EU FDI Screening – Level Up in Multilevel Governance?

The Commission's Proposal for a New Regulation on the Screening of Foreign Direct Investment into the Union

Alexia Crivoi*

Contents

Abstract

The current Union framework for the screening of foreign direct investment is about to be renewed. In January 2024, the Commission presented a proposal for a new Regulation that is supposed to bring about more convergence in the currently strongly fragmented national legislation landscape. The Proposal obliges Member States to introduce national screening mechanisms and tries to harmonise those by

* Alexia Crivoi is a PhD Candidate in European and International Law at Vienna University of Economics and Business (WU Wien, Austria) and Policy Officer for Trade and Investment Policy at the Austrian Federal Ministry of Labour and Economy. Email: alexia.crivoi@wu.ac.at. The views in this article are strictly the author's and do not represent a position of the Ministry.

prescribing a minimum scope of application and a number of screening factors. The article gives an overview of the changes and tries to analyse in how far they can contribute to a more enhanced, effective screening exercise across the Union. In addition, the Proposal raises questions as to its conformity with primary law, in particular with regard to its appropriate legal basis and its relation to the free movement rules. By expanding FDI screening also to certain types of foreign-held intra-EU investment, a dichotomy between FDI screening and the freedom of establishment is created. The article thus tries to analyse how the Proposal can be reconciliated with the European Court of Justice's (strict) case law on restrictions to the freedom of establishment.

Keywords: Investment Screening, Economic Security, Freedom of Establishment, Common Commercial Policy, Internal Market Law

A. Introduction

In January 2024, the European Commission (Commission) presented its proposal for a (new) regulation on the screening of foreign investments in the Union (Proposal).[1] The proposed regulation, if adopted, will repeal the existing framework for the screening of FDI into the Union provided by Regulation (EU) 2019/452 (FDI Screening Regulation, Regulation),[2] which has been in force since October 2020.

This article aims to analyse the Proposal and its conformity with key aspects of primary law. To provide a more complete picture, it first briefly lays out the policy context in which the Proposal was tabled (B). After that, it sheds some light on the main substantive changes the Commission proposes and discusses them against the background of the question of their added value compared to the current framework (C). Finally, the article analyses the Proposal's conformity with the Treaties, in particular regarding choice of legal basis and free movement rules (D).

B. FDI screening in the context of economic security

The Proposal for a renewed FDI Screening Regulation is part of a package meant to "advance European economic security".[3] The package consists of five initiatives, with the revision of the FDI Screening Regulation being one of them, alongside white papers on export controls, the screening of outbound investment, and research and development involving dual-use technologies, as well as a proposal for a

1 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, C(2024) 23 final.
2 OJ L 79 of 21/3/2019, p. 1.
3 *European Commission*, Communication from the Commission to the European Parliament and the Council. Advancing European economic security: an introduction to five new initiatives, C(2024) 22 final.

Council recommendation on enhancing research security.[4] These initiatives are the first translation of the recently adopted European Economic Security Strategy (Strategy) into concrete action. The Strategy, tabled by the Commission in June 2023, lays out the European Union's policy response to geopolitical tensions threatening the functioning of the Union's economy. Its focus lies on "de-risking": possible threats to the Union's or Member States' (MSs) security arising from certain economic activities should be identified and tackled via a mix of various response measures stretching over different policy areas. The Proposal must thus be seen against the background of the Economic Security Strategy, as a piece of the toolbox contributing to safeguarding Europe's "economic security". The reason why this is particularly noteworthy is because, so far, there is no definition or explanation of what the Commission envisages as "economic security". At the same time, FDI screening is conducted on grounds of "security and public order", whereby security should be understood as "national security" in the sense of Art. 4 para. 2 third sentence TFEU.[5] The Commission is trying to provide some reassurance that the screening grounds will remain national security and public order.[6] However, the context in which the Proposal was presented seems to open the door for a possibly broader interpretation of the concept of security.[7] While the proposal for the current Regulation stood in contrast to the US approach of equating economic security and national security,[8] this is now definitely no longer the case for the Proposal.

4 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, C(2024) 23 final, p. 2.

5 Cf. *Blanke*, in: Blanke/Mangiameli (eds.), Art. 4 TEU, paras. 75 ff.; on the interpretation of "security and public order" in accordance with the GATS see *Velten*, The Investment Screening Regulation and Its Screening Ground "Security or Public Order", CTEI Working Papers, 2020-01, available at: https://repository.graduateinstitute.ch/record/298429?ln=en&v=pdf (3/4/2024).

6 *European Commission*, Call for Evidence for an Initiative (without an impact assessment), Ref. Ares(2023)4695417, p. 3; cf. however *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, C(2024) 23 final, p. 2 saying the Proposal is fully in line with the European Economic Security Communication.

7 This is backed by the Proposal's list of critical activity areas in which investment screening should be mandatory for all MSs, see section C.III. of this article.

8 *De Kok*, EL Rev 2019/1, p. 43.

C. The main changes to the existing framework

I. Starting point: Regulation 2019/452 as entry-level legislation

The FDI Screening Regulation was the Union's first step towards regulating FDI flows into the Union. The policy debate preceding its adoption[9] and the legislative procedure show that the Regulation's adoption was no easy task and in fact could be seen as a shift in the Union's open stance towards foreign investment in the face of geopolitical upheavals.[10] The Regulation, embodying the result of compromise,[11] can be largely regarded as "entry-level legislation" – a view that is reinforced by its built-in obligatory review exercise. According to Art. 15 of the Regulation, the Commission must evaluate the functioning and effectiveness of the Regulation three years after its entry into force and, if appropriate, may accompany its review by a proposal for legislative amendment. The result of this review – accompanied by feedback from the OECD, the European Court of Auditors, MSs and stakeholders[12] – is now the Proposal for a new FDI Screening Regulation. The key outcome of the Commission's review and of the feedback received was a lack of effectiveness and efficiency. Substantive, procedural, and institutional divergences in existing MSs' screening mechanisms, alongside the absence of screening legislation in other MSs altogether, render cooperation within the European framework ineffective. The soft obligations under the current Regulation, in particular the merely voluntary establishment of a screening mechanism by MSs, fail to guarantee an effective protection of the MSs' and/or the Union's security and public order interests. Therefore, the Commission now tries to provide, at least partially, some solutions to the calls for deepened regulatory convergence. As visible from comparing the two titles of the current Regulation[13] and the Proposal for a new regulation,[14] the Commission

9 See https://www.bmwk.de/Redaktion/DE/Downloads/E/eckpunktepapier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf?__blob=publicationFile&v=2 (3/4/2024); https://www.politico.eu/wp-content/uploads/2017/08/170728_Investment-screening_non-paper.pdf (3/4/2024).

10 For an overview see *Bismuth*, in: Bourgeois (ed.), pp. 103 f.; *Bohnert*, in: Winner (ed.), pp. 13 f.

11 See *Velten*, The Investment Screening Regulation and Its Screening Ground "Security or Public Order", CTEI Working Paper 2020-01, available at: https://repository.graduateinstitute.ch/record/298429?ln=en&v=pdf (3/4/2024), calling it a "vague compromise"; *Hindelang/Moberg*, CMLR 2020/5, p. 1431.

12 *OECD*, Framework for Screening Foreign Direct Investment into the EU, available at: https://www.oecd.org/daf/inv/investment-policy/oecd-eu-fdi-screening-assessment.pdf (3/4/2024); *European Court of Auditors*, Special report 27/2023: Screening foreign direct investments in the EU, available at: https://www.eca.europa.eu/ECAPublications/SR-2023-27/SR-2023-27_EN.pdf (3/4/2024); feedback from the public consultation, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework_en (3/4/2024).

13 Regulation (EU) 2019/452 (…) establishing a *framework* for the screening of foreign direct investments into the Union (emphasis added).

14 Proposal for a Regulation (…) *on the screening* of foreign investments in the Union (…) (emphasis added).

tries to move away from providing a mere framework to actually regulating screening per se.

II. An obligation for Member States to introduce a screening mechanism

Under the current Regulation, "Member States *may* maintain, amend or adopt mechanisms to screen FDI in their territory on the grounds of security or public order".[15] Thus, MSs have so far been free to decide whether or not to screen FDI inflows. While the adoption of the FDI Screening Regulation, alongside recurrent political pressure from the Commission,[16] has led to a remarkable increase in the number of MSs with a screening mechanism, there is still one MS (Cyprus) that has not signalled any political commitment to adopt screening legislation. However, by virtue of the internal market, an effective EU-wide FDI screening practice is impossible unless *all* MSs have a functional screening mechanism in place.[17] Therefore, Art. 3 of the Proposal now stipulates that "Member States *shall* establish a screening mechanism".[18] Under the Proposal, Member States are thus under a Union obligation to introduce a mechanism for screening FDI on grounds of security and public order.

III. Harmonising national screening mechanisms

The current Regulation provides for a number of "good governance" criteria that (existing or future) national mechanisms must comply with. Pursuant to Art. 3 paras. 2–6 of the Regulation, national screening rules must foresee timeframes, be transparent and non-discriminatory, clearly set out the triggering circumstances and the grounds relevant for screening, provide protection for confidential information and a possibility to seek recourse against screening decisions. As some commenta-

15 Art. 3 of the Regulation.

16 *European Commission*, Report from the Commission to the European Parliament and the Council. Second Annual Report on the screening of foreign direct investments into the Union, COM(2022) 433 final, p. 7; *European Commission*, Communication from the Commission. Guidance to the Member States concerning foreign direct investment from Russia and Belarus (…), OJ C 151 of 6/4/2022, p. 1.

17 *OECD*, Framework for Screening Foreign Direct Investment into the EU, available at: https://www.oecd.org/daf/inv/investment-policy/oecd-eu-fdi-screening-assessment.pdf (3/4/2024), p. 65; *European Court of Auditors*, Special report 27/2023: Screening foreign direct investments in the EU, available at: https://www.eca.europa.eu/ECAPublications/SR-2023-27/SR-2023-27_EN.pdf (3/4/2024); feedback from the public consultation available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework_en (3/4/2024), p. 19; *Crivoi*, The Upcoming Review of the FDI Screening Regulation, EU Law Live, Weekend Edition No. 158, 14 October 2023, available at: https://issuu.com/eulawlive/docs/weekend_edition_158 (3/4/2024), p. 5.

18 Art. 3 of the Proposal (emphasis added).

tors conclude, these requirements can be seen as no more than a concretisation of Union principles and/or the Court of Justice's case law on free movement rules.[19]

This approach, described as "light-touch harmonisation"[20] or as "a means of indirect partial harmonisation"[21], may now be about to change into deeper approximation of national screening mechanisms.[22]

First, Art. 4 of the Proposal provides a set of "minimum requirements" for what the Commission considers "the essential features" of national screening mechanisms.[23] However, what at first glance seems like a long (new) list still mostly contains general guarantees of national administrative law, such as an adequate procedure for the screening authority to determine its jurisdiction (or lack thereof), prevention of circumvention, judicial recourse guarantees, etc.

Nonetheless, some new obligations relating to the procedural design of national screening mechanisms stand out. For example, under Art. 4 para. 2 letter a, national screening authorities must "carry out an initial review followed by, where necessary, an in-depth investigation to determine whether the foreign investment is likely to negatively affect security or public order". Effectively, this provision harmonises the procedural design of screening mechanisms by mandating a two-step procedure. On the one hand, this could contribute to a more efficient information exchange within the cooperation mechanism, as it would ensure that only cases that meet a certain threshold of seriousness are being notified and the mechanism does not get unnecessarily overburdened. On the other hand, however, this creates the risk that national authorities might be inclined to only notify to the cooperation mechanism transactions being screened in the second stage and thus discard cases resolved in the initial review phase from a possible notification. However, such practice would disregard the fact that a transaction that might be unproblematic in one MS may still pose a threat to the security or public order of another MS and may therefore still require notification. Overall, Art. 4 para. 2 provides a few considerable powers and obligations (to be implemented by national legislation) for national screening authorities, such as the empowerment to screen, *ex officio*, transactions other than those subject to mandatory screening under the Proposal, up to at least 15 months after the completion of the investment, as well as the obligation to publish an annual report with (aggregate and anonymised) data on the investments screened (letter f).

Second, and most notably, the Proposal harmonises the minimum scope of application of national screening mechanisms, by mandating that MSs "shall ensure that their screening mechanisms apply *at least* to investments subject to an authorisation

19 *Hindelang/Moberg*, CMLR 2020/5, p. 1447; *de Kok*, EL Rev 2019/1, p. 42.
20 *Hindelang/Moberg*, CMLR 2020/5, p. 1446.
21 *Bohnert*, FDI Screening Regulation 2.0, available at: https://www.celis.institute/celis-blog/fdi-screening-regulation-2-0-towards-greater-regulatory-convergence/ (3/4/2024).
22 For a view arguing the Regulation has harmonising effects see *Herrmann*, ZEuS 2019/3, p. 465.
23 Recital 18 of the Proposal.

requirement pursuant to Art. 4 para. 4".[24] Under Art. 4 para. 4 of the Proposal, such authorisation requirement is stipulated when the FDI target either participates in a project or programme of Union interest, as laid down in Annex I of the Proposal, or operates in one of the critical areas of activity laid down in Annex II of the Proposal. The critical areas range from advanced technologies in various fields (semiconductors, artificial intelligence, quantum, biotechnologies, digital, sensing, space, energy, robotics, advanced materials) to critical medicines and critical financial services.

Effectively, the Annexes prescribe the minimum scope of application of national screening mechanisms. In addition, under Art. 19 Proposal, the Commission is empowered to amend the Annexes via delegated acts, in accordance with the standard conditions to the exercise of the delegation powers laid out in Art. 20 of the Proposal. A decision on the necessity of such amendment should be based on "changes in the circumstances relevant to the security or public order interests of the *Union*".[25] While reference to the Union's interests seems sensible in the context of the EU-wide screening framework, it is worth noting that there is no definition or (clear) understanding of what constitutes security or public order interests of the Union, as these are concepts typically falling under the MSs' prerogative according to Art. 4 para. 2 third sentence TEU.[26] Unless there is MSs consensus that a certain matter constitutes a shared security or public order interest among all MSs, this term risks to give rise to possible tensions to the MSs' security and public order prerogative. This is also in line with the Court's case law on the public order justification for restrictions on fundamental freedoms, according to which MSs are granted discretion, within the limits of the Treaties, to define the concept of "public policy", recognising that "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another".[27] Moreover, Art. 19 para. 2 of the Proposal lists a set of criteria for the Commission to consider in view of a possible amendment, such as resilience of supply chains (letter a) and of infrastructures (letter b) of particular importance for the security or public order interests of the Union. These rather vague criteria, not relating strictly to *national* security, seem to underscore the idea that the Commission is increasingly moving towards FDI screening in the context of *economic* security.

Third, the Proposal makes the criteria to be taken into account when screening FDI compulsory. Currently, Art. 4 para. 1 of the Regulation provides a list of *target-related* factors that MSs and the Commission *may* consider. The list, which is not exhaustive, includes the investment's potential effects on critical infrastructure, critical technologies and dual use items, supply of critical inputs (such as energy,

24 Art. 3 para. 2 of the Proposal (emphasis added); see also Recital 9 of the Proposal reinforcing that MSs "should also be able to extend the scope of their national screening mechanism", as long as it complies with the provisions of the regulation.

25 Art. 20 of the Proposal (emphasis added).

26 *Daniel*, in: Hindelang/Moberg (eds.), p. 473.

27 CJEU, case C-41/74, *Van Duyn/Home Office*, ECLI:EU:C:1974:133, para. 18; *Herrmann*, ZEuS 2019/3, p. 446.

raw materials, food security), access to sensitive information, and freedom and pluralism of the media. Article 13 of the Proposal essentially duplicates the current list (with some technical clarifications), but makes the consideration of the factors obligatory for both MSs and the Commission. Aside from the current target-related factors, Art. 4 para. 2 of the Regulation lays down *investor-related* criteria that MSs and the Commission *may* additionally take into account, such as an investor's possible control by a third-country government or their involvement in activities affecting security or public order. The Proposal also mandates the (obligatory) consideration of these criteria and amends this list by adding the investor's past involvement in non-authorised investments, which are subject to restrictive measures, their engagement in illegal or criminal activities or their likelihood to pursue a third country's policy objectives or to facilitate a third country's military capabilities.

Overall, these amendments aim to address the effectiveness concerns voiced regarding the strong fragmentation of MSs' screening practice outlined above. The approximation of MSs' screening mechanisms' scopes, alongside the obligation to consider some common criteria when screening, may indeed bring about a higher degree of harmonisation in national screening practice and facilitate cooperation within the mechanism. At the same time, prescribing a certain scope of application for national screening entails a certain encroachment on the MSs' security prerogative, which is why, to avoid possible tensions between the renewed regulation and Art. 4 para. 2 TEU, a considerable degree of flexibility for MSs' screening decisions must be safeguarded.

IV. Expanding the Regulation's scope to intra-EU indirect FDI

The Court of Justice clarified in its much-discussed[28] *Xella* decision of 2023 that the Regulation only applies to *foreign* direct investments, a term only encompassing "investments in the European Union made by undertakings constituted or otherwise organised under the laws of a third country".[29] This means that where an investment is done by an undertaking constituted under the laws of a MS, the transaction will fall outside the scope of the Regulation – even if that undertaking is ultimately owned or controlled by a third-country investor (so-called "indirect FDI"). The only exception is when the EU undertaking exists solely in order to

28 See for an overview *Andreotti*, Screening of foreign direct investment within the Union, EU Law Live, 25 July 2023, available at: https://eulawlive.com/op-ed-screening-of-foreign-direct-investment-within-the-union-protection-of-essential-interests-or-abuse-of-rights-c-106-22-xella-magyarorszag-by-nicolo-andreotti/ (3/4/2024); *Pérez*, The Court of Justice draws a line in the sand for foreign investment screening, EU Law Live, 26 July 2023, available at: https://eulawlive.com/op-ed-the-court-of-justice-draws-a-line-in-the-sand-for-foreign-investment-screening-ruling-in-xella-magyarorszag-c-106-22-by-alberto-perez/ (3/4/2024); *Shipley*, Where Investment Screening and the Internal Market Meet, EU Law Live, 22 September 2023, available at: https://eulawlive.com/op-ed-where-investment-screening-and-the-internal-market-meet-xella-magyarorszag-c-106-22-trajan-shipley/ (3/4/2024).

29 CJEU, case C-106/22, *Xella Magyarország*, ECLI:EU:C:2023:568, para. 32.

circumvent screening – which will not be the case as soon as the EU undertaking pursues a certain degree of economic activity instead of being set up as an artificial arrangement only with the purpose of circumventing screening.[30]

As a side note, MSs have always been able to cover indirect FDI under their national screening legislation. In fact, they are free to cover any type of intra-EU investment – whether "genuinely" intra-EU (by purely European investors) or not (by European investors ultimately under foreign control). In any case, even though those investments fall outside the scope of the Regulation in absence of a (direct) foreign element, national screening laws must still comply with the free movement rules.[31]

When the question of covering indirect FDI was first raised in *Xella*, AG Capeta opted for a broad interpretation of "foreign direct investment" driven by the *telos* of the Regulation,[32] arguing that "what matters is who ultimately acquires control over the EU undertaking".[33] However, the Court of Justice interpreted the definition of a "foreign investor" in Art. 2 of the Regulation more narrowly, thus arriving to a different conclusion. The Court ruled that the Regulation only covered investment made by genuinely foreign investors. For legal entities, this means only undertakings constituted or otherwise organised under the laws of a third country.[34] Where an undertaking is constituted under the laws of a MS, the Court, refuses to pierce the corporate veil and does not attach any importance to the ultimate foreign origin or control of a *prima facie* EU undertaking.[35] However, the Court arrives at this result in a rather inconsistent manner. By making reference to the EU nationality of the ultimate beneficial owner behind the foreign investor,[36] it raises the question if EU nationality does, after all, play a more significant role and if the case would have been decided otherwise in absence of an EU national as ultimate beneficial owner.[37] Still, the Court's interpretation of excluding intra-EU indirect FDI from the Regulation's scope is consistent with a holistic analysis of the Regulation text and reflects the co-legislators' intention.[38]

30 Cf. CJEU, case C-446/04, *Test Claimants in the FII Group Litigation*, ECLI:EU:C:2006:774, para. 57 on the delimitation of circumvention.
31 See below in section D.2. of this article.
32 Opinion of AG Capeta, case C-106/22, *Xella Magyarország*, ECLI:EU:C:2023:267, para. 45.
33 Ibid., para. 43.
34 CJEU, case C-106/22, *Xella Magyarország*, ECLI:EU:C:2023:568, para. 32.
35 Ibid., para. 37.
36 Ibid., paras. 15, 28, and 48.
37 *Crivoi*, The ECJ's Judgment in Xella, CELIS, 18 October 2023, available at: https://www.celis.institute/celis-blog/the-ecjs-judgment-in-xella-judicial-cherry-picking/ (3/4/2024).
38 *Crivoi*, The Upcoming Review of the FDI Screening Regulation, EU Law Live, Weekend Edition No. 158, 14 October 2023, available at: https://issuu.com/eulawlive/docs/weekend_edition_158 (3/4/2024), p. 8.

However, not covering indirect FDI has been repeatedly identified as one of the Regulation's shortcomings.[39] The exclusion of investment through EU undertakings that are ultimately in the hands of foreign investors leaves a considerable gap for the protection of security and public order and risks undermining the purpose of the Regulation, as well as resulting in overall inconsistency and unequal treatment.[40] Therefore, the Proposal now stipulates that the new regulation will cover indirect FDI – or, as the Proposal calls it, "investment within the Union with foreign control".

Article 2 para. 3 of the Proposal defines this concept as "an investment of any kind carried out by a foreign investor through the foreign investor's subsidiary in the Union, that aims to establish or to maintain lasting and direct links between the foreign investor and a Union target that exists or is to be established, and to which target the foreign investor makes capital available in order to carry out an economic activity in a Member state". From this definition, one can conclude a few things: First, the Proposal definition aims to cover a wide range of types of investments ("of any kind"), such as asset and share deals or investment in the form of major long-term loans.[41] Second, greenfield investment should also be covered.[42]

However, a few aspects remain unclear – most notably, the precise understanding of foreign control. The definition in Art. 2 para. 3 of the Proposal lays down three cumulative criteria.

a) The investment must be carried out through a foreign investor's subsidiary in the Union

Article 2 para. 7 of the Proposal defines a "foreign investor's subsidiary in the Union" as "an economically active undertaking established under the laws of a Member State meeting the conditions set out in Art. 22 para. 1 of Directive 2013/34/EU (…), *and* directly or indirectly controlled by a foreign investor" (emphasis added). This wording suggests there are two requirements that must be met: *First*, the conditions of Art. 22 para. 1, and *second*, direct or indirect control.

39 *OECD*, Framework for Screening Foreign Direct Investment into the EU, available at: https://www.oecd.org/daf/inv/investment-policy/oecd-eu-fdi-screening-assessment.pdf (3/4/2024), p. 81; *European Court of Auditors*, Special report 27/2023: Screening foreign direct investments in the EU, available at: https://www.eca.europa.eu/ECAPublications/SR-2023-27/SR-2023-27_EN.pdf (3/4/2024), p. 22; *de Kok*, EL Rev 2019/1, pp. 44–45; *Bungenberg/Reinhold*, ZASA 2023, p. 13.

40 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, C(2024) 23 final, p. 3.

41 See on the current Regulation *Bohnert*, in: Winner (ed.), p. 39 with further references; Recital 9 of the Regulation.

42 Cf. *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, C(2024) 23 final, p. 2.

- By reference to Directive 2013/34/EU (Financial Statements Directive), the Proposal clarifies when an EU undertaking must be seen as a "subsidiary" of a foreign investor: when the two entities must file a consolidated management report. Article 22 para. 1 lays down, exhaustively, the situations in which this is the case (such as majority of voting rights, a shareholder position in addition to personnel rights, right to exercise dominant influence, etc.) – all criteria prescribing different types of "control".
- From the additional reference to direct or indirect control in Art. 2 para. 7 of the Proposal ("and"), one can infer that *more* types of control than those listed in Art. 22 para. 1 of the Financial Statements Directive should be covered. However, the operating articles provide no further guidance as to what constitutes such direct or indirect control. Recital 11 clarifies that intra-EU investment does not need to be screened in the absence of "ownership, control, connection to or influence from foreign investors", such as "when a foreign investor participates in the Union entity without a controlling stake". By analogy, Art. 2 para. 3 thus seems to cover a wide range of situations – be it *legal* control via a direct or indirect controlling stake (the amount of which will vary depending on the circumstances of each individual case)[43] or via rights granted by the shareholders' agreement, or *de facto* control via other factors such as personal or structural influence, the existence of which will undoubtedly pose considerable difficulties in proving in practice.

Overall, it seems the Commission intended to leave considerable room for assessment as to the existence of foreign control or lack thereof[44] and seems to make such assessment dependent on both quantitative (e.g. majority ownership) and qualitative (risk-related) standards.[45]

b) Aiming to establish or to maintain lasting and direct links between the foreign investor and a Union target that exists or is to be established

In the absence of more concrete guidance on the meaning of "lasting and direct links" in the operating articles, the recitals clarify that this criterion should exclude portfolio investment from the scope of the proposed regulation.[46] Recital 16 of the Proposal explains that the framework should not cover acquisitions "intended for purely financial investment without any intention to influence the management and control of the undertaking". It is, however, unclear why the Commission requires "direct" links between the foreign investor and the Union target, while for the definition in Art. 2 para. 7 of the Proposal of a foreign investor's subsidiary it is sufficient that the subsidiary be indirectly controlled by the foreign investor.

43 Cf. ibid.
44 Cf. ibid., p. 3 where the Commission explains the need for "sufficient flexibility".
45 Cf. ibid., p. 3.
46 Recitals 16–17 of the Proposal.

c) The foreign investor makes capital available to the Union target in order to carry out an economic activity in a MS

The wording of this criterion seems to require that the funding of an investment done by an EU undertaking come from its foreign owner/controller. Therefore, if a foreign-owned EU company invests in another EU company without any financial backing for the completion of the transaction from its foreign owner, there will be no screening. The operability of this criterion, however, seems questionable considering difficulties in proving the lack of internal financial backing in light of company groups' cash pooling practices or internal capital market opportunities.

D. A primary law assessment

I. The choice of legal basis

The question of the correct legal basis when it comes to Union acts on screening FDI is generally complex due to the intricate web of national and Union competences intertwined in this policy area. Already the proposal for the current FDI Screening Regulation sparked a heated discussion on the question of the appropriate legal basis.[47] The matter was by no means confined to an academic discussion: it also had significant political relevance, as different institutions took diverging views on competence matters.[48] For one, this is because FDI, while expressly covered by the Union's Common Commercial Policy, can also fall under the provisions of the free movement of capital, creating a horizontal conflict. What further complicates the matter is that the screening relies on the grounds of security and public order – matters strictly reserved to MSs under Art. 4 para. 2 third sentence TEU, thus also giving rise to a vertical conflict.

In its Proposal, the Commission suggests the renewed regulation be based on a dual legal basis consisting of Art. 207 and Art. 114 TFEU. This is a novelty compared to the current Regulation which is based solely on Art. 207 TFEU and warrants a closer look at both provisions.

The Union's Common Commercial Policy (CCP) under Art. 207 TFEU has a wide scope, which expressly covers "foreign direct investment". Since the Regulation adopts the definition of FDI provided by the Court of Justice for the purpose of delimitating Art. 207 TFEU (which is, in fact, the definition elaborated in the context of the free movement rules),[49] it is undisputed that the subject-matter of the Regulation *prima facie* falls within the ambit of Art. 207 TFEU. What is more, the treaties do not prescribe the purposes for which CCP acts may be enacted.[50] There-

47 For an overview see *Bohnert*, in: Winner (ed.), pp. 31 f. with further references; *Günther*, Beiträge zum Transnationalen Wirtschaftsrecht 2018/157, pp. 18 ff.
48 See *Günther*, Beiträge zum Transnationalen Wirtschaftsrecht 2018/157, p. 22 with further references.
49 *Cremona*, in: Bourgeois (ed.), p. 36.
50 Ibid., p. 33.

fore, the fact that the FDI Screening Regulation was enacted with the primary motivation of securing *national security and public order* – i.e., not for commercial policy purposes – is not an obstacle for it to be based on Art. 207.[51] Nor is the fact that the Regulation does not advance the Union's CCP, but in fact restricts market access, as there is no requirement that CCP may only be used for liberalisation purposes.[52] Therefore, a Union act such as the FDI Screening Regulation meant to restrict FDI flows for the purpose of safeguarding national security and public order may, in principle, be based on the CCP.

The Court of Justice clarified that, in order to be covered by Art. 207 TFEU, a Union act must "specifically relate to trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects" on trade between the Union and one or more third countries.[53] Even without stipulating mandatory screening by MSs, it has nonetheless been argued that the current Regulation has such effect on FDI and can be thus based on Art. 207 TFEU. By providing "some minimal procedural requirements" for MSs' screening mechanisms and a cooperation mechanism for exchanging information on FDI flows, the Regulation directly and immediately influences screening decisions.[54]

However, such *direct and immediate* effect seems questionable for the following reasons: *First*, as already argued above, the procedural requirements laid down in the Regulation are a mere concretisation of basic principles of primary law that national administrative law must already comply with. Besides, the obligations flowing from the Regulation largely apply only where MSs have established or plan to enact national screening mechanisms[55] – a decision left entirely to MSs' discretion. This creates the somewhat paradoxical situation in which obligations flowing from an exclusive Union competence presuppose voluntary legislative action by MSs to create a scope for their application. *Second*, an effective functioning of the cooperation mechanism heavily relies on more or less voluntary contributions by individual MSs. While MSs are obliged to notify FDI undergoing screening, the mechanism lacks further steps to ensure an effective flow and consideration of information.[56] Under Art. 6 para. 9 and Art. 7 para. 7 of the Regulation, MSs "shall give due con-

51 *Kretzschmar*, pp. 349 ff.; note however *Cremona*, in: Bourgeois (ed.), p. 48 arguing that the Court of Justice does set some boundaries to the use of Art. 207 TFEU.

52 *Herrmann*, ZEuS 2019/3, p. 464; see also *Schill*, LIEI 2019/2, pp. 107 ff. arguing the Regulation ultimately achieves further liberalisation by creating a level playing field compared to third states and that subsequently enables the Union to grant market access via treaty negotiations.

53 CJEU, case C-414/11, *Daiichi Sankyo*, ECLI:EU:C:2013:520, paras. 51–52; CJEU, case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paras. 57–58; CJEU, case C-389/15, *Commission v Council (Revised Lisbon Agreement)*, ECLI:EU:C:2017:798, para. 51; CJEU, Opinion 2/15, *Accord de libre-échange avec Singapour*, para. 25.

54 *Hindelang/Moberg*, CMLR 2020/5, pp. 1436–1437.

55 *Backenstraß/Kirst*, ZEuS 2023/3, p. 284.

56 Cf. *Bohnert*, FDI Screening Regulation 2.0, available at: https://www.celis.institute/celis-blog/fdi-screening-regulation-2-0-towards-greater-regulatory-convergence/ (3/4/2024) calling the mechanism "virtually toothless".

sideration" to comments or opinions from other MSs or from the Commission.[57] However, as Recital 17 of the Regulation already suggests, such obligation to give due consideration could already arise from the duty of sincere cooperation under Art. 4 para. 3 TEU. Much rather, an effective exchange of information would imply enhanced accountability of the MSs receiving other MSs' comments and/or Commission's opinions. This could take place via e.g. an obligation to provide feedback as to the steps taken (or lack thereof) to mitigate the risks flagged by the Commission or by other MSs – all while preserving the MSs' final decision-making powers.[58] Furthermore, even if one argued that the nature of the obligation is irrelevant as long as the mechanism achieves the desired effect of information exchange, the cooperation mechanism still inherently suffers from an effectiveness deficit because of the lack of binding substantive provisions under the Regulation. Divergences in national mechanisms' scopes of application, timelines, screening thresholds or generally different design of screening systems (sectoral vs. cross-sectoral screening, notification requirement or lack thereof, etc.), as well as in the national administration of screening procedures (personnel capacities and willingness to cooperate within the European mechanism) have so far impaired a coherent exchange of information and thus the effective and efficient functioning of the cooperation mechanism.

Therefore, looking at the current Regulation, it can be argued that Art. 207 TFEU was not the most fitting choice for its legal basis.[59] In the absence of real obligations under the Regulation, the direct and immediate effect on trade seems questionable – especially considering that "having mere implications for trade" does not suffice for a Union act to be based on Art. 207 TFEU.[60]

This, however, changes with regard to the Proposal. Obliging MSs to introduce a national screening mechanism with a certain minimal scope of application would clearly have an effect on investment flows between the Union and third countries, as it essentially means that any investment into a Union target active in a critical area will be subject to (at least preliminary) screening, no matter in which MS the target is located.[61] Therefore, it seems sensible to suggest the revised regulation be based on Art. 207 TFEU.

However, things become more complicated when considering that the Proposal expands the current Regulation's scope by encompassing indirect FDI, i.e. intra-EU

57 Cf. Recital 17 of the Regulation.

58 Cf. *OECD*, Framework for Screening Foreign Direct Investment into the EU, available at: https://www.oecd.org/daf/inv/investment-policy/oecd-eu-fdi-screening-assessment.pdf (3/4/2024), p. 75.

59 *Cremona*, in: Bourgeois (ed.), pp. 39–40; *Crivoi*, The Upcoming Review of the FDI Screening Regulation, EU Law Live, Weekend Edition No. 158, 14 October 2023, available at: https://issuu.com/eulawlive/docs/weekend_edition_158 (3/4/2024), p. 12.

60 CJEU, Opinion 2/15, *Accord de libre-échange avec Singapour*, para. 25; *Cremona*, in: Bourgeois (ed.), pp. 40 ff.

61 *Crivoi*, The Upcoming Review of the FDI Screening Regulation, EU Law Live, Weekend Edition No. 158, 14 October 2023, available at: https://issuu.com/eulawlive/docs/weekend_edition_158 (3/4/2024), p. 12.

investment where the investor is ultimately foreign-owned or -controlled. Article 207 TFEU is strictly concerned with *international* trade, not trade (or investment) between MSs among themselves.[62] Where a Union act establishes obligations aimed at both foreign and intra-EU investment, an internal market legal basis is necessary.[63] This is also in line with the Treaties providing in Art. 207 para. 6 TFEU that "the exercise of the CCP shall not affect the delimitation of competences between the Union and the Member States", meaning the Union's (shared) competence for regulating the internal market should be preserved.[64] Therefore, while certain harmonising effect can be achieved via a CCP-act,[65] the CCP cannot provide sufficient basis for regulating Union-domestic investment flows.

Article 114 TFEU, the central provision for the harmonisation of MS' laws, aims to ensure the realisation of the internal market objective as set out in Art. 26 TFEU.[66] According to the Court's case law, Art. 114 TFEU may be used as a legal basis for measures addressing disparities between the laws of the MSs where such disparities are liable to create or maintain appreciable distortions of competition, with a view to creating a level playing field within the internal market.[67] This is the case with regard to the approximation of national screening mechanisms via first, prescribing a minimum scope of application as a common denominator, and second, laying down common criteria to be taken into account by all MSs when screening FDI. This way, possible races to the bottom to attract foreign investors can be avoided.[68] More conceptually, an effective regulation of FDI screening in the Union, especially where the screening exercise is de-centralised, will inherently relate to the internal market, as the internal market is the core factor making a uniform approach to FDI screening across the Union necessary.[69]

Therefore, the Proposal's suggestion for a dual legal basis is convincing.[70] The Court of Justice takes a strict stance when it comes to dual legal bases and only allows them as an exception to the general rule that a Union act should be based solely on one competence provision. As a consequence, dual bases are allowed where a measure pursues two aims or has several components and none of them

62 CJEU, case C-414/11, *Daiichi Sankyo*, ECLI:EU:C:2013:520, para. 50; CJEU, case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, para. 56; *Cremona*, in: Bourgeois (ed.), p. 40; *Kretzschmar*, pp. 229 f.

63 *Cremona*, in: Bourgeois (ed.), pp. 48 f.

64 Cf. ibid., p. 40 f.

65 Cf. *Bungenberg/Reinhold*, para. 58.

66 *Kellerbauer*, in: Kellerbauer/Klamert/Tomkin (eds.), Art. 114 TFEU, para. 1.

67 Ibid., para. 2 with further references.

68 Cf. also *Crivoi*, The Upcoming Review of the FDI Screening Regulation, EU Law Live, Weekend Edition No. 158, 14 October 2023, available at: https://issuu.com/eulawlive/docs/weekend_edition_158 (3/4/2024), p. 13; *Bohnert*, FDI Screening Regulation 2.0, CELIS, 6 February 2024, available at: https://www.celis.institute/celis-blog/fdi-screening-regulation-2-0-towards-greater-regulatory-convergence/ (3/4/2024).

69 *Vranes*, p. 9; cf. *Bohnert*, FDI Screening Regulation 2.0, CELIS, 6 February 2024, available at: https://www.celis.institute/celis-blog/fdi-screening-regulation-2-0-towards-greater-regulatory-convergence/ (3/4/2024).

70 *Cremona*, in: Bourgeois (ed.), pp. 48 f.

can be identified as the main one, but rather the two aims or components are "inseparably linked without one being incidental to the other".[71] Looking at the Proposal, the CCP-component of introducing an obligation for MSs to screen foreign investment is inseparably linked to the internal market component subjecting certain cases of intra-EU investment to the screening mechanisms (as argued above), and that additionally approximates the criteria on which MSs should base their assessment.

II. Free movement rules

Both MSs' national and Union secondary legislation on the screening of FDI must comply with primary law, in particular with the free movement rules laid out in the Treaties. Measures on FDI screening will fall under the freedom of establishment as set out in Arts. 49 and 54 TFEU and the rules on free movement of capital in Art. 63 TFEU.[72] The Court of Justice has clarified in its (controversial[73] and not entirely consistent[74]) case law that the applicability of the free movement of capital – the only freedom extending to the third-country context – depends on the freedom's relationship[75] to the freedom of establishment, even in a third-country context in which the latter does not apply.[76] Essentially, the Court distinguishes the application of the two freedoms depending on whether the national legislation is intended to affect the ability of investors to "exert a definite influence on a company's decisions and to determine its activities".[77] Where that is the case, the freedom of establishment applies. If, however, a national measure is intended to apply "to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking", the measure must be reviewed against the free movement of capital.[78]

Thus, national screening measures will fall within the ambit of the free movement rules in the following cases:

- Free movement of capital, where they are intended to apply to portfolio investment, both in intra-EU and extra-EU scenarios. For the purposes of this article, which focuses on screening of foreign *direct* investment, this will not be further analysed.

71 CJEU, case C-490/10, *Parliament v Council*, ECLI:EU:C:2012:525, paras. 44–47.
72 *Herrmann*, ZEuS 2019/3, p. 435.
73 *Hindelang*, p. 63 ff.; *Hindelang*, IStR 2013/3, p. 77; *de Kok*, EL Rev 2019/1, p. 30; *Schill*, in: Bourgeois (ed.), p. 69.
74 *Steiblyte/Tomkin*, in: Kellerbauer/Klamert/Tomkin (eds.), Art. 63 TFEU, para. 15.
75 See *Vranes*, in: Winner (ed.), pp. 104 ff.
76 More recently CJEU, case C-47/12, *Kronos International*, ECLI:EU:C:2014:2200, para. 29 with further case law references.
77 CJEU, case C-47/12, *Kronos International*, ECLI:EU:C:2014:2200, para. 31; *Steiblyte/Tomkin*, in: Kellerbauer/Klamert/Tomkin (eds,), Art. 63 TFEU, para. 14.
78 CJEU, case C-47/12, *Kronos International*, ECLI:EU:C:2014:2200, para. 32.

- Freedom of establishment, where they are intended to apply to direct investment by a Union investor, provided the facts of a given case satisfy the Court's conditions.[79]

However, a national screening decision restricting a freedom can be justified under the *ordre public* exception of Art. 52 para. 1 and Art. 65 para. 1 letter b TFEU. According to the Court's settled case law, justification grounds "must, in the EU context and, in particular, as derogations from a fundamental freedom enshrined in the TFEU, be interpreted strictly".[80] Therefore, "public policy and public security may be relied on only if there is a *genuine and sufficiently serious threat to a fundamental interest of society*",[81] whereby a merely potential threat does not suffice.[82]

The proposed amendment to cover intra-EU indirect FDI creates a certain dichotomy between the legitimate objective of capturing scenarios possibly entailing security and public order risks and the freedom of establishment – a freedom benefitting any company incorporated under the laws of a MS, regardless of its ownership structure.[83] As became visible in *Xella*, the Court of Justice refuses to pierce the corporate veil and ignores the foreign corporate structure of a company that is incorporated under the laws of a MS. In other words, a European-incorporated company is a European company. This result is also in line with Art. 54 TFEU which only names incorporation under the laws of a MS and a Union-link (via some type of presence in a MS) as relevant for the company's "nationality". This approach, described in literature as the "structure theory" (as opposed to the "control theory") deliberately and expressly rejects looking into the origin of a company's owners or controlling entity to determine its "nationality". Against this background, the tension between the purposefully wide scope of the freedom of establishment and the proposed expansion of the FDI Screening Regulation to intra-EU investment becomes more apparent.

Nonetheless, the fact that a foreign-owned EU company falls under the scope of the freedom of establishment does not necessarily imply that the standard of review must be the same as in the case of a purely intra-EU situation. In other words, the strict standard provided by the Court of Justice's case law requiring a "genuine and sufficiently serious threat to a fundamental interest of society" could possibly be lowered when reviewing measures restricting the freedom of a foreign-owned EU company that are necessary to protect a MS' security and public order interests.

79 Note that in intra-EU situations, the Court will examine the facts of a given case, in addition to the national measure's purpose, to ascertain whether the freedom of establishment is applicable, see CJEU, case C-47/12, *Kronos International*, ECLI:EU:C:2014:2200, para. 37.

80 More recently see CJEU, case C-106/22, *Xella Magyarország*, ECLI:EU:C:2023:568, para. 66.

81 CJEU, case C-106/22, *Xella Magyarország*, ECLI:EU:C:2023:568, para. 66; CJEU, case C-244/11, *Commission v Greece*, ECLI:EU:C:2012:694, para. 67 (emphasis added).

82 CJEU, case C-476/98, *Commission v Germany*, ECLI:EU:C:2002:631, para. 157.

83 See *Forsthoff*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 54 TFEU, para. 22.

Considering that the Court's case law was developed in genuine EU-situations,[84] applying a differentiated scrutiny standard when reviewing the national measures' proportionality seems feasible and would be in line with the structure theory approach of Art. 54 TFEU.[85] Such a differentiated approach can also be supported by the Court's acceptance of reciprocity considerations in external scenarios.[86] However, in *Xella*, the so far only case in which the Court had the chance to rule on an investment screening decision on intra-EU indirect FDI, the Court upheld its strict threshold even in a foreign ownership situation. Still, this does not preclude a possible lowering of the degree of scrutiny in other cases, as it can be argued that *Xella* was an atypical case of indirect FDI for the following reasons: First, as argued above, the Court, although rather inconsistently, did seem to attach some importance to the EU nationality of the foreign investor's ultimate beneficial owner. Second, the case involved a group of European companies that, while foreign-held, pursued genuine economic activities (also on their own) and had sufficient Union-links (in the sense of Art. 54 TFEU, such as by commercial presence in a MS). Therefore, it is not necessarily excluded that the Court will lower its scrutiny standard in other intra-EU indirect FDI cases, in which the economic existence of the EU-companies might be less substantiated.

However, if one were to argue the Court could lower its degree of scrutiny, the case law still requires a "genuine and sufficient threat". By contrast, the wording in the Proposal merely requires an investment to be "likely" to affect security or public order.[87] This significantly lower threshold stands in strong contrast to the Court's case law and thus gives rise to concerns about the Proposal's compatibility therewith.[88] More precisely, the threshold of mere "likelihood" must be reviewed against the Court's rejection of hypothetical risks and the requirement of a "direct link between that threat, which must, moreover, be current, and the discriminatory measure adopted to deal with it".[89] To assess the existence of such a direct link, national screening authorities will have to take into consideration – alongside the factors enumerated in Art. 13 of the Proposal – further circumstances of the case, such as the degree of control acquired by the foreign investor, or the importance of the acquired target in its particular sector. If national screening practice will solely rely on the likelihood of a negative effect, it seems highly probable that negative screening decisions will be deemed disproportionate.

84 Cf. CJEU, case C-106/22, *Xella Magyarország*, ECLI:EU:C:2023:568, paras. 15, 28, 48, where the Court even reiterates that the ultimate beneficial owner of the foreign investor is Irish and thus an EU national.
85 *Herrmann*, ZEuS 2019/3, pp. 451 ff.; *Vranes*, in: Winner (ed.), p. 115.
86 *Herrmann*, ZEuS 2019/3, pp. 452 ff.; see also *Bungenberg/Reinhold*, para. 59 on the flexibility to take into account reciprocity and other economic considerations granted under the CCP.
87 Art. 13 of the Proposal.
88 This equally holds true for the current Regulation which provides for the same threshold in Art. 4.
89 CJEU, case C-476/98, *Commission v Germany*, ECLI:EU:C:2002:631, para. 157.

E. Conclusion

The Proposal for a new regulation on FDI screening brings about more convergence of national screening legislation. It closes a gap in EU-wide effective FDI screening practice by obligating all MSs to adopt a screening mechanism, prescribing the national mechanisms' minimum scope of application and partly harmonising the criteria MSs must take into account when screening FDI. All these changes are welcome in light of the stark fragmentation in national screening practice across the Union.

A significant change to the existing Regulation is covering intra-EU indirect FDI. This without doubt creates a dichotomy to the internal market rules, more precisely to the freedom of establishment – a freedom that any company incorporated under the laws of any MS enjoys, regardless of its foreign ownership structure. Reconciling the free movement rules as a cornerstone of the internal market, and more specifically the very high threshold mandated by the Court of Justice's case law on restrictions to the freedoms, with the Proposal's objective of covering indirect FDI, will turn out to be a balancing act for national screening authorities.

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