adopted in 1996 and 1998 with reference to the electricity and natural gas markets, respectively. These sectors constituted monopolies, so the objective of the directives was to gradually open these markets to competition. Following this, the EU liberalization policy also covered the telecommunications, transport, postal services of electronic communication sectors.

[28] The Treaty of Rome are signed on 25 March 1957 and enter into force on 1 January 1958. They establish the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), respectively. Later, with the entry into force of the Treaty on European Union, signed in Maastricht in 1992, the expression European Economic Community (EEC) was replaced by the expression European Community (EC).

[29] See Article 92 of the Treaty establishing the European Community, which states that "save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market".

In fact, concomitant with the liberalization trend, there is a transformation of that neutral position taken by the Community towards privatization, even in the face of the economic crises in which some Member States, including Italy, were finding themselves. In fact, both the Commission and the Council, encouraged privatization policies by considering them functional to the formation of a solid Community competition network. In this sense, we recall the Council's first Recommendations on the economic policy of the Member States and the Community[30] referring to the years 1994, 1995 and 1996. However, these measures were exhortatory in nature and, as a result, the Commission took the first steps toward a decision-making path aimed at implementing privatization projects in Member States. Of particular note among the Commission's decisions in this area, is the one on the recapitalization of Italy's leading airline *Alitalia*[31]; it was the subject of a restructuring plan that committed the Italian State to refrain from any intervention in the management of the company for reasons other than those arising from its position as a shareholder.

In the final analysis, it is thus possible to note the role as a driving actor assumed by the EU in a context of liberalization and privatization, transposed within most Member States. The legislations of the latter have helped to refine the regulation of new management activities arising from privatization, including controls by public authorities on foreign investment aimed at domestic enterprises operating in certain sectors designed to render public or strategic services.[32]

3. The golden share and the Court of Justice case law

As explained in the previous section, the privatization process that ruled the 1990s gave rise to new dynamics because of the need to control the competitive discipline having as its object strategic productive sectors. In light of these changes, a large part of

[30] See Council Recommendation of 11 1994, No. 94/480/EC; Council Recommendation of 10 July 1995, No. 95/326/EC; Council Recommendation of 8 July 1996, No. 96/431/EC.
[31] See Commission on the recapitalization of the Alitalia company of 15 July 1997, 97/789/CE, para. 44.
[32] See Vittoria Cusumano, *Le procedure di screening degli investimenti stranieri alla luce delle nuove sfide globali*, 29 (2021).

the European Countries involved in the processes of liberalization and privatization, introduced specific clauses in their legal systems that would guarantee the presence of the State in the conduct of certain corporate activities engaged in strategic sectors, regardless of the share of capital owned by the State and claimed against the respective company.[33] These clauses provide for special instruments of control concentrated in the hands of public authorities that are converted into real special powers exercisable by the government with respect to relevant decisions on the governance of the aforementioned activities and can be traced, at least initially, to the legal institution of the so-called golden share.

The golden share represents one of the most important exceptions to competition and internal market law. It can be defined as those special powers that are the result of the public sphere's desire to influence the private sphere, for choices that are considered strategic for the protection of the community. Its purpose is not to put the government in charge of private companies, but to direct them to self-correcting and preventive actions necessary to avoid undesirable outcomes that would conflict with public interests.[34]

State interference in the economic sphere was manifested by a willingness to continue to maintain forms of control of varying intensity, in those enterprises that, as a result of privatization processes, have moved out of the sphere of public control. A forerunner of a phenomenon that would increasingly involve the entire European landscape, the United Kingdom was the first to promote privatization under the leadership of Margaret Thatcher, from whom the so-called "Thatcherism" takes its name.[35] Thatcherism indicates a political-economic current characterized by a tendency to refrain

[33] In this sense, an ideal typical dichotomy between public and private law arises, particularly with reference to the delicate legitimacy of special powers held by the State in privatized companies. For more on this topic, see Tont Prosser, *Privatising Public Enterprises. Constitutions,The State and Regulation in Comparative Perspective*, (Oxford: 1991); Peter Craig, *Public Law and Control over Private Power*, The Province of Administrative Law, 96 ff (Oxford: Michael Taggart 1997).

[34] See Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 29-33 (2022).

[35] *Ibidem*. For further discussion see also David Parker, *The UK"s Privatization Experiment: the Passage of Time Permits a Sober Assessment*, CESifo Working Paper No. 1126 (2004); available at the link: https://www.ifo.de/DocDL/cesifo1_wp1126.pdf [Last accessed August 13, 2022]. In particular, the author quotes the following words from Mrs. Thatcher: "*Privatization [...] was crucial to improving Britain's economic performance. But for me it was also much more than that: it was one of the central means of reversing the corrosive and corrupting effects of socialism [...] Just as nationalization was at the heart of the collectivist program by which Labour governments sought to reshape British society, so privatization is at the heart of any program of reclaiming land for freedom*".

from the exercise of public power in the economy, limiting the latter to the creation of essential rules. The institution of the golden share was thus understood as having a transitional nature and as a special, unique and redeemable action, conferring the possibility of exercising a right of veto. The golden share found its regulation in the British statutes of companies after privatization had taken place and, for reasons interconnected with the contractual source of these public powers, these took on a different nature and scope in practice.[36]

Although it has been described as a distortion of corporate law,[37] and despite the socialist resistance of some political forces to privatization first[38] and the golden share later, these phenomena have spread to several European legal systems. Indeed, ensuring that the ownership and control of a once public company did not fall into hostile hands, preventing the sale of strategic assets, and maintaining the corporate purpose of the company in accordance with the interest of the community, were the recurring reasons that prompted the various Member States to adopt these forms of control.[39]

The identity of the objectives pursued and concerns raised, however, has not led to coordination at the European level among Member States for the supervision and defense of common interests, to be found especially in the case of FDI. The result of this lack of integration at the European level can be traced in the significant differences that have emerged in the different ways in which the golden share has been conceived at the national level. In fact, the private nature recognized to the golden share by the British legal system has not always been reflected in other legal systems. For instance, the Netherlands considered the golden share to be of a public nature. Significant differences have also emerged in the Belgian and French experience, where the establishment of a golden share took place through legislative act followed by ministerial decrees that would

[36] See *supra* at 34.
[37] *Ibidem*. See Audax Peter Rutabanzibwa, *What is golden in the golden share? Company law implications of privatizations*, 17 The Company Lawyer 2, 40-46 (1996).
[38] The reasons behind the wave of privatizations in Europe are to be found according to Alfredo Macchiati, *Privatizations: between economics and politics* (2016), in the increasingly strong doubts about the efficiency of the public enterprise management model and in the need for immediate liquidity of states as solutions to public over-indebtedness.
[39] See *supra* at 34.

lead to the transformation of an action from ordinary, to what has been called "*action spècifique*".[40]

Despite the differences, the various forms of golden share found a point of contact in their derogatory nature from European internal market rules, with the consequence they would be deemed legitimate only if exercised in a non-discriminatory manner, on the basis of objective and public criteria, and only because of overriding reasons of general interest inherent in public order, public health and public safety.[41]

In order to settle the interpretative and applicative doubts inherent in the fundamental freedoms, the Court of Justice in a case against Italy tried to bring clarity by outlining a system of categorization of the different possible national measures, a scheme later disregarded by the same Court in subsequent cases.[42] Nonetheless, the tendency in making a distinction between European and non-European investors entails in the case of foreign direct investment the greater decisiveness of the *erga omnes* protection offered by the free movement of capital. The distinction with investors from non-EU states has then also found relevance in EU jurisprudence where the Court of Justice, in examining national measures aimed at considering investors regardless of their origin, has not failed to hint that a different approach limiting the scope to non-EU investors could have led to different outcomes.[43] Indeed, it is undeniable, although there are no cases where this has been directly noted,[44] that Member States enjoy greater power in regulating foreign

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[40] See *supra* at 34.
[41] *Ibidem.*
[42] Reference is made to *Commission v. Italy* of 26 March 2009, Case C-326/07 (2009 I-02291). In prioritizing freedom of establishment over free movement of capital for the first time, the Court distinguished the following categories: (i) provisions of national law applicable to capital holdings in companies established in Europe and held by EU nationals that allow a definite influence on the company's decisions; which would fall within the scope of the freedom of establishment (ii) direct investments, i.e., investments aimed at establishing lasting links that presuppose that the shares held allow an effective participation in the management of the company or in its control; relevant to the free movement of capital; (iii) national legislation applicable regardless of the size of the holding; which would fall within the scope of both freedom of establishment and free movement of capital. See on this point Thomas Papadopoulos, *COVID-19 Crisis and Screening of Foreign Direct Investments in EU Privatized Companies*, 27 International Trade Law and Regulation 1, 54-75 (2021).
[43] See *Commission v. Hellenic Republic* of 8 November 2012, Case C-244/11. The CJEU pointed out that the rule under scrutiny was aimed at all potential investors and not only investors from third states, as it lacked a "provision of a legislative nature from which it would appear that the scope of application of that regime concerns only the latter investors". On this point see also Daniele Gallo, *On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments*, European Papers 1:3, 823-845 (2016).
[44] *Ibidem*

investment albeit this is most evident only by taking into consideration the inapplicability of freedom of establishment.[45]

The Commission's monitoring activities and infringement proceedings, thus brought to the attention of the Court of Justice various issues that made the various golden share systems conflicting with European law. For this reason, the Commission, in a 1997 Communication, highlighted how general investment authorization procedures and rights of veto or imposition on the election of members of the company's governing body would be deemed incompatible with European law.[46] The decisive contribution to the development of golden shares, however, was provided by the Court of Justice through various rulings that strongly conditioned the birth and development of various national systems. One important case, in which Italy was the respondent, saw the Court emphasize how, although the golden share was not to be considered illegitimate in the light of European law, it still had to be based on transparent and objective criteria, having as its ultimate goal the protection of a national interest.[47] Similarly, public security may be invoked only in the event of a real and sufficiently serious threat to a fundamental interest of society and must be interpreted strictly, as the scope of this exception cannot be subject to unilateral interpretation by each Member State.[48]

Regarding the legitimacy of measures in the strict sense, several pronouncements have ruled the illegality of regulatory provisions aimed at *e.g.*, limiting the possibility of participation by investors from non-Member State, limiting powers to appoint directors and inhibiting powers to strategic decisions.[49]

The incessant activity of the Commission and the Court of Justice has thus conditioned the different declinations of the criteria for the exercise of the golden share

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[45] See *supra* at 34.
[46] See Communication of the Commission on certain legal aspects concerning intra-EU investments of 19 July 1997, p. 15-18 (97/C 220/06).
[47] See *Commission of the European Communities v. Italian Republic* of 23 May 2000, Case C-58/99 (2000 I-03811).
[48] See *supra* at 34. See also *Commission of the European Communities v. French Republic* of 4 June 2002, Case C-483/99 (2002 I-04781); and *Commission of the European Communities v. Kingdom of Spain* of 13 May 2003, Case C-463/00 (2003 I-.04581).
[49] See *Commission of the European Communities v. Federal Republic of Germany* of 23 October 2007, Case C-112/05 (2007 I-08995); *Commission of the European Communities v. Kingdom United Kingdom* of 13 May 2003, Case C-98/01 (2003 I-04641); *Commission of the European Communities v. French Republic* of 4 June 2002, Case C-483/99 (2002 I-04781).

in Europe, with the ultimate goal of outlining and accompanying Member States toward a virtuous model that would base its *ratio legis* not on the subject at stake, but on the economic activity pursued by the company being invested in.[50] With respect to the latter, the possibility might been evaluated to implement a special power, which has been considered legitimate since it respects the spaces left by the treaties through the exceptions to the rules of the internal market, if justified by imperative reasons of general interest (which can never be substantiated by reasons having a merely economic nature) and proportionate with respect to the objective pursued.[51]

The various national systems were thus revised in the light of the Court of Justice's indications, significantly innovating the approach adopted up to that time. The result of these reforms has connoted the shift from State-shareholder, as emerged from the evolution that took place with the emergence of the reality of golden shares and departed from the previous approach of State-owner, to State-regulator.[52] The consequence is the shift from special powers exercisable by reason of a shareholding held by the State in public enterprises, to forms of exercise of these powers that disregard the existence of a public shareholding in the share capital of companies, such powers being reserved to the State by law in enterprises active in strategic sectors. The consequence of this new approach implies that even if governments opt to divest their holdings in enterprises considered strategic, they will still be entitled to the exercise of such powers.[53]

3.1 The golden share in the United Kingdom

As anticipated, the United Kingdom holds the record as the first Country in Europe to have introduced golden share clauses. As early as the early 1980s, the British executive

[50] For a reconstruction of the concept of a "virtuous golden share," see H. Fleischer, *Case Note on the Golden Shares Cases*, 40 Common Market Law Review 2, 493-501 (2003); The author describes the golden share as virtuous because of its compliance with European law as an institution (i) based on a clear and precise regulatory text; (ii) subject to subsequent state control and effective judicial review with precise deadlines to allow for opposition; (iii) not of prior authorization; and (iv) the exercise of which, constituting a form of state interference in the economic sphere, would be reasoned and clarified.
[51] See *supra* at 34.
[52] For further discussion, see Vittorio Minervini, *Il ritorno dello Stato salvatore. Nuovi paradigmi (post Covid) nel rapporto fra Stato e mercato?*, Mercato Concorrenza Regole 22.3, 471-506 (2020).
[53] See *supra* at 34.

began the season of privatization of public enterprises, and the beginning of this process traditionally coincides with the sale of a majority stake in British Telecom[54], as well as a more general privatization of domestic telecommunications sectors.

A significant peculiarity lies in the legal basis of the golden share within the British system. In fact, the source of this instrument of control was not identified in legislative measures or disciplines of a general and organic nature, but rather in precise statutory clauses of the privatized companies. Specifically, these clauses granted the State, qualified as a "special shareholder," the ownership of a golden share, i.e., a "golden share" with a symbolic nominal value of only one pound, but nevertheless capable of conferring greater rights than those arising from ordinary shares and special powers in the shareholders' meeting. In this way, the executive reserved jurisdiction over the strategic choices of the respective companies operating in sensitive domestic sectors in order to prevent that portion of control from being taken over, rather, by foreign investors.

The golden share took the form of two different types: the first was that of the so-called built in majority which consisted of giving the public shareholder more voting rights than all the shares in private hands. In practice, the shareholder could take part in the managing events of the company by enjoying a majority in the meeting and the possibility of invoking the extraordinary meeting. The second type, on the other hand, was the so-called relevant person, aimed at ensuring a cap on share ownership. In this case, shareholders were required to notify the holding of share packages exceeding 5 percent of the total share capital and the disposal of voting shares exceeding 15 percent. If these limits were exceeded by a relevant person shareholder, an adversarial process (during which voting rights were suspended) could be initiated with the aim of forcibly disposing of the shares held by the shareholder until the maximum threshold set was reached.

In essence, the reason behind the presence of golden share clauses in the statutory acts of privatized companies was to prevent foreign investors from taking controlling positions in the activities of strategic companies.

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[54] In 1984, the sale of 51 percent of British Telecom's shares was realized.

3.2 France and the action *spécifique*

In light of the U.K. experience, other Countries in Europe, predominantly in the Western area, have felt the sensitive nature of privatized companies in strategic sectors, and have not been slow to adopt statutory mechanisms of national defense responding to the logic of the British golden share and in the aftermath of privatization processes precisely in order to secure a possibility of control even against private managers.

The French legal system has been of decisive influence in the development of such special powers in Europe.

Like most of the Member States, France has been a protagonist of the “privatization season”. By privatization, broadly speaking and with respect to the French experience, is meant the process of freeing corporate organizations from public ownership in a progressive manner. The pursuit of different policies was at the heart of privatization, with the overall goal of strengthening the market at the expense of the State, an objective that stood in stark contrast to the long tradition of state intervention in the French economy, the roots of which go back to the practices of dirigisme through fiscal policies and public procurement of Jean-Baptiste Colbert (1619-1683), Secretary of State under Louis XIV.[55]

In the aftermath of World War II, France presented itself with a national business system where power was concentrated in the hands of a few actors (politicians, state officials and business leaders), reigning in the belief that strong economic growth would only be possible through direct state intervention. An extensive privatization program first occurred only in 1986, when the sale of a considerable number of companies into private hands within five years was envisaged in the wake of the Thatcherism that was spreading in Europe. With the implementation of this program and the consequent “withdrawal of the State,” an attempt was made to devolve more responsibility to the private sphere in the name of greater efficiency of society as a whole and greater competitiveness of French

[55] See Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 44-45 (2022).
, For further information refer to Mairi Maclean, *Economic management and French business from de Gaulle to Chirac*, (Springer 2002).

companies in European and global markets.[56] This led to the beginning of an early form of mixed economy and the privatization of some national companies for the benefit of *noyaux durs*, i.e., a core of stable shareholders who are granted privileged rights to purchase shares in exchange for the obligation to remain loyal.[57] This system was characterized by groups of public and private investors who controlled each other through cross-shareholdings, a control scheme that was later reflected at the enterprise level as well, bringing issues such as shareholder value creation and return on capital to a higher level of attention.[58] Through these schemes, which involved the sale of modest shareholdings and various limits on their transferability, a system was emerging that effectively protected newly privatized enterprises, making the launch of a successful takeover bid particularly complex. One of the main concerns of the French government was to maintain control of the companies at least in order to prevent the companies from ending up in foreign hands. However, despite the emergence of these new corporate governance practices, the typical French corporate structure remained largely unchanged, with power concentrated at the top and directors appointed by small groups of elite individuals whose training and careers were centered on the State.[59]

A privatization, this time more in the narrower sense and with a drastic reduction in the importance of the *noyaux durs*, occurred with the pressure brought by the new strict European budget rules, instrumental to European Monetary Integration and the need to meet the Maastricht criteria, particularly in terms of deficits. In fact, the size of the state budget deficit provided a permanent incentive to privatize state-owned enterprises, as France had consistently run large deficits since 1981. The French privatization law of 1993 provided for extensive privatization in the competitive sector, but not in the monopoly sector, which was instead to have its statute amended to achieve greater flexibility. An independent price review commission was again set up, with more powers than in the first round of privatization, and limits on foreign shareholding were substantially relaxed, although the State retained the right to veto (i) foreign holdings of

[56] See Mairi Maclean, *Privatisation in France 1993–94: New departures, or a case of plus ça change?,* 18 West European Politics 2, 273–290 (1995).
[57] See Vincent Wright, *Party Parliament and Personality: Essays Presented to Hugh Berrington*, 85 (2002).
[58] Reference is made to Mairi Maclean, *Economic management and French business from de Gaulle to Chirac*, (Springer 2002).
[59] See *supra* at 55. See also Vivien A. Schmidt, *Privatization in France: The Transformation of French Capitalism*, 17 Environment and Planning C: Government and Policy 17. 4, 445–461 (1999).

more than 5 percent in companies operating in the health or defense sectors; and (ii) the sale of assets deemed likely to compromise "national interests".[60]

It is for these reasons that France has historically witnessed a high number of frictions with European law, the privatization process having been slower and in any case not encompassing entire sectors considered to be of public utility, as a result of the inherent connection, characteristic of French ideology, between the provision of public services and the state figure.

EU directives have played a decisive role in the evolution of French ideologies and economic realities, and, in many cases, French governments have taken advantage of them to promote policies that they intended to support but would face domestic opposition. In fact, while the promotion by European policy of property neutrality in business is an established principle, the promotion of competition in most sectors remains strong, with the consequence that state-owned enterprises cannot survive in the new deregulated environment without drastic changes.[61]

Control of privatized companies in France historically has been maintained through intricate holding structures, but also and especially through the institution of the *action spécifique* ("specific action"). The first form of this institution to spread in France was based on a regulatory provision according to which it would be possible for the Minister of the Economy, after hearing and informing a specific commission set up to create the rules for the evaluation of privatizable companies, to provide for the transformation of an ordinary action into a special one.[62] The special powers of such an action would have meant that the French government could oppose and screen any relevant operation likely to harm the national interest, involving the companies that were the protagonists of the privatization wave. In the event that the purchase of corporate holdings was carried out irregularly, this would have resulted in the impossibility of exercising the relevant voting rights and the obligation to dispose of the securities within specific time limits.[63] In practice, the State through this institution held the power of final decision on production

[60] *Ibidem*
[61] See *supra* at 55. See also Berne and Pogorel, *Privatisation Experiences in France*, 3 CESifo DICE Report 1, 33-40 (2005).
[62] Reference is made to Law 86/912 of 6 August 1986.
[63] See Francesco Gaspari, *Libertà di circolazione dei capitali, privatizzazioni e controlli pubblici: La nuova golden share tra diritto interno, comunitario e comparato*, Vol. 40, 124 (G Giappichelli Ed. 2015).

choices, retaining control of the holdings and influencing the objectives of the company. As a result, such irreconcilability between the goal pursued through privatization, which included, first and foremost, the creation of a market in free competition, and the ways in which State control was preserved, led the public to believe that the specific action was an expression of the State's desire to continue to be a protagonist and the continued importance of nationalizations. At the same time as the second wave of privatization, the normative foundation of specific action underwent changes with Law 93-923 of 1993 (the "*novella*"). The *novella* affirms the full operation of the specific action established by decree and emphasizes how the knowledge of the presence of a specific action in the enterprise is necessary for the purpose of its evaluation.[64] The influence exerted on the evaluation of the enterprise through this institution would in fact have been certainly negative, because of the risks associated with the powers of the state exercisable by the presence of this special action and capable of discouraging investors. These powers were embodied in the possibility of appointing one or two members of the administrative or supervisory body - which empowered the State with effective supervision but whose vote would be merely advisory - and in the power to veto transactions likely to prejudice the national interest involving the company's assets. A special power, exercisable irrespective of the holding of stakes in the privatized companies and disconnected from the specific action, was then the right of approval that the State held for significant stakes that investors from third States wished to acquire in enterprises active in sectors particularly relevant to the national interest, defined in Article 10 of the novella.[65]

The powers arising from the specific action were then subject to modification as a result of frictions with European law, with which incompatibilities were highlighted *inter alia* in the "*Eglise de scientologie*" case[66] and the "Commission v. France" case,[67] concerning Elf-Aquitaine. In *Eglise de scientologie*, the ECJ emphasized that derogations to fundamental freedoms legitimized by reasons of public security must be interpreted restrictively, so as to prevent the possibility of unilateral interpretation by each Member

[64] See Gianluca Scarchillo, *Privatizzazioni e Settori Strategici – L'equilibrio tra interessi statali e investimenti stranieri nel diritto comparato 38,* (G. Giappichelli Ed. 2018).
[65] *Ibidem*
[66] See CJEU Association *Église de scientologie de Paris v The Prime Minister* of 14 March 200, Case C-54/99 (2000 I-01335).
[67]See *Commission of the European Communities v. French Republic* of 4 June 2002, Case C-483/99 (2002 I-04781).

State. In particular, the prior authorization regime for FDI defined too broadly what investments were likely to harm the interests that the French legislation purported to protect, making it impossible for investors to predict under what circumstances authorization would be required.

In Commission v. France, on the other hand, the Court of Justice ruled that the powers granted to the French Minister of the Economy were incompatible with European law on the free movement of capital and freedom of establishment, deeming disproportionate and excessively discretionary the public authority's right of approval, the caps set on the exercise of voting rights and the powers of intervention in the event of major changes in the company's ownership structure.

Important changes in the specific action then followed from 2014 onward, beginning with amendments to the Monetary and Financial Code to expand the scope of strategic sectors relevant for the purposes of the protection guaranteed at the national level by FDI.[68] To this end, French legislation, partly due to the direct influence of the cases cited above, to clarifies that relevant "foreign investments" are all those in which a non-French investor invests in a French entity active in one of the sensitive sectors or activities. Also included in this definition are indirect investments made by French companies not controlled by natural or legal persons of the same nationality. Notification of the foreign investment is required when the investment (I) falls within the types of investments for whose control the procedure is designed; and (II) it is directed to an enterprise operating in one of the strategic sectors identified by the regulations.[69] Although the aforementioned list of strategic sectors was shorter for EU investors, then underwent, with Decree No. 2019-1590, a change in approach that led to identity in the sectors regulated by the investment control mechanism. This resulted in a much broader list of strategic sectors which became relevant to the procedure for EU investors as well.[70] Furthermore, for the same reasons that led to a greater level of clarity in defining the applicability *ratione personae* of the regulations, any requirement for prior authorization in non-reserved areas of the French economy under the Monetary and Financial Code was dropped.[71]

[68] See the so called decree Alstom; n. 2014-479, adopted on 14 May 2014.
[69] See Jérôme Philippe and Aude Guyon, 9 The Foreign Investment Regulation Review 56, (2021).
[70] See Emily Xueref-Poviac and Katrin Schallenberg, 1 Foreign Direct Investment Regulation Guide, 161, (2022).
[71] See Philipp Stompfe, YSEC Yearbook of Socio-Economic Constitutions, 79-115, (2020).

Relevant foreign investments for the purposes of the prior approval of the Minister of the Economy are those that involve (I) the acquisition of control of a legal entity under French law; (II) the acquisition of a business unit operated by a legal entity under French law; and (III) for non-EU and EEA investors only, exceeding 25 percent of the share capital of French companies active in critical sectors.[72] Embracing the principles expressed in European case law (*e.g.*, proportionality and legal certainty), the French legislation specifies the economic sectors relevant to the prior authorization regime[73] and provides for a set of parameters on the basis of which the decision of the Minister of Economic Affairs will be made. In particular, the provision of restrictions will be legitimate if it is appropriate to guarantee national interests, including public order, public security and national defense.

It should be noted that the concept of national interest is not legally defined in French law. This lack, together with the very broad and general definitions that are offered for the identification of the relevant regulated sectors, leave the French Minister with a high degree of discretion in approving or rejecting foreign investments, making it complex for the foreign investor to predict the outcome of the procedure.[74] The latter may result not only in the approval or rejection of the requested authorization, but also in the imposition of conditions upon whose compliance the authorization will be conditional. However, the conditions imposed will still have to be respectful of the principle of proportionality, primarily with regard to the protection of the national interest to be safeguarded. The request for approval by the Ministry of Economy is mandatory, suspensive and will have to be submitted before the finalization of the transaction. The order of 31 December 2019 formally establishes the information required in the filing application. It is then possible for those with French nationality to ask the Ministry of Economy to confirm whether its activities fall within the scope of France's foreign investment regulations.[75] In general, it has been noted that foreign investment control is

[72] For further information refer to Jérôme Philippe and Aude Guyon, 9 The Foreign Investment Regulation Review 56, (2021).
[73] The number of relevant critical sectors then increased with Decree No. 2018-1057 of 29 November 2018, by which the which the list came to include 14 sensitive sectors e.g. energy, transport, electronic communication networks and services, artificial intelligence, robotics, semiconductors, as well as public health.
[74] See Philipp Stompfe, YSEC Yearbook of Socio-Economic Constitutions, 79-115, (2020)..
[75] See Emily Xueref-Poviac and Katrin Schallenberg, 1 Foreign Direct Investment Regulation Guide, 161, (2022).

becoming a real public policy tool to prevent leading companies in the national economy from being sold to foreign investors on terms that do not safeguard national interests. However, such protectionist fears are allayed by the reasonable use the French authorities seem to be making of these powers and by the few refusals to which the closing of the proceedings has given rise.[76]

4. The concept of Foreign Direct Investment and Foreign Investor in the light of the European approach

For the purpose of a full understanding of the subject in question, it seems now necessary to devote part of the analysis to reconstructing the genesis of the notion of "foreign investment" by clarifying some basic concepts as well as questioning some considerations.

There is no definition of foreign investment in EU law, nor is such an expression to be found in the Treaties or instruments of secondary EU law or in the Agreements concluded by the EU until, as it will be seen below, the Lisbon Treaty of 2009[77]. Indeed, it is not possible to unearth references to foreign investment prior to that Treaty either with respect to third countries or for intra-EU investment. The expression "foreign direct investment" appears, in fact, in Articles 206 and 207 of the TFEU at the beginning of Part V (on the Union's external action), at the opening of Title II in which the Common Commercial Policy resulting from the Customs Union is established; Article 206 cites: " 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"; Article 207, on the other

[76] See Bonellierede, Bredin Prat, De Brauw, Hengeler Mueller, Slaughter and May and Uria Menendez, *Foreign Direct Investment*, (2019); available at the link: https://www.uria.com/documentos/publicaciones/6036/documento/Foreign_direct_investment_guide.pdf?id= 8456.

[77] Signed in 2007 and entered into force in 2009 consists of two parts: "Treaty on European Union" and "Treaty on the Functioning of the European Union".

hand, states: “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 common commercial policy shall be conducted within the context of the principles and objectives of the Union’s external action”.

The absence of antecedent references to “foreign investment” can be explained in the sense that this expression, in international law, is mostly used in instruments for the protection of foreign investment and since this competence remained until, precisely, the Lisbon Treaty, in the hands of the Member States, it was, on the part of the Member States themselves, desired to avoid creating a dangerous confusion in the delineation of competences[78].

The areas of EU competence that are closest to investment protection, and in whose regulations there are clear references to the notion of foreign investment, are the movement of capital and the establishment[79]. A definition of investment can be extrapolated from these two matters of EU competence.

The movement of capital is dealt with in Articles 63-66, Part III, Title IV of the TFEU and is, in principle, free of all restrictions both between Member States and between Member States and non-Member States: the approach is unique and, while the rules are not identical, the notion of movement of capital remains the same for both intra-EU and extra-EU movement. The connection between the movement of capital and the definition of investment in EU law can be understood by examining the Capital Movement Council Directive[80]. The Directive’s header links it to the implementation of Article 67 of the TFEU (establishing “the area of freedom, security and justice”), while Article 1 of the Directive reiterates that, without prejudice to subsequent provisions, restrictions on the movement of capital shall be abolished and the movements of capital itself shall be classified in the “nomenclature” in Annex Number 1. This “nomenclature”

[78] See Joseph Reiter, *The EU-Mexico Free Trade Agreement: Assessing the EU Approach to Regulatory Issues*, Regionalism, Multilateralism and Economic Integration, Sampson and Woolcock (ed) 90 (2003).
[79] See Angelos Dimopoulos, EU Foreign Investment Law, 36 (2011).
[80] See Council Directive of 24 June 1988 *for the implementation of Article 67 of the Treaty*, 88/361/EEC (*OJ L 178, 8.7.1988,* p. 5-18).

consists, essentially, of a non-exhaustive list (as explicitly stipulated in order not to unduly restrict the application of Article 1), which includes, in the first point, precisely direct investment which has, as its point of reference, in the exemplifications provided by the directive, the asset or capital provided by the investor. At the first point is cited “establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings “; a similar case, at the second point, is “participation in new or existing undertakings with a view to establishing or maintaining lasting economic links”; left without a precise expiration date are “long-term loans with a view to establishing or maintaining lasting economic links” mentioned at the third point; at the last point are also covered “reinvestment of profits with a view to maintaining lasting economic links”. It is clarified that the list of investment transactions refers to both investments in the domestic territory by nonresidents and investments abroad by residents.

What is most important to note is that, until the Lisbon Treaty, the protection of foreign investment was not within the competence of the European Union and, therefore, the 1988 definition is not based on the enumeration or description of the forms taken by the invested capital in its profit-producing phase, but hinges on the phase of capital circulation[81] immediately preceding and preparatory to the investment itself; the property rights pertaining to the investment in its unfolding stage are not protected, as in asset-based definitions, but the form of capital transferred in the purpose of making a direct investment characterized by the engagement of capital in an activity managed by the same person who provided the capital is protected. An exception to the direct management rule are long-term loans which, however, involve a commitment of capital and a lasting link to the asset, albeit not in direct management.

The Directive has expired, but the Court of Justice of the European Union continues to apply its contents in its jurisprudence on the movement of capital. The link between capital movement and investment has been affirmed in the *Luisi and Carbone*[82] and

[81] See Angelos Dimopoulos, *EU Foreign Investment Law*, 37 (2011).
[82] See CJEU *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* of 31 January 1984, Case C-286/82 and 26/83 (1984 00377).

Casati[83] cases. The Court ruled that the transfer of capital "must be essentially concerned with the investment of funds", the transfer of money to remunerate a service is not an investment; in the *Luisi and Carbone* case, the Court specified that "movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service"[84]. The price of the service in a bilateral exchange relationship cannot be qualified as a circulation of capital nor, consequently, as an investment for which is required, instead, a character of "unilaterality", which is typically characteristic of the opening of economic activities and which involves, as an implicit character, the taking of a risk. The character of counter-performance can, in fact, exclude the character of investment in a certain and unambiguous way only in the case of the provision of cross-border services, while performance, in the case of purchases and sales, may be worth excluding the sole notion of direct investment, but may coexist with other recognized forms of indirect investment, *e.g.,* portfolio investment (see *supra* section 1 for a definition).

As for the principles on establishment, the second institution to refer to in constructing a definition of investment, they are set out in Articles 49 to 55 of the TFEU and, according to Article 49: "Freedom of establishment shall import access to self-employed activities and to the pursuit thereof, and the establishment and management of undertakings, in particular companies [...]." It is precisely in these mentioned activities that freedom of establishment is embodied and which applies, therefore, to the construction and management of an enterprise and also of subsidiaries and offshoots, and, according to the case law of the EU Court of Justice[85], also to purchases of enterprises.

To recapitulate, the notion of direct investment is defined in EU law indirectly, under the respect for the free movement of capital as an entry in the illustrative list to Annex I of Directive 361 of 1988 explanatory of this freedom; under the respect for the

[83] See CJEU *Criminal proceedings against Guerrino Casati* of 11 November 1981, Case C-203/80 (1981 02595).
[84] See paragraph 21 of the decision.
[85] See Judgment of the Court *Überseering BV v Nordic Construction Company Baumanagement GmbH* (NCC) of 5 November 2002, Case C-208/00 (2002 I-09919) paragraph 77.

right of establishment, in Article 49, implicitly recalling in its contents the same Annex I of the aforementioned Directive. The Court clarifies this link in Überseering BV v. Nordic Construction Company Baumanagement GmbH[86]: "Furthermore, it must be borne in mind that as a general rule the acquisition by one or more natural persons residing in a Member State of shares in a company incorporated and established in another Member State is covered by the Treaty provisions on the free movement of capital, provided that the shareholding does not confer on those natural persons definite influence over the company's decisions and does not allow them to determine its activities. By contrast, where the acquisition involves all the shares in a company having its registered office in another Member State and the shareholding confers a definite influence over the company's decisions and allows the shareholders to determine its activities, it is the Treaty provisions on freedom of establishment which apply". From this paragraph of the 2002 judgment, on a preliminary question, it can be understood that the movement of capital and establishment are two sides of the same coin of investment[87]. Of course, both institutions are much broader in scope than direct investment, yet it can be said with some certainty that both institutions encompass the phenomenon of direct investment.

As mentioned above, and as will be seen more fully below, with the Lisbon Treaty, the treatment of foreign direct investment (from third countries) has become a competence of the Union. One consequence of this was the need to distinguish between the notion of foreign direct investment in the rules of the internal market (establishment and movement of capital), which has been discussed so far, and the notion that the EU would have chosen to adopt, under the CCP (Common Commercial Policy) posed by Article 207 of the TFEU, in investment protection treaties with economic organizations or third Countries.

In other words, the notion of foreign direct investment, in the system of capital movement and establishment, had to meet and compare with the international notion of direct investment (given the new competence of the Union). The basis of the two notions

[86] *Ibidem*

[87] It should be pointed out that establishment, as opposed to the movement of capital, is a Community legal institution that applies only to the movement of persons and enterprises within the territory of the Union.

(of the internal market and the common commercial policy) are essentially the same and concerned with the commitment of capital and the control of it and activity and it was the level of control necessary to qualify as direct the investment to be an element of possible disharmony. However, the problem ceased to exist and lost relevance the moment the EU embraced an all-encompassing notion of direct investment with the adoption of the Screening Regulation.

At this point, it is therefore necessary to continue the explanation by now incorporating the definition that has emerged since the advent of the Regulation.

As it will be better explained below (see section 4.2), according to the harmful investor and private information concern, the EU and Member States are concerned that (I) a foreign investor gains (II) influence over a domestic target that allows him to shape the investment target's business decisions according to his harmful interests. These two aspects of concern are addressed by different elements in the notion of FDI according to the Regulation. Therefore, within the meaning of the Regulation, the notion of FDI can be split it in two different elements: the element of "foreign" and, on the other hand, the element of "direct". The first aspect, foreign investor, is incorporated in the element of "foreign". The element of "direct", on the other hand, relates to the aspect of gaining influence over domestic assets.[88]

Starting with the notion of *direct*, within the context of Article 2(1) of the Regulation a "foreign direct investment" should be understood 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 out 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".

In the light of the above, it can be pointed out that the definition provided by the Regulation present profiles of great similarity with some other well-established definitions. Namely, reference to the Capital Movement Directive is evident by presenting

[88] See Jens Velten, *Screening Foreign Direct Investment in the EU*, European Yearbook of International Economic Law 26, 44 (2022).

the same defining elements of “lasting and direct links” and “effective participation” in “management or control.” In addition, as already clarified, the notion provided by the Directive also applies to FDI as movement of capital as understood by the freedom of capital movement in Article 631 TFEU. Further similarities can be found between the definition provided by the Regulation and some treaties in the realm of investment to which the EU is party: reference is made to the OECD Code of Capital Movements which in Annex A, List A section I states “Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof”. Moreover, also the OECD and International Monetary Fund’s (IMF) definition is very similar, except for the statistical threshold of 10% voting right to establish an effective participation. Hence, many relevant sources of law and economics apply a definition that is similar to the Screening Regulation.

For what concerns the foreignness of a Direct investment, it is strictly linked to the purpose of the definition. In other words, from the perspective of an economy’s balance of payments for example, the focus is on the inflow capital from another national economy. Accordingly, the OECD definition, for instance, refers to an investment ‘by a resident enterprise in one economy ... in an enterprise ... that is resident in an[other] economy’.[89]

However, within the definition of the Regulation, it is the foreignness of the investor and not the capital to be at the center of the definition. The question that arises is: what exactly makes an investor foreign? Accordingly, the Screening Regulation provides a definition built on the concept of the investor’s place of legal organization. More specifically, Article 2(1) defines FDI as Direct investment by a foreign investor and Article 2(2) then defines foreign investor 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”. Article 2 (7) of the Screening Regulation adds that “undertaking of a third country” means an undertaking constituted or otherwise organized under the laws of a third country. Hence, the Screening Regulation defines the foreignness of an investor

[89] See OECD, *Benchmark Definition of Foreign Direct Investment 48*, para. 117.

according to the place of his legal organization.

The EU Commission (the "Commission") and the Court of Justice of the European Union ("CJEU") have also both taken a stance on the definition of "foreign direct investment" and "direct investment". The Commission has generally described a foreign direct investment as "any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity".[90] The CJEU has stated that "direct investment is characterized, in particular, by the possibility of participating effectively in the management of a company or in its control".[91]

It is here interesting to underline the evolution of the concept of the FDI also in the light of this jurisprudential positions. One may notice how the definition conceived by the Screening Regulation is characterized by a greater degree of specificity when compared with the general notions provided by the Commission and the CJEU. The former, unlike the provision of the Regulation, (1) does not mention the figure of the "foreign investor" and generally refers to "any foreign investment"; (2) with respect to the "lasting and direct link" it limits the scenario only to its establishment without going further with its maintaining too as the Regulation does; (3) the Commission's definition circumscribes the presence of the said "link" to the relationship between the foreign investment and the undertaking while the Regulation posits the foreign investor and the entrepreneur as the active parties of that relationship. On the other hand, the notion provided by the CJEU comes across as even more meager and generic compared to that put in place by the Regulation: the Court merely refers to the participation in a company leaving out any reference to specific subjects or peculiarities of the dynamics concerned.

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[90] See Commission *"Towards a comprehensive European international investment policy. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions" of 7 July 2010,* COM (2010) 343 final.
[91] See *Commission of the European Communities v Kingdom of Spain* of 13 May 2003, case C-463/00 (2003 I-04581).

4.1 The EU competence over FDI: policy developments before and after the Lisbon Treaty

Since the formation of the European Community, foreign investment protection and European Law have followed parallel paths: investment law has been characterized by the conclusion of bilateral international agreements, while European Law has been concerned with regulating the emergence and development of the internal market[92]. The negotiation of the Treaty of Rome in 1957 did not provide for the conferral on the nascent European Economic Community ("EEC") of competence over foreign direct investment[93]: the explanation for this non-conferral lies in the fact that the ownership regime and the definition of the criteria for the nationality of natural persons and the criteria for access to the territory were the internal competence of each State, therefore the latter would continue to conclude their own investment agreements individually with Countries outside the EEC.

Among the most significant innovations introduced by the Lisbon Treaty in the area of common commercial policy is the granting of express competence to the European Union over foreign direct investment[94]. The reasons behind this expansion of competence were dictated by the fact that the European Union has long assumed the role of a global player[95], both for inbound and outbound investments to third Countries; moreover, the

[92] In particular, the existing relationship between International law and European Union law has sometimes been controversial and for this reason has been the subject of scrutiny by both doctrine and jurisprudence. On this point see Maria Rosaria Mauro, *Accordi internazionali sugli investimenti e Unione europea*, Studies on European Integration 2 (2010).
[93] See Armand De Maestral, *The Lisbon Treaty and the expansion of EU competence over foreign direct investment and the implications for investor-state arbitration*, Yearbook on International Investment Law and Policy, 365-396 (2010).
[94] Article 3(1)(e) TFEU states that the EU has exclusive competence in the area of common commercial policy; in addition, Article 207(1) TFEU provides that: "The common commercial policy shall be based on uniform principles, particularly with regard to tariff modifications, 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 standardization of liberalization measures, export policy, and trade protection measures, including those to be taken in cases of dumping and subsidies. The common commercial policy shall be conducted within the framework of the principles and objectives of the Union's external action."
To claim that the EU has acquired a competence for foreign investment only as a result of the Lisbon Treaty would not be absolutely correct; in fact, there were European Community agreements encompassing these aspects beforehand. For example, The EU is a party to the Energy Charter Treaty, a multilateral agreement for the promotion of international cooperation in the field of energy that also contains provisions on investment protection. The agreement entered into force on 16 April 1998, and the European Union, then the European Community, signed the treaty on 17 December 1994. Individual member countries are also parties to the treaty and independent of the European Union's membership.
[95] As specified by Giovanni Pitruzzella, *Foreign direct investment screening in EU*, Foreign direct investment screening, Foreign direct investment screening, 63 (Bologna: 2019)*: "Since the Lisbon Treaty,*

awareness that the regulation of international trade and that of foreign direct investment are intimately linked has emerged with increasing evidence, both in practice and in doctrine[96].

A starting point regarding the European Union's external competence in investment is found in Article 133 of the Treaty Establishing the European Community ("TEC")[97] on the common commercial policy, later amended by the Lisbon Treaty.

Called upon to rule on the issue, the Court of Justice ("the Court") stated that Article 133 did not present a perfectly exhaustive list of trade policy instruments; as a result, liberalization measures were not necessarily to be applied to trade in the strict sense, but could rather be considered applicable also to those activities that carried out economic development: the Court thus clarified how the stability of trade policy was to be assessed from a broader perspective[98], implicitly admitting investment issues as well. The European Community was thus granted the necessary competence to conclude trade agreements having certain effects on foreign investment; however, this competence had to ensure the proper representation in international relations of the Member States, defining their position as members of the European Community and as representatives of their territories[99].

During the 1970s, the Court had assessed that the Community's external competence in common commercial policy was an exclusive competence[100]. Moreover, it had opted for a broad interpretation to delineate the scope of this competence, with the ultimate aim of enabling the European Community to effectively defend its commercial interests abroad and to protect the internal market against distortions of competition. In a

the EU has become a major player in international investment law. This is a consequence of Article 207 TFEU which has brought commercial policy within the full competence of the EU and has extended the Common Commercial Policy to include the FDI".

[96] For further discussion on the competence of EU over FDI see Fabrizio Marella, *Unione europea e investimenti esteri diretti*, *L'unione europea a vent'anni da Maastricht, verso nuove regole*, 107-140 (Napoli: 2012); Angelos Dimopoulos, *EU foreign investment law*, (Oxford: OUP, 2011).

[97] See Article 133 TEC: *"The common commercial policy shall be based on uniform principles, especially with regard to tariff changes, the conclusion of tariff and trade agreements, the standardization of liberalization measures, export policy, and trade defense measures, including those to be taken in cases of dumping and subsidies".*

[98] See Opinion of the Court of 4 October 1979, International Agreement on Natural Rubber, Opinion 1/78, para. 4: *"[...] the enumeration of the purposes of trade policy is not limiting and should not, as such, exclude the use, in the Community framework, of any other procedure designed to regulate external trade".*

[99] *Ibidem*

[100] See *Commission of the European Communities v Council of the European Communities* of 31 March 1971, European Agreement on Road Transport, Case C-22/70 (1971 00263).

well-known opinion, the Court provided that under the internal powers entrusted to the European Community, in order to achieve a given objective "the Community is competent to enter into such international commitments as are necessary to achieve that objective, even in the absence of express provisions in this regard".[101]

However, the jurisprudential approach in favor of a broad interpretation of the common commercial policy has changed in relation to the demands coming from Member States oriented in favor of competences not exclusively assigned to the European Community, but divided among different institutions, including those of the Member States. In ECJ Opinion 1/94, expressed in relation to the European Community's competence to enter into international agreements on services and the protection of intellectual property[102], the Court had indicated that the regulation of technical barriers to trade provided for in multilateral agreements relating to trade in products fell squarely within the common commercial policy, with the consequence that such an agreement could only be entered into by the European Community, although the matter was also within the competence of the individual Member States[103].

On the contrary, the different modalities of provision of services under the General Agreement on Trade in Services ("GATS") did not cover the whole range of matters governed by the common commercial policy, therefore, the conclusion of this agreement had to be shared between the European Community and its Member States[104]. A similar assessment was made by the Court with regard to the conclusion of the Agreement on

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[101] See Opinion of the Court of 26 April 1977, Draft Agreement establishing a European laying-up fund for inland waterway vessels, Opinion 1/76, para. 1.

[102] See Opinion of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Opinion 1/94.

[103] See Opinion of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Opinion 1/94, para. IX: "*The provisions of the Agreement on Technical Barriers to Trade annexed to the Agreement Establishing the World Trade Organization are simply intended to prevent technical regulations and standards, as well as procedures for assessing conformity with technical regulations and standards, from creating undue obstacles to international trade, so that the said agreement must be considered part of the common commercial policy and for that reason can only be entered into by the Community, notwithstanding the fact that the Member States retain, as Community law stands at present, competence in this area".*

[104] See Opinion of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Opinion 1/94, para. X: *"[…] the discipline reserved for third country nationals when crossing the external borders of Member States cannot be considered as falling under the common commercial policy. More generally, the existence in the Treaty of specific chapters devoted to the free movement of persons, both natural and legal, shows that these matters are not included in the common commercial policy. [...] It follows that the common commercial policy does not cover the modes of supply of services defined by the GATS as 'consumption abroad,' 'commercial presence,' and 'presence of natural persons".*

Trade-Related Aspects of Intellectual Property Rights ("TRIP")[105], ruling that the competence to conclude TRIP was shared between the European Community and its Member States[106].

The Treaty of Amsterdam in 1997 took the opportunity to introduce an important development in the area of European Community competence; it marked a turning point in European Community competence in trade policy by adding a paragraph to Article 133 extending negotiating powers to intellectual property matters as well, after consultation with European Parliament (the "Parliament") and unanimous decision by the Council of the European Union (the "Council")[107]. Subsequently, the 2003 Treaty of Nice prescribed more clearly than the Treaty of Amsterdam that the provisions on trade agreements apply equally to the negotiation and conclusion of agreements within the domain of trade in services and commercial aspects of intellectual property[108]. This provision thus becomes the only explicit external competence that falls within the domain of foreign direct investment.

The ambition of the reformed European Union and the belief that, as a result of its enlargement processes, several States lacked the practical competence to conclude and maintain bilateral investment treaties led the Council to the adoption in 2006 of an important document: the "Minimum Platform on Investment" ("MPoI")[109]. The platform incorporated a model to be used for future free trade agreements between member and non-member Countries, being, however, limited to establishment-related measures and thus not including direct provisions on expropriation or investor-state dispute settlement. Said document was seen as a first step toward the establishment of an ambitious European investment policy, and the Union thus set itself the goal of taking a more active role in foreign direct investment. However, in itself, the platform had no impact on the division of competencies; legally it was, in fact, only a non-binding model for negotiation, since

[105] See Opinion of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Opinion 1/94, para. 13.
[106] The Court's conclusions in Opinion 1/94 stipulate that: *"1) The Community is exclusively competent, under Article 113 of the EC Treaty, to conclude the Multilateral Agreements relating to the trade in products; 2) The competence to conclude the GATS is shared between the Community and its Member States; 3) The competence to conclude TRIPs is shared between the Community and its Member States".*
[107] See Article 133, TCE, para. 5 (Amsterdam Version).
[108] See Article 133, TCE, para. 5 and 6 (Nice Version).
[109] See Minimum Platform on Investment for EU FTA's, available at the link https://data.consilium.europa.eu/doc/document/ST-15375-2006-INIT/en/pdf .

it did not constitute any formal regulations it had mainly symbolic value. This led to the Lisbon Treaty, which represented the definitive turning point in relation to the division of competencies on negotiation, conclusion and enforcement of international investment agreements.

With the entry into force of the Lisbon Treaty on 1 December 2009, the European Union gained exclusive competence over foreign direct investment; the Commission described this as the new frontier for the common commercial policy[110].

The European Union's competence in foreign investment can be traced back to Article 207 of the Treaty on the Functioning of the European Union ("TFEU"), which provides that the common commercial policy shall be based on uniform principles, also including those related to foreign direct investment, and that the common commercial policy shall be conducted within the framework of the principles and objectives of the European Union's external action. The purpose of this strengthening of the European Union's prerogatives thus appears to be to benefit from broader powers in the negotiation of future agreements and to prevent a multiplicity of Member States' policies that could undermine the uniformity of the internal market[111]. The European Union thus consolidates itself as a decisive player in the field of foreign direct investment and, in light of such a role, it will also demonstrate clear resourcefulness in relation to the more specific aspects of the discipline under comment; of particular note is the role assumed by the European Union regarding issues of foreign investment screening. In the following sections, therefore, it will be possible to elaborate on the Screening Regulation of the Parliament and of the Council establishing a framework for the screening of foreign direct investment in the European Union[112].

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[110] See Commission *Towards a comprehensive European international investment policy* of 7 July 2010, COM (2010) 342, p. 7, available at the link https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF. For further discussion on the topic see Roberto Baratta, *La politica commerciale comune dopo il Trattato di Lisbona*, *Diritto del commercio internazionale* 26.2, (2012): 403.

[111] See Jan Ceyssens, *Towards a Common Foreign Investment Policy-Foreign Investment in the European Constitution*, 32 Legal Issues of Econ. Integration 259, (2005).

[112] See Giovanni Pitruzzella, *Foreign direct investment screening in EU, Foreign Direct Investment Screening, Il controllo sugli investimenti esteri diretti*, 63-69 (2020).

4.2 The background of FDI screening in the EU from a political and economic perspective

In order to conduct a comprehensive analysis centered on the EU's and Member States' FDI screening mechanism, it is necessary to also map the topic in a broader way than its mere legislative excursus: namely, by framing it also from a political and economic point of view.

Starting from the political roots that characterize the FDI screening mechanism, we can state that it presents itself as multifaceted and heterogeneous. In fact, it differs greatly among the actors involved in the screening process: the Commission, the European Parliament, and Council; as well as among and within Member States.

While for some the economic benefits represent the most important aspect to take into consideration (and this is particularly true for capital scarce Member States)[113], for others it is critical to pay attention to certain societal interests and the harm they may suffer from FDI. Such problematics have been the center of the discussion around the screening regulation and allow to identify four main concerns vis-à-vis foreign investors: (I) foreign investors distorting competition in the EU (competition concern), (II) the foreign investors" home countries failing to accord the EU investors a treatment similar to that the EU accords to "their" investors (reciprocity concern), (III) foreign investors operating the FDI in a way that harms the EU and Member States interests (harmful investor concern), and (IV) harm to EU citizens" private information (private information concern).[114]

With regards to the competition concern, EU and Member States fear investors may lack a set of competition rules compatible with the ones EU competitors must respect. Specifically, EU competitors, unlike foreign investors, must comply with competition rules for public undertakings in Art 106 TFEU as well as the general prohibition of competition-distorting state aid in Art 107 TFEU. As a consequence, this imbalance could

[113] See Régis Bismuth, *Reading between the lines of the EU regulation establishing a framework for screening FDI into the Union. In: EU framework for foreign direct investment control*, 106 (The Netherlands: Kluwer Law International (2020). Specifically, he lists: Ireland, Spain, Portugal, Greece, and the '"Nordic countries'. countries".

[114] See Jens Velten, *Screening Foreign Direct Investment in the EU*, European Yearbook of International Economic Law 26, 7 (2022).

result in investors having an advantageous position over EU competitors. [115]

In essence, the competition concern is mainly apparent in two specific and distinct stages of the FDI screening: the undertaking of the FDI as such and after the FDI has taken place. When undertaking the FDI, an investor with access to public funding may have a competitive advantage over other investors since he will be able to pay a much higher prize for the target than EU investors. This condition results in a risk of distortion of the efficient resources allocation.[116] Similarly, after the FDI has taken place, foreign investors who are not bound by competition rules may be equipped with additional means than those made available to EU competitors, and thus use them to their detriment. In order to face the competition concern, the EU and Member States may opt for two different solutions: to screen FDI specifically from investors who received state support potentially violating EU competition rules or to compare competitions rules of the EU to those of other states and consequently screen investors from states that provide less competition protection. [117]

The reciprocity concern led to the adoption of a more cautious attitude by the EU and Member States who appear to be reluctant to accord favorable treatment to investors from home countries that in turn do not accord similarly favorable treatment to EU investors.[118] The main target of this concern are countries with a high rate of FDI inflows (e.g. Brazil, China, India, and Russia).[119]

With regards to the third concern vis-à-vis foreign investors (i.e. harmful investor concern), it is the theater for one of the main discussion revolving around the FDI"s screening mechanism: identifying the so called "sensitive assets" that give rise to a discrepancy between investors and public interests, namely security, public order, or economic or geopolitical policies. Three are the assets qualified as enough sensitive to

[115] See Sébastien Miroudot and Alexandros Ragoussis, *Prospect in International Investment Law and Policy: world trade forum*, chapter 4 page 60, (Cambridge University Press: Enchadi Roberto, Sauvè Pierre, 2013); Mario Martini, *Zu Gast bei Freunden? Staatsfonds als Herausforderungen an das europäische und internationale Recht*, Die Öffentliche Verwaltung, 314-322 (2008); Marc-Philippe Weller, *Ausländische Staatsfonds zwischen Fusionskontrolle, Außenwirtschaftsrecht und Grundfreiheiten*, ZIP: Zeitschrift für Wirtschaftsrecht 29.17, 857-864 (2008).
[116] See Commission "*White Paper on Levelling the Playing Field as regards Foreign Subsidies"* of 17 June 2020, COM (2020) 253 final, p. 7.
[117] See Jens Velten, *Screening Foreign Direct Investment in the EU*, European Yearbook of International Economic Law 26, 11 (2022).
[118] See Jens Velten, *Screening Foreign Direct Investment in the EU*, European Yearbook of International Economic Law 26, 29 (2022).
[119] See Commission, COM (2017) 494 final (n. 4), p. 3; Commission, SWD (2019) 108 final (n. 8), p. 13.

rationalize a potential screening: (i) defense sector, (ii) critical infrastructure, technology and inputs, (iii) strategic infrastructure, technology and inputs.

Finally, with respect to the fourth and last concern (i.e. private information concern), it takes into account a scenario where sensitive personal data carried by the FDI target may be acquired by the IT systems of the investor's home country. At a EU level, this concern is strictly linked to Art 9(1) of the GDPR.[120]

Switching the focus of this paragraph to the second aspect characterizing the present overview, we can now move on to the analysis of the economic background of FDI screening. From an economic perspective FDI can be distinguished in two categories that clarify its rationale as well as its effects: FDI as Multinational Enterprise ("MNE") activity and as capital movement. [121] FDI as an MNE can be defined as "the transfer of a package of assets or intermediate products"[122] and comprises tangible assets. Therefore, by means of FDI as an MNE activity, the investor gains the power to become an MNE. On the other and, FDI as a capital movement has been defined by the Organization for Economic Co-operation and Development 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.[123]

Based on both perspectives, FDI as an MNE activity and as capital movement, it

[120] See 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.).

[121] See G. Heiduk and J. kerlen-Prinz, *Direktinvestitionen in der Außenwirtschaftstheorie,* Theorie und Empirie der Direktinvestitionen, 23-54 (Duncker & Humblot 1999); Lipsey, *Home- and Host-Country Effects of Foreign Direct Investment*, Challenges to Globalization: Analyzing the Economics, 334-335 (University of Chicago Press 2004); Brakman and Garretsen, *Foreign Direct Investment and the Multinational Enterprise*, 1 (MIT Press 2008a).

[122] See John H. Dunning and Sarianna M. Lundan, *Multinational enterprises and the global economy*. Edward Elgar Publishing, 7 (2008).

[123123] See OECD, '*Benchmark Definition of Foreign Direct* Investment' (*Investment* para. 117 (Paris, 2008), para. 117) (emphasis added). The IMF follows this definition, IMF, '*Balance of Payments and International Investment Position* Manual'*Manual* paras. 1.29, 6.8 (Washington, DC, 2009), paras. 1.29, 6.8.).

emerges that FDI needs control of a domestic asset. Moreover, the two categories are then fundamental when it comes to cataloguing which groups of FDI are the center of the EU and Member States concerns vis-à-vis foreign investors and of the screening mechanisms.

Hence, having described the political and economic scenario in which both EU and Member States are located when operating an FDI screening, it easy now easier to understand the scenario against which the previously described legislative background has shaped. In fact, we can remark the fact that prior to the adoption of the Screening Regulation by the EU, nearly half of the Member States were already provided with an FDI screening mechanism at national level. However, those mechanism were largely heterogeneous and usually did not cross the border of security and public order interests. Ultimately, regardless the EU's open investment policy and the sense of uncertainty caused by foreign investors, the decision was taken that the EU should face the concerns vis-à-vis foreign investors through FDI screening. However, Commission, Parliament and Council members did not reverse course and continued showing divergent positions. Moreover, some Member States claimed FDI screening may deter FDI they needed.[124]

Despite the situation characterized by a lack of unanimity, the Commission proposed the Screening Regulation.[125]

Now that the foundations have been laid, the next section will be exclusively devoted to an in depth analysis of the said Screening Regulation.

5. Regulation (EU) 2019/452 and the discipline for the screening of FDI into the EU

Scientific and technological progress in recent years has contributed to a certain frenzy in the pace that characterizes today's international trade relations. The entry of

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[124]See Régis Bismuth, *Reading between the lines of the EU regulation establishing a framework for screening FDI into the Union. In: EU framework for foreign direct investment control*, 106 (The Netherlands: Kluwer Law International 2020), p. 106,). Specifically, he lists: Ireland, Spain, Portugal, Greece, and the '"Nordic countries'. countries".

[125] See Commission *Proposal for a regulation of the European parliament and of the Council establishing a framework for screening of foreign direct investments into the European* Union of 13 September 2017, COM (2017) 487 final (n. 30).

new technologies and ever-increasing elements of innovation in existing goods or services into the market and society has led several countries on a global scale to have to include regulatory disciplines related to such novelties in their national legal systems. In particular, the need has become necessary, if not also urgent, to provide for the construction of new delicate balances capable of prospecting a guarantee for the maintenance of national and international order and security while taking into consideration the aforementioned new interests, which have now assumed relevant roles in the world social scene for both investors and civil society in general. Moreover, it can be pointed out that these balances have a transversal nature, as they refer to interests belonging to multiple dimensions: not only the economic, commercial and financial spheres are involved, but also the civil and political social spheres. It has already been noted how, in the context of the European Union, individual Member States have already addressed the dynamics of advancing trade relations by developing and refining investment screening systems in their domestic regulatory systems. However, in order to fully understand the scope and current practical relevance of such systems, a broadening of perspectives becomes inevitable, leading to the acquisition of an overview of the relations that exist between the Member States and the Union itself, as well as between them and foreign countries and individuals[126].

On the basis of this premise, this section will traverse the direction taken by the European Union in this matter, with the creation of a new single European balancing system such as to foster, on the one hand, market openness, accentuating the free movement of capital, goods and services, and capable of maintaining, on the other, essential monitoring of the same channels of openness, with reference to FDI from actors outside the European Union. The adoption of Regulation (EU) 2019/452, which was approved on 19 March 2019 and entered into force on 11 October 2020, expresses in this sense the position of the European Union as a compact, open but careful front in the face of new foreign investments taking over the European regional system[127].

[126] Foreign individuals, understood as economic actors, may be considered subjects of international law in view of their role in the economic dimension of the international community.

[127] On this topic, see J. De Kok, *Towards a European framework for foreign investment reviews*, European Law Review1, 24-48 (2019); M. S. Bonomi, *Foreign Direct Investment Screening Measures in the EU and Duty to Give Reasons*, Roma Tre Law Review (2020); B. P. Amicarelli, *Remedies against Unlawful Foreign Direct Investment Screening Measures under the New Common EU Regulation*, Roma Tre Law Review (2020); A. Sapir, A. Garcia-Herrero, *Should the EU have the power to vet foreign takeovers?* (2017), available at the link https://bruegel.org/2017/09/ should-the-eu-have-the-power-to-vet-foreign-takeovers/.

Over the past two decades, the foreign investment screening mechanism has been mainly regulated, or at least conducted, by the European Court of Justice, which, as noted in the previous sections, has directed Member States through its case law so that they could implement the aforementioned screening mechanisms without violating the principles of free movement of capital and freedom of establishment protected by the Treaties as founding principles of the Union.

As of 2017, the European Commission has concretely mobilized in the forefront for the harmonization of a foreign investment screening discipline throughout the European territory.

An undoubtedly important stimulus to this end was precisely a study conducted by the Commission aimed at defining the trend of FDI and identifying the foreign players who own the largest investments in Europe. The study carried out showed that the United States and Canada were among the major players, that the EFTA Countries were on the decline, and that China, on the other hand, was becoming increasingly important in this respect[128]. The study and analysis of the subject has generated a progressive and profound acquisition of awareness, at the European level, of the relevance of the dynamics related to current foreign investment and the changing trade balances between the different countries of the world, a change that, moreover, seems to be oriented toward shifting the economic center of gravity from the traditional Western pole to the new Eastern pole.

Notably, in 2017 the European Commission produced a discussion paper on managing globalization by launching a debate on how to steer globalization in a way that was beneficial to all[129]. The paper emphasizes the EU's commitment to open global trade

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128 A reading of the Commission's COM (2017) 474 revealed trends where some emerging economies are playing an increasing role as foreign direct investors. The United States remains by far the largest foreign investor in the EU, but its share of FDI volume in the EU fell to 41.4 percent in 2015 from 51.3 percent in 1995. During the same period, Japan's share also fell from 7.7 percent to less than 3 percent. At the same time, Brazil and China saw significant increases in their shares, which rose from 0.2 percent and 0.3 percent in 1995 to 2.2 percent and 2.0 percent respectively in 2015, making them the fifth and sixth largest foreign investors in the EU.

129 See Commission, *Reflection paper on managing globalization* of 10 May 2017, COM (2017) 240 final. The document's preface states: "*Many Europeans, particularly young people, believe that being connected to people in other countries and continents can improve their lives, and they are right to think so because about one-third of our national income comes from trade with the rest of the world. Many Europeans, however, are concerned, because they believe that globalization means job losses, social injustice or low standards in environment, health and privacy. In their view, globalization contributes to the gradual disappearance of traditions and identities. We must respond to these concerns, and we can only do so by openly addressing the issues raised. Debate will make us stronger and better able to provide equitable and sustainable responses in line with the aspirations of Europeans. [...] It is therefore time to reflect on what the EU can do to steer globalization in line with our common interests and values, to ask what we can do*

that is as sustainable and fair as possible, and the same principles can be applied to FDI from outside the EU. Indeed, these are interpreted as an important source of growth and innovation, which is why the Union intends to maintain a favorable investment environment.

Having consolidated this position, the European Commission subsequently issued a Communication with a particularly symbolic title: "Welcoming Foreign Direct Investment while Protecting Key Interests". The document suggests some concrete measures for the control of certain FDI in the Union carried out by Member States and, where appropriate, the Commission; most importantly, the document accompanies a proposal for a Regulation establishing a framework for the control of foreign direct investment from third countries for reasons of security and public order, as well as a mechanism for cooperation between Member States.

It is in this context that Regulation (EU) 2019/452 arises in the European legal system. The objective of the Regulation is to create a common monitoring system on foreign investment to protect strategic assets and monitor operations with potential impact on security and public order in Europe.

The Regulation is expressly without prejudice to the exclusive competence of Member States for national security, and their right to protect their essential security interests. Thus, Member States are free to maintain, adopt or modify mechanisms to control foreign direct investment in their territory for reasons of security or public order, mechanisms that must be notified to the European Commission and that must in any case conform to the standards of transparency and efficiency set at the European level.

In conclusion, the act defines a common framework of the control powers of Member States; codifies the mechanisms of cooperation between Member States and the European Commission, ensuring permanent coordination between them; and finally, provides for a specific instrument of control to protect the interests of the Union. In essence, the Regulation aims to develop an active role for the Union in international cooperation on FDI.

The new legislation envisaged by the Regulation can be analyzed from two main

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to protect, defend and empower European citizens, especially the most vulnerable ones, and to reach agreement on how the EU-its institutions, Member States, regions, municipalities, social partners, broader civil society, businesses, universities-and international partners can act together to manage globalization".

perspectives, which will be discussed in more detail below: the identification of the scope of the Regulation establishing a framework for the control of foreign investment in the Union, as well as the establishment of a European control mechanism characterized by the participation of the Commission and the establishment of cooperation mechanisms on the horizontal level between Member States and on the vertical level between Member States and the European Commission[130].

5.1 The scope of application

The first pillar on which the Regulation is based concerns the definition of its scope, which specifically refers to foreign direct investment. According to Article 2, the notion of foreign direct investment appears to be particularly broad and elastic, by which is meant an "investment of any kind by a foreign investor intended to establish or maintain lasting and direct links between the foreign investor and the entrepreneur or enterprise to which capital is made available for the purpose of carrying on an economic activity in a Member State, including investments which allow an effective participation in the management or control of a company carrying on an economic activity".[131]

The objective scope therefore has some flexibility; in fact, Article 4 refers to the "factors" that may be taken into consideration by Member States and the Commission in determining whether a certain foreign investment may affect security or public order. The list of such factors actually represents a kind of codification of areas in which investment screening seems particularly appropriate, since these are areas where risks to sensitive security or public order interests are likely to be generated. The document clarifies, however, that the list should be considered "non-exhaustive," thus aiming to cover a wide range of investments.

A first set of sectors specifically covers critical infrastructure, whether physical or

[130] For this reconstruction see Maria Rosaria Mauro, *L'effetto del Covid-19 sull'accesso degli investimenti stranieri: le recenti modifiche introdotte nel regime di "golden power", Gli effetti dell'emergenza Covid su commercio, investimenti e occupazione, una prospettiva italiana*, eds. Pia Acconci and Elisa Baroncini (Bologna 2020).
[131] See *supra* section 4 for the position of the Commission and the Court on the Article.

virtual, which includes traditional utilities such as energy, transportation, water, communications, and media. Of particular relevance, on the other hand, is the reference to health infrastructures, which places an emphasis on the protection of human life and the network of medical and care services, which takes on special significance today in light of the events generated by the COVID-19 pandemic. Additional areas are configured in the Regulations that mark an innovative profile with respect to national screening regulations. For instance, European legal system includes among critical infrastructures also aerospace, information protection, financial and electoral regimes to ensure the proper functioning of each country's economic and democratic system. Next, the areas of robotics and cybersecurity, food safety, access to sensitive information, and media freedom and pluralism[132] are relevant.

Of particular interest appears to be the second part of Article 4, which deals with the subjective scope of the Regulation. Pursuant to the provisions on the matter, among the factors that may be taken into consideration by EU countries in foreign investment screening procedures there is the circumstance where the foreign investor has already been involved in activities affecting security or public order in a Member State or where there is a serious risk that the investor will engage in illegal or criminal activities. However, even more sensitive would be the circumstance where the foreign investor is directly or indirectly controlled by the public administration, including state bodies or armed forces of a third country, also through ownership structure or substantial financing.

The latter prospect conceals a fundamentally important aspect of investment screening, an aspect that appears related to the problematic profile of so-called sovereign wealth funds. In particular, these can be defined as state-owned foreign investment vehicles that, by reason of their nature, raise questions about what risk investments of this kind pose to the normal functioning of market economies[133].

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[132] Article 4 of the Regulation (EU) 452/2019 includes, in its entirety: "*critical infrastructure, 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, aerospace, 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; or the freedom and pluralism of the media*".

[133] Sovereign Wealth Funds will be addressed in Section 1.2.5 below.

One profile that should be taken into account as a concluding reflection regarding the scope of the Regulation, consists in the fact that certain rules contained therein nevertheless leave room for some largely discretionary assessments and appreciations that have a wide margin of questionability. With respect to the factors that may be taken into consideration by Member States and the Commission in determining whether a given investment is capable of adversely affecting security or public order, or with respect to whether there is a serious risk that the investor has engaged in or is engaging in criminal or illegal activities, Article 4 of the Regulation also extends consideration to "potential effects"; right on the basis of this provision, it is clear that control over investments could be the result of political, changeable, or otherwise discretionary assessments that are exposed to wide review.

5.2 The role of the Commission and the cooperation between Member States: information requirements and flow in screening and non-screening scenarios

Having framed the scope of the Regulation, it is appropriate to proceed to the identification of the manner in which the control of risky foreign direct investments to the security or public order of one or more Member States of the Union is articulated.

First of all, under the Regulation, the control mechanism is understood as "*an instrument of general application, such as a law or regulation, accompanied by the relevant administrative requirements or implementing rules or guidelines, which defines the terms, conditions and procedures for assessing, examining, authorizing, subjecting to conditions, prohibiting or liquidating foreign direct investment for reasons of security or public order*".[134] Moreover, the control mechanism, as mentioned, is characterized by the active participation of the Commission and a system of cooperation not only vertical, thus pertaining to relations between Member States and the Commission, but also horizontal, as a form of dialogue between Member States that share forms of interest with respect to

[134] See Article 2, Regulation (EU) 2019/452.

a foreign investment implemented in one of their territories. According to this premise, cooperation is articulated differently depending on whether foreign investments constitute the subject of scrutiny at the national level (Article 6 of the Screening Regulation) or whether, on the contrary, they are not subject to any system of internal control (Article 7 of the Screening Regulation). As *per* both articles, the cooperation is enabled by the use of ‘contact points’, established by Article 11. These contact points, which must be instituted by Member States and by Commission, overlook the implementation of the Regulation. For this reason, these must be included in whatever related issue may arise from it. [135]

With respect to the first hypothesis, it will be possible to speak of “preventive control”, in the sense that a foreign investment that has those certain objective or subjective characteristics analyzed in the previous paragraph will constitute the subject of scrutiny first at the national level and, subsequently, at the European level.

In this case, Member States are required to notify the Commission of foreign investments in their territory that are the subject of ongoing scrutiny under national law[136]. In particular, if the state concerned considers that the transaction falls within the scope of the Regulation and may affect security or public order in one or more Member States, it will be required to notify both the Commission and the other Member States of all the information necessary for them to be in a position to express opinions on the matter. Thus, having grafted a screening procedure at the national level, both the Commission and the other Member States will be able to intervene in the procedure in compliance with two conditions, either alternative or cumulative: first, the operation should directly involve one or more Member States, thus it must be likely to affect their security or public order in order for them to effectively participate in the screening; alternatively, or in addition, these Member States should have relevant information to facilitate the screening assessment, since this would justify the second hypothesis of the participation of the other

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[135] See Beatrice Olivieri, *Safeguarding national security interests: an overview of global screening procedures on foreign direct investment*, 110 (2020).

[136] On this point, it is useful to view the following document: *List of Screening Mechanisms Notified by Member States Last Updated: 24 November 2020 Pursuant to Article 3(8) of Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investment in the Union, the Commission shall make available to the public a list of Member States’ screening mechanisms and shall keep it updated. The following table is based on Member States’ notification of screening mechanisms and their changes, pursuant to Article 3.7 of Regulation (EU) 2019/452*, available at the link: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.

Member States or the Commission in the screening procedure[137]. In both cases the Member State that believes to be in danger may provide the other Member State with "duly justified" comments and notify its intention to do so within 15 days following the receipt of the information laid out by Article 9[138], and send it to the relevant State no later than 35 days after the same date.[139]

Outside the hypothesis of the aforementioned "prior control" is the circumstance in which certain foreign direct investments are not subject to control by the Member States, for example, in the case of those countries that have not yet arranged autonomous regulatory disciplines in this regard. In this case, where the aforementioned conditions are met, both another Member State and the Commission may request information and, consequently, offer comments to the State concerned. Differently from the previous Article, States are under a time constraint, as they may only comment on investments in the 15 months following their completion. This second hypothesis, however, seems destined to be of reduced practical relevance, in view of the assumption that almost all Member States of the Union are already making use of new foreign investment control systems that can be activated in appropriate cases introduced in the legislation of each country[140].

In this context, if the Commission considers that a foreign direct investment may affect projects or programs of interest to the Union for reasons of security or public policy,

[137] To ensure the effectiveness of the cooperation mechanism, it is important to ensure a minimum level of information and coordination in all Member States regarding foreign direct investments that fall within the scope of this Regulation. Such information should be made available by Member States for foreign direct investments subject to ongoing control as well as, upon request, for other foreign direct investments. Relevant information should include such aspects as the ownership structure of the foreign investor and the financing of the planned or already implemented investment, including, where available, information on subsidies granted by third countries. Member States should strive to provide accurate, complete, and reliable information.

[138] The notification may also include a request for more information on the same topics. On the subject, the Article states that "*any request for additional information shall be duly justified, limited to information necessary to provide comments, proportionate to the purpose of the request and not unduly burdensome for the Member State undertaking the screening*".

[139] If additional information was requested, the comments shall be issued within the twenty days following the receipt of such information. The Article also states that, "*in the exceptional case where the member state undertaking the screening considers that its security or public order requires immediate action, it shall notify the other Member States and the Commission of its intention to issue a screening decision before the set timeframes and duly justify the need for immediate action. The other Member States and the Commission shall endeavor to provide comments or to issue an opinion expeditiously".*

[140] As of the end of 2017, almost half of the EU Member States have mechanisms by which they controls foreign direct investment. These are: Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, and Spain. These are also joined by the United Kingdom.

pursuant to Article 8 it may issue an opinion intended for the Member States in which the foreign direct investment is still planned or has already been carried out[141]. The Commission's opinion will be taken into "the utmost consideration" by the State concerned, which, if it wishes to disregard it, must adequately justify the reasons for its choice. In other hypotheses, however, the text of the Regulation stipulates that opinions must be given "due consideration," and there is no explicit reference to an aggravated motivational obligation. In any case, any opinions provided by the Commission and the Member States are not binding.

Regarding the deadline for the conclusion of the screening process, the Regulation establishes a minimum deadline of 35 days to allow for the necessary consultations to take place between the Member States and the Commission

As for the final measure, on the other hand, the European Regulation provides for both the possibility of vetoing certain investment transactions and the possibility of imposing measures and conditions that have not been previously determined and typified. This will then be communicated to the notifying parties, and thus, as the case may be, to the acquiring investor or the firm.

Finally, it should be emphasized that the screening mechanism for foreign direct investment under the Regulation entails the obligation to prepare an annual report on the investment operations that have taken place during the year in each of the territories concerned, and which the Member States are required to submit to the Commission so that the latter can, in turn, submit an annual report to the Parliament and the European Council on the implementation of the Regulation under consideration[142].

Thus, from the provision of the annual report emerges the principle of cooperation existing not only between states and European institutions, but also between the institutions themselves.

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[141] Projects or programs of Union interest include those that involve a consistent amount or a significant share of Union funding or those that fall under Union law relating to critical infrastructure, critical technologies, or critical inputs that are essential to security and public order. Moreover, the list of projects or programs of Union interest figures in the Annex to the Regulations.

[142] On this point it may be specified that starting from 12 October 2023, and every five years thereafter, the Commission should evaluate the functioning and effectiveness of the Regulation and submit a report to the European Parliament and the Council. This report should include an assessment of whether or not this Regulation needs to be amended. If it proposes to amend this Regulation, the report may be accompanied by a legislative proposal.

In conclusion, the Regulation seems to contemplate a general principle of due diligence with respect to control mechanisms. In fact, Member States are obliged to adopt mechanisms to control foreign direct investment in their territory for reasons of security or public order, or they can maintain or modify those already existing in the systems[143]. Moreover, the additional positive obligations are posed to detect and prevent the circumvention of control mechanisms and descendant decisions, as well as to ensure that foreign investors have the opportunity to seek judicial redress against the decisions of national authorities Finally, the principles of transparency and non-discrimination applied to the treatment of foreign states are reiterated. Such prescriptions are intended to ensure control systems that tend toward compliance with minimum standards that guarantee legal certainty and the principle of legality.

5.3 The opinions of the Commission

As anticipated above, the Commission is entitled to issue opinions every time a Member State is allowed to submit comments. In practice, the Commission may exercise the power to issue an opinion in all the cases it believes an FDI may affect the national security or public order of more than one Member State, or when it owns crucial information related to the investment at stake. An opinion does not have to necessarily follow the comments submitted by Member States but the FDI it refers to must be considered harmful for the national security and public order of at least one third of Member States. Moreover, once the opinion is published, the emission must be notified to all Member States. As with comments, an affected state that "*duly considers that a foreign direct investment in its territory is likely to affect its security or public order*" may be the one to request an opinion to the Commission. The same timelines that apply to comments also apply to opinions, with an extension allowing the Commission to issue,

[143] In addition to this there is a notification requirement, meaning that Member States shall notify the Commission of any changes to an existing control mechanism or the adoption of a new mechanism within 30 days of the date of entry into force of the new control mechanism or any changes to an existing control mechanism..

within the 5 days following the deadlines, a follow-up opinion to the comments submitted by Member States.[144]

It is still debated whether the opinions issued by the Commission under the Screening Regulation can be subject to Court review pursuant to Article 263 and 267(1)(b) TFEU (respectively, action for annulment and preliminary reference on validity).

However, a firm point can be identified in the context of this still evolving discussion: it is the national decision and not the opinion itself the act to take into consideration when assessing the implications on interests vis-à-vis third parties.

The national decision is adopted following the opinion, therefore this latter can be categorized as an intraprocedural act issued within a composite procedure resulting in an act of the national authority rather than one of the Commission. Accordingly, opinions are not able to limit the power of discretion of Member States and the States where the investment is carried out, on the other hand, cannot promote an action for annulment against the opinions. Furthermore, the same conclusion can also be reached with regard to the annulment action brought by extra-EU investors and target companies, it being an action whose preconditions (Article 263(4) TFEU) are even more rigorous.

However, net of the present reflection, one might consider that national judges may appeal to the Court of Justice in the context of a preliminary reference on validity (ex Article 267(1)(b) TFEU), in order to examine whether the opinions adhere to the Screening Regulation and to EU law in general. [145]

In concreto, the extra-EU investor, as well as the target undertaking, could rely on an indirect action, grounded in national procedures and remedies, rather than following the path provided by Article 263 TFEU. However, there is no relevant practice yet.

[144] This extension does not apply to FDI not undergoing screening, since the Commission is still bound to comply with the '15 months after completion' deadline.

[145] Reference is made to Sara Poli and Daniele Gallo, *The Foreign Investment Screening Regulation as a means to protect and enhance the European technological sovereignty*, (2022).

5.4 Screening mechanism and objectivity of parameters

Article 1(1) defines the objective of the Regulation as the creation of a European screening framework for FDI in the Union. However, this presentation is not entirely representative of what has so far been put in place with the Regulation, the mechanism implemented being different from what might be expected on a first reading of the Regulation's introductory Article . In concrete terms, the regulatory competence of FDI screening remains with the Member States. The administrative-processual profile of the screening comes to be harmonized without major innovations through requirements pivoting on principles e.g., transparency and non-discrimination, that in any case would already underlie the legislative activity of a constitutional state.[146]

Moreover, the aforementioned requirements[147] will only apply in the event that a state decides to adopt or maintain a screening mechanism. Article 4 of the Regulation contains a no exhaustive list of factors that may be considered relevant in determining whether a foreign investment may have an impact on security or public order. In the assessment to be made, Member States are provided with factors referring to both the investor and the foreign investment in *re ipsa*. Among the various peculiarities of the present case that the criteria take into consideration, the circumstance whereby the foreign investor is controlled or financed by third countries, which is in line with the concerns posed as the *ratio legis* of the Regulation itself, assumes particular relevance.[148]

However, the aforementioned legislation does not harmonize the material scope of the controls explicated at the national level, but it rather provides for the assessment factors that may be relevant, without informing or prejudicing the assessments of the Member State leaving it up to them the identification of these factors, as is made clear by

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[146] See Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 104-106 (2022).
 this point see Giulio Napolitano, *The Regulation on the Control of Foreign Direct Investment*, 2. (2020). The author emphasizes how the Regulation, by adopting a model of foreign investment control governed by the principles of legality and good administration with the objective of guaranteeing inter alia (i) predictability, (ii) procedural participation, (iii) reasonable duration of proceedings, (iv) justification of public decisions and (v) the right to judicial protection, nevertheless leaves wide discretion to public authorities, thus resulting in an absence of guarantee of the investor's actual ability to succeed in seeking and obtaining, for example, the prospective judicial protection. On this point see also Steffen Hindelang and Andreas Moberg, *The art of casting political dissent in law*: *The EU'S framework for the screening of foreign direct investment*, Common market law review 57.5, 1427. (2020).
[147] Art.See Article 3 of the Screening Regulation.
[148] See *supra* at 146.

various statements, such as "may consider", "*inter alia*", "may also".[149] This does not mean that Member States have been given absolute freedom to place restrictions on such investments: in the case of restrictions on fundamental freedoms a justification will still be due i.e., in the case of reference to public policy by providing evidence of the existence of a real and sufficiently serious threat to a fundamental interest of society.[150]

Furthermore, the measure taken by the Member State will have to be proportionate, and it will not be possible for Member States to automatically resort to banning or conditioning foreign investment merely because some of the factors set forth in Article 4 have occurred. In fact, Article 4 does not set a level of risk that would justify *in re ipsa* a Member States' intervention of such seriousness; consequently, the latter is left with only the coordination mechanism. Strong interference measures against an FDI thus require specific and concrete risks, but some States set requirements that appear more "elastic" than those described above. One example is Germany's Foreign Trade and Payments Act, which requires an "*acquisition [that] could jeopardize the public order or security of the Federal Republic of Germany or another Member State of the European Union*".[151]

Although Member States were already obligated to comply with all European legislation prior to the Regulation, no new concrete harmonization measures were adopted, even with this provision. The usefulness of Article 4 can be found for the purpose of a higher level of legal certainty, due to the possibility of Member State to rely on the compliance with European law of the control mechanisms implemented at the national level in case they may lie on the factors indicated by the Screening Regulation itself.[152]

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[149] See Hindelang and Moberg, The art of casting political dissent in law, 1427.*Ibidem.* According to the authors, the goal pursued by the European legislature is to achieve a "converging interpretation and application of those legal terms across the EU Member States: in other words, a '"rough consensus'consensus".

[150] See *supra* at 146. See CJEU case,Association *Église de scientologie, de Paris v The Prime Minister* of 14 March 2000, Case C-54/99, March 14, (2000. I-01335). The Court emphasizes that "*public policy and public security [...] in the Community context, particularly in so far as they authorize a derogation from the fundamental principle of the free movement of capital, must be understood in a restrictive sense, so that their scope cannot be determined unilaterally by each Member State without the control of the Community institutions [...] they can therefore be invoked only in the event of a genuine and sufficiently serious threat to one of the fundamental interests of the community [...] Those grounds cannot, moreover, be diverted from their proper function in order to be used, in reality, for purely economic purposes*".

[151] See *supra* at 146. Reference is made to the translation offered by the Language Service of the Federal Ministry of Economic Affairs and Climate Action: Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* - AWG); available at the link: https://www.gesetze-im-internet.de/englisch_awg/englisch_awg.html.

[152] See *supra* at 146.

5.5 The reasons behind investment restrictions and the implementation of democratic principles

The new challenges of a Planet on the wave of globalization require to be addressed through the development of new strategies capable of filtering risky movements and operations for markets and civil society. In the area of foreign direct investment, screening mechanisms thus figures as a filtering tool. In recent years, about 90 percent of the measures undertaken at the European level have involved operations to improve investment screening systems falling within the scope of different sectors. Most Member States in Europe are strengthening, expanding or modifying their screening systems, and these include those countries that until the Regulation came into force had no screening system at all. Such a situation, in fact, could in the long run pose a risk to the security of other Member States interacting with those countries that are less prepared in terms of foreign investment screening and security.

In this context, controls on foreign investments in the EU might on the surface give the generic impression of making European territory more hostile and less welcoming to foreign investors. However, it should be reiterated that the introduction of the Regulation and its implementation should be interpreted not as the assumption of a protectionist stance, but, on the contrary, as a form of preparation for a steady and gradual welcoming of foreign investments in a well-defined manner, taking into account the spirit of interaction between the Member States and the standards as close as possible to the rules of the market and democratic nature, under the principles of transparency, access to and protection of information, non-discrimination and legality. In light of this, it seems appropriate to come back on Article 63 TFEU, which, as mentioned above, provides for the free movement of capital not only within the European Union, but also with respect to third countries.

In the case of “predatory purchases” of strategic assets by foreign investors, e.g., to limit the supply of a particular good or service to the Union market, the most relevant exception is the “public policy or public security” exception in Article 65 TFEU. In this regard, as clarified in the case law of the European Court, although Member States enjoy a discretion in determining public policy and public security requirements in accordance with national needs, these public interests cannot be determined unilaterally without any control by the institutions of the Union and must be interpreted restrictively: that is, the grounds of public policy, public security and public health may be invoked only in the case of an actual and sufficiently serious threat to one of the fundamental interests of the community.

Finally, it should be noted that, in the analysis of justification and proportionality, restrictions on capital movements to or from third countries are placed in a different legal context than restrictions affecting capital movements within the European Union. Consequently, in the case of restrictions applied to transactions involving third countries, additional grounds of justification may be allowed under the Treaty, which may also be understood in a broader sense.

For the sake of completeness on the point of restrictions on foreign direct investment, the series of proceedings initiated by the Commission against Austria, Denmark, Finland and Sweden in connection with certain bilateral investment agreements concluded by these States with third countries[153] may be highlighted. These cases are particularly relevant in view of the fact that the challenged agreements granted unconditional rights to the establishment of foreign investors without providing for the exceptions to the free movement of capital provided by the Treaty.

The ECJ found that they were incompatible with European law since such a dynamic could have prevented the Union, in the future, from taking the restrictive measures that although the Treaty allows. This confirms that European openness to foreign investment is not, nor does it actually want or can be, absolutely unconditional.

In the current global context, however, the European Union appears to be one of the last institutions to have established at the regional level a single set of rules on investment screening, and the Union's delay in mobilizing itself in this direction is even more pronounced if a comparison is made with the regulatory systems of other regions of the world, such as that of the United States, China or Japan, for example.

However, downstream of the Regulation, Europe stands as one of the most open

[153] See Court of Justice, judgment of March 3, 2009, Case C-205/06, *Commission v. Austria*; judgment of 3 March 2009, Case C-249/06, *Commission v. Sweden*; judgment of 19 November 2009, Case C- 118/07 *Commission v. Republic of Finland*.

areas to foreign investment, which is considered more of a driver than a tendency threat. In fact, free trade remains one of the cornerstones underpinning decisions made by the European regulator. As demonstration of the fact that the EU turns out to have one of the most open investment regimes in the world, and collectively EU Member States turn out to have the fewest restrictions in the world with respect to foreign direct investment, arises an examination of the OECD"s Index on the Restriction of Foreign Direct Investment Regulations, which measures legal barriers against foreign investment in more than 60 countries worldwide. This index shows a kind of imbalance between European market access for foreigners, and foreign market access for Europeans. It is noted, in particular, that there are few obstacles for foreign investors to invest in the European Union, and conversely, in many countries in the rest of the world the number of new restrictive measures has recently increased; China, for example, remains among the countries with the highest restrictive index, along with the Philippines and Saudi Arabia[154].

According to OECD data for 2016, the flow of inbound foreign direct investment into the EU reached 538 billion U.S. dollars (470 billion in 2015), surpassing the highest level of investment recorded before the 2007 crisis. Over the past two decades, the United States, while remaining the largest foreign investor in the EU, has reduced its share of direct investment from 51.3 percent in 1995 to 41.4 percent in 2015[155]. For the reasons stated so far, one of the crucial issues to be resolved in this matter remains the lack of reciprocity in the movement of capital such that a European investment to some foreign countries faces many more obstacles than a similar investment to Europe. In fact, it is true that more often than not, investments abroad encounter real bans or major limitations, such as in China, where investments are subject to the so-called "Negative list". Moreover, the European screening system is based on the principle of legality and good administration, in contrast to other systems, such as, for example, the U.S. or Chinese systems, in which the process is more opaque and from which the primacy of the political decision on the choices of admitted transactions emerges.

The reform intervention dictated by the Regulation therefore attempts to reduce this

[154] See in this regard the Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers, 1 January -31 December 2016 COM. (2017) 338 Final.
[155] Source: Eurostat. Eurostat, Foreign Affiliates Statistic (FATS), 2014. The United States tops the list with 26,000 subsidiaries located-in order of importance-in the United Kingdom, Germany, the Netherlands, France, and Italy. China controlled about 4,000 companies in the EU.

disparity, creating as a corollary more investment opportunities for European companies as well.

To conclude, it should be emphasized that the standards of the European Union, inspired by the principles of openness, transparency and democracy, characterize the entire system of regional integration both in relations between intra-EU and extra-EU countries; while it is true that a certain imbalance is perceived in the different conditions of access to the European market and to some foreign markets respectively, it is also true that the EU will continue to pursue the standards developed so far, which in any case will also govern future trade relations especially in the field of investment. In this regard, a reference to the Comprehensive Agreement on Investment, an agreement currently being negotiated between the European Union and China aimed at redefining the parties" investment relations, seems interesting. Specifically, the agreement is intended to replace previous bilateral agreements on the subject concluded between individual Member States and China, thus aiming for a uniform regulation on European territory. The main objectives of the agreement include limiting restrictions and conditions of access to the Chinese market for European investors, the goal of forming equal competition between European and Chinese operators under the principle of non-discrimination, and, finally, the goal of promoting responsible investment in accordance with the principles and rules of sustainable development.

Ultimately, the Regulation and further initiatives undertaken by the European Union on investment and screening help consolidate its position as a unique and active economic actor in foreign investment monitoring operations.

5.6 The critical profile of Sovereign Wealth Funds

Lastly, and as a further elaboration of the previous paragraph, it interesting to also examine the issue inherent in sovereign wealth funds (“SWF”)[156] since it is precisely with

[156] For an overview of SWF, see Edmondo Mostacci, *Stati finanziari e mercati sovrani: la crisi economica e gli strumenti per fronteggiarla, Diritto pubblico comparato ed europeo 11.I*, 305-325 (2009); Antonio Gigante, Aldo Ligustro, *Il diritto internazionale degli investimenti di fronte alla sfida dei fondi sovrani, Diritto pubblico comparato ed europeo*, 1179-1221 (2010); Mathias Audit, *Is the erecting of barriers against foreign sovereign wealth funds compatible with international investment law?,* The Journal of

regard to these institutions that the justifications for host-state restrictions on foreign investment assume particular relevance. In particular, SWF have established themselves as one of the main institutional investors in the global capital market and are part of the broader set of so-called sovereign investment vehicles, in which very different entities are generally brought together, e.g., central banks or state-owned enterprises, in each case united by a publicist matrix or by the sources of financing used. A sovereign wealth fund is, therefore, an investment fund established or owned by a government, a national monetary authority or, in any case, a public agency[157].

Despite the recognized benefits of SWF investments, concerns have also emerged in recipient countries, including those in the European Union[158]. The main concerns related to the operations of these funds stem from the lack of transparency about the size of the capital under management, the composition of portfolios, the objectives of investments, the risk of conduct that could amount to market abuse, and the danger of politically or strategically motivated investments. In particular, the said strategic reasons would consist in the fact that the objectives pursued by this type of investment are not economic or commercial in nature, but rather geopolitical, in that they are aimed at securing the possession of advanced technologies or, in general, meddling in the economies of other countries by exercising political or strategic control over them.[159]

Such circumstance tends to mark the tension between the need of States to attract

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World Investment and Trade, (2008); S. Alvaro and P. Ciccaglioni, *Sovereign wealth funds and the regulation of investment in strategic sectors,* CONSOB, Discussion Paper No. 3, (July 2012), to which this section refers; see also Fabio Bassan, *A regulation for sovereign wealth funds,* Market, Competition and Rules, 95-132 (2009); Alberto Quadrio Curzio and Valeria Miceli, "*Fondi sovrani", i nuovi attori dell"economia mondiale*, Il Mulino 57.3, 555-566 (2008).

[157] The International Working Group of Sovereign Wealth Funds (IWG), established by the International Monetary Fund, has defined SWFs as "*funds or investment vehicles owned by the state (central government or subnational authorities); thus excluded [from the category] are foreign exchange reserves held by monetary authorities, investments made by state-owned enterprises, and pension funds; while there is some institutional variability, it is nevertheless clear that these assets are distinct from the ordinary balance sheet of the states to which they belong*" (translation from International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds: Generally Accepted Principles and Practices "Santiago Principles," 3 (2008). Along the same line is the definition given by the European Commission in its Communication to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions "Towards a Common European Approach to Sovereign Wealth Funds," No. 115/2008, 27 February 2008.

[158] It should be noted that despite nascent concerns with respect to such funds, the courts of the European Union have not been able to express themselves fully on the subject of sovereign wealth funds and state-owned enterprises; on this point see Daniele Gallo, *Corte di Giustizia UE, golden shares e investimenti sovrani*, *Diritto del commercio internazionale*, Fasc. 4 (2013).

[159] The issue in Italy was addressed at the time by, among others, Paolo Savona and Patrizio Regola, *Il ritorno dello Stato padrone, I fondi sovrani e il grande negoziato globale*, II (Rubbettino 2009).

investment from foreign investors, which also includes state-owned companies and sovereign wealth funds of other countries, and the need, as well as the duty, of the receiving States themselves to protect their national security and strategic interests.

The strong growth of foreign direct investment flows and, above all, those made by SWF brought to the attention of international organizations and nation-states the critical profiles associated with the operativity of this type of funds, criticalities translated into attempts at hostile takeovers. The issue of SWF investments does not exclusively touch Europe. On the contrary, by their very nature, these funds have international relevance. For this reason, their role within the international financial system has been the subject of discussion among both the holders of the funds themselves and the countries receiving their investments.

A relevant reflection on the scope of SWF and their aspects, both positive and negative, was conducted by Finance Ministers and Central Bank Governors meeting in Washington at the G7 meeting on 19 October 2007. There, leading international multilateral organizations, including the International Monetary Fund ("IMF") and the Organization for Economic Cooperation and Development ("OECD"), were invited to initiate "a reflection on the role of Sovereign Wealth Funds and mechanisms to address the challenges they pose". Based on this mandate, the IMF initiated the International Working Group of SWF ("Working Group"). The Working Group developed a kind of "code" of conduct, or rather, a set of principles of conduct consisting of 24 General Accepted Principles and Practices for SWF, known as the "Santiago Principles"[160]: a code of conduct thus belonging to the category of soft law. These principles reiterated that SWF should base their investment decisions exclusively on economic objectives, just as they should compete on a level playing field with private sector investors. In this vein,

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[160] For further information on the subject, refer to Joseph J. Norton, *The "Santiago Principles" for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes*, Journal of International Economic Law 13.3, 645-662 (2010) available at the link https://doi.org/10.1093/jiel/jgq034; Anthony Wong, *Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations*, 34 Brooklyn Journal of International Law 1081, (2008), available at the link: https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?hl=it&as_sdt=0percent2C5&q=Santiago+principles+authors&btnG=&httpsredir=1&Article=1183&context=bjil.

recipient countries called on SWF to be more transparent[161].

The sense apprehension about SWF can also be inferred from the European Commission's, Communication of 27 February 2008 entitled "A Common Approach to Sovereign Wealth Funds".[162] At the time, the Commission felt the need to take action to provide criteria that could be used by Member States engaged in redesigning their national disciplines aimed at limiting SWF investments. Thus, the Commission, on the one hand, reminded states to respect the principles of freedom of movement of capital and establishment contained in the TFEU and, on the other hand, clarified how these principles, in the legal framework of the Union, should not, in any case, be considered as absolute freedoms, since Article 65 TFEU, as mentioned in the preceding paragraph, affirms, among other things, the right of States to adopt measures derogating from this prohibition if the restrictions are justified on grounds of public order or public security.

The same Communication reports a reference to the relevant EU legal framework: SWF investments in the European Union are subject to the same rules and controls to which all other forms of investment, domestic or foreign, must be subject, and the principles of free movement of capital between Member States and between Member States and third countries as enshrined in the Treaties apply to them. Therefore, similarly to regulations containing special powers in the hands of states vis-à-vis privatized companies, the abstract legitimacy must be matched by concrete regulations that respect the set of criteria established in EU case law. In particular, in order to justify a derogation from compliance with the prohibition of placing restrictions on the freedom of capital, it is necessary that the threat of harm to the national interest is serious and present, that the instrument envisaged comply with the canons of proportionality, and that the application criteria are precise, clear and non-arbitrary.

However, the discipline in the area of FDI and SWF control, into which the aforementioned Code of Conduct and the European Commission's Communication on Sovereign Wealth Funds undoubtedly fall, is enriched by the new source of hard-law

[161] See Robert M. Kimmitt, *Public Footprints in Private Markets: Sovereign Wealth Funds and the World Economy*, 87 Foreign Affairs 1, 119-130 (2008), available at the link: https://www.jstor.org/stable/pdf/20020272.pdf?refreqid=excelsiorpercent3A380e8f9381b8cbca9cc8d657 25d9b dbc.

[162] See *Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions* of 27 February 2008, COM (2008) 115 final.

represented by the new, and aforementioned, Regulation.

In conclusion, having observed the criteria for the restriction of foreign investment, as well as the critical issues arising in the special case where SWF are involved, it is appropriate to emphasize that measures restricting foreign investment should be interpreted as measures to protect the sensitive interests of the State, and not as sources of unjustified forms of restriction on the freedom of movement of capital. On closer inspection, in the current historical context, such a conception of protection becomes necessary in light of the events related both to progress in the field of technology and the critical issues sown by the pandemic emergence of COVID-19 on multiple sides, in view of the fact that both phenomena have made the markets of Member States, as well as the single market, more vulnerable.

5.7 Commission second annual report on the screening of Foreign Direct Investments into the Union: an analysis

In accordance with the requirement for yearly reporting under Article 5 of the Screening Regulation, the Commission released the "Second Annual Report on the Screening of Foreign Direct Investments into the Union" ("the Report")[163] and an accompanying "Commission Staff Working Document"[164] on 1 September 2022. As it will be discussed below, the Report provides us with valuable information on the prevalence and incidence of the FDI phenomenon at the EU level.

The Report states that worldwide FDI flows grew in 2021, reaching €1.5 trillion. This represents a 52 percent increase from 2020 and an 11percent increase from the levels seen in 2019 before the COVID-19. With inward FDI of €117 billion, which is a 31 percent decline from 2020 and a 68 percent decline from 2019, the EU contributed to the

[163] See *Second Annual Report on the screening of foreign direct investments into the Union* of 1 September 2022, COM(2022)433 final. Available at the link: https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)433&lang=en.
[164] See *Screening of FDI into the Union and its Member States* of 1 September 2022, SWD(2022) 219 final. Available at the link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0219.

global recovery. The key factor causing these outcomes was a decline in inward FDI in the Netherlands, Germany, Luxembourg, and Ireland. Notwithstanding this decrease in total FDI flows into the EU, 2021 saw a 32 percent increase in mergers and acquisitions and a 12 percent increase in greenfield investments compared to 2020. In 2019, the number of acquisitions was still 9 percent lower than it was before the pandemic, and for greenfield investments, the disparity was even greater at 39 percent.

With 32.3 percent of all acquisitions and 39.4 percent of greenfield investments, the US accounted for the majority of FDI into the EU in 2021, followed by the United Kingdom with 25.6 percent and 20.9 percent, respectively. China only made up 2.3 percent of all international acquisitions in 2021 (down from 3.4 percent in 2020) and 6 percent of greenfield investments (down from 7.1 percent in 2020). Strict capital regulations and the concentration of investment activities in specific key industry sectors are most likely to blame for this result. Chinese investments in the EU nonetheless totaled €9 billion in 2021 (down from €6.5 billion in 2020).

With a share of 16.4 percent of all foreign investor purchases in 2021, representing a 20 percent increase from 2020, Germany was the top target destination. Following closely behind with shares of international transactions of 13.8 percent, 10.7 percent, and 10.5 percent, respectively, were Spain, France, and the Netherlands. Information and communications technology (ICT) and manufacturing were the two key industries that fueled the recovery in international trade in the EU. With 30 percent of new acquisitions and 15.4 percent of new greenfield investments in 2021, ICT scored first in M&A activity and second in greenfield investments (after retail, representing a growth of 34 percent and 15 percent respectively compared to 2020).

However, despite the optimistic economic prognosis, the cost of energy and raw materials has increased dramatically, and the economic fallout from supply chain interruptions brought on by Russia’s invasion of Ukraine have had an impact on the EU’s deal-making momentum.

6. Conclusion: the evolution of the European approach and the concerns it raised

The strategy adopted by the European Union with regard to foreign investment screening mechanisms makes such Organization a strong player in the global context and hardens its international trade relations. In essence, the introduction of the Screening Regulation allows, both at the EU level and of the Member States individually considered, a more reasoned and robust management of increasingly important dynamics on both a global and regional scale.

In the course of the analysis to which the preceding paragraphs were devoted, an overview of the development of the European approach toward the investment screening system was provided. Thus, it was seen how, in its embryonic stage, the Court was the only main actor taking relevant positions in the field of foreign investment monitoring; on several occasions the Court recalled the respect for the principles of free movement of capital, freedom of movement and freedom of establishment, as well as the more general principles of legality, democracy, fairness and transparency that are at the top of the existing legal systems within the European Union.[165]

Subsequently, however, other European institutions have also emerged, among which we would particularly mention the Commission. The latter has actively acted in the process of shaping a common legislation for all Member States so as to standardize and harmonize the discipline of foreign investment screening according to the fundamental principles of the European Union.

Therefore, in light of this brief recapitulation, we can notice how the European Union has well defended its influential role as an economic player and has consolidated its position in the international context by ensuring an open and favorable space for foreign investments so that they can be received in a democratic, non-discriminatory and

[165] See *supra* what has been said in section 1 of the present chapter. See also *Commission of the European Communities v. French Republic* of 4 June 2002, Case C-483/99 (2002 I-04781): "The free movement of capital, as a fundamental principle of the Treaty, may be restricted by national legislation only if the latter is justified by reasons provided for in Article 73d(1) of the Treaty or by overriding reasons of public interest and which apply to every person or undertaking carrying on an activity in the territory of the host member state. Moreover, in order to be so justified, the national legislation must be suitable for securing the attainment of the objective pursued and not go beyond what is necessary to attain it, in order to satisfy the criterion of proportionality".

transparent manner in the regulation and management of them, in view of the fact that they are perceived as a driving factor for European economies and societies, and not, instead, as a certain source of threats to them.

Moreover, at the same time, the EU has also been concerned to counterbalance this openness with the strengthening of investment screening measures where these could threaten security or public order. As already pointed out, such prevention is a result of the great technological progress that necessarily requires screening of investments. Moreover, it must be pointed out that the recent health and economic emergency situation figures among the reasons for the implementation of such mechanism too. In addition, this outcome was also led by the need to address the concerns of Member States who, although equipped with a screening system, were complaining about the potential ineffectiveness of these systems in practice due to the possibilities of circumventing them through the guarantees of freedom of establishment as a result of the taking of the control of a company in another Member State that lacked a similar mechanism.

Indeed, it should be emphasized that in light of the demands made by individual Member States, the Screening Regulation was an easy solution. Therefore, despite fears that protectionist deviations could have negative effects on the market, the creation of a regulation such as the one under analysis had several positive effects. In particular, the Regulation, in an attempt to control FDI more tightly by creating more restrictive conditions of access, creates a strengthening of the European Union's position in negotiations with third countries to obtain more favorable access to their markets and, in general, a higher level of overall liberalization through reciprocity.[166]

However, on the other hand, the Screening Regulation is largely based on voluntary provisions[167] and is very flexible in its operation. There is no obligation to establish a screening mechanism, only voluntary ways of sharing know-how among States that have adopted a mechanism. As a result, at least for now, the expectation of having a European framework that would strike a balance between, on the one hand, cooperation within the European Union for the screening of FDI that could affect public order and security and,

[166] For further information see Stephan W. Schill, *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, Amsterdam Law School Research Paper, Amsterdam Center for International Law (11/2019); available at the link: https://ssrn.com/abstract=343447

[167] See Cunha Rodrigues, Extraterritoriality of EU Economic Law, 197 (Springer International Publishing 2021).

on the other hand, the different interests of Member States can thus be considered disregarded.[168]

Finally, Article 4 lists the screening factors that may be considered by Member States, leaving wide room for interpretation of terms such as “critical infrastructure” and “sensitive facilities”. Therefore, it is reasonable for questions of meaning and interpretation to arise on these terms at the national level.[169] For example, in Italy, the extension of special powers as a result of the Regulation and the categories of doubtful interpretation mentioned, accompanying the context of emergency measures prompted by the COVID-19 pandemic, has led, for the first time, to the extension of the screening mechanism (so-called golden power) to the financial, credit, and insurance sectors, raising several doubts in doctrine.[170]

In conclusion, the cooperation mechanism has significant positive effects, but their concrete realization must be verified on the basis of the practical implementation of the new legislation by Member States rather than by the system in *re ipsa*, since a system that obliges formal notification may create a system of communication between Member States, the fruitfulness of which is not automatically guaranteed. A clear example of this is, *inter alia*, the “due consideration” given to opinions received.[171] The Regulation does not provide other Member States and the Commission with any specific means of protection in the event that the proceeding State does not give due consideration to the comments and opinions or otherwise deviates from them.[172] The Commission may attempt to initiate infringement actions against States that ignore the opinions expressed,

[168] Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 106-108 (2022).

[169] See Christoph Mager and Tugce Yalcin, *Impact of the new Foreign Direct Investment (FDI) Screening Framework of the EU for foreign companies in Austria*, DLA Piper, (2019); available at the link: https://www.dlapiper.com/en/austria/insights/publications/2019/08/impact-of-foreign-direct-investment-screening-framework-of-the-eu-for-foreign-companies-in-austria/

[170]See *supra* at 168. See Daniele Gallo, *La questione della compatibilità dei golden powers in Italia, oggi, con il diritto dell’Unione Europea: il caso delle banche*, *Rivista della regolazione dei mercati* 1, 26-54 (2021); R. Lener, Golden powers e investimenti esteri nelle infrastrutture finanziarie, *Rivista trimestrale di diritto dell’economia* 228, (2020).

[171] See *supra* section 5.2 of the present chapter. Reference is made to the text of Article 6 (9) of the Screening Regulation on the cooperation mechanism: “The Member State undertaking the screening shall give due consideration […] to the opinion of the Commission […]. The final screening decision shall be taken by the Member State undertaking the screening”.

[172] See Frank Röhling and Uwe Salaschek, 9 The Foreign Investment Regulation Review: EU Overview 49, (2022).

however, given the Commission’s heavy workload and limited resources, it is difficult to expect such actions to be on the daily agenda.

CHAPTER II – THE IMPACT OF THE SCREENING REGULATION: COMPETITION CONCERNS, SOVEREIGNITY CONCERNS AND EXPECTATIONS

After having dealt with procedural aspects, this second chapter will focus on the main implications that the adoption of the Regulation has generated. To this end, space will be given to more critical considerations in light of these first two years since the Regulation's implementation. It will investigate, in particular, the implications that the expansion of powers in the hands of the European Commission may have in terms of national sovereignty prerogatives dwelling on the Hungarian case that can be considered emblematic in order to understand the criticalities that the system seems to reveal; subsequently, the focus will be shifted to the topic of competition using the relationship between foreign subsidies and FDI as a key narrative. In addition, with the intention of providing an even more current scope to the entire work, the matter of the technological revolution following the rise of the fifth-generation wireless network will be addressed.

1. The Franco-German Manifesto: a call for protection

On 19 February 2019, France and Germany agreed to co-publish "A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century" ("Franco-German Manifesto").[173] By means the Franco-German Manifesto, a series of requests were advanced by the aforementioned Member States, as well as by additional States that later chose to join it. The connecting feature of all the demands made is to be found in a call for protection.[174] Experts commonly refer to the "geopolitics of protection"[175], by which is meant the set of instruments that States equip themselves with to control investments and thus markets. In fact, even in an economic system such as the European

[173] See "A Franco-German Manifesto for a European industrial policy fit for the 21st Century". Available at the link: https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a- european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2
[174] See Vittorio Pettinato, *Foreign Direct Investment Screening*, Il controllo sugli investimenti esteri diretti, 57 (2019).
[175] See Dreun Aresu, *Come proteggere l'Italia? Golden Power e nuovo Iri*, (Limes: 2020). Available at the link: //www.limesonline.com/cartaceo/golden-power-e-nuovo-iri-come-proteggere-litalia

one, which is connoted by a strong liberal policies, it may be essential to widen the powers of public authorities in order to respond to the need for protection of various public interests, as well as to strike a balance between these interests and the economic-industrial policies that are set to be pursued.

In recent years, a number of concerns have been raised about the adequacy of existing European legislation in relation to the goal of preserving a competitive Europe, especially with regard to increasingly topical issues such as the transition to a safer, low-carbon, sustainable and circular economy and of digital transformation, particularly of the energy industry. The importance of these issues led first to the "Berlin Declaration"[176], and later to the Franco-German Manifesto that was subsequently joined by other Member States - including Italy and Poland, with which an expanded Manifesto was created.[177]

The Franco-German Manifesto called for (I) a re-examination of the final considerations arrived at as a result of a debate, which has never really been concluded, concerning merger control procedures and the limits resulting therefrom for the growth of European companies; as well as (II) careful consideration of the distorting effects caused to the European market, and to the competitive conditions therein, by the presence of companies controlled by third States benefiting from significant subsidies.[178]

According to the signatories Member States of the Franco-German Manifesto, both an extra-EU and intra-EU perspective should be adopted when reviewing these rules. The European Union's long-term goal of maintaining a high level of global competitiveness should result in greater flexibility on the part of the European Commission, especially in the assessment of relevant markets in merger control procedures, in order to take a long-term competitive view.[179] Indeed, this process would finally allow "European champions"[180] to emerge and be promoted.

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[176] See "Berlin Declaration on Digital Society and Value-based Digital Government | Shaping Europe's digital future", Digital-strategy.ec.europa.eu. Available at the link: https://digital-strategy.ec.europa.eu/en/news/berlin-declaration-digital-society-and-value-based-digital-government

[177] See Cosimo Marcantuono, *Il golden power ed il Foreign Direct Investment in Italia ed Europa,* 93 (2022).

[178] *Ibidem.*

[179] *Ibidem.*

[180] The definition of "national champions" or "European champions" is controversial, and no single interpretation can decisively resolve doubts about the correct meaning of this terminology. Currently, these

The central topic of debate, according to the States sponsoring the Manifesto, was the need to balance competition law with public interests. In addition, the Franco-German Manifesto States emphasized: "We will succeed only if we are able to defend our technologies, our companies and our market". With this statement, France and Germany suggest the necessity of a united European response so that foreign direct investment in Europe does not cause harm either economically or politically. The European Commission, in the face of Member States' demands and concerns, recognized that the ownership-neutral approach in Article 345 TFEU, whereby treaties do not preclude the nationalization of companies or their privatization[181], may render merger control ineffective in the face of the challenges created by State owned companies.[182]

Member States therefore exhorted EU policymakers to address the "challenges raised by competitive foreign industries that are supported through instruments that are not in conformity with obligations under international law or applicable principles of the EU internal market, including EU competition law, and to find an appropriate and balanced response".[183]

In addition to the Screening Regulation and intimately related to it, the other regulatory interventions that can be said to have followed the line drawn by the Franco-German Manifesto are: (I) the final proposal for a Regulation on foreign subsidies distorting the internal market, and (II) the implementations of the cybersecurity

terms are commonly used to refer to large companies capable of establishing themselves and emerging globally, consequently representing important economic opportunities for the member state in which they are established, resulting in a public interest for that state in the economic activity pursued by such champions.

181 See Thomas Papadopoulos, *Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion after Commission v. Greece*, European Company and Financial Law Review1, 235 (2015). In particular, the author points out that although Article 345 TFEU does not call into question the right of member states to establish a system for the acquisition of real estate, such a system remains subject to the fundamental rules of EU law, including those of non-discrimination, freedom of establishment and free movement of capital. See also Daniele Gallo, *The question of the compatibility of golden powers in Italy today with EU law: the case of banks,* Journal of Market Regulation, 26 (2021).

182 See Cosimo Marcantuono, *Il golden power ed il Foreign Direct Investment in Italia ed Europa,* 96 (2022). See also Communication from the Commission, *EU-China - A Strategic Perspective*, JOIN(2019) 5 final. In particular, the Commission points out that "EU merger control rules do not allow the Commission to take action against the acquisition of a European firm solely because the acquirer has benefited from foreign subsidies. Trade defense instruments apply to subsidies that affect the price of products imported into the EU, but these instruments do not cover all possible effects of unfair subsidies and support provided by third countries".

183 See Berlin Declaration on Digital Society and Value-based Digital Government.

framework, up to the so-called. Cybersecurity Act.[184]

2. A gap that needed to be filled: the Foreign Subsidies Regulation

Subsidies have always been at the forefront in the European debate because of their capacity to distort competition and the internal market. It is therefore not surprising that Member States' concerns have resurfaced loudly in the wake of the failure of the CAI negotiations with China to address this issue, leading to a new attempt to address the problematic and establish a "global level playing field".[185]

Despite the advent of the Screening Regulation, the European system was not perceived adequate to provide a coordinated response to address market distortions.[186] There are two main reasons for this. First, although the Screening Regulation allows access to information on the source of the foreign investor's finances[187] and takes into account public funding when assessing a possible threat to public order or security, this does not imply the implementation of a screening system for Member States; therefore, many subsidies could avoid the current system. Moreover, the concepts of security or public order cannot be blended with reciprocity and a level playing field in FDI.[188] Second, based on EU merger control rules, "even if it were verified that a company had received subsidies capable of distorting the internal market granted by third Countries,

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[184] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022).

[185] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022).See Commission Communication T*rade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final.

[186] See Nuno Cunha Rodrigues, *Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU*, 197-227 (2021), according to which " the FDI-screening Regulation is insufficient in order to create a level playing field between EU and non-EU companies when dealing with foreign subsidies". See also MODRALL, *Anti-Subsidy' Regulation – A New Big Stick in the EU Regulatory Arsenal*, Kluwer Competition Law Blog, (2021). Available at the link: http://competitionlawblog.kluwercompetitionlaw.com/2021/05/06/anti-subsidy-regulation-a-new-big-stick-in- the-eu-regulatory-arsenal/. According to the author: " The Commission's trade defense rules offer no protection when non-EU subsidies distort investment decisions, market operations [...]".

[187] See Article 9(2) and Recital 23 of the Screening Regulation.

[188] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022). See also Nuno Cunha Rodrigues, *Extraterritoriality of EU Economic Law: The Application of EU Economic Law Outside the Territory of the EU*, 197-227 (2021). The author states that "it is undeniable that the FDI screening regulation is insufficient in creating a level playing field between EU and non-EU companies when it comes to foreign subsidies".

this might still not be sufficient to trigger intervention".[189]

"The need to "fill gaps in EU law in order to address with completeness the distorting effects in the single market induced by foreign Country ownership and foreign financing through State aid"[190] led to the proposal to "add a pillar to EU competition law in order to equip the Commission with appropriate investigative tools in the event that a company is deemed to engage in 'distortive' behavior due to public subsidies".[191] Following up on the White Paper on foreign subsidies[192] and responding to requests made first by Member States and then by the European Parliament and the European Council, the Commission proposed a regulation to control foreign subsidies that distort the internal market. The draft aimed to strike a balance between, on the one hand, maintaining an open market that can benefit from the positive effects of openness to foreign investment and, on the other hand, unfair practices that are stimulated by foreign subsidies".[193]

The Commission has often been labelled as rigid when imposing state aid policies on European companies[194], creating competitive obstacles for them in comparison with companies located in third Countries where different and generally less rigid limits apply.[195] The issue is not new, and in fact began to be considered by the Commission as early as 1997, first with reference to state aid for maritime transport[196], "providing for the possibility of financing to equilibrate the incentives available to third country

[189] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022). See also Carpi Badia Josep M., *EU Merger Control in a Globalized Economy*, 6 Competition Law & Policy Debate 1, 1–26 (2020).
[190] See European Council, The Conclusions, Bruxelles, 21-22 March 2019, EUCO 1/19. Available at the link: http://documenti.camera.it/leg18/dossier/pdf/AS010.pdf
[191] See European Parliament, Annual relation on the competition policy – 2019, 2019/2131(INI). Available at the link: https://www.europarl.europa.eu/doceo/document/A-9-2020-0022_IT.html.
[192] See Commission, WHITE BOOK - concerning the introduction of a level playing field in foreign subsidies. In particular, "EU state aid rules help to preserve a level playing field in the internal market [...] However, there are no similar rules for the subsidies that non-EU authorities grant to companies operating in the internal market".
[193]See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law,* 42 (2022). See also R. Magliano, *La ricerca di equilibrio tra investimenti esteri diretti e interventi emergenziali a tutela dell'interesse strategico nazionale: una sfida per l'Unione Europea*, Rivista del commercio internazionale, 1057 (2021)..
[194] See Alexis, *Foreign subsidy controls: The new European Commission proposal*, Concurrences-Review (11/2021). Available at the link: https://www.concurrences.com/en/review/issues/no-4-2021/pratiques/foreign-subsidy-controls-the-new-european-commission-proposal
[195] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022)
[196] See Official Journal of European Communities OF 5 July 1997, C 205.

competitors, and then in light of various sectoral interventions with the creation of countervailing duties".[197]

With the adoption of Regulation (EU) 2022/2560 on Foreign Subsidies ("FSR" or "Subsidies Regulation") based on Articles 114 and 207 TFEU[198], the Commission therefore sought to remedy the inadequacy of the measures implemented to date by attempting to regulate three specific cases: (I) subsidies that facilitate mergers, (II) subsidies that allow distortions of public tenders by facilitating the submission of bids that inhibit all competition, and (III) other cases of subsidies.[199]

The scope of the FSR is limited to "enterprises "[200] that are active in the EU, without any requirement regarding their establishment.[201] Thus, the application of the Regulation is possible for all enterprises that carry out economic activities in the European market and benefit directly or indirectly from foreign subsidies. Thus, it covers all service, manufacturing, financial, and transportation infrastructure activities, such as ports or airports. Since the only requirement is the economic nature of the activity carried out, it is possible to conclude that public entities in third Countries that promote exports or deal with commercial policy also fall under the considered definition.[202]

An enterprise receiving a subsidy (in any form), which decides to leave a Member State and relocate to a third Country, falls within the scope of the FSR. Subsidies aimed at the relocation of European companies, although not explicitly mentioned in the text of

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[197] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022). See also EU Regulation 2016/1035 for shipbuilding and EU Regulation 2019/712 for transport.
[198] They refer respectively to harmonization for the internal market the former and to the commercial policy common the second.
[199] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022). See also Commission Staff Working Document, *Impact Assessment - Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal marke*t, SWD (2021) 99 final.
[200] See Luja, *The Foreign Subsidies Regulation: Countering State Aid Beyond the European Union*, 20 European State Aid Law Quarterly 2, 187–99 (2021). The author states: "To avoid any misunderstanding, the definition of 'undertaking' is in no way limited to undertakings established in or controlled by (parent companies in) the granting state [...] government-owned companies and sovereign wealth funds might see their special treatment at home questioned under these new rules when they themselves or their subsidiaries become active in EU".
[201] See Article 2 of the FSR.
[202] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022).

the FSR, are considered in the Commission staff working paper.[203] However, the concepts of "third Country" and "relocation" are not specifically defined in the Subsidies Regulation. The latter provides for an assessment of state aid through a four-step process: (I) identification of the subsidy, (II) identification of distortions to the single market, (III) identification of positive effects and balancing test, and (IV) identification of remedial measures or commitments.[204]

2.1 Key provisions of the Foreign Subsidies Regulation

"A foreign subsidy requires the transfer of resources[205] from a third Country or its public entities, which can take many forms: capital injections, loans, guarantees, waiver of tax revenues otherwise due, and even the provision of goods and services.[206] The subsidy must be attributable[207] to the State, and in this regard, the FSR provides that the State's role in the economy and its legal and economic nature may be taken into account. This provision is decisive for the attributability of subsidies in cases where a State that systematically plays a decisive economic role is involved". [208]

The next step is to define the benefit derived from the subsidy[209], which will be

[203] See Commission Staff Working Document, *Impact Assessment - Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market*, SWD/2021/99 final.

[204]See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 42 (2022).

[205] See Official Journal European Union. Commission Notice on the notion of state aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union. 2016/C 262/01.

[206] See Article 3(2) of the FSR. See also Luja, *The Foreign Subsidies Regulation*, 187. According to the author, "the supply of goods and services or purchase" referred to in Article 2 (2) should be understood as "transactions or volumes that would not normally take place under the above conditions between third parties (because of value, price, terms or dedicated supply)".

[207] See the parameter used in the CJEU decision, *France v. Commission (Stardust)* of 16 May 2002, C-482/99. In particular: "it is settled case-law that it is not in all cases necessary to show that there has been a transfer of state resources in order for the advantage granted to one or more undertakings to be regarded as state aid within the meaning of Article 87(1) EC," and that "Article 87(1) EC covers all pecuniary instruments which the public authorities may actually use to support undertakings, whether or not those instruments belong permanently to the State's assets".

[208] See Cosimo Marcantuono, For*eign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law*, 45 (2022).

[209] See Robins and De Valois Turk, *Third country, second thoughts? The EU's foreign subsidies regulation*, 125 (Oxera 2021). Available at the link: https://www.oxera.com/insights/agenda/articles/third-country-second-thoughts-the-eus-foreign-subsidies- regulation/. "It is plausible that the same methods available for determining compliance with the so-called market economy operator principle (MEOP) in state aid cases could also be used to assess the existence of a 'benefit' in the context of foreign subsidies." On the MEOP

deemed to exist by the Commission on the basis of the test on whether it can be said that a private investor of similar size and operating under normal market conditions would have made the same investment in favor of the recipient of the subsidy.[210] The underlying rationale is that if the intervention of the public authority granting the subsidy took place under normal market conditions, there would be no benefit relevant for the purposes of the Subsidies Regulation and the protection of competition in the internal market.[211]

The FSR then bases its analysis of the presence of the distorting effect caused by the subsidy on two criteria: (I) the improvement of the competitive position of the subsidy recipient and (II) the distortion of competition in the single market.

With regard to the first criterion, the improvement of the recipient's position can be identified in any alleviation of burdens normally imposed on the enterprise's budget, which is reflected in an improvement of its position in relation to that of its competitors.[212] The distortion of competition in the single market, on the other hand, is examined by Article 4 of the Subsidies Regulation through the provision of a set of indicators that take into account the amount of the subsidy, its nature, the situation of the enterprise and the relevant market, and the economic activity of the enterprise concerned in the internal market. Article 4(2) of the FSR then provides for an exception, under which foreign subsidies are presumed not to cause significant distortions of the domestic market if their amount does not exceed €4 million in three fiscal years.[213]

It is also important to note that Article 5, in considering subsidies to facilitate or enable a merger or bid, does not require proof that it was intended for a specific transaction. In this way, the FSR also allows for "borderline cases" to be considered in the spectrum of application, such as a long-lasting subsidy granted without a predetermined specific purpose but which later proves to be useful for the purposes of, for example, submitting a competitive bid. Finally, although FSR provides for a central

test and its "benchmarking and profitability methods" see Von Phedon, *Market Economy Operator Test*, (Lexxion 2020). Available at the link: https://www.lexxion.eu/stateaidpost/market-economy-operator-test/
[210] See Official Journal of the European Union, "Communication from the Commission on the concept of state aid covered by Article 107(1) of the Treaty on the Functioning of the European Union", 2016/C 262/01.
[211] See *supra* at 208.
[212] *Ibidem*
[213] *Ibidem.*

role for the Commission[214] in identifying the subsidy and its effects through specific procedures and parameters, spacing from the origin and effective destination of the subsidy to the market position of the recipient firm, it also provides for cases in which under certain circumstances there will be no need to conduct a detailed investigation. This is because certain categories of subsidies are considered “very likely” to be distortive, particularly such an eventuality occurs if the subsidy allows the firm to bid unduly advantageously or directly facilitates a transaction.[215]

As the third step in the subsidy examination process, the assessment of the consequences of the agreement will be decisive in determining whether remedies or conditions should be imposed. Article 6 of the Subsidies Regulation refers to the possible positive effects on economic development and distortion of the single market, with the implication that if the Commission finds that the negative effects of the distortion of the internal market outweigh the positive effects, the company will be subject to the imposition of remedies.[216]

However, it should be pointed out that relevant state aid is only that which is classified as compatible with Article 107 TFEU. To this end, the same legislation sets two conditions whose fulfillment will need to be verified: (I) the subsidy must promote the development of certain economic areas or activities and (II) it must not counteract the common interest by adversely affecting trading conditions.[217] Verification of the first criterion is the one that will generally prove complex due to the circumstance that third Countries, when granting subsidies, tend to pursue trade policy objectives rather than true economic development objectives in Member States.[218]

2.2 The role of the Commission and its investigation powers

The objective of the Subsidies Regulation with regard to foreign subsidies is thus

[214] See supra at 64.
[215] See *supra* at 208. See Jason Schulz and Forwood, *The European Commission adopts far-reaching proposals to control foreign subsidies*, White & Case LLP, (2021). Available at the link: https://www.whitecase.com/publications/alert/european-commission-adopts-far-reaching-proposals-control- foreign-subsidies#
[216] See *supra* at 66.
[217] See CGUE, *Republic of Austria v. European Commission* of 22 September 2020, C-594/18.
[218] See *supra* at 208.

to solve the actual or potential distortion they cause[219], adopting a view aimed solely at restoring competition in the market and without reference to potential compensation for European firms that may have been harmed. The FSR requires the Commission to address potential and actual distortions of the internal market, with the ability to impose wide-ranging remedies. In fact, the Commission can impose both structural and behavioral remedies, while the beneficiary of the relevant subsidy may offer to assume certain obligations as a remedy for the injury caused, which may even include repayment of the subsidy received.[220]

In the case of a merger facilitated by a subsidy, on the other hand, the Subsidies Regulation provides for an *ex ante* notification requirement “if the firm exceeds certain parameters relating to aggregate turnover and aggregate financial contribution, but there is no reference to aggregate turnover”.[221] This last aspect is instead considered in Article 1 Council Regulation (EC) No. 139/2004 (the “Merger Regulation” or “ECMR”) with which it seems that the regulation under analysis intends to align, especially considering that this alignment is instead total for the procedural deadlines provided. In the case of non-compliance with the prior notification obligation, the Commission may sanction the company concerned up to 10 percent of its turnover, which could even apply to all parties involved in the merger, as they are all subject to this obligation.[222]

The Commission is placed at the center of the implementation of the legislation under analysis, both procedurally and substantively. For the procedural side, the FSR impose three stes of review[223]: “(I) *ex officio*, in which case it is the Commission, on its own initiative, that decides to review foreign subsidies that it deems potentially capable of distorting the market; (II) initiation of review following one of the notifications that the FSR provide as mandatory in a number of cases, including when there are subsidies granted with a view to a merger; and (III) review in the case of foreign subsidies potentially capable of influencing the award of a public procurement contract”.[224]

[219] See Article 6 of the FSR.
[220]See *supra* at 208.
[221] See *supra* at 208.
[222] *Ibidem.*
[223] See chapter 2,3 and 4 of the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM/2021/223 final.
[224] See *supra* at 208.

The Commission has thus become the holder of various investigative powers prepared to grant it power of access to all information it deems relevant to the assessment of the case. It can require the company concerned to provide information it deems necessary for the assessment, as well as impose sanctions for non-cooperation or incorrect information. The Commission can also request information on the transaction if there is a mere suspicion about the existence of a subsidy in the three years preceding the merger, even if the thresholds provided for in the regulation are not met.[225]

The powers thus far described can be exercised with respect to firms established in one of the Member States or in non-Member States. However, given the possible difficulties the Commission may face in obtaining such information, Article 14 provides that the Commission may make decisions on the basis of the only information available, even if only partial. On the basis of such limited information, the Commission may also be led to believe that failure to cooperate in providing the requested information is an indication that the enterprise concerned has received a financial contribution that confers a material advantage.[226]

Inspection powers may be exercised with respect to enterprises established in Europe, and in such a case it will be possible to request the assistance of Member States in carrying out the necessary tasks for this purpose.[227] In the case, on the other hand, of the need to conduct inspections in enterprises established outside the EU, these will be possible only with the consent of the enterprise concerned and the third Country, which must be informed for this purpose.

2.3 The coordination with the Screening Regulation

At this point, it is legitimate to ask ourselves to what extent the Screening Regulation and the Subsidies Regulation manage to coexist. In essence, it is interesting to understand what are the joint effects of these two sets of controls on foreign investment

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[225] See Modrali, *The EU Anti-Subsidy Regulation - Implications for M&A*, Kluwer Competition Law Blog, (2021). Available at the link: http://competitionlawblog.kluwercompetitionlaw.com/2021/11/16/the-eu-anti- subsidy-regulation-implications-for-ma/. According to Modrali this leeway "may be inspired by the Commission's controversial decision to accept (and even encourage) referrals by Member States of transactions below EUMR thresholds, regardless of whether the transaction in question meets Member States' review thresholds".

[226] See *supra* at 208.

[227] See Article 13 of the FSR.

in the EU.

The procedural insights that can be extrapolated from the analysis of the two regulatory systems suggest that the two regimes are indeed intended to coexist[228]. It can be also pointed out that both sets of rules will inevitably be perceived as protectionist by non-EU Member States. Potential acquirers of companies in the EU/participants in tenders in the EU will at the very least face delays and potentially remedies, e.g., for tax breaks granted in let's say Seoul that are in no way intended to have any effect in Europe. Moreover, both sets of rules undermine at least the spirit and probably the substance of the WTO. It could be argued that the EU could have chosen to strengthen the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement")[229]. However, it did not. Under the SCM Agreement, the Union has the ability to initiate interstate dispute settlement proceedings against certain foreign subsidies granted by WTO members and limited to goods. Article 44(9) of the FSR states that "this Regulation shall not prevent the Union from exercising its rights or fulfilling its obligations under international agreements. No investigation shall be conducted under this Regulation and no measures shall be imposed or maintained where such investigations or measures would be contrary to the Union's obligations under any relevant international agreement to which it is a party. In particular, no measures shall be taken under this Regulation that amount to specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures, granted by a third Country member of the World Trade Organization". However, the plain truth is that, together with the recent wave of sanctions against Russia, the proliferation of rules under which regulators in Europe unilaterally control activities around the world, instead of relying on the weak WTO system, does not bode well for the cause of multilateral trade rules. Another relevant procedural aspect is that both rules raise interesting applications at the level of domestic courts. One may wonder if it possible to challenge the validity of a transaction before a civil court because it has not been notified to the European

[228]Recital 3 of the FSR explicitly states that "This Regulation applies to all economic sectors, including those of strategic interest to the Union and critical infrastructure, such as those mentioned in Article 4(1)(a) of Regulation (EU) 2019/452 of the European Parliament and of the Council".
[229] "The WTO Agreement on Subsidies and Countervailing Measures regulates the provisions of subsidies and provides rules for countervailing measures to offset the injury caused by subsidized imports. A Member of the WTO can impose countervailing measures provided it can show that there are subsidized imports, an injury to a domestic industry and a link between the subsidized import and the injury".

Commission in application of the FSR. The FSR does not have a provision curtailing the powers of the Member States similar to Article 21 ECMR. It should be recalled that EU Regulations have direct effect. Similarly, in the AEGON case, the European Commission invoked Article 21 EUMR to oppose to an attempt by Hungary to unduly prohibit a transaction in application of its FDI rules. An open point arises as to whether the application of the FSR to an M&A transaction will also curtail the powers of the Member States to intervene against the same transaction pursuant to national FDI screens.

Finally, one cannot but wonder whether the elements of “national security” and “public order” will play a role also in the FSR review as well as they play one within the FDI Screening Regulation.

It is possible to say that the intermingling of the issue of subsidies and national security is certainly not overlooked in EU law. The FSR is an EU regulation and an act of EU secondary law and, like any act of secondary law, must be interpreted in accordance with the EU Treaties. For instance, there are merger control cases in which the Commission has taken into account considerations other than competition in its review[230]. National security and public order could thus play a similar role in the interpretation of the FSR.

Article 52.3(c) of the FSR appears to view subsidies to strategic industries and critical infrastructure as particularly sensitive to the internal market. Indeed, under this provision, the Commission is authorized to establish “specific thresholds for notifications for certain economic sectors or differentiated thresholds for different types of public procurement contracts, especially where the practice of the Commission enables the identification of economic activities where foreign subsidies are more likely to distort the internal market, including as regards strategic sectors and critical infrastructure.” Hence, by attempting to interpret this provision broadly (implying that subsidies to strategic sectors and critical infrastructure are problematic for the internal market), the text of FSR itself could open the door for FDI considerations in the FSR review.

As noted above, FSR fills a potential gap left by FDI screening. In fact, the use of foreign subsidies in transactions is rarely a triggering event for FDI review. It may play a

[230] See *Universal v. EMI* of 12 December 2007, Case C-412/06 and, more generally for the Treaty in the merger context see *Société Génerale des Grandes Sources and others v. Commission* of 27 April 1995, Case T-96/92 and *Association belge des consommateurs test-achats v. Commission* of 12 October 2011, Case T-224/10.

role in the substantive assessment of FDI, but foreign subsidies *per se* rarely lead to a filing (exceptions are cases where the subsidy confers control on the State).

The new FSR could thus allow the Commission to examine these types of transactions. However, some international law arguments seem to lean toward retaining the FSR as an instrument focused only on competition and a level playing field. One such reason might be the EU's obligations under WTO law. Another reason is the particular constitutional architecture of the EU. According to Article 4(2) of the TEU: "[The EU] shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

In conclusion, the review that the Commission may conduct with regard to subsidies has obvious points of contact with that conducted with regard to FDI: it can essentially give rise to an authorization, a conditional authorization or a prohibition. However, more importantly, in accordance with Article 1(2) FSR, it applies to "foreign subsidies granted to an undertaking, including a public undertaking which is directly or indirectly controlled by the State." This kind of investor might fall under the national FDI regimes. This implies, in the worst scenario, a transaction might be reviewed under the FDI and FSR regimes due to the same reason but leading to different, maybe even contradictory, outcomes. Therefore, in this case, concerns for national security might not coincide with concerns regarding the distortion of the internal market and this might lead to remedies complicated to reconcile.

In essence, while the Commission is attempting to achieve a level playing field for companies receiving subsidies from the EU and third Countries, it remains to be seen how it will be implemented in practice. Building on what has been learned in the context of FDI screening, it will be interesting to see the practical implications of implementing the FSR. While the level playing field effects are the only yardstick, it is the subsidy itself and its economic impact that must be evaluated, while it should not matter whether the subsidy is granted by an allied Country or a strategic rival Country. In contrast, the nationality of the investor is crucial for FDI screening.

From a legislative perspective, the FSR applies to all foreign investments from third Countries without distinguishing between residence or nationality of the investor. However, the regulation is part of a trend toward protectionist and politicized investment control, and it is reasonable to expect that subsidized firms from certain jurisdictions (e.g., China) will by definition be considered more problematic than others.

3. The new frontier of 5G: toward a fourth industrial revolution

Over the past few years, some choices adopted by European Institutions have been dictated by recent technological progress. For this reason, in order to be able to appreciate the latest regulatory updates on the protection of strategic interests, it is necessary briefly describe the main transformations in technology that have conditioned them.

The main event is undoubtedly the development of 5G technology, *i.e.* the fifth generation of wireless networks. Whether a given network qualifies as a fifth-generation network depends on compliance with certain standards codified by international standardization bodies, including, for example, the International Telecommunications Organization[231].

In particular, the goals of fifth-generation networks are aimed at creating a reliable network with low latency, *i.e.* the time lag between sending and receiving information or data, that can ensure greater efficiency not only in face-to-face communications between people but also in interactions between machines, *i.e.* smart objects[232] and, in general, in the management of data traffic that currently exists[233]; in this way, the 5G system will form the foundation of various artificial intelligence applications.

In light of this, it should be emphasized that in the future, 5G networks will form the backbone of the economic and social systems of different European Countries: the maintenance and management of vital economic and social services such as energy,

[231] The International Telecomunication Orgamization is a specilised UN Agency that deals with issues related to communication and information technologies.
[232] See below the "Internet of things" definition.
[233] To better understand the scope of the service under consideration, it is useful to recall the definition of fifth-generation mobile network given in Commission Recommendation (EU) 2019/534 of 26 March 2019, according to which it incorporates "a set of all relevant network infrastructure elements for mobile and wireless communications technologies used for connectivity and value-added services with advanced performance characteristics, such as very high data capacities and data rates, low-latency communications, ultra-high reliability, or the ability to support a large number of connected devices. This set may include traditional network elements based on previous generations of mobile and wireless communications technologies, such as 4G or 3G. 5G networks should be understood to include all relevant parts of the network".

transportation, banking or health services will depend on it; even the organization of democratic processes, such as elections, will increasingly rely on digital infrastructure and 5G networks. Given this relationship of "dependence" of essential services on new digital infrastructures, the consequences of systemic intrusions or malfunctions would cause serious damage to the single market with inevitable repercussions on local civil society. For these reasons, it becomes a matter of strategic importance to ensure the cybersecurity of fifth-generation networks, especially in a time in history where cyber-attacks are more sophisticated than ever.

5G can be considered, therefore, in the same way as a foreign direct investment operating in strategic sectors, and as such will be analyzed in light of the regulatory framework for foreign investment screening.

Given the characteristics of 5G service, the European Union has moved by urging Member States to prepare their domestic systems to host, and more importantly regulate and monitor, the latest generation digital infrastructure awaiting effective and homogeneous deployment.

"Moreover, 5G is described as what will inaugurate in the fourth industrial revolution, accelerating digital transformation through new technologies and standards in telecommunications that will enable the achievement of a new concept of the Internet of Things ("IoT"). IoT has been defined by the European Agency for Cyber Security ("ENISA") as "a cyber-physical ecosystem of interconnected sensors and actuators, enabling intelligent decision-making"[234], the innovativeness of which poses numerous challenges for the risks associated with IoT devices, systems and services, with decisive impact on the security, safety and privacy protection needs of citizens particularly due to "cyber threats." Applications of 5G technologies include data storage, processing and transfer. However, the interdependence of the systems they use makes a European framework necessary to regulate and secure these operations.[235]

The relevance of the protection needs delineated, as well as the creation of a system

[234] See the ENISA definition of IoT available at the link: https://www.enisa.europa.eu/topics/iot-and-smart-infrastructures/iot

[235] See Cosimo Marcantuono, *Il golden power ed il Foreign Direct Investment in Italia ed Europa,* 111 (2022). See Commission Communication, *A New Industrial Strategy for Europe*. The Commission stresses that "Europe's digital transformation, security and future technological sovereignty depend on our strategic digital infrastructure".

that will allows the European Union to be ready for the new fifth-generation technology and the innovations to which it will lead, especially in order to be able to remain competitive with the "Chinese and American champions" who have already built a robust foundation to face these technologies, have led to various interventions at the European level over the years.[236] The European legislature gradually created a legal framework to improve cybersecurity by adopting the Network and Information Security Directive No. 2016/1148 and the Cybersecurity Regulation (EU) No. 2019/881. Within the framework thus outlined, ENISA is becoming increasingly central, serving the Commission and Member States. The safeguard of critical information infrastructure, stressed in the Franco-German Manifesto, is becoming crucial for the European Union, especially for the economic and political future, given the large number of opportunities and potential dangers that new technologies pose.[237] The goal being pursued at the European level is to increase Europe's cybersecurity competitiveness, especially in light of the cyber-attacks that have showed several deficiencies in the existing framework.[238]

The term "cybersecurity" refers in a narrow sense to the set of measures to protect against cyber-attacks; in a broad sense it also refers to protection from physical risks to the components of a computer system. The definition of the International Telecommunication Union (ITU) is one of the most used[239], and this defines as general

[236] See Kan, *Huawei's bid to accelerate Europe's digitalisation*, euronews.next (2019). Available at the link: https://www.euronews.com/next/2019/11/08/huawei-s-bid-to-accelerate-europe-s-digitalisation. On the issue of the protection of strategic interests related to new technologies, see also Gianluca Scarchillo, *Golden Powers and Strategic Sectors in the European Perspective: The Huawei Case. An Initial Commentary on Regulation (EU) 2019/452 on the Control of Foreign Direct Investment*, Journal of International Trade, 569 (2020). The author points out that the fears underlying the progression of Chinese champions (in the development of 5G technology on European soil) are due to the "particular regime of public presence in the regulation of Chinese companies, which is particularly intrusive [...] with significant and obvious interconnections between politics and private companies."

[237] See Cezary Banasiński and Marcin Rojszczak, *Cybersecurity of consumer products against the background of the EU model of cyberspace protection*, Journal of Cybersecurity 7.1 (2021): tyab011.

[238] See Cosimo Marcantuono, *Il golden power ed il Foreign Direct Investment in Italia ed Europa*, 111 (2022). See also Parliament's questions and answers available at https://www.europarl.europa.eu/doceo/document/E-8-2018-001005_EN.html?redirect . Specifically reported is "the Council expressed the EU's serious concern about the increased ability and willingness of third states and non-state actors to pursue their objectives by engaging in malicious cyber activities and stated that the EU will continue to strengthen its capabilities to address cyber threats".

[239] See the ITU's definition of cybersecurity as: "tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance, and technologies that can be used to protect the organization's and user's cyber environment and assets [...]". Available at https://www.itu.int/en//ITU-T/studygroups/2013-2016/17/Pages/cybersecurity.aspx .

security objectives the availability, integrity and confidentiality of data.[240]

The term "vulnerability" generally refers to the set of shortcomings in a system that causally expose it to manipulation by unauthorized entities[241]. Vulnerabilities can result in the gain of great power, conducting through malware to the establishment of espionage systems or cyber weapons. Information security therefore is in the hands of institutions and their capacity to detect and correct such vulnerabilities".[242]

3.1 The NIS Directive

In 2016, the European Commission published the "5G Action Plan", which defines a plan for investment in 5G infrastructure in the EU.[243] This plan is aimed at supporting the development and adoption of next-generation networks, especially with regard to cell deployment, investment incentives, and the timely availability of the radio spectrum needed for concrete applications of the network itself. In particular, in order to realize a low-latency network system such as is needed for 5G, coordinated administrative action is needed at the national and European levels to increase the number of operational network repeaters in the various national territories.

Therefore, the Directive (EU) 2022/2555 ("NIS2")[244] on "measures for a high common level of cybersecurity across the Union" was approved which repealed Directive (EU) 2016/1148 ('NIS"). It aims at revolutionizing the European position on

[240] See *supra* at 227.

[241] See Steven Bellovin, *Lawful Hacking: Using Existing Vulnerabilities for Wiretapping on the Internet*, 12 Northwestern Journal of Technology and Intellectual Property 1, 1-66 (2013).

[242] See Cosimo Marcantuono, Foreign Direct Investment and Competition Policy after the Franco-German Manifesto. Embedding Political Dissent in Law, 27 (2022).On this point refer also to Jason Andress, *The Basics of Information Security: Understanding the Fundamentals of InfoSec in Theory and Preceptice*. The author emphasizes how it is of great importance to recognize that the conceptualization of national security is by its nature constantly evolving and open-ended and has in recent times come to encompass information security, which in principle concerns the protection of data confidentiality, integrity and availability.

[243] See Commission, *Shaping Europe's digital future – 5G Action plan*. Available at the link: https://digital-strategy.ec.europa.eu/en/policies/5g-action plan#:~:text=The%20Commission%20launched%20a%20plan,5G%20infrastructure%20in%20the%20EU

[244] See Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive), *OJ L 333, 27.12.2022, p. 80–152.*

cybersecurity and require Member States to implement adequate security systems. The NIS2 Directive renovates the old framework (I) establishing security and notification standards for utility operators, (II) requiring Member States to designate specialized compliance authorities, (III) creating cybersecurity recovery teams to be activated in the event of a cyber-attack, and (IV) requiring Member States to establish a Computer Security Incident Response Team ("CSIRT").[245]

This Directive's target is to implement an actual European regime to simplify cooperation among Member States, a goal similar to that which led to the Screening Regulation.[246]

In fact, it can be said that the European strategy for the protection of critical digital infrastructures has two levels: on the one hand, protection from FDI in particular when driven by political aims and directed at gaining control of infrastructures on the basis of which the new technology operates, and on the other hand, the establishment of mechanisms for monitoring and certifying products available on the market according to their level of cybersecurity. This is well illustrated in the Commission's Recommendation (EU) 2019/534, in which the two objectives of (I) the security and operation of infrastructure and (II) the problem of the origin of infrastructure and the preservation of European sovereignty are addressed in Recitals 3 and 6, respectively.[247]

In Europe, cybersecurity is considered highly linked to the exercise of internal market competencies, and this interpretation, already reflected in the NIS Directive, is broadened in the NIS2 . In the latter, Recital 5 takes center stage, emphasizing the lack of homogeneity of cybersecurity policies and how it menaces the integrity of the single market and weakens the position of consumers.[248]

The directive is intended for "Operators of Essential Services" ("OESs") and "Digital Service Providers" ("DSPs"), requesting them (I) to enforce technical and organizational remedies for the security of networks that embrace the risks to which they are exposed, as well as (II) to implement precautionary measures, appropriate for reducing the potential effect resulting from said risks by seeking to ensure a minimum

[245] See *supra* at 234.
[246] *Ibidem.*
[247] *Ibidem.*
[248] *Ibidem.*

continuity of service even in these scenarios.[249]

3.2 The Cybersecurity Act

“The European framework so far described has been criticized for achieving a lower level of harmonization than desirable, creating the possibility that an operator providing services in several Member States may qualify as an OES in some States but not in others, and that OES operating in several Member States may be subject to different rules.[250]

Another critique advanced by the doctrine, which is also reflected in the requirements highlighted by the Franco-German Manifesto, is the failure to consider in Annex II of the NIS Directive sectors such as robotics, artificial intelligence, and other critical infrastructure. Given the presence of these gaps for the purposes of comprehensive regulation as a concrete response to the critical issues outlined above, the next move in reching the security requirements considered necessary for new technological sectors was the enactment of the European Electronic Communications Code (“EECC”), contained in Directive 2018/1972.[251]

The EECC recasts to the four previous directives[252] and aims to establish a harmonized framework for regulating public electronic communication networks (“ECNs”) and public electronic communication services (“ECSs”).[253] Specifically, this directive requires Member States to ensure that ECSs and ECNs offering public services take technical and organizational measures to manage and minimize the risks associated with the networks and services they offer, seeking to minimize risks to users.[254] Moreover, in this area, it is possible to find a further important role given to ENISA, as well as the premises for the creation of a common framework resulting from the provision of (I) the possibility for the Commission, taking into account the opinion of ENISA, to

[249] *Ibidem.*
[250]See *supra* at 234. See Bracken, *NIS Directive: European Commission reports on inconsistencies and considers changes*, Flash publication by Cullen International, (2019). See also European Cyber Security Organisation, “Position Paper- The NIS Directive Review” ecs-org.eu, 2020. Available at the link: https://ecs- org.eu/documents/publications/5fd24425bc74c.pdf
[251] See *supra* at 234.
[252] See Recital (1) of the EECC Directive.
[253] See Article 1 of the EECC Directive.
[254] See Article 40 of the EECC Directive.

adopt implementing acts with reference to the measures described[255]; (II) provision that the technical and organizational standards "shall be based as far as possible on European and international standards," without prejudice to the possibility for Member States to establish additional requirements[256]; and (III) entrusting the Commission with enforcement powers to resolve cross-border interference between Member States and promote a coordinated approach. [257]The directive also provides for the evaluation of achieved safety standards and safety audits to be entrusted to specific competent authorities.[258]

It is in this scenario that an additional representative piece of the evolving European cybersecurity framework has most recently been inserted: the EU Regulation 2019/881 ("Cybersecurity Act"). The Cybersecurity Act sets out to create the basis for a single certification system for ICT products[259], streamlining cooperation structures and strengthening the position of ENISA[260], which is described in Article 4 as a center of expertise on cybersecurity. The regulation is divided into two parts: the first (up to Article 45) deals with the role of ENISA, while the second aims to create a European framework for cybersecurity certification of products and services.

ENISA is given a central role in the creation of the single certification scheme; in fact, at the request of the Commission, it will be asked to develop and submit a proposal for a single certification scheme, as well as a work program related to the latter. Such a scheme is of clear importance for the improvement of EU market conditions in order to create a secure digital single market and to engender a feeling of trust in market players and consumers active in the market towards European security standards and their compliance. In addition, ENISA collaborates with the Stakeholder Cybersecurity Certification Group[261], which is called upon to provide an opinion that, although not binding, will be taken into account by ENISA in the execution of its tasks.

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[255] *Ibidem*
[256] *Ibidem*
[257] See Recital (316) of the EECC Directive.
[258] See Article 41 of the EECC Directive.
[259] Which refers to any product that stores, retrieves, transmits, manipulates, or receives information electronically in digital form.
[260] See Recitals (16) and (17) of the Cybersecurity Act.
[261] Established for the purpose of assisting the Commission and ENISA in consultation with all stakeholders. See Recital 62 of the Cybersecurity Act.

Considering in more detail the European certification scheme that the Cybersecurity Act is intended to establish, the implementation of this scheme will follow a procedure that will start with ENISA, which will be called upon to create the framework of the certification system. The latter will then forward the results achieved to the stakeholders' cybersecurity certification groups. Finally, the Commission will decide which products and services should be certified. Suppliers and manufacturers of such products and services may voluntarily request to be subject to the certification system, which may also be mandated in specific cases by national laws or European regulations. Certification systems, once evaluated by the European Commission, will eventually replace the various national certification systems[262] and certificates issued through these will be recognized throughout the European Union.[263]

The importance of developing a single certification system to engender confidence in the end users of the system is also underscored by Article 1.1 (b) of the Cybersecurity Act, which highlights the general usefulness of the latter for the IoT, as well as for providing an answer to the problem of fragmentation of the internal market in this field, enabling the creation of a true single digital market. With this in mind, since the harmonization of testing methods leading to certifications is necessary for effective pursuit of the announced goals, Section 51 of the Cybersecurity Act sets out two possible types of security: "by design" and "by default".

Security by design means that security must be considered and taken into account during the initial product design phase. Security by default means that devices should have a predetermined security wall, such as an initial password, or that relevant parts should have default protected access.[264]

The Cybersecurity Act, in order to create a framework of sanctions that is applicable to the occurrence of cybercrimes that attack the European cybersecurity framework, sets specific legal criteria to consider the type of attack in the specific case as well as the perpetrators. The cyber-attacks considered are those " with significant effects that constitute an external threat to the Union or its Member States"[265], caused by

[262] See Article 57 of the Cybersecurity Act.
[263] See Article 49 of the Cybersecurity Act.
[264] See *supra* at 234.
[265] See Recital (2) of the Council Implementig Regulation (EU) 2020/1125 of 30 July 2020 implementing Regulation (EU) 2019/796 on restrictive measures against cyber-attacks that threaten the Union or its Member States.

“unauthorized actions involving access to or interference with information systems, interference with data or interception of data”[266]. Relevant offenses are thus those that (I) have not been duly authorized by the right holder or permitted by European or national law; and (II) are likely to cause a significant effect, such as, inter alia, the disruption of critical state functions, substantial economic loss, and causing harm at the same time to more than one Member State. While the definition lacks any reference to the relevance or otherwise of the voluntariness of the conduct engaged in, clear reference to intentionality can be found in the preamble to Council Decision 2019/797, which clarifies that the regulatory measures under analysis are to be applied to “cyber-attacks [. . .] willfully carried out”.[267]

Although it can be concluded from the analysis conducted that cybersecurity regulation is still in an embryonic state, with mechanisms for cooperation still too general to be appreciable, these regulations seem to lay the groundwork for what will be a system that will develop at the same time as the concrete and widespread advent of the fifth-generation mobile network.[268]

The voluntariness that permeates the possibility that the EU declaration of conformity will be issued - unless otherwise provided for by national and/or European law - surely functionally weakens the value and practical effect of these certificates and the system. Nevertheless, such considerations do not come unexpectedly, as it has been foreseen *a priori* that the single certification system will not be mandatory at least for an initial period. Following this first adaptation period planned by the European legislature until 31 December 2023, the Commission will have to publish an overall evaluation of the certification systems implemented up to that time and, based on this evaluation, draw up the list of products that will have to be certified in order to be placed on the market.[269]

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[266] See Summary of Decision (CFSP) 2019/797 and Regulation (EU) 2019/796, European Union Restrictive Measures Against Cyber Attacks. Available at the link: https://eur-lex.europa.eu/legal-content/en/LSU/?uri=CELEX:32019R0796

[267] See Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

[268] See Commission Communication, *A New Industrial Strategy for Europe*, COM(2020) 102 final. Specifically, “Europe’s digital transformation, security and future technological sovereignty depend on our strategic digital infrastructure. In addition to the Commission’s recent work on 5G and cybersecurity, the EU will develop a critical quantum communications infrastructure, intended to build a secure and certified ‘end-to-end’ infrastructure based on quantum key distribution over the next 10 years to protect key digital assets of the EU and its Member States”.

[269] There is no evaluation yet. See Cosimo Marcantuono, *Il golden power ed il Foreign Direct Investment in Italia ed Europa,* 93 (2022).

In conclusion, it has been seen how, since cybersecurity-relevant infrastructures can be the subject of FDI, the control of investments aimed at acquiring control or ownership of them becomes relevant. New European regulations adopted over the years to improve the level of protection and security have laid the foundation for the creation of an advanced cybersecurity system. The unpredictability of the concrete developments of an innovative technology such as 5G, as well as the unprecedented issues it may raise, justify a step-by-step approach that finds its origin in the creation of certification systems suitable for engendering a feeling of "trust" in the market, which then finds development in defined sanctions and the attribution of competencies, the implementation of which requires infrastructure development and know-how.[270] In fact, at the EU level, a quite robust regulatory cybersecurity framework has been developed. Accordingly, foreign investors in the EU area may benefit from several measures aimed at guaranteeing a safe cyber environment. On the other hand, a number of questions still need to be addressed at both international and EU level. Specifically, it remains to be seen whether the current EU cybersecurity regulatory framework provides Member States with enough support in order to respond to large scale cross-border cyber incident or crisis and, on the other hand, if the EU will also include cybersecurity aspects in international investment-related agreements". [271]

4. Prerogatives of National Sovereignty and FDI control: a jarring combination

As it could be seen from the analysis carried out in the previous chapters, the European Union is objectively at the mercy of a period marked by unprecedented global challenges that is part of an international landscape where rivalries and interdependencies between major powers are becoming increasingly unwieldy due to rapidly evolving trade and investment relations used for purposes with exclusively strategic implications. [272]

The only viable means of meeting these global challenges and ensuring the security

[270] See Cosimo Marcantuono, *Il golden power ed il Foreign Direct Investment in Italia ed Europa,* 142 (2022).
[271] See *supra* at 208. See also Federica Cristani, *Designing a governance system for cybersecurity of foreign investment in Europe*, Institute of International Relations Prague, 18 (2022).
[272] See *supra* chapter I section 5.

of the Union as well as individual Member States is the so-called "European strategic autonomy".[273] The concept of security is thus elevated to a general justification tool for the response offered by the Union to global economic upheavals.[274] In essence, as extensively pointed out in the preceding paragraphs, from a diminution of State power to the benefit of a higher authority "into which the State itself is integrated"[275] we see the return of public intervention in the economy. This has thus led to the revival of a debate on the issue of the need for national security in its dialectical relationship with EU law. It is precisely against this background, therefore, that the provision of the Screening Regulation to protect companies operating in strategic national sectors and as a legal reflection of external events that are risky for the Country's security[276] is inserted.

In this context, it seems particularly relevant to investigate the implications that this expansion of powers in the hands of the European Commission may have in terms of national sovereignty prerogatives as well as on the process of European integration. This section, building on what has been said about the distribution of competencies in the FDI[277] field, aims to focus on the impact of the European framework on the sovereignty of Member States. Moreover, having reconstructed this framework, it dwells on a practical case that can be considered emblematic in order to understand the criticalities that the system - when tested by current contingencies - seems to reveal. Specifically, reference is made to the FDI control mechanism introduced in Hungary, and thus the measure by which the Hungarian government exercised a veto over a domestic economic asset purchase transaction and the subsequent decision of the European Commission about its incompatibility with EU law will be discussed. The decision, intervening for the first time since the pandemic and the war in Ukraine contingencies, may set an interesting precedent about future developments in Member State-EU relations regarding domestic

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[273] See Commission, *Communication from the Commission to the European Parliament, the council, the European economic and Social Committee and the Committee of the regions trade policy review - an open, sustainable and assertive trade policy* of 18 February 2021, COM/2021/66 final. The Communication introduces the concept of "open strategic autonomy".
[274] See Niklas Helwig and Ville Sinkkonen, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term,* European Foreign Affairs Review, 2 (2022).
[275] See Sabino Cassese, *La nuova costituzione economica*, chap.10 p. 291 (Bari: 2021).
[276] In a nutshell, the evolution of special powers has witnessed a shift from "golden share," where governments could maintain forms of control and influence over privatized public enterprises, to FDI control mechanisms (so-called "golden power" in the Italian context), which provide for public intervention in the face of foreign direct investment in enterprises operating in strategic sectors regardless of any state participation in the enterprise itself.
[277] See above chapter I section 2.

FDI control mechanisms, as well as revealing a potential growing concern on the part of the Commission about the proportions that the phenomenon might acquire under the impetus of the ever-changing international environment.[278]

4.1 The issues related to National Sovereignty

The issue of FDI screening, especially when approached from the perspective of the need to protect strategic interests for reasons of national security and public order, is intimately connected to the issue of sovereigntỳ, not only in international relations but, above all, in the relationship between Member States and the European Union.[279]

It should be remembered that the Screening Regulation did not have as its ultimate goal to introduce a unified screening mechanism at the European level, but rather to define a regulatory space within which to operate the harmonization of the many existing fragmented national mechanisms. In fact, this system is not centralized and the individual Member States figure as the actors called upon to exercise control, due to the exclusive responsibility reserved for it in matters of national security and public order, as safeguarded by Article 4(2) TEU[280] - which expressly provides that "[...] national security remains the exclusive responsibility of each Member State" - as well as by Articles 65(1)(b) and 346 TFEU[281].

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[278] See Federica Marconi, *Regolamento (UE) 2019/452 e meccanismi di controllo degli investimenti esteri diretti: il vaglio europeo sul caso ungherese* 1, 183 (2023).
[279] See Lapo Mola, *Sicurezza nazionale e trattamento degli investimenti stranieri nel diritto internazionale,* 160 (2010); Carlos Esplugues, *Foreign Investment, Strategic Assets and National Security*, 335 (Cambridge: 2018); Jie Ma, *International Investment and National Security Review*, Vanderbilt Journal of Transnational Law, 901-947 (2019); Andreas Reinisch, *Standards of Investment Protection*, (Oxford: 2008); Changliang Bian, *Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity*, 4 The Journal of World Investment & Trade 22, 561-595 (2021).; Avinash Dixit, *International Trade, Foreign Direct Investment, and Security*, The Annual Review of Economics 3, 191 (2011); Giovanni Fattori , *Libertà religiosa e sicurezza*, (Pisa: 2021).
[280] For broader considerations see: Fabrizio Ferraro, Brief Notes on the Exclusive Competence of Member States in National Security, I Post of AIUSDE 7, 96 Section "Annual and Interim Conferences" (2019), which highlights how the inclusion of national security among the exclusive competences of the Member States with the inclusion in Article 4 TEU was intended "[...] to 'compensate' the States for the competences attributed to the Union with the abolition of the pillars. Paragraph 2 of this article, [...] expressly states that national security remains within the exclusive competence of the states, giving this national prerogative a general value, not limited to the area of freedom, security and justice".
[281] The EU Regulation itself, in Article 1(2) and (3), reiterates that: "This Regulation is without prejudice to the exclusive competence of the Member States regarding national security, as set out in Article 4(2) TEU, as well as the right of Member States to protect their essential security interests in accordance with Article 346 TFEU. Nothing in this Regulation shall limit the right of any Member State to decide whether or not to control a particular foreign direct investment under this Regulation." In addition, it is interesting

In essence, the intention was to prevent the European Union, through said Regulation, from creating the basis for an erosion of essential aspects of national sovereignty in a field, such as that of security and public order, which is normally excluded from its sphere of competence; on the other hand, that the control of FDI could be transformed into a real instrument of industrial policy, aimed at pursuing protectionist aims by individual Member States.

Whereas, it is within the power of Member States to decide whether to maintain, modify, adopt or not to adopt control mechanisms[282], should they decide to have them, they are obliged to comply with the principles set forth in the FDI Regulation. These include: (I) ensuring that such mechanisms are transparent, non-discriminatory, adhere to established deadlines, and protect confidential and commercially sensitive information; (II) allowing for appeals against their decisions; and (III) introducing the necessary enforcement measures for them.

At the outcome of the proceedings, the decision on FDI control in each case rests with the Country on whose territory the investment takes place.

The provision of the European framework, however, has not resulted in the disappearance of the peculiarities of individual Member States. The transposition of the mechanism varies from Country to Country according to the different jurisdictional configurations that - due to institutional, substantive and procedural characteristics - make the exercise of special powers take on multiple declinations.

The perimeter of the screening model is affected by the greater or lesser relevance that national sensibilities attach to the notion of "national security" and "public order".[283] The former is strongly rooted in international law, which recognizes every State's right to defend its territory and community, to the extent that the need to protect "essential

to note that recital 16 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) also lists national security among "[...] activities outside the scope of Union law".

[282] Recital No. 8 of the FDI Regulation provides that "[...] It is solely for the Member State concerned to decide whether to establish a control mechanism or to control a determined foreign investment".

[283] See Giulio Napolitano, *Il regolamento sul controllo degli investimenti esteri diretti: alla ricerca di una sovranità europea nell'arena economica globale*, Rivista della regolazione e dei mercati 1, 2-20 (2019); Daniele Gallo, *Sovranità (europea?) e controllo degli investimenti esteri*, 1 AISDUE 10, (2022) highlights how, however, critical issues may arise in relation to the failure of the FDI Regulation to intrude into the organizational arrangements chosen by States. In particular, the failure to provide for forms of separation between politics and administration could be relevant, with negative consequences especially in countries where the latter is not particularly developed. The author gives the examples of Poland and Hungary. The peculiarities of the latter's investment control mechanism will be analyzed in more detail below.

security interests" is often provided for as an exception in international trade and investment treaties[284]. It is worth noting again that even Article XXI of the GATT, provides that States have discretionary recourse to "exceptions concerning security" whenever they deem it necessary for the protection of their essential security interests[285].

Developments in recent years have led to a broadening of the more traditional notion of security, which has also come to assume prominence in its interconnections with growing economic concerns. [286]

At the present stage, significant differences therefore remain between the different mechanisms with reference to the definition of what constitutes FDI, procedural deadlines, and reporting requirements.

In its first two reports to the European Parliament and the Council[287], the European Commission reiterated its strong expectation that all 27 Member States would put in place national mechanisms for monitoring FDI, identifying this as the condition for ensuring the effective protection of each Member State from potentially risky foreign investment from third Countries.[288] It also said it was committed to actively promoting the advancement and alignment of the various national legislative processes by assisting Member States with "technical and strategic guidance, technical meetings, exchanges of

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[284] See Maria Rosaria Mauro, *L'effetto del Covid-19 sull'accesso degli investimenti stranieri: le recenti modifiche introdotte nel regime del "Golden Power*", Gli effetti dell'emergenza Covid-19 su commercio, investimenti e occupazione. Una prospettiva italiana, 193- 224 (2021).

[285] Article XXI GATT provides the exception that: "Nothing in this Agreement shall be construed: a. as being intended to oblige a Contracting Party to furnish any news the disclosure of which it considers contrary to the essential interests of its security; b. as being intended to prevent a Contracting Party from any measure which it considers necessary for the protection of the essential interests of its security".

[286] The said "broadening" must be intended in the sense that Member States enjoy discretion in determining the requirements of public policy and public security based on their national needs (Article 1(1) and 3(1) of the Regulation) resulting, therefore, into a continuous mutation of the concept of security and the enlargement of the factors threatening such security in view of the challenges of the new world that take the shape. See on the point Strawberries of 9 December 2020, Case C-265/95, para. 33. Yet, this does not mean that Member States can unilaterally determine the public interests without any control by the institutions of the Union. Instead, restrictions based on these public interests must be proportional, comply with the general principles of EU law, such as the principle of legal certainty, and must not be implemented due to wholly economic ends. Moreover, in COM (2017) 487 final, para 17 the Commission stated that the Regulation should provide the necessary flexibility for Member States to consider their national circumstances and individual situation when screening FDIs on grounds of security or public order. From this follows that EU law does not contain a definition of what constitutes grounds of security or public policy and this justifies even more the broadening of such notion.

[287] See Reports from the Commission to the European Parliament and the Council: First Annual Report on the Control of Foreign Direct Investment in the Union, COM/2021/714final and Second Annual Report on the Control of Foreign Direct Investment in the Union, SWD(2022)219final.

[288] *Ibidem*

information and best practices".[289]

This encouragement, at both political and technical levels, was also confirmed by the Communication adopted in times of health crisis, in response to the shock and economic vulnerability caused by the pandemic[290], as well as the one aimed at addressing concerns arising from war contingencies and targeting Russian and Belarusian FDI[291].

Member States were, therefore, urged to reinforce the control mechanisms already in place, or to establish new ones if they were entirely lacking. In the alternative, however, the Commission urged the use of all available options to deal with possible hostile takeovers in domestic markets.

The rush to use special powers is a strongly growing trend. In 2021, of the 27 Member States, six have strengthened and two have initiated consultative processes to update existing mechanisms, three have incorporated them *ex novo* into their legal systems, and seven have activated their internal procedures to equip themselves with them[292].

The European Commission, in the Work Program 2023[293], announced that a revision of the FDI Regulation is in the works, in light of the experience gained in the first two years of implementation. It will be interesting to analyze how the recommendations in the OECD report will be implemented[294]. These include those aimed at (I) requiring all Member States to have their own mechanism for monitoring FDI; (II) extending the scope of application to certain sectors and transactions with particular

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[289] *Ibidem*

[290] See 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)* of 26 March 2020, 2020/C 99 I/01. This was followed by the Guidelines for the Interpretation and Implementation of the Screening Regulations.

[291] See Commission *Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions* of 6 April 2022, 2022/C 151 I/01. See also Antonio Alì, *Dalle misure restrittive dell'Unione europea alla "guerra economica" nei confronti della Russia e della Bielorussia a seguito dell'invasione dell'Ucraina*, Questione Giustizia, 42-53 (2022).

[292] Respectively: France, Germany, Hungary, Italy, Latvia, Lithuania; the Netherlands and Romania; the Czech Republic, Denmark, Slovakia; Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg and Sweden. It appears that Bulgaria and Cyprus still lack such mechanisms (or-at least-it has not been publicly reported whether initiatives in this direction are in the offing). The list of control mechanisms notified by Member States is available at: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

[293] See Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, *Commission work program 2023: A Union standing firm and united* of 18 October 2022, COM(2022)548 final.

[294] See OECD, *Framework for Screening Foreign Direct Investment into the EU – assessing effectiveness and efficiency*.

requirements; and (III) further strengthening the Commission's role in monitoring transactions not notified by Member States, even if the effects are confined to only one of them. In addition, based on the experience gained from the application of the current regime in force, the Commission has reiterated its intention to strengthen controls on strategic exports, in synergy with Member States and other international partners, as well as opening toward the possibility of considering the adoption of additional tools for controlling strategic outbound investments.[295]

It is within this framework that the European Commission's decision on some interesting profiles of the interaction between EU law and national FDI rules, as well as a referral to the Court of Justice (the outcome of which is awaited)[296], both referring to the new configuration of special powers by the Hungarian government, are to be found. The decisions made in such cases may have significant implications for national practices, as these will the first pronouncements by European Institutions on the structure of domestic control mechanisms downstream of changes made to address emergency circumstances.

4.2 The Hungarian case

FDI has taken on an increasing role in the Hungarian economy, especially following the opening to liberalism[297]. Despite this, it is only since October 2018 that Hungary has also aligned with European Countries with FDI control systems[298]. Prior to this revision, control mechanisms existed limited to specific sectors such as, for example, energy and utilities, where transactions were subject to prior approval by the national regulator.

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[295] See Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, *Commission work program 2023: A Union standing firm and united* of 18 October 2022, COM(2022)548 final. These considerations are included in the par. titled "An economy that works for people," and in which it is reiterated that the decisions in the work program were made during a period of great economic instability and uncertainty, and that the measures taken-especially those with effects on competition-may be reevaluated after the winter.

[296] For further information refer to https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689

[297] See Magdolna Sass, *The effectiveness of host country policy measures in attracting FDI: The case of Hungary*, The development dimension of FDI: policy and rule-making perspectives – Proceeding of the Expert Meeting held in Geneva from 6 to 8 November 2002, UNCTAD/ITE/IIA/2003/4, p. 49.

[298] A Magyarország biztonsági érdekét sértő külföldi befektetések ellenőrzéséről, 2018. évi LVII. Törvény (Act No. LVII of 2018 on the Control of Foreign Investments Offending Hungary's National Security, hereinafter "Act LVII"). The law was implemented by Government Decree No. 246/2018 (XII.17).

This system, applicable as of 1 January 2019, provides for a regime to control FDI in strategically sensitive sectors, based on the need to protect national interest and security, giving competence in this matter to the Minister of the Interior.[299] Starting in 2020, the ordinary regime was complemented by a temporary and emergency mechanism introduced to deal with the pandemic crisis[300].

Procedurally, a common feature of both mechanisms is that they require notification, in writing and within ten days of the transaction, for the purpose of its authorization[301]. Any transaction implemented without having obtained prior approval from the competent Minister is considered void from the standpoint of Hungarian law.

Application of the ordinary regime is mandatory when the foreign investor[302] intends to acquire an enterprise important for national security or a stake in such an enterprise of more than 25 percent (10 percent in the case of a public company), or determines a controlling interest, or, again, causes the combined shares of foreign investors in such an enterprise - except for joint stock companies - to exceed a total of 25 percent. In the temporary regime, the notification requirement is triggered in the case of transfer of shares, capital increase, transformation, merger or division, issuance of bonds, establishment of a usufruct right over a share[303].

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[299] Monitoring is conducted by the Office for the Protection of the Hungarian Constitution (Alkotmányvédelmi Hivatal), which is the domestic security intelligence agency.

[300] The temporary screening regime (in its original formulation, applicable no later than June 2022) was introduced by Government Decree No. 227/2020, effective 26 May 2020. The provisions regarding the exercise of special powers were then confirmed by A veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készültségről szóló 2020. évi LVIII. törvény (Act LVIII of 2020, on Transitional Rules Concerning the Termination of the State of Emergency and Epidemiological Crisis, hereinafter "Act LVIII," effective June 18, 2020). Most recently, Government Decree No. 289/2020 (VI.17) supplemented these provisions and provided a table with the industrial sectors covered by the application of these powers. It should be noted that in this case, exceptionally, the competence was given to the Ministry responsible for the national economy - currently the Minister of Technology and Innovation.

[301] With the notification, detailed information must be provided about the foreign investor, including its business activity and ownership structure, as well as the planned transaction. Given the coexistence of the two mechanisms, if the transaction falls within the scope of the special powers, the investor is required to submit two separate applications: one addressed to the Ministry of the Interior and the other to the Ministry of Technology and Innovation. Consequently, he is required to comply with the substantive and procedural peculiarities of both mechanisms.

[302] Foreign investors, under the ordinary regime, are citizens or legal entities not belonging to EU or EFTA countries, or legal entities yes registered in an EU or EFTA Member State, but whose control is exercised by a citizen or legal entity from outside the EU or EFTA.

[303] Specifically, it is required (i) that the total value of the investment reaches or exceeds 350 million Hungarian forints and that the foreign investor acquires, directly or indirectly, majority control, or at least 10 percent ownership; (ii) that the foreign investor acquires at least 15 percent, 20 percent, or 50 percent ownership; and (iii) that the acquisition results in a total combined share of foreign investors exceeding 25 percent.

With reference to the this regime, the definition of a foreign investor has been extended to include any legal person or other organization registered in the European Union (including Hungary) that acquires an ownership or controlling interest in a Hungarian strategic company, as defined by Government Decree 289/2020, where majority control is held by a citizen or legal person from outside the European Union or the European Free Trade Association ("EFTA").

From an objective point of view, sectors relevant to national security include (i) arms, ammunition and military equipment, dual-use products, intelligence equipment; (ii) services related to payment system management; (iii) establishment, development, or operation of state and municipal electronic information systems; (iv) provision of electricity, gas, and utilities; (v) electronic communications services; and (vi) insurance activities[304]. These areas have been further extended, far beyond the provisions of the FDI Regulation, as a result of the introduction of the special regime.[305]

Overall, the framework has raised more than a few concerns about its compatibility with European provisions, mainly due to the obscurity of essential concepts such as "security interest" and "acquisition of direct or indirect ownership," as well as the absence of objective criteria in the examination of relevant transactions. Added to this is the lack of transparency and the wide discretion enjoyed by the Ministries responsible in taking decisions on the matter, as well as the rather long deadlines for concluding the procedure when compared to other national regimes[306]: sixty working days for the ordinary regime and thirty for the temporary regime, which can be further extended at the discretion of the

[304] These activities are identified in Article 2(4) of Law LVII. The government was further authorized to define in detail the activities subject to notification by its own decree.

[305] Annex 1 of Government Decree No. 289/2020 lists the activities deemed strategic. This includes the energy, transportation, and communications sectors, as well as the strategic sectors defined in Article 4(1)(a)-(e) of the FDI Regulation. These include express reference to: production of medicines, medical devices or other chemical products; fuel production; telecommunications; retail and wholesale; production of electronic devices, machinery, steel and vehicles; defense industry; energy production and distribution; services related to the state of emergency; financial services; food processing (including meat, milk, cereals, tobacco, fruits and vegetables); agriculture; transportation and warehousing; construction and production of building materials; health care; etc.

[306] Consider, among others, the Italian experience. The investigation is carried out by the Coordination Group on Special Powers and entrusted on a case-by-case basis to the relevant Ministry, and the time limit for the completion of the investigation is 45 days, which can be extended in the case of requests for information to the notifying company, with a suspension of up to 10 days, until the receipt of the requested information, or in the case of investigative requests to third parties, with a suspension of up to 20 days, again until the receipt of the requested information. See R. Chieppa, *The new discipline of golden power after the amendments of Decree-Law No. 21 of 2022 and Conversion Law No. 51 of May 2022*, Federalismi.it, 9 (2022).

Minister in charge (up to sixty working days for the first regime and up to fifteen for the second).[307]

Specifically, the European Commission ruled on Hungary's veto of the acquisition of the Hungarian subsidiaries of the *AEGON Group* ("AEGON") by Vienna Insurance Group *AG Wiener Versicherung Gruppe* ("VIG"). The transaction was part of a much broader transaction whereby VIG intended to acquire AEGON's Hungarian, Polish, Romanian and Turkish businesses active in life and non-life insurance, pension funds, asset management and ancillary services.

Notably, the Hungarian decision was made in the emergency context of the pandemic crisis, at a time when the government had further modified its screening regime so as to include the insurance sector within its scope.[308] The Hungarian government's rationale for the decision was to acquire the Hungarian insurance sector.

According to the Hungarian government's rationale, the veto would have been justified by the need to protect strategic national interests. However, on 12 August 2021, came the decision by which the Commission unconditionally cleared the transaction[309], finding it to be in compliance with the "Merger Regulation" ""[310]. Pursuant to Article 21 of the Merger Regulation, the European Union has exclusive jurisdiction over transactions of Community significance, and the applicability of national laws is always to be considered excluded, except where specific conditions are met that allow Member States to take appropriate measures to protect their legitimate interests, which include public safety, media plurality and prudential rules[311].

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[307] For a comparison with other national systems see *supra* chap. 1 section2.

[308] However, the reference is to the discipline of control over FDI as it was formulated prior to the amendments made to address the effects of the pandemic and which provided for the exercise of special powers in traditional strategic areas. The available documentation on the subject, moreover, still refers to the Minister of the Interior as the veto authority.

[309] See *Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/20041 and Article 57 of the Agreement on the European Economic Area,* Case M.10102 – VIG/AEGON CEE.

[310] See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Paragraph 4 provides that: "[...] Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media, and prudential rules shall be regarded as legitimate interests within the meaning of the first paragraph."

[311] In the present case, the notified transaction had been deemed to have a European dimension within the meaning of Article 1(2) of the Merger Regulation, as "[...] (i) the undertakings concerned have a combined worldwide turnover of more than EUR 5,000 million (VIG: 10,429 million, AEGON CEE: [. ...]), (ii) each of them has a Union-wide turnover in excess of €250 million (VIG: [...], AEGON CEE: [...]), and (iii) none of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State." See European Commission, Case M.10102 - VIG/AEGON CEE, cit.

Furthermore, it is provided that Member States may take appropriate measures to protect legitimate interests only on the condition that such measures are compatible with the general principles and other provisions of European Union law and that they are communicated to the Commission, provided that this is always done in accordance with a restrictive interpretation of the term "public security." In such cases, the Commission is given the task of examining not only the appropriateness of such measures and their compatibility with European law, but also whether and to what extent they are really intended to protect a legitimate interest. All this with the ultimate goal of safeguarding the free movement of capital within the Union.[312]

On 29 October 2021, the European Commission formally opened an investigation into the Hungarian case and, after considering the input of the national authorities, concluded that they should have notified the Commission of their intention to veto the transaction before the measure was adopted. Accordingly, it found that Hungary's veto decision violated the Merger Regulation and, because of this, ordered Hungary to withdraw the decision by 18 March 2022. Otherwise, the Commission could have decided to initiate infringement proceedings at the Court of Justice in accordance with Article 258 TFEU.

Indeed, according to the Commission's assessments, it had not been proven that the adoption of the measure actually aimed to protect Hungary's legitimate interests as required by the Merger Regulation. In particular, strong doubts were harbored about the suitability of the transaction by the Austrian company to pose a threat to a fundamental interest of the Country, especially given that both VIG and AEGON already had a well-established presence in Hungary.

Furthermore, the Commission found that the veto resulted in a limitation of VIG's right to conduct a cross-border transaction and that the Hungarian authorities had failed to demonstrate that the measure was justified, appropriate and proportionate. Consequently, it concluded that the veto was incompatible with EU rules on freedom of establishment.

It must be remembered that while the Commission's assessment was still ongoing, on 22 December 2021, VIG announced that it had reached an agreement with the Hungarian government, which would provide for a 45 percent stake by the State in

[312] *Ibidem*

AEGON's Hungarian subsidiaries and in UNION Vienna Insurance Group *Biztosító Zrt*. (VIG's existing Hungarian subsidiary, "UNION"). On the same day that the press release of the Commission's decision was published[313], the Hungarian Minister of Finance announced the agreement between VIG and UNION - a 100 percent state-owned investment fund - to acquire a 45 percent stake in all of AEGON's Hungarian subsidiaries.

Thus, by the time the Commission's decision was made, the elements from which the investigation itself had been triggered had already disappeared, given the agreement between VIG and the Hungarian government and the finalization of the transaction. Nonetheless, the decision takes on particular relevance because the Commission decided to apply the provision of Article 21 of the Merger Regulation in the context of FDI control, effectively setting an important precedent that Member States will have to take into account when applying national regimes, especially in the present historical phase.[314]

For the sake of completeness, it should be noted that perplexities about the new configuration of special powers in Hungary prompted a further clarifying intervention.

In fact, on 15 February 2022, the Budapest District Court, which has jurisdiction over appeals against decisions to exercise special powers[315], filed a request for a preliminary ruling in the context of the annulment of the decision by which the Ministry of Technology and Innovation imposed a veto on the acquisition of shares in a Hungarian strategic company active in the extraction of raw materials, by a foreign investor producing concrete, controlled by a company based in Bermuda and whose beneficial owner is an Irish natural person[316]. The buyer had approached the Tribunal claiming that the ministerial decision amounted to arbitrary discrimination and/or a restriction on the free movement of capital, pointing out that in a previous transaction in 2017 the European Commission had already approved its ownership structure.

In particular, two questions were raised. The first, was related to the compatibility with the rules on the free movement of capital (Article 65(1)(b) TFEU) of the Hungarian

[313] See Commission – press release, *Mergers: Commissions finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of Article 21 of the EU Merger Regulation* of 21 February 2022 Available at the link: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258

[314] Keep in mind that it was more than fifteen years ago that the Commission last resorted to the application of Article 21 of the Merger Regulation. See European Commission, *Enel/Acciona/Endesa* of 5 December 200, Case COMP/M. 4685.

[315] Appeal is allowed in case of alleged violations of procedural rules, or to assert grievances against the contents of the decision.

[316] See *Xella Magyarország v. Innovációs és Technológiai Miniszter* of 15 February 2022, Case C-106/22.

emergency regulation on the control of FDI. The latter, as anticipated, allows a foreign takeover of a domestic company producing an essential raw material-cement, in the case at hand-on the assumption of a risk of supply shortage for the companies, potentially detrimental to the domestic economy in the context of the pandemic.

Doubts of incompatibility with the Screening Regulation were raised about: (I) the provisions defining state interest rather broadly, so much so as to include "[...] the public interest [...] relating to the security and continuity of networks and facilities and the continuity of supply" (wording of the temporary regime)[317]; (II) the breadth of the definition of foreign investor, apt to include also investors from another Member State[318]; (III) the identification of the prerequisites to the vetoing of the transaction, in case there is a damage or threat to the State interest, public security or public order of Hungary, taking into account, in particular, the need to ensure the supply aimed at the satisfaction of the basic needs of society[319].

The second question, contingent on a positive answer to the first, focused instead on the relationship between the exercise of special powers by a national government and the simultaneous initiation of the merger control procedure by the European Commission. More specifically, it questioned whether the circumstance that the latter authorized a merger relating to the chain of ownership of an indirect foreign investor - after exercising its exclusive powers by conducting a merger control procedure - precludes the exercise of decision-making power under the law of the Member State.

It is clear that the ECJ's ruling may have a significant impact on the practice of FDI control by Member States, further clarifying the limits of compatibility with the

[317] Section 276(1) of Law LVIII ("[...] public interest: the public interest, not regulated by sectoral EU and national law, relating to the safety and security of networks and equipment and the continuity of supply; [...]").

[318] Section 276(2)a) of Law LVIII ("[...] a 277. § A legal person or other organization having a specific ownership or a specific influence in a business company having its registered office in Hungary and carrying out a specific activity within the meaning of paragraph (2) of Article 277(2), registered in Hungary, in another Member State of the European Union, in another Member State of the European Economic Area or in the Swiss Confederation, if the person having a majority influence in the legal person or other organization within the meaning of the Act on the Civil Code is a national of a State outside the European Union, the European Economic Area or the Swiss Confederation or a legal person or other organization registered in such a State, [. ..]).

[319] Section 283(1)b) of Law LVIII ("[...] in the case of acquisition of property, acquisition of ownership of the bond, acquisition of the right of usufruct, acquisition of the right to operate, by the notifier, whether there is a risk of prejudice to or threat to the interests of the State, public security or public order of Hungary, or the possibility of such prejudice or threat, in particular with regard to the security of the supply of basic social needs, in accordance with Articles 36, 52(1) and 65(1) of the Treaty on the Functioning of the European Union. [...]).

fundamental principles of the European Union, especially in cases subject to dual review proceedings, as well as providing an interesting hermeneutical key on future developments in the complex institutional balance in this area. It should be noted, however, that at the time of writing, the Court of Justice's decision has not yet been handed down.

5. Brief preliminary conclusions: expectations and implications for the future of FDI

While the previous chapter conducted an analysis mainly aimed at the concept of FDI and the procedural aspects of the Screening Regulation, the present one focused instead on the concrete implications of this framework and its practical outcomes. On the basis of such an investigation, it is therefore possible to state that the scenario in which the process of building the so called common commercial policy was initiated has changed dramatically. In fact, the goal that has been emerging in recent years has been to make the European Union stronger and more resilient to meet the challenges arising from growing geopolitical rivalries, often invoking the need for European sovereignty as an answer to nationalist and protectionist tendencies and to the challenges arising from an increasingly competitive World in which the myth of globalization has now revealed its weaknesses.[320]

Therefore, it will be interesting to observe whether and how the Member States will stabilize the provisions - often of an exceptional and temporary nature - introduced to cope with the pandemic emergency first and the one brought about by the Russian-Ukrainian conflict later and, above all, what will be the position of the European Institutions regarding the application to different concrete cases, especially when the restrictions are envisaged against intra-EU investors. In this context, it was seen how the Hungarian case seems to show a mutual distrust between the different institutional levels, in addition to the difficulties related to the need to ensure full compatibility with European

[320] See Federica Marconi, *Regolamento (UE) 2019/452 e meccanismi di controllo degli investimenti esteri diretti: il vaglio europeo sul caso ungherese* 1, 202 (2023).

principles and to balance multiple instances and interests involved[321]. It is clear from the case examined that the decision by a Member State to apply national rules on FDI may nevertheless be subject to scrutiny by the European Commission and, therefore, fall under exclusive supranational competence, if the purpose (or at any rate the result) is to distort the operation of European provisions. Possible overlaps between European merger control and national FDI controls, despite the different purposes pursued, must be resolved by recognizing the primacy of European Union law over the national laws of Member States.

Nevertheless, the use of FDI control mechanisms should still retain its exceptional character, representing a tool to be used only where truly necessary, so as to avoid additional system costs. Moreover, the need for coordination between institutional levels seems to be even more evident given that FDI in any of the Member States does, in fact, give access to the entire internal market. The lack of control mechanisms in some States, as well as differences on the sectors included in the scope or on the degree of pervasiveness of control leading to the adoption of the final decision, may represent a major vulnerability to European security, allowing potentially hostile foreign firms to circumvent stricter mechanisms present in other States and to escape subsequent control through practices of "Europeanization" of ownership structure. [322]

In the current situation, the strengthening of European prerogatives in an ever-increasing number of areas is accompanied by an overbearing return of the State, determined to claim the widest room for maneuver within the margins of its sovereignty.

If not wisely and appropriately managed, it is not difficult to imagine that the current frictions will, sooner or later, lead the two levels to collide, thwarting the efforts made so far to ensure joint and cohesive action toward the external threats generated by a situation that raises increasing questions and security fears.[323]

The decision to maintain, modify or adopt a national FDI screening mechanisms

[321] *Ibidem.* See also Francesco Gaspari, *Special powers and economic regulation between national interest and the socioeconomic and political crisis of the European Union*, Federalismi.it, 118-134 (2020); that author states that the EU would be facing an irreversible crisis, confirmed by the strengthening of protectionist defenses by individual member states. In his arguments he recalls Giulio Napolitano who, with reference to the FDI Regulation, had already highlighted the need for the "[...] formation of a shared political vision that in today's Europe appears particularly difficult to achieve".
[322] *Ibidem.*
[323] *Ibidem.*

remains the discretion of the individual Member States[324]. Indeed, as enunciated in Article 1(2) the Screening Regulation is "without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU". In addition, in the context of the Screening Regulation, the right of each Member State to decide whether or not to screen a particular FDI under its own regulatory framework is not limited.[325] Consequently, it should be reiterated that the primary objective of the Regulation is not to get all Member States to adopt national legislation on FDI screening, but rather to establish efficient rules that implement and promote the objectives of the common commercial policy.[326] This framing is closely related to the subject matter and scope of the Screening Regulation, as defined in its Article 1 (1). In other words, the Regulation is a block exemption regulation that provides minimum procedural requirements to be complied with by all Member States with FDI screening mechanisms as well as specific rules regarding trilateral cooperation and information exchange between the Member State in which the FDI is planned or has been completed, other Member States if they believe that such FDI may affect their security or public order, and the Commission[327]. In this sense, the Regulation, in addition to the functions of notification, reporting, publication, and general coordination and exchange of information and data, gives the Commission the authority to issue non-binding opinions under Article 288 TFEU.[328]

Nevertheless, the Commission has made it clear on more than one occasion that it would use the Regulation as a tool to incentivize Member States to take a proactive role in the field of FDI screening. These aspirations were initially expressed by the Commission in its 2020 Communication, in which it openly called on Member States without national legislation on FDI screening "to establish a comprehensive screening mechanism and, in the meantime, to use all other available options to address cases where the acquisition or control of a particular enterprise, infrastructure, or technology would

[324] See para. 6 Preamble, Regulation 2019/452. See also Art. 207 of the Treaty on the Functioning of the European Union.
[325] See Article 1(3) of the Screening Regulation.
[326] See Nina Tepes, *Foreign direct investment screening in the EU -Future perspectives and implied obligation*, 28 (2023).
[327] See Article 6 of the Screening Regulation.
[328] See Para. 16 Preamble of the Screening Regulation.

create a risk to security or public order in the EU, including a risk to critical health infrastructure and the supply of critical inputs".[329] The statement was reiterated in the Commission's 2021 Communication on Trade Policy Issues[330], the First Annual Report on FDI Screening in the Union (" First Annual Report")[331], and the Second Annual Report on FDI Screening in the Union ("Second Annual Report"), in which the Commission expressly stated that it "firmly expects that additional Member States will very soon adopt and strengthen national FDI screening legislation and related mechanisms for potentially risky foreign investments ".[332]

The war in Ukraine, not surprisingly, once again highlighted the ambitions of the Commission, which called on Member States that currently do not have a FDI screening mechanism (or whose screening mechanism does not cover all relevant FDI transactions or does not allow for screening prior to making investments) to "urgently establish a comprehensive FDI screening mechanism and in the meantime use other appropriate legal instruments to address cases where the acquisition or control of a particular enterprise, infrastructure or technology would create a risk to security or public order in the EU".[333]

As for those Member States that are still in the process of establishing their own screening mechanism, the Commission called on them "to accelerate its adoption and prepare for its implementation, including by supporting it with adequate resources".[334]

Clearly, the main focus has shifted from "the right of each Member State to protect

[329] See 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), OJ C 99 I/1, 26.3.2020, p. 1.

[330] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, 18.2.2021, p. 20.

[331] First Annual Report on the screening of foreign direct investments into the Union {SWD(2021) 334 final}, COM(2021) 714 final, 23.11.2021, p. 6. The Report covers the period from 11 October 2020 to 30 June 2021, p. 7.

[332] Second Annual Report on the screening of foreign direct investments into the Union {SWD(2022) 219 final}, COM(2022) 433 final, 1.9.2022., p. 21. The Report covers the year 2021, with an overlap with the First Annual Report.

[333] See Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ C 151 I/1, 6.4.2022, p. 2. Communication primarily relates to Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine (OJ L 229, 31.7.2014, p. 1) and its amendments and Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures in view of the situation in Belarus (OJ L 134, 20.5.2006, p. 1) and its amendments.

[334] *Ibidem*

its essential security interests”[335] to the qualitatively more generalized obligation of all Member States to duly address the risk that FDI may create to EU security or public order.[336]

At this point it is crucial to remember that both the limits and the use of the European Union’s competences are respectively governed by the principles of attribution, subsidiarity and proportionality.[337] Although all Member States are obliged to facilitate the accomplishment of the EU’s tasks and to refrain from any measure that might jeopardize the achievement of the EU’s objectives[338], arguments that attempt to justify the Commission’s effort to influence the outcome of the decision that clearly falls within the exclusive authority of each Member State must inevitably fail because they run up against the explicit provisions of the Screening Regulation itself.

The Commission is required by Article 15 (1) to present a report to the European Parliament and the Council by 12 October 2023, and every five years thereafter. The provision also requires Member States to be involved in this exercise and, if necessary, to provide the Commission with additional information for the preparation of the report. At the same time, Article 15 (2) provides the possibility for the Commission to use this report in order to recommend amendments to the Regulation. This report may be accompanied by an appropriate legislative proposal. In light of the Commission’s active role in promulgating the idea that each Member State should introduce national FDI screening legislation as soon as possible, and especially the fact that there remain only two Member States (Bulgaria and Cyprus) that have not publicly signaled any initiative to adopt national FDI screening legislation[339], it can reasonably be expected that the Commission’s assessment will further focus on the need to harmonize and align the national FDI screening legislation of all Member States.[340] In the words of the Commission, “a national screening mechanism in all 27 Member States is necessary to safeguard the Union from potentially risky foreign investment from third Countries” as this ensures that Member States and the Commission protect “the collective security of

[335] See Article 1(2) of the Screening Regulation.
[336] See Nina Tepes, *Foreign direct investment screening in the EU -Future perspectives and implied obligation*, 29 (2023).
[337] See Article 5 TEU.
[338] See Article 4 TEU.
[339] See Article 5(4) of the Screening Regulation.
[340] See Nina Tepes, *Foreign direct investment screening in the EU -Future perspectives and implied obligation*, 31 (2023).

the Member States and the Union, as well as the security of the single market and the very high level of economic integration it allows”. [341]

In the next chapter, it will be possible to move the perspective to other regional areas of the World, thus casting an eye on the main features of the foreign investment screening systems belonging to two important Countries, the United States and China, in order to ultimately grasp the similarities as well as the substantial differences that arise in the relationship between the screening systems analyzed in this paper.

[341] *Ibidem*

CHAPTER III – BEYOND THE BORDERS: EU FDI SCREENING MECHANISM BETWEEN USA AND CHINESE LEGISLATION. THE RESPONSE TO THE CHELLENGES OF THE MODERN WORLD

The previous chapters bounded its analysis within the European borders. However, it is interesting and, as will be seen, at the same time necessary, to move beyond the European borders and towards East. To this end, the present chapter will be partly devoted to analyzing the Chinese approach to foreign investment and its influences on the EU system. Then it will also investigate the evolution of the American screening system by highlighting its points of interaction with the European model. In substance, a general reflection will be provided that will embrace peculiarities and criticalities of these models, with the purpose not of mere comparison but of critical analysis that always keeps the European system as the focal point.

1. The EU competence in concluding foreign investment agreements

In the course of the first chapter[342], the legislative developments of the EU competence over FDI before and after the Lisbon Treaty were largely outlined. However, in the incipit of this chapter and with a view to establishing an analysis that looks beyond the European borders, it seems incumbent to return briefly on the topic and this time dwelling on the revision made in 2007[343] mostly from the point of view of the expansion of the so-called "external" competence of the EU in the field.

For a long time, European law has been concerned with the creation of the single market as an essential element of the economic integration of Member States, on the premise of the recognized free movement of goods, services, labor and capital. Investments regulation, on the other hand, was left to the discretion of Member States to

[342] See supra the discussion led in chapter I section 4.1 "The EU competence over FDI: policy developments before and after the Lisbon Treaty".
[343] The Lisbon Treaty was signed in 2007 and entered into force in 2009 and consists of two parts: "Treaty on European Union" and "Treaty on the Functioning of the European Union".

enter into bilateral international conventions, as they were responsible for establishing their own autonomous border policies. At an early stage, therefore, there was a dystonia in which the Community's competence in trade matters coexisted with national competence over the development of rules of covenanted international law on the admission, treatment, protection and guarantee of foreign direct investment, despite the fact that the two profiles were closely linked in the international economy.[344]

The 1957 Treaty of Rome, which created the European Economic Community, established the first customs union, with the removal of barriers to trade between the founding States and the establishment of a common customs tariff for products imported from non-EU States.

Therefore, the common European trade policy, as outlined in Articles 113-115 EC Treaty (Articles 131-134 in the Nice version)[345], did not include the subject of FDI. However, as early as the 1970s, the Court of Justice intervened to interpretatively extend the boundaries of the Community's external competence in trade policy confirming its general and exclusive nature.[346] The aim was, primarily, to foster the emergence of the EU as a global economic actor at the global level capable of standing as a counterpart in the geo-economic competition of macro-States such as the U.S. and China[347], given also the progressive enlargement to include new European Countries. In particular, by combining the provisions on the common commercial policy with those on the free movement of capital and services, the principle of parallelism between internal and external powers was leveraged, whereby whenever the EU regulated an area internally, a parallel supranational competence would then arise on the external level too[348]. The

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[344] See Federica Marconi, *Regolamento (UE) 2019/452 e meccanismi di controllo degli investimenti esteri diretti: il vaglio europeo sul caso ungherese 1*, 183 (2023).

[345] Article 133(1) specified that "The common commercial policy shall be based on uniform principles, especially with regard to tariff changes, the conclusion of tariff and trade agreements, the standardization of liberalization measures, export policy, as well as trade defense measures, including those to be taken in cases of dumping and subsidies".

[346] See *European Commission v. Counsil* of 31 March 1971, Case C-22/70. See also some opinions of the Court, first of all the opinion of 11 November 1975, Case 1/75, 01355 par. B2 which recognized how unilateral behavior by Member States could have undermined the achievement of common goals. More extensively on the subject see Andrea Giardina, Sulla competenza a stipulare della Comunità economica europea, Rivista di diritto internazionale, 609- 623 (1971). More recently, see *Commission v. Denmark, Sweden, Belgium, Luxembourg, Austria and Germany.Judgment* of 5 November 2002, Joined Cases C-467/98, C-468/98, C-471/98, C-472/98, C-475/98 and 476/98.

[347] See Fabrizio Marrella, *Unione Europea ed investimenti esteri diretti*, Core (2013).

[348] See *European Commission v. Council* of 31 March 1971, Case C-22/70 (AETS), point 6 and following of the motivation; opinion of 26 April 1977, n. 1/76. On the topic see also, Francesco Montanaro, *Il parere*

adoption of the Single European Act[349], which came into force in 1987, set 31 December 1992 as the deadline for completion of the single market. The Maastricht Treaty, which enshrined the creation of the European Union in 1992, expanded competence in trade matters and removed restrictions on foreign investment, both in terms of inflows and outflows, as part of the broader provisions for the free movement of capital and payments.[350] In addition, the European Communities joined the World Trade Organization ("WTO") in 1995, the year of its establishment, operating there as a unitary actor, represented by the Commission and not the Member States. The WTO, which complemented the previous trade-related agreements such as General Agreement on Tariffs and Trade[351] ("GATT"), has enabled the creation of a forum for the negotiation of agreements aimed at reducing barriers to international trade and enabling competition on a level playing field, so as to contribute to economic growth and development[352].

Following the adoption of the Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001, then, trade policy encompassed the negotiation and conclusion of international agreements in the area of trade in services[353] and the trade-related aspects of intellectual

2/15 della Corte di giustizia dell'Unione europea e il futuro della politica commerciale dell'Unione, AIC, 3-4 (2017);

[349] The Single European Act brought amendments to the Treaties establishing the European Communities and established European political cooperation. Once the Single European Act (SEA) entered into force, the title 'European Parliament'(which the Assembly had used since 1962) was made official. The SEA also increased the EP's legislative powers with the introduction of the cooperation and assent procedures.

[350] The issue of including FDI in the common trade policy was initially raised by the European Commission during the Intergovernmental Conference (IGC) that led to the Maastricht Treaty in 1992. However, the intention was quickly abandoned due to lack of support from member states. See, Y. Devuyst, *The EC'S Common Commercial Policy and the Treaty on European Union*, 16 Word Competition, 72 (1992) and A. Young, *Extending European Cooperation: The European Union and the "New" International Trade Agenda*, Manchester University Press, 30 (2002). A similar fate befell the repetition of the issue in the Commission's 1996 opinion for the ICG that led to the 1997 Treaty of Amsterdam: the transfer of competencies that was in the initial draft was removed due to opposition from member states. On this point: European Commission, Report on the Operation of the Treaty on the European Union, SEC(95)731, 57-60, (1995).

[351] International agreement concluded in Geneva in 1947 by twenty-three countries to establish the basis for a multilateral system of trade relations to promote the liberalization of world trade through a system of internationally recognized trade rules.

[352] See WTO, *World Trade Report: The future of services trade*, WTO, Geneva, 2019; G.M. Ruotolo, *La tutela dei privati negli accordi commerciali*, 32-61, (Bari: 2017); M.G.E. Schaus, *Reviving the WTO and rules-based trading: The EU's role*, CEPS Policy Insights 1, 1-13 (202); B. Hoekman, M. Kostecki, *The political economy of the world trading system: the WTO and beyond*, 17-323, (Oxford: 2009).

[353] In accordance with the division made in GATS (General Agreement on Trade in Services, in force since 1995). See European Commission, *Adapting the Institutions to make a success of enlargement*, Opinion of the Commission under Article 48 of the Treaty on European Union on convening a Conference of Representatives of the Governments of the Member States to amend the Treaty of 26 January 2000, COM (2000)34, p. 26.

property[354].

The Lisbon Treaty in 2009 defined the principles and objectives of the Union's external action - within which the specific aims of the common commercial policy are also located - and broadened the very notion of "commercial policy"[355]. The profound change in investment policy was also brought about by the explicit conferral of its own legal personality with which the European Union can sign international treaties relating to its areas of competence.[356] Innovating the discipline of trade policy, which is one of the most important instruments at the Union's disposal for the pursuit of its purposes[357], it was thus explicitly given exclusive competence to conclude tariff and trade agreements relating to trade in goods and services, the commercial aspects of intellectual property (thus reforming the regime of shared competences provided for in Article 133 of the Treaty of Rome, as amended by the Treaty of Nice) and FDI. The latter was, therefore, included in the orbit of the exclusive competence of the European Union, falling within the area of common commercial policy, pursuant to Articles 3(1)(e) and 207(1) TFEU[358]. In particular, Art. 3(2) TFEU formally recognized the principle - of a jurisprudential

[354] Agreements on the harmonization of cultural and audiovisual services, educational services, social services and services related to human health continued to remain within the scope of shared competence with the member states.

[355] See G. Adinolfi, *Gli obiettivi e la sfera di operatività degli accordi preferenziali dell'Unione europea*, Gli accordi preferenziali di nuova generazione dell'Unione Europea, 3-15 (Torino: 2021); V. M. Krajewski, *The Reform of the Common Commercial Policy*, EU Law after Lisbon, 294 (Oxford: 2012).

[356] Until the Lisbon Treaty, the Union, while incorporating within itself three distinct communities (European Community, ECSC and Euratom) each having its own legal personality, did not have an explicit legal personality. Nonetheless, Article 24 TEU provided for the possibility of concluding agreements between the Union and third Countries, which, according to many, would already in itself have represented an implicit attribution of international legal capacity (see D.P. Colagione, *The Legal Personality of the European Union*, Il Politico 1, 207-229, (2010)). To date, according to Article 47 TEU: "The Union shall have legal personality" and "In each of the Member States the Union shall enjoy the most extensive legal capacity accorded to legal persons under national law" (335 TFEU). For a more detailed analysis of the events that led to the current allocation of competence in the area of capital movement and investment. See, Gerald Tesauro, European Union Law, 572-575, (Padua: 2012); Luigi Daniele, *European Market Law*, 217-227 (Milan: 2021).

[357] See P. Eeckhout, *EU External Relations Law 2*, 439 (Oxford: 2011), which highlights the relevance stating that it represents «[...] the EU's most developed external policy (...)», as well as the "center-piece".

[358] Article 3(1)(e) TFEU recognizes the exclusive competence of the European Union in the area of common commercial policy, thus resulting in its legitimacy to legislate and adopt legally binding acts in this area. Article 207 TFEU provides that "The common commercial policy shall be based on uniform principles, particularly with regard to tariff changes, 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 standardization of liberalization measures, export policy and trade protection measures, including those to be taken in cases of dumping and subsidies. The common commercial policy shall be conducted within the framework of the principles and objectives of the Union's external action". This, in order to enable the achievement of the objectives set by Article 206 TFEU, according to which the Union shall pursue the progressive removal of obstacles to international trade and the movement of capital.

nature and previously mentioned - of parallelism between internal and external competences of the European Union. At the same time, on the other hand, the control of portfolio investments[359] was referred to concurrent competence. The European Union's competence in foreign investment can be traced back to Article 207 of the Treaty on the Functioning of the European Union ("TFEU"), which provides that the common commercial policy shall be based on uniform principles, also including those related to foreign direct investment, and that the common commercial policy shall be conducted within the framework of the principles and objectives of the European Union's external action. The purpose of this strengthening of the European Union's prerogatives thus appears to be to benefit from broader powers in the negotiation of future agreements and to prevent a multiplicity of Member States' policies that could undermine the uniformity of the internal market[360].

In this context, the role of the European Parliament has been further increased in the decision-making process aimed at concluding international agreements[361], as well as in the adoption of measures defining the framework for implementing trade policy, through the ordinary legislative procedure. In addition, Article 218(6) TFEU provided for the Council to decide on the conclusion of certain international agreements, subject to Parliament's approval. The European Commission, together with the European Parliament Committee on International Trade, is then required to report to the Parliament on the progress of ongoing negotiations.

Thus, it is once again emphasized how the centralization of foreign direct investment competencies at the EU has led to a rationalization of the entire system.

Starting from 2016, it has been possible to observe an acceleration in the European policy of controlling FDI, which has been strongly influenced by global processes that have seen a disproportionate increase in investment from the United States and China[362].

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[359] Those investments of shorter duration through which the investor does not aim to direct strategic choices and establishes a less strong link with the State to which the transaction is addressed. They have been already assessed in section 1 of chapter I.

[360] See Jan Ceyssens, *Towards a Common Foreign Investment Policy-Foreign Investment in the European Constitution*, 32 Legal Issues of Econ. Integration 259, (2005).

[361] Art. 207, para. 3 and 4 TFUE. See Gerald Tesauro, *Diritto dell'Unione europea. Parte istituzionale*, 106 (Torino: 2013).

[362] See European Economic and Social Committee, Opinion - *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for monitoring foreign direct investment in the European Union*, COM(2017)487 final - 2017/0224, which states that during the 2008 financial crisis,

The purchase of numerous domestic infrastructures by non-European Countries has catalyzed the debate about the need for investment regulation at the EU level. The European framework for controlling FDI, in fact, was introduced mainly as a result of pressure from Germany, France and Italy, as a reflection of the three Countries' concerns related to the rise of Chinese investment and with the intention of protecting Member States and the Union "as a whole".[363] In this regard, in the "State of the Union" of 2017[364], President Junker stated: "[...] Europe must always defend its strategic interests. That is why today we are proposing a new European framework for investment screening".[365] Therefore, it is right within the framework of European action on common trade policy outlined above, that the Screening Regulation was inserted as a mechanism of cooperation among Member States and between them and the European Commission as an expression of an "internal" competence, equipping them with tools suitable to jointly address security and public order risks at the domestic level.[366]

2. The European Union's shift of paradigm: brief introductory remarks

Regarding the EU's approach toward the Chinese giant over the past decade, it is interesting to dwell on the shift of paradigm of the European Union which, as it will be explained in the following sections[367], was very receptive to Chinese FDI at the beginning of the decade and then slowly backtracked by raising its guard through the adoption of an

Chinese investment in member states increased tenfold from €2 billion in 2009 to nearly €20 billion in 2015. In 2016 alone, Chinese direct investment in the European Union amounted to €35 billion, an increase of 77 percent compared to 2015 and as much as 1,500 percent compared to 2010. In contrast, also in 2016, investment by European companies in China decreased by 25 percent.

363 See Brigittw Zypries, Michel Sapin, Carlo Calenda, *Letter to Commissioner Malmström by the Bundesministerium Für Wirtschaft Und Energie, Ministère de l'Économie et des Finances, Ministry of Economic Development*, Berlin, February 2017. The fear was that the growing number of investors from third countries could lead to an outflow of technological knowledge capable of undermining national security. In particular, it highlighted the lack of reciprocity in many trade relations with such countries and, consequently, the need to create a mechanism at the European level to avoid the damage resulting from "unilateral" investments.

364 Available at the link https://commission.europa.eu/strategy-and-policy/strategic-planning/state-union-addresses/state-union-speeches/state-union-2017_en

365 See Commission, State of the Union, by Jean-Claude Juncker, President of the European Commission of 13 September 2017, p. 9: «[...] We are not naïve free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening».

366 See supra at 3.

367 See section 2.3 and 2.4 below.

increasingly critical approach. As it will be seen below, the two most frequently used instruments to address the concerns raised by China have been Bilateral Investment Treaties ("BIT's") negotiations and the Screening Regulation itself.

The last decade has seen a remarkable growth in Chinese investment in the EU. In fact, prior to the Global Financial Crisis[368] ("GFC"), the level of Chinese investment in the EU was negligible and it is only with the advent of the GFC that such investments tripled to a peak of $41 trillion that entered the EU from China in 2016.[369]

However, such exponential growth in Chinese investment has also been accompanied by a wave of skepticism. Specifically, while in the immediate aftermath of the GFC Member States welcome Chinese investment in order to restore the economy, at the institutional level the EU hardens its stance regarding FDI by sensing an imbalance between EU firms and Chinese competitors.

As many official strategy documents regarding China attest[370], the European position has undergone a radical shift. More specifically, from 2013 to 2019, the EU's rhetoric vis-à-vis China has taken on a tougher and more pragmatic tone. In 2013, the EU and China released the EU-China 2020 Strategic Agenda for Cooperation[371], a sixteen-page jointly-adopted document which identifies a variety of policy areas for future cooperation, ranging from peace and security to people-to-people exchanges. However, in 2016, the Commission found it necessary to release another document entitled "Elements for a new EU strategy on China". The tone of this strategy document is undoubtedly firmer than the 2013 agenda, with the EU recognizing the importance of putting "its own interests at the forefront in the new relationship" and of the "constructive management of differences".[372] Moreover, in March 2019 the EU releases an even more

[368] Reference is made to the period of extreme stress in global financial markets and banking systems between mid 2007 and early 2009.
[369] See Thomas Hanemann, M. Huotari, Anna Kratz, *Chinese FDI in Europe: 2018 trends and impact of new screening policies*, Rhodium Group and Mercator Institute for China Studies (2019).
[370] See European External Action Service, *EU-China 2020 Strategic Agenda for Cooperation* (2013). Available at the link: https://eeas.europa.eu/sites/eeas/files/20131123.pdf Specifically, it is a sixteen page document which identifies a variety of policy areas for future cooperation. The tone is quite amicable and there are a number of specific goals, especially in terms of economic policy, that directly address EU concerns with China, yet they are articulated in a hopeful and non-accusatory way. For example, rather than State that China is using shoddy regulatory standards as a pretense for limiting market access for EU goods, the agenda States that both the EU and China "confirm their commitment towards international standardization and notification of any standards-restricting market access".
[371] *Ibidem*
[372] See Commission, *Elements for a new EU strategy on China*. Available at the link: http://eeas.

forceful paper entitled "EU-China-A strategic outlook"[373], and this is the first policy document that explicitly labels China as an "economic competitor" and a "systemic rival promoting alternative modes of governance", and instead of simply imploring China to reform its policies, the document considers ways in which the EU can respond to China's obstinance.

Hence, the EU's paradigm shift vis-à-vis China's economic policies in recent years is evident: it moved from a patient and positive approach to a more pessimistic and analytical one.[374]

2.1 The Chinese investment strategy: historical background and legislative developments

The People's Republic of China was founded in 1949, and starting from that date China's reputation for foreign investment has never been particularly positive.

In the Chinese investment model, it is possible to find a twofold division between inbound and outbound investment. To the first profile is related the aspect of admission of investments, their regulation and control on Chinese territory; as for outbound investments, on the other hand, their analysis is relevant because of their influence on the proliferation of screening mechanisms in Western Countries as a measure against China's global growth and its so-called "armed investments", such as those operating in the technological dimension.[375]

Starting from the analysis of the admission of foreign investment in China, we must

europa.eu/archives/docs/china/docs/joint_communication_to_the_european_par-liament_and_the_council_-_elements_for_a_new_eu_strategy_on_china.pdf

[373] See Commission, *Communication: EU-China – A strategic outlook* of 12 March 2019, JOIN(2019) 5 final. Available at the link: https://commission.europa.eu/system/files/2019-03/communication-eu-china-a-strategic-outlook.pdf

[374] For further discussion on the topic see Ethan Kable, *Buying-up Europe No More? How the European Union has Responded to the Challenges of Chinese Foreign Direct Investment*, Claremont-UC Undergraduate Research Conference on the European Union 7 (2021).

[375] See Cosimo Marcantuono, Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 89-92 (2022). See also Maria Adele Carrai, *The Rise of Screening Mechanisms in the Global North: Weaponizing the Law against China's Weaponized Investments*?, 8 The Chinese Journal of Comparative Law 2, 351–383 (2020).

emphasize its clear difference with the European system as legacy of the communist ideology, lack of protection of private property, and exclusion from the international trade and investment market[376] that has long characterized the Country. However, as will be seen shortly, this system has gradually changed while still retaining aspects typically characteristic of a nation with a socialist identity.[377]

In the Chinese context, the role of the State in the national economy is of paramount importance as it is closely linked to the essential features of the mechanism for admitting and controlling foreign investment. In fact, China has been one of the Countries that has longest shied away from opening up to a liberalist policy.

Approaching the issue from a historical perspective, it should be recalled that China has always been involved in international trade relations with the West; suffice it to say that the Silk Road has existed since 130 BC[378]. However, there has always reigned among Chinese emperors the belief that the Country was fully self-sufficient to the point of considering international trade as a marginal and non-essential factor. [379]

Nonetheless, we begin to see the first wave of change with the rise of the new Communist Party leader Deng Xiaoping; he favored the opening up to a new economic policy by giving birth to a "liberalism with Chinese characteristics": China thus begins to exhibit of first neoliberal traits. [380]

There is a shift from a model of a planned economy to one that is open to the market and, in particular, to a system in which certain sectors of the economy open up to the market while remaining supervised by the State.

This change imposes itself as a real revolution that leads to liberalization by encouraging the entry of foreign investment that was previously foreclosed. Specifically, one can speak of a real revolution because in addition to a change on the economic front,

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376 See Cai Congyan, *The Legal Protection of Foreign Investment: A Comparative Study*, (No Title) 243 (2012).
377 See *supra* at 358.
378 See Paolo Santangelo, *Politica estera cinese,* Cina, Istituto italiano per l'Africa e l'Oriente 10, 122-153 (1973). Available at the link: https://www.jstor.org/stable/pdf/40855402.pdf?refreqid=excelsior%3A5f33f8e2272edbe5371fb2489b52c4da.
379 See *supra* at 358.
380 See Maria Adele Carrai, *The global rush to screening mechanism is a new geopolitical context*, Foreign direct investment screening, (Bologna: Giulio Napolitano, 2019).

a change also takes place in political ideology: international investment is in fact now interpreted as a new political instrument.

However, this model still showed the remnants of the old system, and the early forms of liberalization that began in the late 1970s did not guarantee the principle of non-discrimination and equal treatment between foreign and local operators. For instance, in case of access of foreign investors in the Chinese market, there were limits on the participation in the share capital, as well as frequent introduction of a Chinese partner into the shareholding structure. To this end, the Sino-Foreign Equity Joint Venture Law was enacted in 1979, which allowed foreign investors to enter the Chinese market only through joint ventures with Chinese partners. Later, a subsequent law that tended to be in line with the new policy of openness and which it seems appropriate to mention is the Wholly Foreign-Own Enterprise Law of 1986, which allowed foreign investors to enter certain sectors without the necessary participation of a Chinese partner and with the provision that a new company could be established by holding its entire share capital.[381]

Right in this juncture it is to be found one of the focal points of pressure that has been exerted by the United States and the European Union on China in order to solicitate it to adopt further reforms that would allow the achievement of a greater degree of equality between foreign direct investors in China vis-à-vis Chinese investors active on American and European soil.[382] Indeed, it is impossible not to note that trade negotiations between the U.S., China and the EU, particularly those conducted with a view to concluding BIT's, have always played a decisive role in the revision of the foreign investment regime in China, with strong influences exerted reflexively on domestic regulations as well, especially in addressing issues such as technology transfer and the pursuit of reciprocity.[383]

From these regulatory interventions, one can thus see the fragmented nature of

[381] See *supra* at 358.
[382] See "Interim Provisions Guiding Foreign Investment Direction" issued on 28 June1995 and "Catalogue of Industries for Guiding Foreign Investment" of 28 June 1995. See also Cheng Bian, *National Security review of Foreign Investment – A Comparative Legal Analysis of China, the United States and the European Union*, Routledge (2020).
[383] See *supra* at 358. See Michael J. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 6 Cardozo J Int Comp Law 1, 73–108 (2009).

China's foreign investment discipline, which, however, will later be reformed with the introduction of the 2019 New Foreign Investment Law.[384]

In this context, it is worth mentioning that the evolution of Chinese discipline was also strongly influenced by China's membership in the World Trade Organization ("WTO"). The goal of that membership was to increase China's role as an economic player on the international stage, but to that end the Country was required to conform to a set of standards issued by the Organization for the maintenance of the rule of law through four categories of obligations.[385] Accordingly, China was to: (I) provide administrative uniformity of rules on international trade throughout its territory; (II) abide by the principles of regulatory transparency and allow access to information; (III) implement judicial review of administrative acts especially pertaining to international trade; and 4) abide by the obligation of non-discrimination of foreign enterprises through the prohibition of unequal treatment contemplated, in particular, in Article 4 of the Accession Protocol.[386] Alongside these commitments, there were also obligations relating to the liberalization of new sectors, goods, services, obligations to protect intellectual property and, in particular, obligations to liberalize foreign investment[387].

However, while these principles have helped to foster the national policy of openness, on the other hand, they do not seem to find effective implementation even at present; this is because of certain cornerstones of China's discipline on the admission and regulation of foreign investment represented by the 1995 Catalogue for the Guidance of Foreign Investment Industries, which was later repealed and replaced by the 2017 Negative List, an expression of a system currently in force.

The "Catalogue" system served as a macroeconomic guide for the entry of capital

[384] On 15 March 2019, the Foreign Investment Law of the People's Republic of China was adopted by the 2nd session of the 13th National People's Congress. It took effect on 1 January 2020, and replaced several regulations of the inherently highly fragmented foreign investment regime, including the Law on Chinese and Foreign Joint Ventures, the Law on Contractual Joint Ventures, and the Law on Wholly Foreign-Owned Enterprises, collectively referred to as the "Three Foreign Capital Laws".
[385] See John Howard Jackson, *The Institutional Ramifications of China's Accession to the WTO*, China in the World Trading System: Defining the Principles of Engagement, Kluwer Law International 75-80 (1998).
[386] See WTO Decision, Accession of the People's Republic of China of 10 November 2001. Available at the link: https://worldtradelaw.net/document.php?id=misc/ChinaAccessionProtocol.pdf&mode=download
[387] The Chinese government Stated that by the year 2000, i.e., even before China's accession to the WTO, it had completed the review of some 1,400 laws and regulations. See Communication from the People's Republic of China, Information Required in Sections I and III of Annex 1A of the Protocol, of 25 November 2002, WT/GC/ 68.

from abroad; it was divided into four sections referring to four different conditions for the admission and regulation of foreign investment: permitted, encouraged, restricted and prohibited investments. Membership in one rather than the other category was relevant for the purpose of identifying the degree of difficulty in obtaining approval of certain projects in China or for the application of preferential policies, deductions or tax exemptions.

Among the most notable changes made to the most recent editions of the main Catalogues are those of 2011 and 2015: many restrictions provided for foreign investors have been removed. For example, the industrial sectors restricted to foreign investment have been reduced by about half, from 79 to 38, and the sectors in which joint ventures are required have been reduced from 43 to 15. In light of this information, it is therefore even easier to understand how the gradual reduction of sectors prohibited by the Catalogue system is undoubtedly attributable to the liberalization obligations arising from China's WTO accession.

Subsequently, as mentioned above, the Catalogue system was replaced by the Negative List of 2017, which proposes lists of industries and sectors determined by the State in which foreign investment is restricted or prohibited. The foreign investor, in particular, will not only be required to comply with the provisions contained in the Negative List, but will also have to ensure that his investment does not trigger national security concerns. However, the foreign trader who intends to invest in China will have to keep in mind that there are different and specific editions of Negative Lists that determine access to the Chinese market. These include in particular: general Negative Lists, thus applicable to all enterprises, including domestic ones, and Negative Lists aimed at foreign investors, in whose category falls the List specifically applicable to special economic zones such as Free Trade Zones[388].

In light of the above, it is therefore possible to say that China has aligned itself with the obligations dictated by the WTO but, at the same time, it must also be pointed out that the streamlining of the Negative list does not lead China to comply even formally with

[388] Negative Lists aimed at all investors, both domestic and foreign consist of the Negative List for Market Access (2019 edition) and the Catalogue for Guiding Industry Restructuring (2019 edition). In contrast, Negative Lists specifically applicable to foreign investors include: The Special Administrative Measures on Access to Foreign Investment (2019 edition, FI National Negative list) and The Free Trade Zone Special Administrative Measures on Access to Foreign Investment (2019 edition, FI FTZ negative list)

the aforementioned principle of equal treatment, and this is because of the very existence of a Negative list as an instrument that serves to attribute a special regime to the foreign investor as well as to make an effective distinction between the foreign and the local operator.

Finally, a recent attempt to modernize the investment discipline both formally and substantively, was the enactment of the New Foreign Investment Law that came into effect on 1 January 2020. This new investment law on the one hand modernizes the regulatory system by making it more transparent and fair but, from a less formal point of view, the implementation of these principles nevertheless encounters once again limitations in the Negative list system and in the vagueness that characterizes the wording of the new rules especially with regard to the regime of review for national security issues.

Based on the present analysis, it is therefore possible to find a lack of reciprocity between the Chinese and European models in the area of foreign investment regulation and control, especially with regard to screening systems.

Specifically, while on the Western front there is a tendential stance of openness to foreign investment and a gradual adjustment to technological, economic and social development, a strategy at the antipodes has been adopted in China. It has been reluctant at first to allow foreign investment to enter and, later, to adopt accession measures that nonetheless conceal forms of discrimination.

It can be argued that there is an imbalance in the flow of certain outbound investments between the screening systems of China, the United States and Europe. Specifically, China's global rise as a great power turns out to be accompanied by certain investments labeled as "armed investments," to be understood as investments operating in the most advanced technology sector and potentially capable of undermining the sensitive interests of the foreign Countries to which they are directed. In fact, many argue that it is precisely this type of investment that has contributed to the transformation of the World geopolitical environment, in which China now plays a key role, as well as to the creation, modification and imposition of new screening mechanisms in the various Countries of the World called upon to cope with, and in a certain sense called upon to defend themselves against so-called armed investments of a mainly Chinese nature.

The great margin of criticality created by such a circumstance stems from the fact that emerging concerns from certain forms of Chinese investment can sometimes lead some Countries to adopt disguised forms of protectionism. Although national security remains a legitimate concern of individual sovereign States, the existence of a system of general regulation of the matter could lead to the harmonization of screening mechanisms. For this reason, the European system of foreign investment screening could be considered, as of today, the first reference model on the subject, thus going beyond the American system that for a long time instead expressed example and inspiration; the European system is indeed the only screening mechanism applied to a huge market, such as the single European market, inspired and governed by the typical principles of the rule of law.

In conclusion, Chinese legislation comes across as unsupportive of reciprocity in the treatment of foreign investors. Ultimately, screening mechanisms that do not incorporate the principles of the rule of law, and in particular due process standards, risk to result as challenging not only for international cooperation but also for the very corollaries on which the international economic order has been based since World War II.

2.1.1 Focus on to the China adhesion to the WTO

China's accession to the WTO took place on 1 December 2001[389], revolutionizing the chessboard of world economic powers . In fact, already in 2000, China was the seventh largest exporting country and the eighth largest importing country in the world[390]. Although it seemed a foregone conclusion that such an economically strong State would be part of the Organization, its membership took a long time to arrive due to both exogenous factors, such as the refusal of some States to its admission, and endogenous factors, such as its closure towards the West[391]. China, in fact , was already participating in world economic policy at the end of World War II and in 1947, along with 22 other

[389] See Roberto Cavalieri, *L'adesione della Cina alla WTO: implicazioni giuridiche*, 9 (Lecce: 2003).
[390]See P.Bellabona , F. Spigarelli, *Movin from Open Door to Go Global: China goes on the world stage,* Int. J. Chinese Culture and Management, 102 (2019).
[391] Marco Sabattini, Pietro Santangelo, *Storia della Cina*, 419 (Bari: 2008).

Countries[392], it signed the Protocol of Provisional Application of the GATT, later becoming a Contracting Party to it in 1948, when it came into force . This participation, however, did not last even two years, as the Nationalist government (which fled to Taiwan) that had signed the agreement decided to withdraw its participation after notifying the Secretary General of the United Nations, as they did not want to allow the Chinese Communist Party to reap the benefits of their signature . The situation created was not changed for more than 20 years, in fact during the Maoist period, as mentioned earlier, the Chinese economy closed in on itself without having any relationship with the Western world and later under Xiaoping , China was not yet ready to participate in the global market.

It was not until 1986 that the Government of Beijing notified the GATT of its intention to regain Contracting Nation status. Subsequent to the receipt of the 1986 application for accession to the GATT , it was created a ”working group on Status of the People’s Republic of China” designed to examine the request for re-gaining the status of a contending Country . This special committee had the obligation to draft a preliminary protocol for the Country’s accession to the Organization, setting out rights, obligations and conditions for accession[393]. Despite the fact that negotiations did not take place expeditiously in 1989, there was a sense of optimism since the bilateral negotiations between the People’s Republic of China and the United States had a positive outcome[394]; however, disagreements persisted among the Western powers and, contrary to what one might expect, even domestic public opinion was doubtful about accession. Although admission would certainly have brought an improvement from the standpoint of foreign investment, on the other hand there was an air of uncertainty about the effects such admission would have had on the Country’s domestic economy. Another factor that slowed down the negotiations was the condemnation by Western Countries in connection

[392] The other signatory Countries : the Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States United States of Brazil, of Burma, of Canada, of Ceylon, of the Republic of Chile, of the Republic of China, of the Republic of Cuba, of the United States of America, of the French Republic, of India, of Lebanon, of the Grand Duchy of Luxembourg, of the Kingdom of Norway, of New Zealand, of Pakistan, of the Kingdom of the Netherlands, of Southern Rhodesia, of the United Kingdom of Great Britain and Northern Ireland, of Syria, of the Czechoslovak Republic, and of the South African Union. GATT 1947 available at https://www.fedlex.admin.ch/eli/cc/1959/1745_1807_1812/it

[393] See Preliminar Protocl for the accession to the GATT. Available at the link: https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm

[394] See K. Halvenson, *China’s WTO Accession: Economic, Legal, and Political Implications*, 27 B., Chinese Int’l & Comp. Law Review, 319 (2004).

with the tragic events in Tian-an-Men Square in Beijing, which were so serious that they decided to halt the tasks of the working group. The work resumed and continued for the next two years (1992-1994) from which a first draft protocol was presented but not accepted as it showed how still far the Parties were. In particular, disagreements emerged on the import and export of goods, application of duties and tariffs, backwardness in the agricultural sector and in the application of anti-dumping measures. At the end of these negotiations, China requested and was granted the opportunity to participate as an Observer in the Marrakesh Accords that led to the closing of the Uruguay Round in 1994 and the birth of the World Trade Organization[395]. The birth of the WTO brought the change from the "Working Party on Status of the PRC" to "Working Party on China's accession to the WTO".

The intentions of the new working group were to assess China's economic policy based on the new WTO directives, the new rules on agriculture, trade in services contained in the GATS, the investment discipline contained in TRIMS and the intellectual property right contained in TRIPS . In 1997, a second draft of the protocol was issued which still presented difficulties on China's side to comply with the requirements for accession. Finally the Protocol of Accession of the People's Republic of China was adopted on 10 November 2001 in Doha during the Fourth WTO Ministerial Conference in accordance with Art. 13.2 of the Founding Agreement [396] and allowed China to acquire the status of WTO Member despite not meeting all the basic requirements included in the Protocol, but on which it decided to commit to supplement.

[395] The Uruguay Round was the 8th round of multilateral trade negotiations (MTN) conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986 to 1993 and embracing 123 Countries as "contracting parties". The Round led to the creation of the World Trade Organization, with GATT remaining as an integral part of the WTO agreements.

[396] WTO Admission Protocol of States seeking admission after 1995 available at: https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm. "*The Ministerial Conference, Having regard to paragraph 2 of Article XII and paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization, and the Decision-Making Procedures under Articles IX and XII of the Marrakesh Agreement Establishing the World Trade Organization agreed by the General Council (WT/L/93), Taking note of the application of the People's Republic of China for accession to the Marrakesh Agreement Establishing the World Trade Organization dated December 7, 1995, Noting the results of the negotiations directed toward the establishment of the terms of accession of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organization and having prepared a Protocol on the Accession of the People's Republic of China, Decides as follows: The People's Republic of China may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision*".

2.2 The New Foreign Investment Law

As briefly anticipated above, on 1 January 2020, the New Foreign Investment Law ("New FIL") came into effect in China revolutionizing the entire foreign direct investment scenario. The regulatory framework had to be changed as the previous regulations were to be considered outdated and thus in need of amendment. In fact, the New FIL was drafted to further open its market and level the playing field for foreign investors with Chinese competitors. In addition, China's New FIL aims to facilitate investment to create a more stable, transparent and predictable investment environment. All of these efforts are ultimately aimed at further encouraging FDI in China as part of the "Made in China Plan 2025" .[397]

In the Chinese scenario FDI laws can be considered as special rules with respect to China's existing rule on company law, the latter being applied to the extent that it is not derogated by the special rules, according to the principle *lex specialis derogat generalis*. Even so, FDI laws applied in derogation of the general rule, caused antinomies and overlaps. Indeed, it was necessary to formulate a unified FDI law to replace this fragmented discipline. After years of debates, the State Council first put the FDI laws up for review in 2014, and subsequently in 2015, the Ministry of Commerce ("MOFCOM") published the "Draft of the Law of PRC on Investment from Foreign Countries"[398] (the "Draft"), which, however, was bitterly criticized and set aside[399]. The Draft consisted of 170 articles that promoted the adoption of regulations that would equate foreign and domestic companies. The rationale for the legislation lies in the fact that foreign companies would be able to set up forms of foreign direct investment by making the request directly to the Administration for Industry and Commerce[400], always taking into account the existing Negative List. In fact, the 2015 draft set concepts such as the

[397] See below section 2.3 where the topic will be fully analyzed.
[398] Available at the link https://en.ndrc.gov.cn/policies/202105/t20210527_1281403.html
[399] See G. Gao Li, *China Adopts the Foreign Investment Law*, Zhong Lun Law Firm of 17 March 2019.
[400] Article 16 of the Detailed Implementation Rules on the Approval and Administration of Resident Representative Offices of Foreign Enterprises in China. Technically this is a national organization with local departments in every administrative region in China (generally each province and major city). Practically speaking, though, it often makes more sense to see each region's AIC branch department as an organization in its own right with jurisdiction over industry and commerce in that region. China AICs perform a variety of roles in governing industry and commerce in their jurisdiction such as inter alia: department of market regulation, bureau for registration of foreign-invested enterprises, anti-monopoly and anti-unfair competition enforcement bureau.

"Negative List approach " replacing, as stated above, the Catalogue discipline and established the two new categories of investments on the "List": that of prohibited investments in which FDI is completely prohibited and that of restricted investments[401]. The Draft also established a commission to conduct national security investment validity examinations: the National Development and Reform Commission ("NDRC")[402]. The studies carried out by the NDRC influenced the following 2018 Draft, where for the first time there was an affirmation of the will to reform the investment law . There was a focus on the change of direction by the government by applying the "pre-approval approach", in contradistinction to the "post-filing approach" brought forward by the 2015 Draft[403]. In contrast to the 2015 Draft, however, which spelled out the subject matter more precisely, the 2018 Draft outlined the investment guidelines with a proposal to abolish the forms of investment then in place[404], in order to create a stable, transparent structure, and an enabling environment for FDI in China. A key point of the 2018 Draft was the inability of administrative authorities to force foreign companies to transfer technology since technology transfer was holding back many foreign investors who had no intention of sharing their Know-How with domestic companies[405]. This opening showed how China wanted to conform to other industrialized Countries although it reserved the right to retaliate against Countries that discriminate against Chinese investment by applying the same measures of discrimination. The third and final Draft in January 2019, proposed the new FIL, later approved in March of that year. This Draft consisted of 42 Articles divided into six chapters : general provisions; investment promotion; investment protection; investment management; legal responsibility and supplementary provisions. The law was passed and came into effect on 1 January 2020 . Under Article 1 of the new FIL it is stated that the New Law pursues the aim to "further expand opening-up,

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401 See Xi. LI , *National Security Review in Foreign Investments: A Comparative and Critical Assessment On China and U.S. Laws and Practices*, 13 Berk. Bus., (2016).

402 See Cora Kang, *PRC Legal Update: New Rules on National Security Review of Foreign Investment in China*, (2021). The Development and Reform department and the department in charge of foreign investment, both under the State Council, shall act as co-conveners of the Joint Committee and conduct foreign investment national security review in conjunction with other departments related to foreign direct investment.

403 Approval by the State Council of the System of Joint Interministerial Meetings on the Establishment of the Pilot Free Trade Zone of the State Council (2015) No. 18. Available at the link: http://www.gov.cn/zhengce/content/2015-02/16/content_9486.htm

404 See the Law on Sino-Foreign Equity Joint Ventures, the Law on Sino-Foreign Cooperative Joint Ventures, and the Law on Wholly Foreign-Owned Enterprises.

405 Ibidem

vigorously promote foreign investment, protect the legitimate rights and interests of foreign investors, standardize the management of foreign investment, impel the formation of a new pattern of all-round opening-up and boost the sound development of the socialist market economy".[406] This article affirms China's intention to further open up to the global market, improving the protection of FDI through more transparent policies and ensuring a fair standard between foreign and domestic enterprises. In Article 2 of the new FIL, a definition of investment is given as "investment activity directly or indirectly carried out by foreign natural persons, enterprises or other organizations"[407], meaning all investment activities conducted directly or indirectly by natural persons, enterprises or other organizations from foreign Countries . The Article further describes the possible types of foreign investment : "greenfield" investment, *i.e.* the opening of a company by an investor, or several foreign investors in the territory of China ; M&A, *i.e.* the acquisition of shares, securities , capital, or any other corporate title or interest within the territory of China'; investment of new projects, *i.e.* the participation of one or more foreign investors in new projects; other cases provided for by laws, administrative regulations and State Council provisions. The new FIL removed the definition of "Variable Interest Entities" from the types of foreign investment, thus nullifying the standard of "actual controlling" as proposed during the 2015 Draft. Such standard was removed in lieu of the criterion of nationality of the foreign investor which standardizes the investment discipline between foreign investors and local investors . The new FIL specifies that FDI will enjoy treatment no less favorable than that accorded to Chinese investors at the market entry stage, prohibits the mandatory transfer of technology, allows foreign enterprises to issue shares and corporate bonds and allows the free transfer of funds of foreign investors and within the territory of the People's Republic of China.

In substance the new FIL follows the path taken by the 2018 Draft, that is the "Negative List approach" and namely the trend of annually decreasing the sectors within the lists . Not surprisingly , during the pandemic situation, MOFCOM has stated that it

[406] Article 1 of the New Foreign Investment Law. Available at the link: https://investmentpolicy.unctad.org/investmentlaws/laws/317/china-foreign-investment-law-of-the-people-s-republic-of-china

[407] Article 2 of the New Foreign Investment Law. Available at the link: https://investmentpolicy.unctad.org/investmentlaws/laws/317/china-foreign-investment-law-of-the-people-s-republic-of-china

would have further decreased the List to encourage FDI in China and contain the economic crisis. Specifically, under Article 4 of the new FIL, the system of “pre.-establishment National” is applied , which is to implement the same conditions of entry and protection to foreign investors, as to domestic investors .

Regarding the distinction between direct and indirect investment, the regulations contained in the laws of Foreign Invested Enterprises[408] (“FIEs”), contained the provisions for direct investment and were silent on indirect investment. The provisions for indirect investment are contained in the “ Interim Provisions on Investment Inside China by FIEs” but do not provide a definition of indirect investment and investments made by enterprises incorporated under FIE regulations or their subsidiaries[409]. However , the definition of indirect investment can be taken from other previous normative sources such as bilateral agreements signed by the Country. For example the China- German BIT, defines “indirect investment” “as” invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party”[410] or the China-New Zeeland FTA defines it as “investments of legal persons of a third Country which are owned or controlled by investors of one Party and which have been made in the territory of the other Party”.[411]

[408] On 1 June 2007, the new PRC “Partnership Enterprise” law went into effect, but it prohibited the establishment of foreign partnerships in Chinese territory. However, on 1 March 2010, the “Administrative Measures for the Establishment of Partnership Enterprises in China by Foreign Enterprises” were introduced, which removed this prohibition, thus making it possible for investors in a FIPE to be two or more foreign companies or individual entrepreneurs or a partnership between foreign companies or entrepreneurs and a Chinese partner .

[409] See D. Cao, *China’s new foreign investment law: highlights, challenges and concerns for foreign investors*, Swiss Business Hub (2019). Available at the link: https://www.s- ge.com/en/article/news/20193-c3-china-investment-law

[410] The Federal Republic of Germany and the People’s Republic of China on the Encouragement and Reciprocal Protection of Investments, China-Germany Article 1(b), 1 December 2003. Available at the link: http://tfs.mofcom.gov.cn/article/Nocategory/201002/201002067 87159.shtml

[411] China-New Zealand Free Trade Agreement, China-N.Z., art. 135, 7 April 2008. Available at the link: http://images.mofcom.gov.cn/gjs/accessory/200804/1208158780064.pdf

2.3 EU and the Chinese foreign direct investments: the Chinese influence over the European legislative decisions and the challenges for Chinese investors

Chinese economic activities in Europe are often the cause of great political-economic debates because of the possibility that these are marked by strategic commitments made, *inter alia*, having as their ultimate goal the achievement of political objectives. Of comfort to this perspective is the great level of involvement that Chinese State authorities play, particularly through State-Owned Enterprises ("SOEs"), SWF, and large-scale financing activities through public funds.[412]

In light of these premises, the doctrine in analyzing European concerns with reference to Chinese FDI typically considers the following arguments to be decisive: 1) the growing capacity for political influence and the potential divisions that could result from differing interests among Member States with reference to trade relations with China; 2) the control and safeguarding of national security, particularly by preserving so-called "dual-use technologies" in advanced fields such as artificial intelligence and robotics; 3) differences in corporate governance and labor standards; and 4) the potential political diversion of economic activities conducted on European soil due to the influence of the State as the ultimate decision-making arbiter.[413]

In other words, two main explanations can be identified when trying to find the reasons behind the political challenges posed by Chinese direct investments into the EU: the first is that Chinese FDI causes political unease due to its novelty. The second is the very nature of Chinese FDI itself which is, on the EU side, perceived as inherently different from foreign investment coming from any other third-Country.

Reflections in Europe on Chinese investment have then in recent years mainly taken

[412] See K. H. Reilly, *China's Economic Statecraft in Europe*, 15 Asia Europe Journal 2, 173–185 (2017). See also Edwin M. Truman, *Sovereign Wealth Funds: Threat or Salvation? I* (2009). The author lists five main areas of concern: (i) the mismanagement of investments by SWFs to the detriment of the economy and finance of the countries in which they have a presence; (ii) the pursuit of political and economic power objectives through SWFs; (iii) the intensification of SWF-inspired financial protectionism; (iv) the risk of financial turmoil and uncertainty associated with SWF activities; and (v) conflicts of interest between the countries in which SWFs have a presence and the countries in which they invest.

[413] Cosimo Marcantuono, *Il golden power ed il foreign direct investment screening in Italia ed Europa*, 91 (2022). See Roland Freudenstein, Rising to the Challenge: The EU and Chinese Strategic Investments in Europe. *Chinese FDI in the EU and the US: Simple Rules for Turbulent Times* 81-89 (2019).

into account the long-term European objectives of being able to maintain an adequate level of technological superiority, a decisive factor not only from an economic point of view but also from a social point of view because of the repercussions that inefficient productivity would have on labor costs in Europe as well as on the level of employment of workers and ultimately in order to preserve the political independence of the EU. These reflections have taken place at the European level especially since 2015, with Chinese manufacturer Midea's bid to buy German robot manufacturer KUKA. Despite discussions and attempts to maintain European control over such an important company, the announced transaction was made official on 8 August 2016, sparking several debates in politics.[414]

Political pressure then augmented with the revealing of the new "Made in China 2025" industrial policy and the "Belt and Road Initiative"[415]. The Made in China 2025 policy makes EU Member States concerned, especially after China proclaimed its aim of becoming a technological innovation superpower and replacing foreign technologies with domestic ones, reviving Chinese companies, without lacking an outward approach to securing access to foreign know-how and technologies.[416]

Moreover, as the title of the present section suggests, there is a flip side of the coin and this situation provokes challenges also for Chinese investors and this is extremely linked to "Made in China 2025". As clarified above, the ties between the Chinese government and Chinese acquisitions are strong and, to give some numbers, it has been calculated that over 60 percent of total investments in the EU by Chinese investors since 2000 originate from firms with 20 percent or over government ownership.[417] This, on closer inspection, explains the encouragement to Member States to take into account

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[414] See *supra* at 396. See Paweł Mateusz Gadocha, *Assessing the EU Framework Regulation for the Screening of Foreign Direct Investment—What Is the Effect on Chinese Investors?*, The Chinese Journal of Global Governance 6.1, 36-70 (2020); Cheng Bian, *National Security review of Foreign Investment – A Comparative Legal Analysis of China, the United States and the European Union*, Routledge (2020).
[415] State Council, gov.cn. "Initiative offers road map for peace, prosperity", 2015; Available at the link: http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.
[416] See *supra* at 396. See Steffen Hindelang and Andreas Moberg, *The art of casting political dissent in law*: *The EU'S framework for the screening of foreign direct investment*, Common market law review 57.5, 1427. (2020); Max J. Zenglein and Anna Holzmann, *Evolving made in China 2025*, 8 MERICS papers on China 78 (2019).
[417] See Commission Staff Working Document on foreign direct investment in the EU following up on the Commission communication "welcoming foreign direct investment while protecting essential interests" of 13 September 2017, SWD (2019) 108 final, p. 60.

factors as State-control and State-ownership when determining if a FDI is likely to affect security or public order. Furthermore, as follows from the preamble of the Screening Regulation, the Member States and the Commission should be able to take into account, in particular, if the foreign investor is pursuing State-led outward programs or projects.[418] It is exactly here, in this Statement, that we can find the link with "Made in China 2025" mentioned few lines above. The "Made in China 2025" strategy has identified 10 strategic sectors in which China wants its companies to compete internationally. In particular, the main goal is to establish China as a leading manufacturing power and as an evidence of that, the statistics shows that the sector which received the most outbound Chinese direct investment in EU in 2018 was the manufacturing sector. Furthermore, a surge in M&A deals in the EU from China has been seen in the subsector of aircraft manufacturing and specialized machinery. This is interesting because the Made in China initiative precisely recognized energy equipment and aerospace as strategic sectors. Therefore, in the light of the Screening Regulation, such investments by Chinese investors may be more likely to undergo screening and be subject to negative screening decisions since they fall within those to take into account pursuant to Article 4(1)(a).[419]

To summarize, Chinese direct investments present peculiar characteristics compared to other types of FDI's into the EU and this is a consequence of the strong connection between the Chinese government and companies, of the State-led programs "Made in China 2025" and, finally, also of the public opinion regarding Chinese direct investments. On this basis, the Regulation is most likely to penalize Chinese investors more than other foreign investors. Consequently, sellers might show reluctance towards

[418] See Screening Regulation preamble 13: "*In determining whether a foreign direct investment may affect security or public order, it should be possible for Member States and the Commission to consider all relevant factors, including the effects on critical infrastructure, technologies (including key enabling technologies) and inputs which are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union. In that regard, it should also be possible for Member States and the Commission to take into account the context and circumstances of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes".*

[419] See below section 2.3.1 the "China National Tire Group" case. The Regulation mentions the following sectors which the Member States and the Commission may consider the potential effect on when determining if a FDI is likely to affect security or public order: *critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure.*

Chinese investors due to concerns for public opinion[420]n and to the reduced transaction certainty because of the FDI screening mechanisms.

2.3.1 A case study: China National Tire Group

In the light of what has been Stated above, the present case allows a better understanding on how State ownership or control can derive from State loans in the Chinese-EU FDI context.

In 2017, as part of an anti-subsidy investigation led by the Commission on Chinese imports of a specific type of tires, it emerged that the government of China regarded the tire industry as a strategic industry.[421] In addition, the Commission also discovered that the financial institutions in China are directed by the legal environment to coordinate in order to be aligned with the government's policy goals.

In particular, one of the companies under investigation was the China National Tire Group (the "Company"). The Company was provided with four exporting producers and between 2014 and 2016 two of them registered overall positive financial indicators. In 2017, however, one of the producers developed losses; in addition, also the third and fourth producer registered consecutive years of financial losses, yet benefitted from State loans at good rates. However, at the time of the investigation, loans were replaced with support from parent company in the form of loans taken on behalf of the latter. [422] Therefore, the Commission decided to interrupt the loans for two of the producers unless

[420] See Elfie Ekegren Franzetti, *Foreign Direct Investments Into the European Union – The effect of Regulation (EU) 2019/452 on Foreign Investors*, (2020). The present section used this paper as source.
[421] See Commission, "Commission implementing regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tires, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tires, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163" (2018) OJ L283/1, paras 1-2.
[422] *Ibidem* para 272.

they represented a form a State support in the light of the Company's overall financial situation. Consequently, the Commission defined the Company as an SOE and treated the outstanding amount of the loans at the time of the investigation as a grant given in order to pursue government policies.[423]

In substance, in order to glimpse the most critical aspect of this analysis, the general question to be asked in similar cases is: can such grants be considered as significant funding which constitutes State-control? In the case of China, the answer is positive most of the time and especially when the Company subject to investigation operates in one of the key sectors set out by the "Made in China 2025" initiative.

The reasons against which this conclusion can be justified is that State-control in these circumstances is indicated by State-ownership, significant funding and the investment is in pursuit of State-led outwards programs, *i.e.*, "Made in China 2025".[424]

2.4 The challenges posed by Chinese FDI

In consideration of the above, as far as Europe's response to the challenges posed by Chinese expansion is concerned, we can State that the new EU's Euro-Asia connectivity strategy is one of the main tools used in order to push back on Chinese FDI but it remains to be seen what impact it will have on the practical level of Chinese investment in the EU. However, it is not the only tool and the EU has addressed the various concerns raised by Chinese investment also by pursuing a BIT and implementing the Screening Regulation itself. Indeed, as extensively discussed in the previous chapter, the EU has gained more and more control over investment policies over the past decade as a result of the transfer of competence to the supranational level over foreign investment be means of the Lisbon Treaty. However, the implementation of the Screening Regulation was also accompanied by the initiative to negotiate a Comprehensive Agreement on

[423] *Ibidem* para 279.
[424] See Elfie Ekegren Franzetti, *Foreign Direct Investments Into the European Union – The effect of Regulation (EU) 2019/452 on Foreign Investors*, (2020). The present section used this paper as source.

Investment ("CAI") with China[425]. The CAI was intended to replace the individual BITs that most Member Stats hold with China and therefore create a single BIT between the EU and China. The CAI negotiations began in January 2014 [426]and it was referenced in the EU-China 2020 Strategic Agenda for Cooperation; it has been a key agenda matter at the annual EU-China summits and saw as its main goal to adjust the Chinese policy to that of the Western economic order by making the relationship between EU firms and their Chinese counterparts more transparent and equal. In substance, the single BIT had to rectify the low levels of European investment in China, secure greater access to the market and ensure more predictable conditions for European firms.

During the sixteenth summit between the European Union and China, the contours of this new comprehensive investment agreement were defined. In order to finalize these negotiations, the EU, during the previous summits, pointed out the disadvantageous situation of foreign investors due to China's closure to other Countries, as well as the imbalance of conditions between potential and existing European investors in China. Thus, the Commission outlined the parameters within which to conduct these negotiations in order to create a simple and secure long-term legal framework in both the European and Chinese markets. [427]

On the Chinese side, the CAI is essentially important for two reasons: to compress the many BIT's into a single set of uniform rules and to encourage active participation in global investment regulations.

However, in the first instance, the European Union was not confident about China's possible unification with the rules of customary international law on investment protection and, in particular, on the investors State dispute settlement mechanism. In addition, the Union was also concerned about China's failure to meet the minimum standard of treatment provided, by contrast, by Europe for Chinese investors. [428]

However, 7 years after the negotiations began and in the shadow of a global crisis

[425] See Sophie Meunier, *Divide and Conquer? China and the cacophony of foreign investment rules in the EU*, Journal of European Public Policy 21 (7), 996–1016 (2014b).
[426] *Ibidem*
[427] See Commission *Trade Policy on China* available at the link: http://ec.europa.eu/trade/policy/countries-andregions/countries/china
[428] See C. Titi, *International Investment Law and the European Union*, 26 European Journal of International Law, 639, 651 (2015).

caused by the COVID-19 pandemic, the document dubbed “Key elements of the EU-China Comprehensive Agreement on Investment” was drafted, enshrining the comprehensive agreement between the European Union and China. Presidents Ursula Von der Leyen and Xi Jinping authored the agreement, which, among other things, was later described by European Council President Charles Michel as “balanced, high-level and mutually beneficial; a cornerstone of economic globalization and free trade, just what is needed to sustain world growth in the post-pandemic era”.[429]

Thus, in essence, the CAI saw as its main goal to create a kind of Brussels-Beijing cooperative axis that could embrace a wide number of sectors including, *inter alia*, automotive electrical, information technology, medical equipment and health devices , chemistry, financial services, and construction. The Union essentially pointed to the claim of fair treatment and the abolition of the obligation to transfer know-how with Chinese partners, thus risking the lack of protection of intellectual property rights, which are practically nil in China.[430]

In that agreement, moreover, Europe had secured Beijing’s commitment in complying with the Paris Agreements regarding the possibility , through a strong Chinese legislative change , of also being able to ratify the two major International Labor Organization (ILO) conventions against forced labor with particular reference to the condition of forced labor in which the Uighur Muslim minority in Xinjiang still find themselves, which in the past has been one of the most difficult obstacles to overcome for the conclusion of the Agreement as China for a long time denied this inhumane condition to which the minority was obliged.

Looking critically, however, doubts about China’s openness remained, as there were a perception that the reciprocity so longed for by the EU was still a long way off. In particular, reassurances about improved working conditions are still questioned directly by the Beijing government, which expresses its willingness to continue to follow its own labor regulatory regime, believing it to be in accordance with international standards

On the other hand, regarding the benefits that the ratification of the CAI might have brought , several jurists and economists believed that China in the first period would have

[429] See Roberto Fattiguso https://www.ilsole24ore.com/art/i-leader-europa-e-cina-collegamento-chiudere-l- accordo-investimenti-ADmIXqAB
[430] For instance Apple had to buy his own trademark as it was already previously registered by a Chinese national.

reaped more benefits because the certainty of fair treatment for investment in Europe ensure greater protection and especially because the Chinese companies (funded by the State) would have not been afraid to invest in a market such as the European one post COVID-19 , unlike a more cautious behavior expected by European companies.[431]

However, as one will have noted from the narrative made at the past tense, the CAI proved short-lived and the European Parliament voted to freeze its ratification in May 2021.[432] Indeed, the CAI was hampered by sanctions imposed by the EU and China: in March 2021, Beijing sanctioned 10 individuals and four entities within the European Union in retaliation for EU sanctions that same month targeting Chinese individuals and entities involved in the persecution and mass detention of Uighurs in Xinjiang. This tit-for-tat move was a turning point in European debate on China, leading to a steep rise in strategic mistrust in Brussels and many EU capitals. As EU representative for foreign and security policy Josep Borrell put it, Chinese retaliatory sanctions "created a new atmosphere . . . a new situation" in EU thinking toward China.[433]

Thus, in light of the above and taking a comparative approach, we could say that while on the one hand the Screening Regulation aims directly at identifying the problems arising from inward investment from China, the CAI on the other hand tried to stand as an attempt to incentivize the EU's outward FDI in China.

In conclusion, although ratification of the CAI remains unlikely at the moment, it must be recognized that it would bring tangible improvements in market access and build great opportunities for European companies. In essence, if the EU's goal is to address Chinese expansion through partnership in this arena, the CAI could be a winning strategy.

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[431] See UE-Cina, il super accordo sugli investimenti, Istituto per gli studi di politica internazionale of 30 December 2020. Available at the link: https://www.ispionline.it/it/pubblicazione/ue-cina-il-super-accordo-sugli-investimenti-28820

[432] See European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP) (2022/C 15/17)

[433] See Josep Borrell, "Foreign Affairs Council: Remarks by High Repre- sentative/Vice-President Josep Borrell at the Press Conference," 22 March 2021, https://www.eeas.europa.eu/eeas/foreign-af- fairs-council-remarks-high-representativevice-President-josep-bor- rell-press-4_en, in The Rise and Demise of the EU-China Investment Agreement, Lily McElwee (March 2023). Available at the link: https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-03/230320_McElwee_German_Debate_1.pdf?VersionId=cJqhWJQk7AccmMTGw.mBGqPh5kL7CMCs

2.5 The implication of China's Belt and Road Initiative for the EU: the case of the Italian port of Genoa

As shortly mentioned in section 1.2, the Belt and Road Initiative ("BRI") is a Chinese strategic-trade initiative, which envisages the creation of two guiding routes: the "Economic Belt of the Silk Road" and the "Maritime Silk Road 21st Century"[434]. On the one hand, the project aims to create a dense network of infrastructures aimed at facilitating trade in the Euro-Asian Continent in order to improve cooperation among the Countries "touched" by this new Silk Road through the use of local currency , thus creating a "win - win "[435] strategy among countries based on mutual support, and on the other hand, the realization of the "Chinese Dream "[436] based on China's assertion as the new hegemonic Country in economic policy .

The set of routes has undergone from 2014 (first release date) to 2016 (the most updated map) several changes as more and more Countries have joined the project , taking into account the possible benefits that the project can produce . China's good fortune lies in the fact that the routes were already marked, but it was necessary to improve the system of roads , railways , airports and ports; in fact, always proving itself as a great planner Nation, already some years ahead private companies and investment funds earmarked for the initiative had been moving to be able to realize this project on the grounds of a tradition founded in the construction of infrastructure : in this regard, China has spent far more than any other developing Country in recent decades; it also has extensive experience in massive investment of infrastructure projects and has a very good building materials industry.

It is thus evident how the BRI represents a well-studied attempt to gain hegemony over a very large portion of territory. In fact, such a project of gigantic scope has been

[434] See LI Xiangyang, "Yidai yilu mianlin de tuchu wenti he chulu" (Problemas and solutions for the One Belt One Road) 4, p. 4-5 (2017).
[435] See https://www.internationalworldgroup.it/la-dottrina-diplomatica-di-xi-jinping/
[436] See CAI Chenyu, "Yidai yilu——zhongguo fuxing mengxiang zhanlue"(One Belt One Roadthe strategy for a Chinese rebirth) 2, p. 245 (2017)

referred to in doctrine as a case of "Contingent Power Extension" ("CPE")[437] toward the European Union. Specifically, under the concept of CPE, the BRI is labeled as a dynamic mechanism specifically used by Chinese foreign policy in order to amplify and legitimize its power in other regions, including the EU.

In this context, it is therefore important to question whether and EU can use its institutional systems in order to cope with Chinese investment in its infrastructures while strengthening the regional integration in the process. Now, the Italian case of the Port of Genoa takes a key role in this scenario being a perfect example to refer to in order to examine the power dynamics of the BRI, the processual impact of power extension toward the EU and the consequences in terms of integration.

Italy was the first EU founding Member and G7 Country to formally join the BRI. In fact, one of the first projects was precisely the reclamation of some areas included in the port plane of Genoa. At first, a Memorandum of Understanding (MoU) was signed between China and Italy, and later, the State-owned China Communications Construction Company ("CCCC") signed an agreement of cooperation with the Commissioner for the Reconstruction of Genoa and the Port Authority of Genoa. This project is in line with the Chinese government's intention to group European ports into the 21st Century Maritime Silk Road, which is expected to use the South China Sea and the Indian Ocean to link China's ports with Europe, and to further enhance China's maritime connectivity with the South Pacific.[438]

Traditionally, control of port infrastructures is equivalent to holding control of labor movements, trade flows and logistical transactions over great distances. On the other hand, however, allowing such control entails a sense of loss of territorial sovereignty. Indeed, China's BRI projects in maritime infrastructures have sparked controversial discussions in the EU. However, despite the contentious atmosphere, Chinese and Italian stakeholders interested in Chinese investment promotion have made it clear that these interventions are intended to support the Italian government in its efforts to improve the quality and integration of European infrastructure networks. It is likely that these efforts

[437] See Julia Gurol and Fabricio Rodríguez, Contingent power extension" and regional (dis)integration: China's Belt and Road Initiative and its consequences for the EU, Asia Europe Journal 20, 441-456 (2022).
[438] See Julia Gurol and Fabricio Rodríguez, *Contingent power extension" and regional (dis)integration: China's Belt and Road Initiative and its consequences for the EU*, Asia Europe Journal 20, 441-456 (2022).

coincide with the BRI’s goal of creating new trade routes along the ports of Piraeus (Greece), Marsaxlokk (Malta), Marseille (France), Valencia (Spain), Koper (Slovenia), and Rijeka (Croatia), where Chinese State-owned enterprises have made investments and established trade hubs.[439]

However, the Genoa Port Authority was able to set conditions vis-à-vis large investors. Specifically, it was determined to restrict Chinese investment within the Vado Getway, a deep-sea container terminal in the port of Vado Ligure. In fact, prior to the BRI signing, the two governments had discussed joint efforts in this regard[440]. The Vado gateway is subject to a 50-year concession in the hands of a consortium in which the Italian company APM Terminals is the largest shareholder (50.1 percent), along with Chinese companies Cosco Shipping (40 percent) and Qingdao Port International (9.9 percent). [441]

Consequently, the perpetuation of port operations in Genoa certainly has symbolic value as BRI slowly leads the expansion of China’s systemic power in the EU. However, the marginality of these investments should be noted as Western firms can still effectively participate in public tenders. In fact, to date, further investments in the port of Genoa have been participated by European companies, while Chinese SOEs have failed to win further contracts.

Despite these locally distributed obstacles, the BRI nevertheless sparked fears that China could make itself the author of European “disintegration” on a regional scale. As widely explained in previous sections, EU leaders met in Brussels in March 2019 to discuss the contours of a common China policy but, at the same time, Chinese President Xi Jinping and Italian Prime Minister Giuseppe Conte held a bilateral meeting in Rome to formalize the BRI agreement. As a result, Chinese analysts interpreted the MoU as a

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439 Ibidem.
440 See Francesco Ghiretti, *The Belt and Road in Italy: 2 years later*, The Diplomat (2021). Available at the link: https://thediplomat.com/2021/03/the-belt-and-road-in-italy-2-years-later
441 See Ports of Genoa available at the link https://www.portsofgenoa.com/it/terminal-merci/terminal-container/container-vl/conainer-apm-vl.html . Accessed on 5 May 2023.

"milestone" in Sino-European cooperation[442] while the media spoke of the China-Italy agreement as evidence of Beijing's commitment to multilateralism.[443]

Domestically, on the other hand, the MoU elicited discordant opinions aimed at condemning a disintegration tendency. A few days before the signing, the European Commission issued a Statement warning that "the EU and its member States can only achieve their objectives regarding China in full unity"[444]. These Statements are symptomatic of widespread discontent among EU officials who perceived Italy's decision to join the BRI on its own called the EU's institutional power as an internally coherent, supra-national instance of foreign policy making into question.

However, despite the evident resentment among European Institutions, both the Ligurian regional government and the national government have defended cooperation with China under a pragmatic and "trade-oriented" discourse. With this in mind, Italian shipping industry players and local authorities have been quoted in the Chinese media suggesting that attracting BRI investment is a customary business transaction that helps meet Italy's infrastructure needs and reinforces rather than challenges European values based on free market competition.[445] For many, doing business with Chinese investors is not at all different from transactions with companies in other Western or Asian countries, reflecting the commercial power that Chinese companies are developing in this area of Europe. Such defense was also strengthened in light of a precedent: the construction of a new breakwater in the port of Genoa had been included in the EU-China Connectivity Platform in 2018 (one year before the BRI), agreed upon by China's National Development and Reform Commission (NDRC) and the European Commission, according to a non-binding institutionalized format.

Indeed, the number of Chinese companies investing in Italy is remarkable, but such number has been a precondition and not an outcome of the BRI capable of making up for its poor institutional basis. Chinese companies have consolidated their presence in many

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[442] See Liu Meng, *China-Italy deal a milestone in cooperation*, China Daily (2019). Available at the link: https://www.chinadaily.com.cn/a/201903/26/WS5c99657aa3104842260b2792.html Accessed on 1 May 2020.

[443] See http://www.xinhuanet.com/english/2019-03/24/c_137918586.htm (24 March 2019).

[444] See Commission *EU-China: a strategic outlook* of 12 March 2019, JOIN(2019) 5 final. Available at the link: https://commission.europa.eu/system/files/2019-03/communication-eu-china-a-strategic-outlook.pdf

[445] See https://www.chinadaily.com.cn/a/201908/30/WS5d69047ca310cf3e35568e15.html (30 August 2019).

important sectors of the economy in recent decades. These are strategic and culturally significant sectors such as energy, automotive, real eState, gastronomy, fashion and soccer. This commercial expansion is significant and has also become increasingly tangible in the Port of Genoa. In 2018, the port recorded a turnover of 2.6 million standard containers, amounting to $50 billion, three-quarters of which left Ligurian shores to meet Chinese demand for "Made in Italy" products[446]. In addition, Chinese investments in port design and automated transport technologies have enabled the Vado Gateway to triple its container carrying capacity, thus providing the largest Chinese container ships with safe and physically adequate conditions to access one of the largest hubs for refrigerated food products from Africa or Latin America, which China can now transport more easily to its ports. Therefore, many Northern Italian manufacturers and businesses see Chinese capital and port equipment technologies as a positive development in light of Italy's critical infrastructure issues, which further gives evidence of China's systemic and commercial power in maritime trade and infrastructure.[447]

In light of the above, it is necessary to understand what the case of the port of Genoa represents in terms of the effects of BRI on EU integration. Certainly such a case confirms that BRI figures as an extension of power, albeit with ambivalent or limited effects on regional integration. The MoU provided the BRI with institutional power, albeit limited, mainly because of the symbolic value in the diplomatic sphere of this agreement, which helped the Chinese media apparatus spread the idea that Chinese investments are well received in the West. Thus, the strategic value of the BRI lies in both the normative-discursive dimension and the expansion of trade power. The Port of Genoa has enabled China to spread its image as a respected international player that not only supports economic globalization, but is actually gaining systemic influence in the world's maritime trade networks, even if the intensity and scale of investment has not yet taken hold in the way it was envisioned. At the same time, a common sense of unified strategic involvement in regional infrastructure among European port authorities and companies may be appearing again, indicating a trend toward integration. For example, China's dream of

[446] Ibidem

[447] See See Julia Gurol and Fabricio Rodríguez, *Contingent power extension" and regional (dis)integration: China's Belt and Road Initiative and its consequences for the EU*, Asia Europe Journal 20, 441-456 (2022).

having its State-owned companies' BRI investments extended to the port of Trieste as well, as initially envisioned in the bilateral BRI agreement, has gradually faded away. Here, Italian companies and politicians have been quite apprehensive of Chinese capital, while German companies such as Hamburger Hafen und Logistik AG (HHLA) have been awarded very convenient public bids.

In the final analysis, it can be said that the high-level bilateral launch of the BRI has elicited clear feelings of disintegration on a regional scale. However, Chinese interventions in the port of Genoa also induced a strong sense of global competitiveness among European companies and prompted a regional learning process among European ports in need of foreign investment for infrastructure development.[448]

2.6 A step back: COVID-19 and the impact of the pandemic crisis on FDI in China

In closing this analysis, I think it might be interesting to open a small parenthesis on the topic of the pandemic from COVID-19 and analyze its impact on foreign direct investment in China in light of a now almost complete recovery from this health crisis.

The outbreak of the pandemic in the Chinese territory of Wuhan and its proliferation to other cities and Hubei Province led to the issuance of a State of emergency and a total shutdown of the Country and any activity that could speed the transmission of the virus . Naturally, businesses also came to a halt, bringing a loss of annual economic growth unprecedented since 1990. The industry shutdown forced the Beijing government to implement defensive measures to protect its economy, which in the first quarter of 2020 experienced a sharp decline in every economic sector[449], except for the pharmaceutical sector and the production of health care devices, which instead experienced strong growth . Of course, FDI were also affected by the pandemic, in fact, data provided by the Ministry of Commerce (MOFCOM) outlined a 10.8 percent decline from the previous year which

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[448] *Ibidem.*
[449] See C. Textor *Projected coronavirus impact on China's GDP growth 2023.* Available at the link : https://www.statista.com/statistics/1102691/china-estimated-coronavirus-covid-19-impact-on-gdp-growth/ (24 April 2023).

is equivalent to about $30 Billion . China, like the rest of the World, was certainly not ready for a crisis of this magnitude; moreover, already in 2003 suffered a blockade of the economy caused by SARS so, aware of the measures to be taken , following an initial period of lurch in the economy they tried to find the right asset to make their economy flourish again through foreign investment. In this regard, the Ministry of Commerce presented a comprehensive package of fiscal, monetary, financial and trade policies to support foreign-invested enterprises (FIEs) in the Country in resuming normal operations after the social and economic disruption caused by the pandemic. Although some of these policies may seem vague or redundant, they provide a clear picture of the government's priorities in helping foreign enterprises resume operations and resolve the practical issues they faced due to the worst epidemic of the century[450]. On 10 February 2020, the Ministry of Commerce issued "The Circular on Further Deepening the Reform regarding Foreign Investment Projects to Respond to Epidemic Situations", where it was announced that the national-level economic development zones would have been the restart point of China's economy as full and fair treatment between domestic and non-domestic enterprises had been granted through State aid , so as to attract the foreign entrepreneur in times of crisis and not lose the one who was already running business in China .

Another circular issued on 4 March 2020 by the government, announced the resumption of work by many companies, through incentives and measures to try to ensure, as much as possible, that companies could continue to operate again at normal capacity. To still attract foreign direct investment , the Ministry of Commerce expressed the willing to create an even smaller Negative list , with the understanding that extraction of raw materials and production of automobile parts remains banned or restricted, a new revision would have further expanded foreign investment access in China's service, manufacturing and agricultural sectors thus improving the Country's economy. To facilitate further foreign investment in mainland China, the Chinese government announced a series of tax breaks to help invested foreign enterprises resume their regular production and local operations in China. Regarding business taxation , on 30 March 2020, for example, the State Tax Administration of the People's Republic of China (STA) issued a circular extending the deadline for tax declaration from 20 April 2020 to 24 April 2020.

[450] See Peter C. Pang, *Impact of Coronavirus on Foreign Investment in China*. Available at: https://www.mondaq.com/china/government-measures/925034/impact-of-coronavirus-on- foreign-investment-in-china (28 April 2020).

Previously, the State Tax Administration had extended the tax filing deadline in February and March in order to ease the tax compliance burden of foreign enterprises following the new coronavirus outbreak. In addition to this, taxpayers who still had difficulty in declaring their taxes within the newly extended deadline due to the severe impact of the new coronavirus pandemic could have asked the relevant tax authorities for longer extensions. Considering that April was the tax filing period for the first quarter since the coronavirus outbreak, the circular issued by the State Tax Administration brought great benefit to both taxpayers who filed monthly returns and those who filed quarterly tax returns[451]. Moreover, it is worth stating that the measures taken by the government have ensured that China did not collapse, as, although still struggling with the consequences of the pandemic, it remains a very attractive economic market for Western investors .

In fact, 88 percent of the incumbent companies have no plans to change their investment, nor are they thinking of relocating assets. The data emerge from the European Chamber of Commerce's 4th Position Paper "Shanghai Chapter"[452], after monitoring 600 companies in the leading area of China's economy and finance. The Paper focused on Shanghai, as it alone had recorded a GDP of 473 billion euros at the end of 2019, equal to 160 percent of that of Denmark.

Therefore, the COVID-19 certainly affected the Chinese metropolis, which in response to the crisis situation has applied ad hoc measures .The measures applied relate to planning industry, utilization of industrial land, financial support and enhancement of government services. The rescue project aims to build new space in industrial areas, totaling 108 square kilometers in 26 industrial parks, to encourage new high-value investment. The city's real area of development will be based on e-commerce development in order to attract as many investors as possible. To this end, the construction of digital infrastructure - which includes stations for 5G line, industrial Internet of Things, artificial intelligence, big data center, smart connected vehicles and smart grid - will also be enhanced. In the past three years, the city's investment in digital infrastructure has reached about 200 billion yuan ($28.12 billion). Regarding the use of industrial land, a 50-year land lease will be proposed, helping to reduce land costs for companies considered high value. As for financial support, the city has allocated an investment fund

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[451] Ibidem

[452] See Position Paper European Chamber. Available at the link : https://europeanchamber.com.cn/en/upcoming-events/15917/Meet_the_Shanghai_Chapter_Board

of 400 billion yuan, earmarked for the development of artificial intelligence and biomedicine in the new designated areas[453].

Foreign investment promotion policies have undoubtedly been aimed at preventing the large-scale exodus of foreign enterprises , despite the fact that the situation in the rest of the World was not better. In this sense , the importance of the policy implemented by President Xi Jinping on boosting the economy will bring greater confidence from foreign investors , as they have been strongly protected in such a crisis situation[454]. China surpassed the US in the number of foreign direct investment in 2020. This figure refers to the small decline suffered by China, in relation to the other economic powers. In 2019 saw foreign direct investment drop by 4 percent , compared with 49 percent for the United States and 71 percent for the European Union . The two world powers had gone in two opposite directions: China was growing , promoting foreign direct investment in any way , while the United States due to an overly protectionist Trump policy , has suffered a heavy drop in investment . In fact it should be Stated , that the figure refers only to new investment , as the total cumulative foreign investment over the years in the United States still remains significantly higher than that of China[455].

3. U.S. investment control legislation: Section 721 of the Defense Production Act, 1950

It is now time to shift our attention on the interactions of the EU mechanism with the U.S. screening system of foreign investments, since the latter can be seen as "forerunner" of the implementation of a special powers legislation. In fact, while the European ones see its birth in the 1990s during the privatization era, the overseas

[453] See Phcadvisory,*New Measures Aim to Promote Investment in Shanghai* (2020). Available at the link : https://mp.weixin.qq.com/s/CKueL-_GOZoDAJzbY7c1dQ

[454] See Peter C. Pang, *Impact of Coronavirus on Foreign Investment in China*. Available at: https://www.mondaq.com/china/government-measures/925034/impact-of-coronavirus-on- foreign-investment-in-china (28 April 2020).

[455] See in general for section 1.5 Ernesto Costantini, *La disciplina degli investimenti diretti esteri (IDE): dall'open door policy alla new foreign investment law in Cina, 136* (2020).

economy began to develop almost a decade earlier. The latter has never been characterized by a massive presence of the central State in the market, and this is because of a widespread liberalist sentiment that has always led to a hostile interpretation of any form of economic planning and direct intervention of the public system in the market. Therefore, we should not be surprised that investment control mechanisms in the United States have never been linked to the divestment of State holdings or to instruments typical of private law. From this point of view we can reaffirm, as will be also seen more clearly below, that the American discipline anticipated by several years the establishment of a model of control that inspired, with due differences, the European legislator[456].

Traditionally, the United States has maintained a neutral and tendentially open stance with respect to welcoming foreign investments, which has always been considered as a fundamental element in the economic growth and development of the Country's industrialization process, especially during the 19th century. In fact, foreign capital contributed enormously to the construction of many essential American infrastructures, such as bridges, roads or railroad networks. Therefore, the dominant liberalist ideology supported the so-called open policy, that is a policy of openness to foreign investments.[457]

However, said open policy that has been a cornerstone of American history, met a setback after the outbreak of the First World War. It was precisely on that occasion, in fact, that the first restrictions on foreign investments were realized through the seizure of certain assets, specifically relating to chemical industries of strategic importance to the United States, which had been the subject of substantial investment by Germany. On this occasion, therefore, the first State forms of control over foreign investments in strategic sectors manifested themselves, at least at an early stage, only and exclusively in relation to the needs that the public administration was called upon to address in view of the war effort.

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[456] See Christopher Mann, *The global rush toward foreign direct investment screening: lessons from the United States, in Foreign direct investment screening*, at 15-21 (Bologna: G. Napolitano 2019).
Until 1975, foreign investments were screened by a diverse body of laws. For example, antitrust law, first with the Sherman Act of 1890 and later with the Clayton Act of 1914 were concerned with foreign direct investment on the competitive side. On the other hand, in the area of public safety, there were the Security Act of 1933 and the Security Exchange Act of 1924 whose objectives included the prevention of fraud and manipulation of stock prices.

[457] See Vittoria Cusumano, *Le procedure di screening degli investimenti stranieri alla luce delle nuove sfide globali*, 153 (2021).

With particular reference to relevant legislation in this area, the first restrictions were the subject of the "Trading with the Enemy Act" ("TWEA"), a federal law enacted in 1917 to restrict trade. The main aspect of that law consisted in giving the President the power to restrict, in whole or in part, trade between the United States and Countries hostile to it in wartime, without necessary parliamentary approval. On this point, it should be noted that the text of the TWEA refers precisely to "war and national defense", thus placing the emphasis of the restrictions on the concept of national security[458].

The succession of conflicts that dominated large part of the 20th century and that involved the U.S. front, led to the adoption of a number of laws that gave the executive body broad regulatory authority in certain strategic sectors, in particular the industrial sector, in order to enable the Country to more quickly or efficiently manage the production of certain goods or services necessary to deal with the conflict. Relevant to this are the First and Second War Powers Acts, which precisely gave new powers to the executive body[459]. However, much of this regulation lapsed with the end of World War II and the beginning of the Cold War with the Soviet Union and the North Korean invasion of South Korea in June 1950 prompted the Truman administration to reconsider the need to reestablish an executive authority with greater powers in the interest of national security[460]. Exactly in this context arose the Defense Production Act ("DPA") of

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[458] Part of the text is available at the link: https://web.archive.org/web/20070412205051/https://www.treas.gov/offices/enforcement/ofac/legal/statutes/twea.pdf.

[459] First War Powers Act, 1941 (H.R. 6233, P.L. 77-354, 55 Stat. 838), and Second War Powers Act, 1942 (S. 2208, P.L. 77-507, 56 Stat. 176). "The first of these statutes conferred considerable emergency power on the President to reorganize the executive branch, to enter into contracts and make payments on them, and to regulate 'trade with the enemy'. The second act expanded the powers of the InterState Commerce Commission to improve the efficiency of transportation of war materials; expanded an existing authority for military departments to acquire private property by condemnation, purchase, donation, or other transfer; permitted the Secretaries of War and the Navy to place orders and contracts and the President to give such contracts priority over all deliveries for private accounts or for export; and gave the President the authority to require acceptance of and performance under these contracts and to allocate materials and facilities for their fulfillment. The act also empowered the President to obtain information, records, and reports sufficient to enforce the provisions of the act and clarified existing law on the amount of compensation required if property was requisitioned for defense purposes. The act also included provisions relating to free postage for members of the military services, naturalization of persons serving in the armed forces, acceptance of conditional gifts to further the war program, metal content of coinage, inspection and audit of war contractors, and the gathering and assessment of war information by the Department of Commerce", *Congressional Research Service, The Defense Production Act 1950: History, Authorities and consideration for Congress.*

[460] In a message sent to Congress at the outbreak of war in Korea in mid-1950, President Truman Stated that the United States and the United Nations were responding to a military invasion of the Republic of Korea by forces from north of the 38th parallel, that the nation urgently needed additional military manpower, supplies, and equipment, and that the nation's military and economic preparedness were

September 1950, a measure that granted the President broad authority to control national economic policy[461]. Indeed, this act already shared in its genesis some distinctive features of what we understand today as special powers, although these were essentially related to the possibility of exercising some control over transactions involving military-related products, while leaving other areas uncovered.

Containing seven separate titles, the DPA expanded the President's powers. Specifically, of the seven parts of the act, only three represented the most impactful sections: the first allowed the President to require companies and manufacturers to give top priority to the production of goods and materials deemed necessary for national defense; the second authorized the President to establish mechanisms, such as regulations, orders, or agencies to allocate materials, services, and facilities needed to promote national defense; and the third section, on the other hand, authorized the President to control the civilian economy so that critical materials needed for the national defense effort would be available for defense needs[462].

Among them, of particular note is Section 721 of the DPA[463], which, however, has been amended over the time to the point where it has become one of the main landmarks in the U.S. foreign investments screening framework. This Section is first and foremost concerned with providing key definitions, such as "transaction controlled by a foreign government", "national security", and "critical infrastructure"[464], specifies the powers of

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inseparable. He urged Congress to pass legislation that would guarantee the prompt supply of adequate quantities of needed military and civilian goods, including measures to help compensate for manufacturing demand growth caused by military expansion". For further discussion see DPA v. *U.S. Congress, House Banking and the Currency, Defense Production Act of 1950,* H.R. 9176, 81 Cong., 2 sess., 28 July 1950, H.Rept. 81-2759 (Washington: GPO, 1950), p. 1.

[461] "The *Defense Production Act* (DPA) of 1950 (P.L. 81-774, 50 U.S.C. §§4501 et seq.), as amended, confers upon the President a broad set of authorities to influence domestic industry in the interest of national defense. The authorities can be used across the federal government to shape the domestic industrial base so that, when called upon, it is capable of providing essential materials and goods needed for the national defense", *Congressional Research Service, The Defense Production Act 1950: History, Authorities and consideration for Congress.*

[462] Of all the powers, in particular, they configured those to requisition materials and property, expand the productive capacity of government and private defense, ration consumer goods, set wage and price ceilings, force the settlement of certain labor disputes, control consumer credit and regulate credit and loans for real eState construction, provide certain antitrust protections for industry, and to establish a voluntary reserve of private sector executives who would be available for emergency federal employment. Four of the seven chapters (Titles II, IV, V, and VI), namely those relating to requisitioning, rationing, wage and price fixing, labor disputes and credit controls and regulation, lapsed in 1953 according to the will of Congress.

[463] Section *721* (50 U.S.C. App. 2170). *Authority to review certain mergers, acquisitions, and takeovers*.

[464] The term "foreign government-controlled transaction" covers transaction that could result in the control of any person engaged in interState commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.

the President, lists factors that may be considered for national security purposes, and finally contemplates provisions relating to the obligation of annually referring to the Congress a report of transactions carried out for this purpose. In light of this, it is possible to detect in this respect a certain similarity of approach between the U.S. system and the European system of foreign investments control, which contemplate an obligation to report to the European Commission.

In any case, an even more noticeable paradigm shift took place starting in the 1970s, when in rapid succession a number of measures appeared in the U.S. legal system that drew a more organic discipline of investment control for strategic purposes. We refer, in particular, to the Foreign Investment Study Act of 1974[465], the International Economic Emergency Act of 1977, and Presidential Executive Order 11858/1975.

Specifically, the Foreign Investment Study Act of 1974 required the President to undertake a comprehensive study of the impact of foreign investments in the domestic economy with the purpose, in particular, of comparing foreign investments inbound to the United States with American investments outbound to third Countries, thus capturing the impact that these activities produce in the domestic and external reference system, respectively; determine the impact of foreign investments on U.S. national security, energy resources, balance of payments and trade, agriculture and international economic position; determine the effect of foreign investments on employment levels and personnel practices in the U.S.; and finally, assess costs and benefits on the basis of which it is possible to detect the different policy choices available to the U.S. with respect to international relations with other Countries.

In the light of what has been said so far, it is therefore possible to highlight the special attention that the United States paid with respect to the foreign investments sector as early as the middle of the last century, even if initially this attention was directed with almost exclusive reference to the sectors involved in conflict dynamics and even if one could hardly speak of real monitoring according to the current and more modern idea of

[465] See *United States: Foreign Investment Study Act of 1974 and Regulations of the Departments of Commerce and the Treasury*, *International Legal Materials Cambridge University Press*, March 1975, Vol. 14, No. 2, pp. 420-446.

screening. Nonetheless, the evolution of the U.S. system of foreign investment control has always been characterized by the fact that it pivots on a publicist discipline, unlike, for example, the Italian system or other European systems that have instead originally relied on purely private instruments such as the golden share.

This approach, as has already been noted, has been an example and a reference model for European Countries that have subsequently introduced the golden power discipline precisely inspired by a publicist system. In this context, the awareness of the need for a complete and organic regulation of foreign direct investment induced the then President Ford to increase the supervision of the impact of foreign investment in the American economy with particular reference to strategic sectors, such as security, technology, infrastructure, energy, natural resources and telecommunications: thus, in 1975 the Committee on Foreign Investment in the United States ("CFIUS") was established, a special administrative apparatus that assists the President in the monitoring of foreign investments and that, over the years, covered a decisive role in the review proceedings of those investments operating in certain domestic strategic sectors.

In particular, in the following sections, it will be possible to make an in-depth study of this fundamental body in the American system of foreign investment screening, in relation to the President's activity and in light of the most recent regulatory changes.[466]

3.1 Legislative evolution: from the Exon-Florio and Byrd Amendments to the Foreign Investment Risk Review Modernization Act, 2018

Before reaching the analysis of the current American legislative screening framework, and in order to ensure greater understanding. I believe it is necessary to take a step back and dwell on the legislative developments that have led to such framework.

As mentioned above, the control of foreign investments on American soil sees its genesis in the TWEA dating back to the early 20th century. The latter had as its main

[466] See generally for all section 4 Vittoria Cusumano, *Le procedure di screening degli investimenti stranieri alla luce delle nuove sfide globali*, 153 (2021).

objective to concentrate in the hands of the President the power to vitiate the enactment of fiscal, financial and commercial transactions with adversaries in times of war or national emergency. However, in order to toughen the scope of the TWEA, in 1950 the United States Department of the Treasury enacted the Foreign Assets Control Regulations that gave the government the power to freeze both assets and transactions when certain conditions were met. [467]

However, since both the TWEA and Foreign Assets Control Regulations were much more political than economic oriented, in 1988 the Exon-Florio Amendment passed and it can be seen as the true starting point of the national security review of foreign investments in the United States. That amendment was conceived in response to a series of acquisitions of U.S. companies by Japanese companies. Specifically, it was the Fujitsu-Fairchild transaction that triggered that reaction: the Congress enacted section 5021 of the Omnibus Trade and Competitiveness Act of 1988, amending section 721 of the Defense Production Act of 1950, known precisely as the Exon-Florio Amendment. Strictly speaking, the amendments established the national security review system for foreign mergers and acquisitions in the United States and provided five criteria for determining whether an acquisition was a threat to national security. [468]

Moreover, in the wake of the Exon-Florio Amendment, in 1993 the U.S. Congress passed a new amendment: the Byrd Amendment. It enlarged the range of action of the Exon-Florio one, namely by adding mandatory investigation requirements and providing for heightened investigation of acquisitions by foreign government-controlled companies.[469] Moreover, the CFIUS was required to conduct an additional 45-days investigation after the completion of the 30-days review for proposed transactions where the acquirer was controlled by or acting on behalf of a foreign government and the acquisition involved control of a U.S. entity relevant to the protection of national security. In addition, the newly introduced evaluation criteria recognized new relevance to the potential effects of the transaction on sales of military goods, equipment or technology

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[467] See generally Lu Ding Liang, Shan Yi Fei, *Changing Mechanism of the National Security Review for Foreign Investment- A perspective from the Foreign Investment Risk Review Modernization Act,* 2 CMU Academy Journal of Management and Business Education 1, 1-10 (2023).
[468] *Ibidem.*
[469] See Shao Shaping , Wang Xiaocheng, *An Analysis of the National Security Review System for Mergers and Acquisitions by Foreign Investors in the United States ——and Construction of a National Security Review System for Mergers and Acquisitions by Foreign Investors in China*, The Jurist 3, 154 (2008).

entered into with any Country that had ties to terrorism or possessed weapons of mass destruction, as well as the potential effects on U.S. international technological leadership. Finally, although an essentially voluntary system of acquisition notification by the parties was arranged, it was expected that foreign acquisitions governed by the Exon-Florio review process that were not notified would remain subject to divestiture or other actions by the President.[470]

However, the events of 9/11 brought national security issues to the forefront of intense American attention. This situation forced the Congress to adopt significant changes to the investment control process: on 11 September 2007 the Foreign Investment and National Security Act ("FINSA") was passed.

This further legislative shift may be described as the product of existing frictions between the executive branch and Congress. It was built on the skeleton of the Byrd Amendment and, in essence, that typical U.S. attitude of openness toward FDI was now filtered out and scaled back with regard to those foreign investments that could have been detrimental to national security. Concretely, FINSA added the *ex post facto* review procedure based on the Byrd Amendment, expanded the industries that may be subject to review, and specifically drew the "experience and lesson" from the DPW case[471], believing that a more careful and strict examination was required when the initiator of a foreign merger or acquisition is involved with the government of a Country where the foreign investor is located.

However, we are still far from reaching a turning point in this succession of regulatory changes, and in 2008 a new executive order redefined the role of the President in evaluating transactions and the CFIUS was authorized to use agreements in order to mitigate or minimize the risks associated with them. As a result, these changes led to a broadening of the scope of scrutiny, enabling more firms with divergent interests and concerns to participate in the review process. However, numerous criticisms were leveled

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[470] See Jackson, *The Exon-Florio National Security Test for Foreign Investment*, Congressional Research Service (2006); available at the link: https://www.everycrsreport.com/files/20060615_RL33312_0397ac8f1dda20c439eb93c549808c8777c89e8a.pd f.

[471] In 2006, Dubai Ports Worldwide ("DPW"), a company controlled by the government of the United Arab Emirates, initiated a full-price takeover of the UK-based P&O Shipping Company, a case that led to the enactment of the Foreign Investment and National Security Act (FINSA).

against the FINSA, and particularly debated was the excessive scope of factors to be considered during the review and their generic wording, which gave rise to considerations that saw FINSA as oriented much more toward protectionist than national security purposes.

Indeed, in the American regulatory system, the boundaries of the notion "national security" are blurred and of particular interest is the attempt to reconnect the concept of "national security" with that of the economic welfare of domestic industry. However, the relevance of purely and exclusively economic issues are not and should not be used as appropriate selection criteria in foreign investment control proceedings; in fact, according to a comparative perspective, within the European regional system the CJEU has repeatedly emphasized that exclusively economic reasons should not fall within the *genus* of "overriding reasons of general interest" that rather justify appropriate, necessary and proportionate restrictions to achieve the legitimate objectives of security and public order.[472]

In fact, eleven years after the passage of FINSA, the Congress resumed the debate on the need to reform the CFIUS review process driven by new concerns regarding Chinese investors intent on gaining access to U.S. critical technologies. Moreover, in this context can be found an evident point of contact with the motives behind many control system reforms in Europe. Against this background, on 8 November 2017, Senator Dianne Feinstein, Democrat of California, and Senator John Cornyn, Republican of Texas, finally introduced a legislation to reform the CFIUS: the Foreign Investment Risk Review Modernization Act (FIRRMA).[473]

The FIRRMA provisions clarified the relevance of real eState transactions, another newly envisioned type of transaction, by listing names and locations of specific airports, seaports and military installations that are affected as "covered sites". The scope of the control system was expanded to include a broader spectrum of transactions, which consisted of all transactions suitable for leading to control by a non-U.S. investor of a company engaged in interState commerce in the United States. Were also included the

[472] See, for instance, Judgment of the Court of 3 October 2000 Josef Corsten, Case C-58/98 (2000 I-07919); see also Vittoria Cusumano, *Le procedure di screening egli investimenti stranieri alla luce delle nuove sfide globali*, 157 (2020).
[473] S.2098 -Foreign Investment Risk Review Modernization Act of 2018

"other investments" made by a foreign person in a U.S. company engaged in critical infrastructure, or producing critical technology, or storing or collecting sensitive personal data of U.S. citizens, even if the transaction did not involve taking control of the company.

Procedurally, an abbreviated procedure was created and a mandatory declaration prescribed for transactions involving the acquisition of "a substantial interest" in a U.S. enterprise. This gave CFIUS some discretion to require parties to a transaction to refer to it prior to the completion of the transaction itself in the event of the investor's connection to a foreign government. It substantially expands the scope of the CFIUS review and modernizes the related process. Hence, the FIRMA is believed to be the most significant reform of CFIUS's functions since the FINSA was enacted. [474]

As anticipated, the U.S. control system has influenced European legislators considerably.[475] It is possible to discern this contamination mainly on the substantive-technical level as Member States have had to strike a balance between political pressures, European Law and the limitations arising from the national regulatory system. For instance, circumscribing the issue to the Italian case, it has been argued in doctrine that it would be potentially fruitful for the Italian legislature to refer to U.S. law in order to confer on the Council of Ministers, along the lines of the CFIUS powers, the power to negotiate an agreement with the investor. This would make it possible to reach an agreed solution to prevent the risks associated with the investment as an alternative to the unilateral imposition of measures.[476]

Having thus completed the complex regulatory framework, it is necessary to address, in the following sections, the identification of the key steps of the control mechanism of foreign direct investments in the United States in order to understand its influence on the European system.

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[474] See Lu Ding Liang, Shan Yi Fei, *Changing Mechanism of the National Security Review for Foreign Investment- A perspective from the Foreign Investment Risk Review Modernization Act,* 2 CMU Academy Journal of Management and Business Education 1, 1-10 (2023).
[475] See *supra* section 3 at 110.
[476] See Giulio Napolitano, *Foreign Direct Investment Screening - Il controllo sugli investimenti esteri diretti*, 121 (2020). In particular, the author points out that a similar system is already available under competition law enforcement procedures.

3.2 The role of the CFIUS and the President in the current investment control system

The purpose of this section is to frame the role of CFIUS and the President in the current American system on the grounds of their fundamental importance within it. The U.S. mechanism of investment scrutiny is segmented into multiple moments ranging from the preliminary investigation to decide whether in-depth scrutiny is necessary to the circumstance that requires Presidential decision.[477]

After the implementation of FIRRMA in 2018, mandatory notification was imposed for some specific transactions essentially related to critical technologies. Therefore, the procedure before CFIUS possesses a twofold possibility of activation: notification, either voluntary or mandatory as the case may be, and the Committee's autonomous initiative.

Once the procedure is initiated, the CFIUS has a 45-day time frame to put in place the national security review, aimed at verifying whether the transaction identifies as a "covered transaction". Following this initial investigation, the need to conduct a more in-depth investigation may arise. If the necessary conditions are met, therefore, CFIUS begins the in-depth investigation, i.e., the "national security investigation", which must be concluded within 45 days. Said phase may, however, result in two different outcomes: a first hypothesis provides for the stipulation between CFIUS and the foreign investor of certain behavioral remedies to be taken against the investment operation to be carried out, thus referring to the so-called mitigation measures; or, a second hypothesis provides for the Committee to suggest to the President the final freezing of the operation, on the basis of considerations and evaluations already carried out. In the latter scenario, in conclusion, the President is left with 15 days to issue by means of an executive order his determination. It follows, therefore, that the entire process can take a maximum of 105 days: 45 for the national security review, 45 for the national security investigation, and 15 for the Presidential decision.[478]

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[477] For a detailed description of the procedure see Alessandro Aresu, Matteo Negro, *La Geopolitica della Protezione. Investimenti e Sicurezza nazionale: gli Stati Uniti, l"Italia e l"UE,* Fondazione per lo studio sui mercati pubblici europei (2020).
[478] See Vittoria Cusumano, *Le procedure di screening egli investimenti stranieri alla luce delle nuove sfide globali*, 163 (2020)

Within this process, however, there are some particularly relevant aspects that involve both the CFIUS and the President. With regards to the CFIUS, it is relevant to dwell on the figure of the mitigation measures. These are the conditions negotiated between the Committee itself and the foreign investor that tend to be embodied either in a written agreement between the parties or in an executive order and are intended to regulate the relationship between the United States and the foreign investor. Indeed, such measures may ensure that only specially authorized persons have access to company technology and information; establish guidelines and conditions for the handling of current or future contracts with the U.S. government, as well as commercial and sensitive information; ensure that only U.S. citizens handle certain services and products or that company operations remain located in the territory of the United States; require the establishment of a corporate security committee; and other mechanisms to ensure compliance with required actions.[479]

Such mitigation measures may themselves define the issues that come before CFIUS for consideration, thus avoiding the intervention of the President. Thus, a strong autonomous decision-making power possessed by CFIUS emerges and it is accompanied by a wide margin of discretion granted to the Presidential figure.

Moreover, it is also peculiar how the U.S. legislator is concerned with adapting foreign investment control legislation to the vicissitudes of global commerce, especially, foreign investments. Indeed, CFIUS is asked to assess "*whether a transaction is likely to have the effect of exacerbating or creating new cybersecurity vulnerabilities in the United States or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States*". [480]

On the other hand, as far as the President's powers are concerned, they have a strong political connotation accompanied by great, if not unlimited, discretion. One case in which this defining trait is highly visible is the one that arose around the social media giant TikTok, where the President's willingness to spruce up CFIUS in order to promote broader political interests is evident. TikTok is a subsidiary of Beijing-based ByteDance, which completed a $1billion merger with U.S. social media company, Musical.ly, in

[479] See Roberto Garofoli, *Il controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative, Foreign direct investment screening*, (Bologna: Giulio Napolitano 2019).
[480] See section 1702(c)(6) of FIRRMA.

2017.[481] However, the conditions that led to an investigation of this transaction did not appear to threaten national security. Accordingly, ByteDance did not voluntarily file for CFIUS review as the company did not perceive there to be any obvious nexus to American national security interests. [482] However, on 6 August 2020, President Trump issued Executive Order that called for ByteDance's forced divestment by prohibiting the company from maintaining operations in the U.S. This case, in essence, highlights the jurisdictional uncensurability of Presidential decisions since a forced divestment under CFIUS review cannot be scrutinized in U.S. courts.

Hence, what emerges from the foregoing is once again the intense political connotation of the U.S. President's decisions on the exercise of special powers over foreign investments.

3.3 The U.S. and E.U. screening mechanisms: two systems sharing a common concern

In the previous paragraphs, we have had the opportunity to emphasize how the overseas legislature has anticipated ours in terms of public powers, and we have then highlighted the strong discretion that characterizes the power of the President within the American system and the great importance of the figure of CFIUS in addition to the vast expertise that the latter possesses. Indeed, the dynamics of the American screening system in which the entire process revolves around the activity of CFIUS are a positive feature to the point that they have been taken as a model of reference and example by several systems including the European system. As anticipated, however, this merit is not sufficient to compensate for the critical aspects of the American system such as, for example, the vagueness of certain regulatory provisions. However, as well as the positive aspects, the negative aspects of the American system have served as a warning to the

[481] See Shining Tan, *TikTok on the Clock: A Summary of CFIUS"s Investigation into ByteDance*, Center For Strategic & International Studies available at the link: <https://www.csis.org/blogs/trustee-china-hand/tiktok-clock-summary-cfiuss-investigation- bytedance>.

[482] See Seamus Doyle, *Weaponizing Foreign Investment Screening Mechanisms - Examining How the Guise of Protecting National Security Interests Has Created a New Vehicle Through Which States May Advance Broader Policy Interests*, 33 (2020).

European system, which has taken steps to remedy these shortcomings through the interventions of the Court of Justice of the European Union and the Commission. These institutions have urged Member States to equip themselves with regulatory disciplines characterized by a high degree of specificitỳ in order to broaden the profile of the principle of legality as much as possible and reduce, at the same time, the profile of discretioǹ usable by political bodies in such proceedings, preventing the special powers of governments in matters of foreign investment from turning into instruments distorting the free market.

The U.S. framework, however, continues to maintain ambiguous characters that lend themselves to flexible interpretation depending on the sensitivitỳ of the political administration. Emblematic of this condition is, for example, the Trump administration's recent use of special powers during the Covid-19 health emergency. [483]

Based on this premise, we can now move to the critical analysis of the factors that allow a juxtaposition of the European system with the American system and, specifically, the consideration of foreign investments by China as the weaponization of State-backed. In fact, in this field, the U.S and E.U. have adopted similar policy goals to deal with the Chinese "emergency". However, while an alignment of these policy goals is present, a structural stark divergence resulting from the different construction of the two screening mechanisms can still be found. In essence, for both screening systems, it is possible to imagine the existence of a fine line that collocate them in the balance between national security and protectionism. Specifically, the Regulation considers many of the same China-specific investment trends that FIRRMA aims to combat. However, there are key differences between the E.U. and U.S. measures, in both policy and procedure, which could give rise to future disagreements between the U.S. and its E.U. partners over FDI transactions, despite the mutual goal of increased cooperation on investment screening.[484]

[483] On 3 April 2020, the American President invoked the DPA to order the Secretary of Homeland Security to "allocate for domestic use" the personal protective equipment needed to protect against the virus. This latest order thus authorizes the Secretary of Homeland Security to prevent the export of certain personal protective equipment and to reallocate those that represent an excess over reasonable business, personal or household consumption requirements, or for the purpose of resale at prices above prevailing market prices.
[484] See Jason Jacobs, *Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union*, International Journal of Legal Information 47.2 , 105-117 (2019).

In fact, the Commission is not vested with the power to suspend or block investments. As anticipated in the first chapter of this paper, the Commission can issue nonbinding opinions regarding to which Member States are required to "take utmost account", and they are also required to justify to the Commission any failure to implement the opinion. In addition, parties to transactions under the E.U. Regulation are guaranteed the opportunity to seek judicial redress against the screening decisions. Consequently, this represents a key difference between the two systems, since the U.S. President's final determinations, on the other hand, are not only binding, but not subject to judicial review.

In essence, the affinity between the two systems can be summarized in the approach that both FIRRMA and the E.U. framework demonstrate with regards to China investments: both recognize the fact that China is weaponizing its investments and the need to adapt financial regulations to combat it while ensuring both the U.S and the E.U markets remain open to foreign direct investment.[485]

It is therefore possible to say that the two systems share a common concern and that the Regulation seeks to grant the Commission investment screening authority similar, though limited in comparison, to that which CFIUS exercises over foreign direct investment in the United States. However, CFIUS has a mandate that better matches national security needs and the trends of investment but, on the other hand, the European system fits perfectly in the America's efforts to promote a more China-specific approach to investment security screening among its allies and it shows a positive development in this respect. [486]

It is also important to note that both FIRRMA and the EU proposal lay out very broad provisions and direct agencies and Member States to clarify and implement those provisions through regulations.

[485] *Ibidem*

[486] *Ibidem*

3.3.1 The launch of the U.S.-EU dialogue on China

In view of possible future developments in the field, I think it is very interesting to open a small parenthesis on the recent U.S.-EU dialogue, this latter being a further evidence of the desire of trying to build a cooperation between the two Countries.

On 23 October 2020 Secretary of State Michael R. Pompeo and EU High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission, Josep Borrell discussed a variety of issues of common interest in the context of the Transatlantic Partnership. On this occasion, they launched a new bilateral Dialogue between the European External Action Service and the U.S. Department of State on China. Such dialogue has been defined by the two Representatives as a dedicated forum for EU and U.S. experts to discuss the full range of issues related to China.

The two agreed to continue meetings at the senior official and expert levels on themes including human rights, security, and multilateralism.

The number of substantive venues for regular dialogue on China have increased under the Biden administration. In fact, the fourth of these meetings, and also the most recent one, was held on 1 December 2022 in the presence of the United States Deputy Secretary of State Wendy R. Sherman and European External Action Service Secretary General Stefano Sannino. Object of the discussion were the respective bilateral relations with China and the approach to adopt in order to face the changing strategic environment. They underlined the heterogenous nature of the United States' and EU's respective relations with China and stressed the importance of the United States and the EU maintaining continuous and close contact on their approaches. Both the Secretary General and Deputy Secretary reiterated their intention to stay open to substantive engagements with China on areas of shared interest, from the environment and climate to health and food security.

Moreover, also the importance of economic diversification and resilient supply chains was brought to light. They reaffirmed particular concern about and opposition to China's recent and ongoing economic coercion of international economies and committed to deepen efforts to identify and mitigate vulnerabilities.

With no surprise, the Deputy Secretary and Secretary General also discussed respective exchanges with China on Russia's unprovoked and unjustified war of aggression against Ukraine, including Russia's blatant disregard of nuclear safety and security.

The two reaffirmed their intention to not to circumvent or undermine sanctions against Russia, and not to provide any form of support for Russia's aggression against Ukraine. Moreover, they also took into account "the China's repeated and ongoing information manipulation, including amplification of pro-Kremlin disinformation on Russia's invasion of Ukraine, as well as China's efforts to control narratives and suppress the flow of independent information on other key topics worldwide".[487]

It emerged from the meeting that both Countries will maintain the same line geared toward protecting the UN Charter. Indeed, in this context, they agreed to strengthen cooperation on common problems facing the Countries and to encourage the "respect for international law and principles, and respect for human rights, including the right to peaceful protest"[488]. Moreover, "they further called upon all lenders, including China, to pursue sustainable and transparent lending practices and work cooperatively to address debt vulnerabilities in low income and developing countries"[489].

Moreover, regarding the Taiwan front they mentioned how important it is to " maintain peace and stability in the Taiwan Strait where the United States and EU have clear interests, including in the maintenance of stability, and where regional and global security and prosperity are at stake"[490]. They touched on the subject of China's threats that increase fears of an escalating crisis in the Strait and that would undermine peace and stability as well as negatively impact even "on broader region and jeopardize global prosperity". Finally, "they called for the peaceful resolution of cross-Strait issues and reaffirmed that there is no change in their long-standing basic positions on Taiwan, including their respective one China policies"[491].

Also China's unilateral actions in the East and South China Seas were assessed.

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[487] See *Launch of the U.S.-EU dialogue on China* available at the link: https://useu.usmission.gov/launch-of-the-u-s-eu-dialogue-on-china/ of 26 October 2020
[488] *Ibidem*
[489] *Ibidem*
[490] *Ibidem*
[491] *Ibidem*

With respect to the South China Sea, the main critical matter was represented by China's expansive maritime claims which are not consistent with international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS).

Finally, Deputy Secretary Sherman and Secretary General Sannino reiterated their serious concerns about the human rights situation in China, including in Xinjiang, Tibet, Inner Mongolia, and Hong Kong, which requires urgent attention by the international community at large. They affirmed everyone around the World has the right to peacefully protest, mindful of the ongoing protests in China. They emphasized that the assessment published by the UN Office of the High Commissioner for Human Rights (OHCHR) confirmed the grave human rights violations and abuses in Xinjiang, the network of "political re-education" camps, widespread surveillance, systemic restrictions on freedom of religion or belief against Uyghurs and other persons belonging to minority groups, and the use of forced labor. They also shared concerns about transnational repression tactics and measures, which impact peaceful activists and members of minority groups and their families.

3.4 The EU-U.S. Trade and Technology Council

Finally, and again in the context of cooperation between the two sides of the Atlantic, we can also investigate the EU-US Trade and Technology Council (TTC) launched in 2021 by conducting a critical analysis of this framework in light of foreign investments.

The TTC was created in order to restore transatlantic cooperation, following the failure of the Transatlantic Trade and Investment Partnership project[492], and strengthen

[492] Transatlantic Trade and Investment Partnership (TTIP) was a free trade agreement that the United States and the European Union had been negotiating, mostly secretly, since June 2013. After more than a decade of preparatory discussions, the goal of the treaty was to create a common market that would simplify economic relations between the parties. The main tools were: the reduction of customs duties on goods, services and government contracts operated by multinational companies operating in the U.S. and EU countries; and the simplification and uniformity of existing trade rules through the adoption of new laws that would eliminate differences.

bilateral trade and investment. The TTC, at the moment, has held 3 ministerial meetings and outlined ten policy fields[493] potentially crucial to cooperation. Moreover, following the war between Russia and Ukraine, the need for transatlantic cooperation has become more pregnant since this military conflict has raised the problem of to what extent economic relations between the West and China could also deteriorate in the medium term.[494] As specified, the TTC considers 10 crucial fields in its framework but, on the other hand, it can be pointed out that the crucial role of reducing barriers to transatlantic foreign direct investment has been largely neglected so far and, in my opinion, this lack raises quite a few concerns especially in the context of a common desire to counterbalance Chinese expansion.

As things stand, while on the American side China is the most important item on the agenda, on the European side the situation appears less defined at the very moment. From my point of view, although there is an open stance toward transatlantic cooperation, the EU still retains a cautious attitude due to its previous experience under the Trump administration. In addition, the Inflation Reduction Act[495] is a further obstacle to EU-US cooperation and their coordination on China. However, despite the reluctant attitude in recent times, concrete areas are still identifiable that leave room for EU-US cooperation and included among them are items like counterbalancing China's footprint in the European Union's immediate neighborhood to coordinating screening of tech transfers.

Observing the situation from a "European eye", it is inevitable to consider the drastic changes undergone by the Union. In the wake of the Russian-Ukrainian military conflict there has been a rapid energy decoupling,

a cost-of-living crisis due to rising inflation, decreasing competitiveness for European industry, millions of Ukrainian refugees to Europe, and renewed defense investment all

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[493] This ten fields encompass : Technology Standards Cooperation, Climate and Clean Technology, Secure Supply Chains, Information and Communication Technology and Services Security and Competitiveness, Data Governance and Technology Platforms, Misuse of Technology Threatening Security and Human Rights, Export Controls, Investment Screening, Promoting Small- and Medium-Sized Enterprises (SME) Access to and Use of Digital Tools, Global Trade Challenges.

[494] See Paul J.J. Welfens and David Hanrahan, *The EU-US Trade and Technology Council: Developments, Key Issues and Policy Options* (2022)

[495] The Inflation Reduction Act ("IRA") is the U.S. strategic plan to facilitate the energy transition through investment and tax rebates for companies operating on U.S. soil.

at the same time.[496]

Thus, Europe is in a situation of heavy dependence on several fronts: dependence on the United States with regard to security and defense, dependence on Russia with regard to energy, and dependence on China with regard to supply chains in general and critical raw materials in particular.

As a result, Europe is trying to adapt its policies to cope with a new era of intense geopolitical competition. In this context, the role of China comes to the fore: it represents "a crucial trading partner, a competitor and a rival at the same time. China is an immense market, especially for the industry of key member States such as Germany. It is also the supplier of raw materials and products crucial for the energy transition".[497]

However, while the approval of the CAI was an important step toward overseas cooperation, in my opinion it is necessary for the U.S. to understand the impossibility for Europe to disengage from the Chinese market, especially at a time of great economic stress and disengagement from Russia. Moreover, unlike the U.S., the Union does not have much leeway when it comes to imposing export restrictions. What needs to be emphasized is that the EU cannot take a neutral stance and place itself in the middle between Washington and Beijing.

Decision makers in Europe are very aware of the value of the transatlantic alliance, and presumably so is Washington under the leadership of Joe Biden. For this reason, both sides should work to outline concrete areas in which the EU and the United States can counterbalance China's footprint in the EU's immediate vicinity.

At this point it could be argued that the focus of EU-US cooperation, and thus of the TTC, in the field of foreign investment should be precisely on China's investments including critical infrastructure in the European Union's immediate neighborhood. The United States has historically supported EU enlargement and consolidation of the European Union in the continent. Now would be a good time to do the same and contribute to the strategic thinking of wider Europe. U.S. involvement would be very beneficial when it comes to counterbalancing China's footprint. It will also be very much

[496] See Paul J.J. Welfens and David Hanrahan, *The EU-US Trade and Technology Council: Developments, Key Issues and Policy Options* (2022).
[497] *Ibidem*

in line with NATO's new Strategic Concept.[498]

This brief review, however, is based on the data gathered in the meetings held so far in the context of the TTC. A fourth meeting is scheduled soon (mid 2023), and only then will it be possible to see any progress regarding cooperation in the area of foreign investment. At the moment we can rely on the words of President Biden, who Stated: "I will manage this competition [with China] responsibly" keeping in mind that implications in this regard will inevitably affect all transatlantic leaders.

4. Conclusion: FDI screening mechanisms as index of a Country's identity in the modern world

The present chapter has considered the critical profiles afferent to the EU "as a whole"[499], on the ground that FDI in any of the Member States give inevitably access to the entire internal market. In particular, it has been carried out a juxtaposition of the EU screening mechanism with that of two Countries that represent neuralgic fields in the regulation of foreign investment nowadays. From the analysis thus conductedd, it is possible to discern how the design and operation of investment screening mechanisms are intimately linked to the identity of each State: it could be stated that the said mechanisms reflect the economic policy patterns of each Country of reference and that their evolutions respond to new changes in the modern world.[500] Hence, it was analyzed how the Union, in light of new global challenges, has tried to balance two opposing forces: the need to remain an open space for trade and investment and the need to protect the Continent's productive base and strategic assets in a globalized World.[501]

The first comparison was therefore with the Chinese model. It was seen how such a system is an expression of the Country's own social, political and economic identity, a

[498] NATO's Strategic Concept defines the security challenges facing the Alliance and outlines the political and military tasks that NATO will carry out to address them. For further information go to https://www.nato.int/strategic-concept/
[499] See *supra* at 21.
[500] See Vittoria Cusumano, Le procedure di screening degli investimenti stranieri alla luce delle nuove sfide globali, 190 (2021).
[501] *Ibidem*

system based on the formation of negative lists that highlight blockades and restrictions on foreign investment in certain categories of sectors, while leading to shortcomings in the implementation of the principles of equal treatment of foreign and local investors. However, despite these shortcomings, it has been observed that China in recent years has accelerated the process of modernization and opening up to the global economic market; key to this is the proposed projects such as the One Belt One Road Initiative and Made in China 2025, whose ultimate goal is to establish itself as the leading global power, eventually overtaking the United States and the European Union and achieving the "Chinese Dream". These changes have inevitably affected the European scenario, which has therefore reacted by shaping its frame-work to the new requirements through BITs negotiations and the implementation of the Screening Regulation itself. This reaction thus confirms the hypothesis that the rise of Chinese FDI in the EU has had a centripetal effect: the EU has recognized that Chinese FDI poses unique challenges that are best addressed at the supranational level.

The same circumstance of mutual influence, albeit of a different nature, was also verified with regard to the American case. It has been pointed out that the overseas legislature anticipated ours in terms of public powers, and that the dynamics of the American screening system, in which the entire process revolves around the work of CFIUS, have been a positive feature to the extent that they have been taken as a model of reference in the European system. Moreover, the two systems have also been juxtaposed because of the circumstance that has seen both adopting similar policy objectives in dealing with the Chinese "emergency". In essence, for both screening systems it is possible to imagine the existence of a fine line between national security and protectionism. Specifically, the Screening Regulation considers many of the same China-specific investment trends that FIRRMA aims to combat.

Therefore, the picture now outlined confirms what was anticipated in the incipit: FDI regulations reflect the economic policy patterns of each relevant Country and respond to new changes in the modern World. Specifically, Chinese influence has led the EU to change its frame-work by making it more conservative while, on the other hand, U.S. influence has been met with less apprehension even going so far as to establish a genuine dialogue in an attempt to build cooperation (*i.e.* the CAI)

However, in this context, it should be noted that the progressive evolution of foreign investment screening mechanisms also depends on the events of various kinds that, over time, involve each State. In particular, the most recent events that have contributed enormously to accelerating the processes of renewal of domestic systems in the field of foreign investment screening can today be clearly identified in China's economic rise, particularly its growth in the field of new technologies, and, most recently, also the Covid-19 pandemic, which has created alarms with respect to investment operations operating in strategic sectors, which now includes the health sector. Indeed, the concerns related to them have resulted in intensified foreign investment monitoring and filtering operations in order to defend national security exposed to critical conditions. It has been seen how China, despite more recent attempts to open and liberalize domestic sectors to foreign investment, has largely maintained an admittedly rigid stance with respect to the latter, and with reference to the United States, it has been seen how the new FIRRMA of 2018 contemplates provisions specifically referring to trade relations with China, especially with respect to foreign holdings in the telecommunications sector. [502]

In the face of the ever-increasing focus on the control of foreign investment, it is therefore necessary to ensure that new phenomena, changes, and criticalities do not lead national governments to undertake operations to block investment to the point that in the long run they may appear to be traceable to disguised protectionist policies: the line between economic policies driven by special forms of protection and economic policies driven by invisible forms of protectionism thus appear to be blurred. In conclusion, without prejudice to the legitimate ability of each State to determine and judge its own national security needs, it appears necessary to maintain certain objectives and standards in the implementation of screening mechanisms and to work toward measures of cooperation and harmonization of those principles, which, having proved to be fundamental in this matter, have already emerged with regard to the European screening mechanism.[503]

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[502] *Ibidem*
[503] *Ibidem*

CONCLUSIONS

The present paper has pursued the intention of analyzing the procedural aspects of the EU FDI screening mechanism and then, by shifting the attention beyond the borders of the Union, of addressing the topic of its interactions and mutual influences existing with the mechanisms of two World giants: China and United States.

Therefore, having reached this point of the writing, it is now appropriate to develop some concluding reflections on the critical profiles that have most characterized this discipline, highlighting the implications both in the dimension of the individual Member States and in the broader dimension of the global geopolitical balances in which the EU plays a leading role "as a whole".[504]

The origin of the European control system was first reconstructed starting from the process of liberalization and regulation of markets that took place during the 90s in light of the implementation of the freedoms of capital movement and establishment as cornerstones of the European internal market in the investment area. Subsequently, the analysis turned on the major regulatory interventions that took place in Europe, concluding that political tensions combined with the pandemic crisis were propelling the gradual evolution of European thinking, especially in terms of awareness of the opportunities but also the challenges posed by FDI. As a response to Member States' concerns, the Screening Regulation has enabled, both at the EU level and of the Member States individually considered, a more reasoned and robust management of increasingly important dynamics on both a global and regional scale. In this context, several features of the aforementioned Regulation are certainly noteworthy, including (I) the vertical and horizontal cooperation mechanism between Member States, (II) the power of the Commission to issue opinions and (III) the possibility for Member States to intervene and express their opinion even if the State receiving the investment does not have a screening system. In substance, it was highlighted how the European Union has well defended its influential role as an economic player and has consolidated its position in the international context by ensuring an open and favorable space for foreign investments so that they can be received in a democratic, non-discriminatory and transparent manner in the regulation

[504] See supra Chapter III section 1 at 21.

and management of them.

However, in spite of the positive notes, it is necessary to draw conclusions on the most critical screening profiles at the level of individual Member States and the EU in general, respectively.

The first aspect to consider are the prerogatives of National Sovereignty and thus the absence of an obligation on the part of Member States to have a screening system in order to safeguard at least a select group of sectors, failure to protect which would inevitably have negative repercussions on other Member States as well. An example of such concerns are cybersecurity and related critical infrastructure which, due to their level of interconnectedness and interdependence of infrastructure and technologies, become a matter of strategic importance and therefore considered in the same way as a foreign direct investment operating in strategic sectors. The decision to maintain, modify or adopt a national FDI screening mechanisms remains the discretion of the individual Member States. Indeed, as enunciated in Article 1(2) of the Screening Regulation is "without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU". Consequently, it should be reiterated that the primary objective of the Regulation is not to get all Member States to adopt national legislation on FDI screening, but rather to establish efficient rules that implement and promote the objectives of the common commercial policy. Nevertheless, the Commission has made it clear on more than one occasion that it would use the Regulation as a tool to incentivize Member States to take a proactive role in the field of FDI screening. However, in practice, it is not possible to label the Commission's activities as a merely "incentive" for Member States to protect their essential security interests. In fact, it seems that the introduction of screening legislation by all Member States has actually become a necessary prerequisite for the proper functioning and full effectiveness of the Regulation itself. This idea, however, ill accords with the discretion left to Member States in the matter of adopting FDI screening on the ground of security and public order. The question therefore arises as to whether the Commission's expectation is to be seen exclusively in the context of very specific and defined global threats or, on the contrary, as a result of the its belief that the proper functioning of the single market presupposes, if not actually requires, effective FDI restriction in a globalized economy. Such ambiguity is undoubtedly as harmful to those Member States that are in the process of amending their FDI screening legislation as it is to those Member states that have none and must consider whether to implement one. Should they simply follow the Commission's exhortations or first consider the potential impact such an implementation would have at the national level? Without belittling the Commission's guidance, and while recognizing the benefits of national FDI in a complex geopolitical context that highlights the need for a comprehensive framework that can work across the entire European Union, Member States must be careful not to succumb to pre-packaged solutions, but rather strive to adopt solutions tailored to their specific needs. In this context, it was interesting to dwell on the practical case concerning the FDI control mechanism introduced in Hungary, and thus the measure by which the Hungarian government exercised a veto over a domestic economic asset purchase transaction and the subsequent decision of the European Commission about its incompatibility with EU law. The decision, intervening for the first time since the pandemic and the war in Ukraine contingencies, may set an interesting precedent about future developments in Member State-EU relations regarding domestic FDI control mechanisms, as well as revealing a potential growing concern on the part of the Commission about the proportions that the phenomenon might acquire under the impetus of the ever-changing international environment.

The second point to consider here is the cooperation mechanism as prescribed in Article 6(9) of the Regulation. The Regulation has significant positive effects, but their actual realization must be verified on the basis of the practical application of the new legislation by Member States rather than by the system in *re ipsa*, since a system that requires formal notification may create a mechanism of mere communication rather than coordination among Member States, the fruitfulness of which is not automatically guaranteed. The Regulation does not provide other Member States and the Commission with any specific means of protection in the event that the proceeding State fails to give due consideration to comments and opinions or otherwise deviates from them. The Commission may attempt to initiate infringement actions against States that ignore the opinions expressed; however, given the Commission's heavy workload and limited resources, it can be concluded that it is difficult to expect such actions to be on the daily agenda.

The third aspect to consider is that concerning the implications that FDI control has had on European competition policies. It has been seen how, through the Franco-German Manifesto, Member States (on the initiative of France and Germany) have urged EU policymakers to address the "challenges raised by competitive foreign industries that are supported through instruments that do not comply with obligations under international law or applicable principles of the EU internal market, including EU competition law, and to find an appropriate and balanced response"[505]. This "call for protection" led to the adoption of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market based on Articles 114 and 207 TFEU. In fact, despite the introduction of the Screening Regulation, the European framework was not considered sufficient for a coordinated response to prevent market distortions and the need emerged to fill the gaps in EU legislation to comprehensively address the distorting effects in the single market induced by foreign Country ownership and foreign financing through State aid. Under the FSR, the Commission is placed at the center of its implementation and given the ability to impose far-reaching remedies and also granted broad investigative powers that allow access to all information it deems relevant when addressing potential and actual distortions of the internal market. Such powers, however, are a strong response to the point that they risk being able to cause an imbalance in the opposite direction to the current one. Moreover, after wondering about the possible joint effects resulting from the coexistence of the Screening Regulation and the Subsidies Regulation, it can be concluded that the two regimes are indeed bound to coexist. Both sets of rules will inevitably be perceived as protectionist by non-EU Member States; potential buyers of companies in the EU/participants in tenders in the EU will at the very least face delays and potentially remedies, e.g., for tax breaks granted in let's say Seoul that are in no way intended to have any effect in Europe. Moreover, both sets of rules undermine at least the spirit and probably the substance of the WTO since the EU chose not to strengthen the SCM Agreement and adopted the FSR instead. Moreover, the grounds of "national security" and "public order" may play a role also in the Subsidies Regulation review as

[505] See *supra* Chapter II section 1 at 10.

well as they play one within the FDI Screening Regulation. The review that the Commission may conduct with regard to subsidies has obvious points of contact with that conducted with regard to FDI: it can essentially give rise to an authorization, a conditional authorization or a prohibition. In essence, the FSR applies to all foreign investments from third Countries without distinguishing between residence or nationality of the investor. However, the regulation is part of a trend toward protectionist and politicized investment control, and it is reasonable to expect that subsidized firms from certain jurisdictions (*e.g.*, China) will by definition be considered more problematic than others.

It can thus be concluded that Europe has not responded to the competition challenges by adapting existing rules but has instead initiated concrete regulatory initiatives to address the issues that have ignited public debate in this regard.

Finally, moving outside European borders and considering the critical profiles afferent to the EU as an Organization, an analysis was conducted devoted in part to the Chinese approach to foreign investment and its influences on the EU system and then to the evolution of the U.S. screening system highlighting its points of interaction with the European model. The investigation was conducted with the aim not of mere comparison but of a critical analysis that kept the EU system as the focal point.

According to this perspective, it was observed how China in recent years has accelerated the process of opening up to the global economic market through projects such as the One Belt One Road Initiative and Made in China 2025. These changes have inevitably affected the EU as Organization since FDI in any of the Member States give access to the entire internal market. The EU has therefore reacted by adapting its regulatory framework to the new requirements through the BIT’s negotiations (*i.e.,* the CAI) and the implementation of the Screening Regulation itself. This reaction thus confirms that the rise of Chinese FDI in the EU has had a centripetal effect: the EU has recognized that Chinese FDI poses unique challenges that are best addressed at the supranational level. The same circumstance of mutual influence, albeit of a different nature, has also been verified with regard to the U.S. case, as for both screening systems it is possible to imagine the existence of a fine line between national security and protectionism; specifically, the screening regulation considers many of the same China-specific investment trends that FIRRMA aims to combat.

Thus, it can be concluded that FDI regulations reflect the economic policy patterns of each relevant context and respond to new changes in the modern World. In particular, Chinese influence has led the EU to change its regulatory framework by making it more conservative, while U.S. influence has been met with less apprehension, even going so far as to establish genuine dialogue in an attempt to build cooperation (*e.g.,* CAI).

Therefore, it is intended to emphasize, as a conclusion of this paper, that as of today, individual interventions to limit the discretion of national governments are no longer sufficient to foster investment attraction, but an even more ambitious challenge becomes necessary aimed at the creation of common, flexible and superordinate guidelines that can allow each Country the space to determine and judge its own national security needs while serving as a general reference point to foster an harmonization of universal principles to be applied to investment screening procedures.

Ultimately, it is necessary to ensure that new phenomena, changes, and criticalities do not lead national governments to undertake operations to block investment to the point that in the long run they may appear to be traceable to disguised protectionist policies: the line between economic policies driven by special forms of protection and economic policies driven by invisible forms of protectionism thus appear to be blurred. Without prejudice to the legitimate ability of each system to determine and judge its own national security needs, it appears necessary to maintain certain objectives and standards in the implementation of screening mechanisms and to work toward measures of cooperation and harmonization of those principles, which, having proved to be fundamental in this matter, have already emerged with regard to the European screening mechanism.

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