



INSIGHT

EU STRATEGIC AUTONOMY AND TECHNOLOGICAL SOVEREIGNTY

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FOREIGN INVESTMENT CONTROL PROCEDURES AS A TOOL FOR ENFORCING EU STRATEGIC AUTONOMY

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ABSTRACT: The adoption of EU Regulation 2019/452 establishing a framework for the screening of foreign direct investment into the Union has been met with many reservations. While it appeared that it was becoming crucial for the EU to adopt a screening instrument in order to protect essential European interests, the mechanism that came into force in the autumn of 2020 seems too modest, giving the Commission no decisive power. However, thanks to a succession of unprecedented global crises (economic crisis, COVID-19 crisis, Russian aggression against Ukraine) and the emergence of offensive strategies on the part of certain foreign investors, in particular Chinese investors, the European Commission has gradually strengthened the European FDI control mechanism. This mechanism is now focused on the protection of European security, which includes economic security. Moreover, the Commission is clearly seeking to strengthen its own powers in this area. In order for the European FDI screening system to become an instrument for the defence of European strategic autonomy, the next step could be a reform of the system, which would formalize these transformations and would make the Commission the lead authority in the area of FDI control.

KEYWORDS: Foreign direct investment – screening mechanism – national security – economic security – EU strategic autonomy – EU Commission.

I. INTRODUCTION

The EU is the main forum for Foreign Direct Investment (FDI) inflows¹ and is one of the most open markets in the world. The universal free movement of capital (art. 63 TFEU) is an important lever for attracting FDI to Europe, even if EU law does not ensure absolute

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¹ The EU is the main venue for FDI inflows, ahead of the United States and excluding the COVID-19 period when there was a dramatic fall in FDI flows.



freedom of investment.² Traditionally, this openness puts the EU in a “paradoxical” situation.³ On the one hand, it is a strength, as FDI is considered good for the economy and for society; it enables knowledge transfer, technological spillovers, tax revenues and other advantages. But on the other hand, it places the EU in a weak position on the global market: since its market is already largely open, the EU’s bargaining power is limited in commercial negotiations. In sum, the EU extremely liberal stance can be a source of vulnerability for the European economy. However, this liberal dogma has never been challenged head-on, either by the European institutions or by the Member States. A return to any form of *protection*, which could quickly be equated with *protectionism*, has long been considered antinomic to the European economic project. In this context, the absence of a screening mechanism for FDI has been pointed out as a major weakness of European law from the moment that FDI came within the scope of the common commercial policy defined in art. 207 TFEU. But the first proposals as to regulation in this sense were simply not examined by the European institutions.⁴ However, half of the Member States already had such national systems of control. And some of them – including Germany, France and Italy, which are particularly exposed to the economic expansionist strategies of certain foreign investors – have worked to ensure that the EU better protects European industries from foreign acquisitions.⁵ Finally, other Member States have become convinced of this need.⁶

This awareness has grown rapidly in recent years. A succession of events has illustrated how globalization and liberalization have created economic interdependence in strategic sectors such as defence, the digital sector, strategic infrastructures, energies, transport, medicine and pharmaceuticals, foods, etc. and how this interdependence can be “weaponized” against EU strategic autonomy.⁷ The succession of financial crises has

² In particular, for greenfield investment, freedom of establishment, which applies only to European entities (arts 49 ff TFEU), limits freedom of investment.

³ SW Schill, ‘The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization’ (2019) Amsterdam Law School Legal Studies Research Paper 105.

⁴ Following the proposed acquisition of the Italian company Draka by a Chinese investor, two Commissioners, Mr. Tajani and Mr. Barnier, sent a joint letter to the President of the Commission on 9 February 2011. The letter invited the Commission to look into the issue of foreign investment control, mentioning the possible definition of a notion of “European interest” and envisaging “a harmonization of the criteria and modalities on the basis of which the competent authorities of the Member States carry out these verifications”.

⁵ In February 2017, the French, German and Italian governments expressed their concerns about acquisitions of European companies in strategic sectors by foreign interests in a joint letter to the Commission. See the letter: Bundesministerium für Wirtschaft und Energie www.bmwk.de.

⁶ However, at first many Member States were opposed to this project. See R Bismuth, ‘Reading between the Lines of the EU Regulation Establishing a Framework for Screening FDI into the Union’ in JHJ Bourgeois (ed), *EU Framework for Foreign Direct Investment Control* (Wolters Kluwer 2019) 103,104 ff.

⁷ On “weaponized interdependence”, see H Farrell and AL Newman, ‘Weaponized Interdependence: How Global Economic Networks Shape State Coercion’ (2019) *International Security* 42, 45.

weakened European industry. The development of the Chinese “go out policy” with, among other strategies, the “One Belt, One Road” approach, and the take-over of EU infrastructures such as the Piraeus Port, is seen as new economic expansionism. The COVID-19 pandemic has accelerated the movement to strengthen FDI control tools, in Europe but also worldwide.⁸ Finally, the Russian aggression against Ukraine has further weakened the European economy, to the point that its capacity to provide for the most basic needs of its population – food and energy – is threatened.

In light of this succession of events, the adoption of EU Regulation 2019/452 establishing a framework for the screening of FDI into the Union was more necessary than ever. This *Insight* focuses on the potential role of this EU screening mechanism as regards the protection of EU strategic autonomy. However, it must be underlined that this tool has not been adopted *in isolation*. It constitutes a piece of a broader policy designed to reinforce the EU’s economic power in its international relationships. The Communication of the European Commission on concentrations and killer acquisitions of start-ups (March 2021),⁹ the Regulation on foreign subsidies distorting the internal market (December 2022),¹⁰ the International Procurement Instrument (June 2022)¹¹ or the Commission Recommendation on cybersecurity of 5G networks (March 2019)¹² all mark a profound change in EU economic policy. The Commission in particular is making massive use of the normative power of the EU to clearly break with its traditional “naivety” with respect to liberalization and globalization.

In this in-progress global strategy, Regulation 2019/452 is a key item. Actually, and for the moment, the EU framework is quite modest. It is far from being equivalent to the US screening mechanism – under the authority of the Committee on Foreign Investment in the United States (CFIUS) and the President of the USA – which is a decisive weapon for defending the US economy. Regulation 2019/452 provides a “framework” only, which does not replace national mechanisms. Its objectives are to encourage States with no screening mechanism to adopt their own procedures; to reinforce the transparency and

⁸ UNCTAD, ‘Investment Policy Responses to the COVID-19 Pandemic’ (May 2020) Investment Policy Monitor unctad.org; A Novik and others, ‘Investment Screening in Times of COVID – and Beyond’ (7 July 2020) www.oecd.org.

⁹ Communication C(2021) 1959 final from the Commission of 26 March 2021, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.

¹⁰ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal markets

¹¹ Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union’s public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI).

¹² Commission Recommendation (EU) 2019/534 Cybersecurity of 5G networks of 26 March 2019.

the predictability of the existing procedures; to make the national screening mechanisms converge towards common standards; and to reinforce cooperation between national authorities and the European Commission. In its operational aspect, the framework leaves the power to control (or not) FDI inflows to the Member States.¹³ Consequently, the European Commission has no veto power; Regulation 2019/452 simply provides that: “[w]here the Commission considers that a foreign direct investment undergoing screening is likely to affect security or public order in more than one Member State, or has relevant information in relation to that foreign direct investment, *it may issue an opinion addressed to the Member State undertaking the screening*”.¹⁴

Moreover, the screening of FDI is not supposed to be authorized to defend purely economic interests. *A priori*, Regulation 2019/452 does not extend the margin of discretion of Member States. This is the case with most national investment screening mechanisms, which are primarily designed as instruments for the protection of national security and not as instruments for the preservation of national economic interests.¹⁵

However, since its implementation (Regulation 2019/452 entered into force in October 2020), the structuring dimension of the EU Framework has been reinforced, its philosophy has evolved, and the role of the Commission is becoming decisive. Yet, through the successive crises, two strong movements can be observed. The first movement is the recognition, alongside the national security of the Member States, of “EU national security”. The existence of security interests transcending individual State interests is induced in Regulation 2019/452. But the practice of the last years has brought it forward. The second movement is the appropriation by the European Commission of the screening framework to make it a central instrument of its economic defence policy. This is not to say that the screening of investments is progressively escaping the Member States. On the contrary, since the adoption of Regulation 2019/452, several Member States have adopted new national FDI screening mechanisms and, in September 2022, only two Member States – Bulgaria and Cyprus – had not yet considered the possibility of setting up such a system.¹⁶ However, it appears that the European Commission intends to play a role that goes beyond what the 2019 Regulation allows. In any case, these two movements illustrate how the control of investments in Europe is gradually becoming a tool for protecting European strategic autonomy.

¹³ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union art. 1(3) and art. 3(1).

¹⁴ Art. 6(3) Regulation 2019/452 cit. emphasis added.

¹⁵ UNCTAD, ‘National Security-Related Screening Mechanisms for Foreign Investment. An Analysis of Recent Policy Developments’ (December 2019) Investment Policy Monitor unctad.org. A notable exception is the case of the Investment Canada Act which authorizes the blocking of FDI if it does not provide a “net benefit to Canada” (art. 16(1) Investment Canada Act [1985]).

¹⁶ Report COM(2022) 433 final from the European Commission of 1 September 2022 Second Annual Report on the Screening of Foreign Direct Investments into the Union, 8 ff.

II. FROM MEMBER STATES' NATIONAL SECURITY TO 'EU NATIONAL SECURITY'

II.1. THE WIDE SCOPE OF THE CONCEPT OF NATIONAL SECURITY

Originally, national security was concerned with protection against military threats to the territory of the State.¹⁷ But this conception has evolved.¹⁸ In domestic law as in international law, national security now covers protection against multiple threats, such as those to a State economy or to the well-being of its population. The COVID-19 crisis has revealed that the national security of States could also be based on their capacity to respond – from a health and economics point of view, both immediately and in the long term – to supply needs that are sometimes prosaic (e.g. the supply of surgical masks), and sometimes more fundamental (pharmaceutical research in particular). The extension of the notion of national security also goes hand in hand with the extension of the list of “strategic sectors” targeted by restrictive national regulations.¹⁹ These sectors are those that are considered essential to the economy, social welfare, national security and the fulfilment of essential government functions: defence and equipment, telecommunications and electronic communications, energy production and distribution, security services, water supply, cryptology, financial services and infrastructure, media, oil and gas production, distribution and storage, transport and aviation, and sometimes health services.²⁰

During the spring of 2020 several States, both EU Member States and non-EU States, thus adopted measures to strengthen their national FDI screening mechanism in order to preserve their operational capacity to meet the medical, food and more generally material needs of their population.²¹ At no time was it argued that the extension of these arrangements exceeded the objective of protecting national security. Yet, in the field of investment screening, this notion is “self-judging”. Moreover, the pandemic has shown that the economic interdependence of States can be a source of vulnerability. Consequently, it becomes extremely difficult to disentangle purely economic interests from those that affect the security of the State.

The European Commission has clearly endorsed this broad acceptance of the national security of States, by adopting the *Guidance to the Member States concerning foreign*

¹⁷ DA Baldwin, 'The Concept of Security' (1997) *RevIntlStud* 5.

¹⁸ J Ma, 'International Investment and National Security Review' (2019) *Vanderbilt Journal of Transnational Law* 899.

¹⁹ On “critical infrastructures”, see K Gordon and M Dion, 'Protection of 'Critical Infrastructure' and the Role of Investment Policies Relating to National Security' (May 2008) www.oecd.org 3 ff.

²⁰ UNCTAD, 'National Security-Related Screening Mechanisms for Foreign Investment. An Analysis of Recent Policy Developments' cit. 8.

²¹ S Robert-Cuendet, 'Filtrage des Investissements Directs Étrangers dans l'UE et COVID-19: Vers une Politique Commune d'Investissement Fondée sur la Sécurité de l'Union' *European Papers* (European Forum Insight of 13 June 2020) www.europeanpapers.eu 597; S Robert-Cuendet, 'La Crise de la Covid-19 comme Révélateur du Renforcement de la Souveraineté Économique des Etats: l'Exemple des Mécanismes de Filtrage des Investissements Étrangers' (2021) *Journal de droit international "Clunet"* 499 ff.

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 in March 2020 (hereinafter "the 2020 Guidance").²² The Commission calls on the responsibility of the Member States to use the freedom given to them by Regulation 2019/452 to design appropriate responses to FDI, in the context of the pandemic. Thus, it calls on Member States that already have a screening mechanism to "[m]ake full use already now of [their] FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework". Furthermore, it calls on those who do not yet have such a mechanism or who have a mechanism that does not cover all relevant transactions "to set up a full-fledged screening mechanism and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs". Here, national security is used as a banner for the development of investment policies that aim to ensure the autonomy and economic independence of States, with a view to providing first and foremost for the needs of their population.

II.2. TOWARDS EU NATIONAL SECURITY

The broad conception of national security can be applied to Member States as well as to the EU. This highlights the urgency for an "EU national security". As noted above, Regulation 2019/452 states that, in cases where the FDI project may be a threat to the security or the public order of more than one Member State, the Commission can address an opinion to the competent State. Behind this notion of "threat for the security or the public order of more than one Member State" one can indirectly see the idea of the existence of European security interests. Thus, by identifying criteria that aim to help States in evaluating investment projects, Regulation 2019/452 contributes to the mapping of projects that may have an impact on European security. Among these criteria, the Regulation mentions the fact that the FDI project is linked to "critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media [...]", to "critical technologies", "supply of critical inputs, including energy or raw materials, as well as food security" or "access to sensitive information".²³ These criteria are reminiscent of strong elements of the common market. Moreover, this soft approximation of Member States' laws could be a prerequisite for a more prescriptive subsequent harmonization.

²² Communication C(2020)1981 final from the Commission of 25 March 2020, 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).

²³ Art. 4 Regulation 2019/452 cit.

The 2020 Guidance also contributes to strengthening the existence of “EU national security”. Yet, the guidelines emphasize the need to preserve the ability to meet the needs of populations not only at the national level but also and especially at the regional level. This is particularly evident in the following extract:

“Today more than ever, the EU’s openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment. *Vigilance is required to ensure that any such FDI does not have a harmful impact on the EU’s capacity to cover the health needs of its citizens*”²⁴

This gives the European Commission even greater legitimacy to issue opinions on investment projects, that “have to be taken into utmost account by the Member States” even if these opinions are not mandatory.²⁵ It also reduces the margin of appreciation of each Member State: when screening FDI, the national authority has to take into account not only its own national security, but also that of the EU: “FDI screening should take into account the impact on the European Union as a whole [...] Strategic assets are crucial to Europe’s security, and are part of the backbone of its economy and, as result, of its capability for a fast recovery.”²⁶

Apart from the management of the health crisis, the emergence of genuine European security interests has been confirmed. This leads the Commission to state that, even though Member States are still not obliged to have a national screening mechanism,

*“[a] national screening mechanism in all 27 Member States is necessary to safeguard the Union against potentially risky foreign investments from third countries. It would ensure that all 27 Member States and the European Commission screen relevant FDI, thereby protecting the collective security of the Member States and the Union, as well as the security of the Single Market and the very high level of economic integration which it allows”.*²⁷

What is even more striking is that the European Commission, in considering the necessity of FDI control, is no longer in a simple protective posture; it sometimes takes a truly offensive stance.

²⁴ Communication C(2020)1981 final cit. emphasis added.

²⁵ *Ibid.* para. 2.

²⁶ *Ibid.* 2.

²⁷ Report COM(2022) 433 final cit. 7.

III. FROM PROTECTION TO ‘OFFENSIVE DEFENCE’ OF ECONOMIC SECURITY INTERESTS

III.1. TOWARDS WEAPONIZATION OF EU INTERNATIONAL ECONOMIC POLICY

Some commentators consider that screening mechanisms are instruments of economic warfare.²⁸ Indeed, it is possible that States use them in order to adopt “disguised sanctions”.²⁹ This instrumentalization appears to be an illustration of what some authors call the new “geo-economic world order”,³⁰ in which the economic factor is at the heart of geopolitical relations and in which the security imperative invoked by States is a new form of sovereignty. It is the US mechanism, with the extensive power of the CFIUS and the President of the USA, that mainly gives rise to this analysis. However, European practice is falling in with this approach: gradually it is tending to weaponize FDI screening mechanisms.

Already in the 2020 guidelines, the European Commission hardened the tone, talking for example about protecting against “predatory buying”. And some analyses have pointed out that the European Commission intends to give itself powers similar to those granted to CFIUS.³¹ This trend has been accentuated after the COVID crisis. This can be seen through two examples.

The first example concerns the EU’s reaction to the war in Ukraine, in relation with FDI. The Commission adopted the *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*, on April 2022.³² In this communication, the Commission recalls the difference between sanctions and FDI screening mechanisms. However, the Commission considers that, in the context of the war, FDI from Russia and Belarus must be presumed to constitute a threat to the national security of Member States:

“While FDI screening and sanctions are distinct legal instruments, each with a different purpose, and with a different way of operating, Russia’s military aggression against Ukraine calls for greater vigilance towards Russian and Belarusian direct investments

²⁸ Concerning the US mechanism, J-J Jacobs, ‘Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union’ (2019) *IJLI* 105. Concerning the EU policy: PM Gadocha, ‘Assessing the EU Framework Regulation for the Screening of Foreign Direct Investment – What Is the Effect on Chinese Investors?’ (2020) *The Chinese Journal of Global Governance* 36, 38.

²⁹ S Robert-Cuendet, ‘Unilateral and Extraterritorial Sanctions and International Investment Law’ in C Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021) 204, 212 ff.

³⁰ A Roberts, H Choer Moraes and V Ferguson, ‘The Geoeconomic World Order’ (November 2018) *Lawfare* www.lawfareblog.com.

³¹ E.g. J-J Jacobs, ‘Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European’ cit. 105-117

³² Communication from the Commission of 6 April 2022, *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*.

within the Single Market. This goes beyond investments by persons or entities that are subject to sanctions. In the current circumstances, there is a heightened risk that any investment directly or indirectly related to a person or entity associated with, controlled by or subject to influence by the Russian or Belarusian government into critical assets in the EU may give reasonable grounds to conclude that the investment may pose a threat to security or public order in Member States".³³

Consequently, the Commission asks for systematic screening of these FDIs and again asks States without any FDI Screening Mechanism to urgently set up this kind of instrument. Regardless of the legitimacy of this treatment of Russian and Belarusian investments, the process raises questions. The Commission plays on the blurring between sanctions regimes (against a political regime or against individuals and companies) and the screening of investments for economic and political security purposes. Considering that one of the fundamental objectives of the 2019 Framework is to increase the transparency of screening procedures within the EU, it must be noted that the Commission is not acting in accordance with this aim.

The second example concerns the deployment of 5G on the territories of Member States. In its *Communication on Securing 5G*,³⁴ the Commission affirms that, in the framework of Regulation 2019/452, it will scrutinize foreign investments in the 5G area in line with Regulation 2019/452.³⁵ This statement prompts two observations. Firstly, the Commission's intention can be associated with the European Parliament's *Resolution on security threats connected with the rising Chinese technological presence in the EU and possible action on the EU level to reduce them*, adopted in March 2019.³⁶ There is a direct link between the objective to secure 5G deployment and the fear of interference from China. This EU position is not far from the US position towards China and its firms. The US position evokes the "economic war" between the two States³⁷ with the White House characterizing the Chinese "going out" strategy as "economic aggression".³⁸ It also evokes the case of Huawei, which was blacklisted in 2019, officially for having violated sanctions against Iran and for espionage. But actually, the risk to national security alleged by the US government is also a commercial risk of economic dominance of the US market by Chinese companies. In protecting its digital autonomy, the EU could slide towards such

³³ *Ibid.* cit. 1.

³⁴ Communication COM(2020) 50 final from the Commission of 29 January 2020, Secure 5G deployment in the EU - implementing the EU toolbox.

³⁵ *Ibid.* cit. 9

³⁶ Resolution 2019/2575(RSP) of the European Parliament of 12 March 2019 on security threats connected with the rising Chinese technological presence in the EU and possible action on the EU level to reduce them.

³⁷ C Hung Kwan, 'The China-US Trade War: Deep-Rooted Cause, Shifting Focus and Uncertain Prospects' (2020) *Asian Economic Policy Review* 55, 64; J Jacobs, *Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European cit.* 107 ff.

³⁸ White House Office of Trade and Manufacturing Policy, *How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World* (June 2018), trumpwhitehouse.archives.gov.

unamicable economic relations. And screening mechanisms could be used to serve purely commercial aims. The second remark concerns the leadership role of the European Commission: in the Communication on 5G, the Commission considers itself to be the main actor in FDI screening. It states that “[it] will scrutinize foreign investments in the 5G area”, regardless of the attitude that Member States wish to adopt. Here, we observe a shift in responsibility for the defence of European national security. However, this shift cannot be achieved without further reform of EU law.

III.2. THE EUROPEAN COMMISSION AS THE GUARDIAN OF THE EU’S ECONOMIC STRATEGIC AUTONOMY

The EU Framework for the screening of FDI is based on a delicate balance between EU and Member States’ competences. Since the entry into force of the Lisbon Treaty, the EU has wielded exclusive competence over FDI (art. 207 TFEU). The EU is therefore, in principle, competent for defining the level of openness of the European economy to FDI from third countries.³⁹ However, concerning the screening of FDI for national security reasons, the competence of the EU is limited by the fact that Member States have the exclusive competence to protect their public order and their public security.⁴⁰ They are sovereign to assess what threat concerns their own national security. In other words, with the 2019 Regulation, the European legislator exercises the exclusive competence of the EU in the field of FDI and immediately returns it to the Member States. However, this distribution of competences is clearly no longer adapted to practice.

In its economic dimension, security in the EU has, most of the time, a transnational scope. To better fit this reality, the Commission uses its soft normative power – through communications – to reinforce its own role. Through the language it uses, it even exceeds the power formally recognized by European law. Thus, in its second annual report on the implementation of Regulation 2019/452, the Commission notes that “Article 7 allows the European Commission to screen *ex officio* investments of which it becomes aware with a Member State [independently] of the question of whether that Member State has its own screening mechanism or not”.⁴¹ This wording suggests that the Regulation gives the Commission direct screening power. This is not the case, since art. 7 of the Regulation simply refers to the Commission’s power to issue opinions, without any decision-making powers of its own. It can be assumed that the European Commission aspires to transform its “covert” power of control into actual operational competence. And the consolidation of its

³⁹ In this sense, in certain free trade agreements recently signed by the EU, there are provisions on the liberalization of investment flows. See for example the EU-Japan Economic Partnership Agreement which entered into force on 1 February 2019.

⁴⁰ Art.4(2) TEU.

⁴¹ Report COM(2022) 433 final cit. 19. In the French version: “L’article 7 permet à la Commission européenne de *filtrer de droit (d’office)* les investissements dont elle a connaissance dans un Etat membre” (emphasis added)

“doctrine” is decisive. On the one hand, the Commission is exploiting the grey area between the EU’s exclusive competence for FDI and the Member States’ sovereign right to protect their own national security in order to consolidate a European competence to defend EU economic strategic autonomy. On the other hand, by using ambiguous wording, the Commission seems to want to prepare the Member States for a reform of the screening framework that would formally give it much more power than it currently wields.

It is important to recall that in the first version of the Draft Regulation for an FDI screening Framework drawn up by the Commission, it was foreseen that the Commission itself could object to an FDI. Art. 3(2) of the Draft Regulation stated that “[t]he Commission may screen foreign direct investments that are likely to affect projects or programmes of Union interest on the grounds of security or public order”.⁴² At that stage, this solution was premature. But after few months of application of the 2019 Regulation, Member States are rather satisfied with the discipline put in place by EU law and with the support that the Commission can give them. This support should be sought after all the more because the number of FDIs that have been screened has increased significantly since the Regulation came into force.⁴³

In any case, the Commission has already begun working on this possible reform of the Regulation. A proposal could be forthcoming in 2023.⁴⁴ The recent precedent of Germany finally authorizing the takeover of a substantial part of the port of Hamburg by the Chinese investor Cosco, in defiance of the strong reservations expressed by the Commission,⁴⁵ could convince the latter, if need be, to pursue more ardently its ambition to become a fully-fledged screening authority out to defend EU economic autonomy.

⁴² Proposal COM(2017)487 final from the Commission for a Regulation of the European Commission of the European Parliament and of the Council of 13 September 2017 establishing a framework for screening of foreign direct investments into the European Union

⁴³ Report COM(2022) 433 final cit. 12

⁴⁴ *Ibid.* cit. 21; Communication COM(2022)548 final from the Commission of 18 October 2022 Commission Work Programme 2023. A Union Standing Firm and United.

⁴⁵ J Packroff, ‘Hamburg Port Terminal Takeover Divides Berlin and Brussels’ (21 October 2022) EURACTIV www.euractiv.com Since the opinions that the European Commission may issue on an investment project are confidential, it is not possible to know whether the Commission has issued one in this case. However, it can be assumed that it did, given that an essential infrastructure for the EU is involved.

