ARTICLES

PUBLIC ORDER AND PUBLIC SECURITY IN EU LAW
edited by Ségolène Barbou des Places

THE EUROPEANISATION OF "PUBLIC ORDER": THE CASES OF RESTRICTIVE MEASURES TO COUNTER THE SPREAD OF FALSE INFORMATION AND OF RESTRICTIONS TO FOREIGN DIRECT INVESTMENTS

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ABSTRACT: This *Article* examines two legal instruments, in the fields of Common Foreign and Security Policy (CFSP) and the Common Commercial Policy, to inquire on whether the concept of "public order" has been "Europeanised". The first measure is Council Decision (CFSP) 2022/351 prohibiting operators to broadcast the content of selected Russian media outlets. In this context the notion of "European public order" is used to justify the adoption of restrictive measures. Yet, it cannot be maintained that as a result of this Decision Member States have lost their ability to invoke public order on their own. It is too early to conclude that the EU has "Europeanised" public order. Any future development of this notion will depend on whether it will be invoked again by the Council in the practice. The second instrument is Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union. In this context, the Union cannot act through the Commission to autonomously protect European public order by preventing a Member State to accept a Foreign Direct Investment (FDI) that concerns critical technologies and infrastructures. However, the view is taken that this act is leading to a soft 'Europeanisation' of the concept of public order. The recent Commission's proposal (COM(2024) 23), repealing the mentioned Regulation, is a step forward towards the recognition that FDIs in certain areas may be the object of restrictions in case they affect "Union public order and security".

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EUROPEAN PAPERS
VOL. 9, 2024, NO 3, PP. 1424-1436
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/816

KEYWORDS: European public order – common foreign and security policy – restrictive measures – common commercial policy – foreign direct investments – European integration.

I. INTRODUCTION

In the TFEU the notion of "*ordre publique*" (in English "public order" or "public policy") is one of the grounds that justify derogations from internal market freedoms.[1] "This justification may be invoked by Member States to limit free movement rights and for this reason it must be interpreted restrictively on the basis of a well-established case law".[2]

More precisely, public order may be relied upon by national authorities (and not by the EU) only in case of a severe threat to a fundamental interest of society. Reliance on public order is thus subject to an assessment carried out by the EU institutions. The issue which is at heart of this *Article* is whether the practice of the EU external relations shows that the concept of "public order" has been "Europeanised" so that it is now possible for the EU to act to safeguard the fundamental interests of the Union. In other words, this *Article* will inquire on whether "public order" is available not only to Member States but also to the EU institutions as a justification to impose EU-wide restrictions to protect the political and economic dimension of Union's security. This question may be articulated into two sub-questions: *i)* Is there a Union's public order? *ii)* Are there legal constraints imposed on Member States' reliance on public order in areas falling within the Common Foreign and Security Policy and Common Commercial Policy? Two measures will be taken into consideration in the practice to examine these issues: Council Decision (CFSP) 2022/351 prohibiting operators to broadcast the content of selected Russian media outlets[3] in the Union or directed at the Union[4] and Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments (FDIs) into the Union.[5] In both acts Member States have taken a common approach to restrictive measures and restrictions to inward FDI on grounds of public order and security.

[1] Arts 36, 45(3), 52(1) TFEU. Cases C-348/96 *Calfa* ECLI:EU:C:1999:6 paras I-11, point 21; case C-36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219 ECLI:EU:C:1975:137 paras 26 and 27, case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337 ECLI:EU:C:1974:133 para. 18. Primary law makes clear that EU members have a reserve of sovereignty in maintaining public order and security (art. 72 TFEU).

[2] See for examples of well-established case-law case C-54/99 *Église de scientologie* ECLI:EU:C:2000:124 paras 17 ff.

[3] RT English, RT UK, RT Germany, RT France e RT Spanish and Sputnik. These media outlets are under the permanent direct or indirect control of the leadership of the Russian Federation.

[4] Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

[5] 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.

II. Member States as custodians of the Union's public order

Before analysing the two legal acts mentioned above, it is worth highlighting that the CJEU has not never had the opportunity to rule on notion of "Union public order". However, there are interesting remarks on a possible interpretation of this concept in the conclusions of AG Bot in a ruling raised in 2010.[6] The CJEU was asked to examine a restriction to access to coffee shops which sell cannabis to Dutch residents for the purpose of combating drug tourism generated by the cross-border movements of customers coming from other Member States where the marketing of these products is prohibited. The legal issue is whether EU law precludes a similar measure. AG Bot held that the latter did not fall within the scope *ratione materiae* of the free movement of services. Therefore, it could be maintained. His position was that the national measure "represented an expression for the State [The Netherlands] not only of the right conferred on it to maintain its internal public order, but also its obligation vis-à-vis other Member States to contribute to the maintenance of European public order [...]".[7]

In this context Member States are considered the custodians of the European public order; they are not merely responsible for their domestic public order. This is due to the fact that illicit drug trafficking was recognised as a Euro-crime by the Amsterdam Treaty; each Member State is an agent of protection of public order at EU level.[8]

The CJEU followed AG Bot's opinion, although it confined itself to justify the Dutch prohibition on the basis of the legitimate aim of combating drug.[9] The Court did not mention the Union's public order in its ruling. It recognised that the restriction to the free movement of services in question concerned both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union.[10]

The position taken by AG Bot is interesting but it does not recognise the EU institutions as custodians of the European public order, as it seems to emerge in Council Decision (CFSP) 2022/351 to which we now turn the attention.

II.1. The concept of "European public order" in Council Decision (CFSP) 2022/351

Council Decision (CFSP) 2022/351 is a measure, enacted under art. 29 TEU, designed to respond for the first time to a hybrid threat represented by the spreading of false

[6] Case C-137/09 *Marc Michel Josemans* ECLI:EU:C:2010:433, opinion of AG Bot.

[7] *Ibid*. para. 123.

[8] The AG takes this reasoning to the extreme and argues that: "[...] the contested measure would be valid even in the absence of internal public order problems, solely on the basis of the obligation to contribute to the maintenance of European public order", cf *ibid*. para. 122.

[9] Case C-137/09 *Marc Michel Josemans* ECLI:EU:C:2010:433 paras 65-66.

[10] *Ibid*.

Information on the war aimed at justifying Russia's armed attack to Ukraine. The EU reacts to this threat by adopting a prohibition to broadcast information of selected media outlets which are under the permanent direct or indirect control of the government of the Russian Federation.

The justification at the basis of this prohibition is that the propaganda actions of the Russian Federation "constitute a significant and direct threat to the Union's public order and security".[11] Public order is not a self-standing ground to justify the restrictions; it is invoked together with Union's security.[12] While it is natural to invoke Union's security as one of the interests to justify the adoption of CFSP measures, it is uncommon to couple Union's security with Union's public order. To the author's knowledge, it is the first time that the Council relies on the concept of Union's public order to adopt restrictions in the field of the CFSP, which is still more intergovernmental in nature, despite the progressive erosion of its distinctiveness with respect to other policies.[13] The interests mentioned above are relied upon by the Council as grounds to enact restrictions to fundamental rights and freedom such as the right to freedom of expression and information, the freedom to conduct a business and the right to property as recognised in arts 11, 16 and 17 of the EU Charter of Fundamental Rights.

A number of questions may be raised on this new generation of restrictive measures. The first and most obvious is whether there is such a thing as a Union's public order. It may also be questioned why is the EU invoking *Union*'s public order? And finally: could the EU not invoke *Union*'s security only to enact the mentioned ban? Possible answers to these basic questions may be provided: the reference to Union's public order is new in the practice; the Council identifies a *Union* dimension of "public order", which is autonomous from the concept of national public order and can be seen as something more than the collective expression of 27 "national public orders". As to the second question, it is submitted that Union's security could not be invoked as the sole ground to justify the restriction at stake in the CFSP act. Indeed, on the one hand, hybrid threats such as disinformation campaigns by their nature do not pose an existential threat to the Union and its Member States as other security threats do (*i.e*. a military aggression). On the other hand, and more importantly, it is submitted that reliance on the Union's public order was necessary since it is the justification that is used by States when they seek to avoid *abuses* of the right to freedom of expression and information, which is protected by art. 10 of

[11] Recital n. 8 of Council Decision (CFSP) 2022/351 cit.

[12] Those propaganda actions have been channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union's public order and security.

[13] See, for example, joined cases C-29/22 P and C-44/22 P, *KS, KD v Commission* ECLI:EU:C:2024:725 in particular paras 117-118. In this seminal ruling the Court defined itself competent to interpret acts or omissions concerning the conduct, definition or implementation of the CFSP, except for those directly related to those political or strategic choices.

the European Convention of Human Right and fundamental Freedoms (ECHR) and by art. 11 of the EU Charter of Fundamental Rights. It may be argued that the Union seems to rely on the notion of "public order" in the same manner as full-fledge States do when they restrict the right to freedom of expression in situations in which this right, is abused by private parties.[14] There are cases in which EU Members of the Council of Europe invoked the public order to restrict a fundamental right to freedom of expression before the ECHR.[15] By invoking "European public order" the Council seems to act in order to avoid abuses of fundamental rights as Members of the Council of Europe do. Arguably, national authorities that enacted bans limiting the freedom of speech acted to counter hate speech and not merely propaganda.[16] However, it can be argued that propaganda is an abuse of the right to free speech.

It is noteworthy that single Member States could have invoked public order to enact similar broadcasting bans at national level; yet, they decided to give a unitary response to the spread of disinformation at EU level. Therefore, it is particularly interesting that they identified the threat to a Union dimension of 'public order' as a justification for the mentioned restrictive measure.

It may be wondered what the broader implications of this decision are. Does it imply that the EU has a general power to enact CFSP in the name of a Europeanised public order? Is the EU turning into a State? Have Member States lost their ability to enact broadcasting bans as a result of the adoption of Decision (CFSP) 2022/351? It should be noted that there is no Treaty basis for the EU to act on the ground that Union's public order is affected by an external threat. This contrasts with Union's security, which is one of the objectives that the EU is competent to safeguard, under art. 21(2)(a) TEU, when the EU acts on the international scene. Yet, it would be difficult to claim that the Union has acted *ultra vires* in adopting CFSP Decision 2022/351. Indeed, this measure was approved unanimously by the Council;[17] the lack of contestation by Member States is a proof that they have all agreed to act at EU level in the name of Union's security and public order.[18] The competence of the EU was also confirmed by the GC which has rejected the annulment action brought by an applicant against the mentioned act on the ground, amongst others,

[14] This happens, for example, in cases of "hate speech". See ECtHR *Association Ekin v France* App n. 39288/98 [17 July 2001]; ECtHR *M'Bala v France* App n. 25239/13 [20 October 2015].

[15] For example, see *Association Ekin v France* cit.

[16] For a criticism to the Council's reliance on public order to address the threat of propaganda see S Lattanzi, 'Su Propaganda e ordine pubblico in Europa' (2023) Politica del Diritto 389 410.

[17] However, this does not mean that the Treaties have been changed by the CFSP Decision under exam. The Treaties can be changed only through the procedure provided for by art. 48 TEU.

[18] However, the competence to adopt this category of restrictive measures was contested by a scholar on the ground that: *i)* the threat to the Union's public order provides too a vague legal basis; *ii)* the Council's measure, without any court order, and adopted by an executive body, are not consistent with international law. RÓ Fathaigh and D Voorhoof, 'Freedom of Expression and the EU's Ban on Russia Today: A Dangerous Rubicon Crossed' (2022) Communications Law ssrn.com 14.

that the EU lacked the competence to adopt the impugned measure under the CFSP.[19] The Court has also confirmed that the Council's decision which was challenged "had objectives that related to public interests which aimed to protect the European society".[20]

At the same time, it cannot be maintained that as a result of the EU's action in order to protect the European public order, Member States have lost their ability to exercise their competence to act on their own. They remain competent to act in order to safeguard national public order. It is too early to conclude that the EU has "Europeanised" public order. Reliance on the Union's public order could be a one-off episode which can be explained by the exceptional circumstances of the war that required the EU to take a common approach and show that it was united in its reaction. Therefore, reliance on the Union's public order may be of little precedential value to assess that the EU is relying on this concept as a *State* does to limit fundamental rights and freedoms. One swallow doesn't make a summer. It remains to be seen whether Union's public order will be invoked again in the practice of CFSP measures. In sum, it is neither possible to argue that the EU is turning into a State on the basis of a single case in which Union's public order was one of the grounds invoked by the EU as if it were a State; nor is it possible to conclude that Member States lost their ability to enact broadcasting bans to protect public order, as a result of the adoption of Decision (CFSP) 2022/351.

What could we expect from the practice in the future? It is possible that reliance on Union's public order is merely an isolated case given the very specific nature of the restrictive measure at stake. As a result, in future action in this field, the Council may decide to justify its restrictive measures on the ground of Union's security only, considering that media outlets spreading disinformation could be seen as Russian "assets";[21] this would imply that the Union is not changing its nature and is not transforming itself into a State. However, an alternative scenario is also possible: Member States in the Council could continue to invoke Union's public order in the practice. This may be symptomatic of the start of a slow change in the nature of the Union.

[19] "Although the applicant has not referred to the division of the Union's internal competences, the adoption of a decision by the Council under Article 29 TEU cannot be called in question by the possibility for the Union to intervene, in the field of audiovisual services, on the basis of other categories of competences governed by the FEU Treaty, in particular the competences attributed to the Union for the regulation of the internal market, under Article 4(2) TFEU".

[20] Case T–125/22 *RT France v Council* ECLI:EU:T:2022:483 paras 55 and 56. See V Szép and RA Wessel, 'Balancing Restrictive Measures and Media Freedom: RT France v Council' (2023) CMLRev 1383-1396.

[21] This is the expression used by the ruling of the High Court of Justice, King's Bench division administrative court, *Graham William Phillips v the Secretary of State for Foreign, Commonwealth and Development Affairs* [2024] EWHC 32 (Admin), 12 January 2024, para. 148. In this case the applicant was a journalist who reported from Donbass whose assets were frozen by the UK on the ground that he was a propogandist for Russia. Mr Phillips challenged these measures for violation of, inter alia, the right to freedom of expression. In the ruling mentioned above the legality of the sanctions was confirmed. In this context, Mr Justice Johnson, defined the journalist a "Russian asset".

II.2. The Foreign Direct Investment Regulation: procedural and substantive obligations on Member States's assessment of FDI that affect public order and public security

Regulation 2019/452 establishes a framework for the screening of foreign direct investment ("inward foreign direct investments") into the Union by Member States.[22] The text of the Regulation does not make clear whether it also applies to EU-intra investments or not. This issue was clarified by the Court of Justice in the *Xella* case: only investments in the EU made by undertakings constituted or otherwise organised under the laws of a third country are covered by the scope *ratione personae* of this Regulation.[23] Enacted in 2019, the Regulation is based on art. 207 TFEU and does not introduce a *common* FDIs screening mechanism centralised at EU level but sets up a Union-wide coordination and cooperation mechanism between Member States and between Member States and the Commission on the screening of FDI that are likely to affect security or public order.[24] The Regulation does not even impose on Member States to introduce legislation that governs

[22] The EU draws inspiration from other jurisdictions, such as United States, which have enacted a screening system of FDI. For comments on this instrument see S Robert, 'Foreign Investment Control Procedures as a Tool for Enforcing EU Strategic Autonomy' (2023) European Papers www.europeanpapers.eu 513-523; M Egan, 'Taking back Control The Political Economy of Investment Screening in the US and EU' in E Fahey, *The Routledge Handbook of Transatlantic Relations* (Routledge 2023); S Hindelang and A Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment' (2020) CMLRev 1427 ff; J de Kok, 'Towards a European Framework for Foreign Investment Reviews' (2019) ELR 24, 25; M Misra, 'Thinking Past Naivete: Investment Screening by the EU as a Problem of (Mis)trust in International Relations' (2023) European Foreign Affairs Review 117.

[23] Case C-106/22 *Xella Magyarország Építőanyagipari Kft* ECLI:EU:C:2023:568. In this preliminary ruling the Court of Justice excluded that Regulation 2019/452 applied to the circumstances of the case and considered the national legislation at stake in breach of the right of establishment. The case concerns Xella, a Hungarian company owned by a company registered in Bermuda, who had negotiated the takeover of Janes, a Hungarian company which owned a quarry in Hungary. Under Hungarian law, Janes was considered to be a "strategic company" because its activities cover "critically important raw materials". The takeover therefore had to be reported to the Minister, who decided to block the acquisition. The reason for the preliminary reference was to determine whether the Hungarian law allowing the Minister to veto the acquisition of a Hungarian company by an EU undertaking with third-country shareholding is compatible both with the rules on the internal market (art. 65(1)(b) TFEU) and with the Foreign Direct Investment (FDI) Screening Regulation (Regulation (EU) 2019/452). While AG Ćapeta considered the latter applicable even to an EU based company which has a foreign element, the Court took the opposite solution, following the Commission's position. The Regulation was not intended to apply to EU companies. The Court held that an EU undertaking registered in Hungary, even if it is controlled by an undertaking of a third country, can be qualified as an EU company, given that its ultimate owner was an Irish national. As such, it is subject to the internal market rules, in particular to the freedom of establishment. The Court's interpretation is in line with the objectives of Regulation 2019/452 and with its spirit. The Xella case is about respect of internal market rules and not of about the protection of European economic security.

[24] Recital n. 7 of Regulation 2019/452 cit.

the screening of foreign direct investments, although the Commission has urged Member States to do so.[25]

The adoption of this Regulation can be interpreted in two different ways: on the one hand, this is an instrument that has re-delegated to Member States sovereignty in the field of free movement of capitals[26] after the Lisbon Treaty brought FDIs under the exclusive competence of the EU. This interpretation is proposed by AG Ćapeta's in her opinion in the *Xella* case.[27] However, this measure also serves the purpose of building a "light EU framework" to screen inward FDIs in case an investor from a third country seeks to acquire control of critical technologies and critical infrastructures and such an investment affects Member States' security and public order. Seen in this light, the Regulation could also be qualified as measure that protects the European economic security.[28] Indeed, despite the limited harmonising ambitions of Regulation 2019/452, the exercise of Member States' powers in assessing FDIs is subject to a number of procedural constraints.[29] In particular, the national authority where the foreign direct investment is planned or has been completed has to notify the Commission and the other Member States; the latter may submit observations on the FDI that a Member State has notified if the investment affects public order or security (art. 6(2)). The Commission may issue an opinion on a notified FDI if it has concerns over security or public order at the request of a Member State. Even more, this institution is empowered to issue an opinion by its own motion in case the investment affects at least two Member States. The notifying Member State has to take the opinion of the Commission "in due account" (art. 6(3)). The same power is exercised by the Commission in relation to FDIs which are not subject to a screening mechanism (art. 7(2)). Finally, in case the FDI affects "Programmes of Union interest",[30] the Commission may release an opinion in case this institution believes that these

[25] Case C-106/22 *Xella Magyarország Építőanyagipari Kft* ECLI:EU:C:2023:267, opinion of AG Ćapeta, para. 32.

[26] In particular, the Preamble indicates that "This Regulation is without prejudice to the right of Member States to derogate from the free movement of capital as provided for in point (b) of Article 65(1) TFEU". See Recital n. 4 of Regulation 2019/452 cit. On this issue see M Cremona, 'Regulating FDI in the EU Legal Framework' in JHJ Bourgeois (ed.), *EU Framework for Foreign Direct Investment Control* (Wolters Kluwer, Alphen-sur-le-Rhin 2019) 31.

[27] See *Xella Magyarország Építőanyagipari Kft*, opinion of AG Ćapeta, cit. para. 35.

[28] For an illustration of this concept, Joint communication JOIN (2023) 20 final to the European parliament, the European Council and the Council of 20 June 2023 on "European economic security strategy".

[29] Member States have the following procedural obligations: the duty to inform the Commission of the FDI screening mechanisms (art. 3(7)), the same duty applies to the Commission and Member States of FDIs which are subject to a national screening mechanism (art. 6(1)); the duty to provide information to Member States that request supplementary information on Member State in whose territory the FDI takes place (art. 6(3)).

[30] "Programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order" art. 8(3) of Regulation 2019/452 cit.

investments affect security and public order[31] of the Union as a whole;[32] Member State hosting the investment has to take this opinion "in the utmost account".[33]

The ultimate decision on whether an investment should be opposed, or be subject to mitigating measures, for public order or security, lies with the Member State where the FDI is planned. However, Regulation 2019/452 seeks to guide national authorities on when FDIs may be prejudicial to security and public order. In making their decisions, these authorities are invited to take an indicative list of factors into consideration before authorising an FDI (art. 4).[34]

The Commission cannot autonomously invoke the Union's public order to object to an FDI in a Member State. There is no reference to such a notion in the text of the Regulation since the EU institutions do not aim at replacing Member States in examining whether FDIs may be prejudicial to the mentioned policy objective. However, Regulation 2019/452 has the merit of having turned the screening of FDIs on grounds of security and public order into a collective exercise of 27 Member States and the Commission. This is why it can be defined as an instrument that sets the path to a "soft Europeanisation" of the notion(s) of "security" and "public order". Along the same line, a scholar note that the mentioned Regulation has elevated "European public order" to a "common good".[35]

It is now necessary to examine how the decentralised system of screening has worked in practice. First of all, it is noteworthy that there was an increase in the number of Member States that have adopted a screening mechanism: they currently are 22. Turning to the screened transactions, in 2021 the notified projects of FDIs were 414 and in 97% of the cases they did not raise risks for security and public order; the Commission considered that there was such a risk[36] and issued opinions on the notified projects of investments only in less than 3 per cent of the cases. Regrettably these opinions are

[31] European Defence Industrial Development Programme, PESCO (and other Programmes).

[32] Recital n. 19 of Regulation 2019/452 cit.

[33] *Ibid*. art. 8(3).

[34] *a)* The effects on critical infrastructure, technologies (including key enabling technologies) and inputs which are essential for security or the maintenance of public order; *b)* the disruption, failure, loss or destruction of which would have a significant impact in a Member State or in the Union; *c)* effects on dual use goods; *d)* whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; *e)* whether the foreign investor has already been involved in activities affecting security or public order in a Member State; *f)* effects on the 'freedom and pluralism of the media.'

[35] D Gallo and S Poli, 'Enhancing European Technological Sovereignty: The Foreign Investment Screening Regulation as a Means to Protect Critical Infrastructure and Critical Technologies in the European Union' in K Armstrong, J Scott and A Thies (eds), *EU External Relations and the Power of Law* Essays in honour of Marise Cremona (Hart publishing, Cambridge 2024) 215-250.

[36] We know that these opinions were issued "only when and if required by the circumstances of a case, more specifically the risk profile presented by the investor and the criticality of an investment target. See Report COM(2022) 433 final from the Commission to the European Parliament and the Council of 1 September 2022, Second Annual Report on the screening of foreign direct investments into the Union p. 19.

confidential;[37] we only know that they were adopted "when and if required by the circumstances of a case, more specifically the risk profile presented by the investor and the criticality of an investment target".[38] Opinions are also used to share relevant information with a screening Member State and/or to suggest the adoption of potential mitigating measures to address identified risks.[39] Investors who were screened came from the USA, UK, and China and the reasons why their investments raised concerns has to do with critical infrastructure, technology and dual use items, and access to sensitive information, as well as possible government ownership or control of, or influence over, the foreign investor.[40]

Although the Commission's opinions were released in a minority of cases this does not mean that these acts do not exercise an influence on Member States' final decisions on whether an FDI should be authorised or not. There are not known examples of a negative decisions on transactions falling within the notion of "foreign direct investment" which were made because of the information provided by the Commission to protect Union's public order. The confidentiality of the Commission's opinions does not help in providing firm answers on the role that the Union has played in screening FDIs on ground of public order. However, the EU currently lives in a context of economic insecurity[41] and geopolitical instability; therefore, it is not excluded that EU's powers will be expanded in the near future, as it seems to emerge from the Commission proposal repealing Regulation 2019/452.

II.3. The progressive "Europeanisation of public order" in the context of the proposal of Regulation on the screening of foreign investments in the Union and repealing Regulation 2019/452

The recent Commission proposal to repeal Regulation 2019/452 sets the scene for a marked Europeanisation of the screening of FDIs.[42] It is noteworthy that the objective of the proposal is "to protect the EU's security and public order in the context of foreign investment screening".[43] In the proposed Regulation there are clear references to a Union's public order as autonomous concept from Member States' public orders;[44] this is in

[37] In 2020 the number of opinions was the same percentage.

[38] Report COM(2022) 433 final cit. 19.

[39] *Ibid*.

[40] *Ibid*.

[41] M Sattorova, 'EU Investment Law at a Crossroads: Open Strategic Autonomy in Times of Heightened Security Concerns' (2023) CMLRev 701.

[42] Proposal COM(2024) 23 for a Regulation of the European Parliament and of the Council of 24 January 2024 on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council.

[43] Recital n. 7 of Proposal COM(2024) 23 cit.

[44] Recital n. 14 of Proposal COM(2024) 23 cit. See also *ibid*. recital n. 43 referring to the public order of the Union which may be affected by the publication of confidential information provided by the Commission to the Member States.

contrast to the original version of the Regulation. One of the Recitals also refers to the need "to make the Member State where the foreign investment is planned or completed more accountable to the Commission and to those Member States that express duly justified concerns for their public order or security or the Union's".[45]

The new legislative measure imposes minimum requirements that Member States should respect in screening FDIs. They shall notify to the Commission and the Member States an FDI which is subject to an authorization requirement at least in case the Union target established in their territory: "(a) is part of or participates in one of the projects or programmes of Union interest listed in Annex I, including as a recipient of funds as defined in Article 2 paragraph 53 of Regulation 2018/1046 of the European Parliament and of the Council 19, or (b) is economically active in one of the areas listed in Annex II".[46]

As a result of the mentioned provision of the Regulation, the number of FDIs that should be notified is very wide. This is due in particular to the numerous technologies, assets, facilities, equipment, networks, systems, services and economic activities which are considered of particular importance for the security or public order interests of the Union, which are listed in Annex II.[47] The impact on Union's public order and security of FDIs in these areas is assessed in the framework of the Union screening mechanism.

The proposed measure will apply to investments from a foreign investor as well as to those within the Union made through the foreign investor 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.[48] The Commission has probably considered that the *Xella*-types situations[49] could in some cases pose risks for security and public order and that therefore it was appropriate to fill this gap by extending the scope *ratione personae* of the proposed FDIs Regulation.

A further noteworthy aspect of the proposal concerns the undertaking that is the object of the transaction of a foreign direct investor which is named "Union target"[50] and it is no longer referred to as in the Regulation of 2019/452 "the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in

[45] *Ibid*. Recital n. 14.

[46] *Ibid*. art. 4(4) of the proposal for Regulation.

[47] Annex II defines a long list of technologies, assets, facilities, equipment, networks, systems, services and economic activities. This list includes dual-use items subject to export controls, equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment; critical technology areas for the EU's economic security such as advanced semiconductors technologies, Artificial intelligence technologies, quantum technologies, biotechnologies, advanced connectivity, navigation and digital technologies, Secure digital communications and connectivity, such as RAN & Open RAN (Radio Access Network) and 6G.

[48] Proposal COM(2024) 23 cit. art. 2(2).

[49] See *Xella Magyarország Építőanyagipari Kft* cit.

[50] Art. 2(1) of Proposal COM(2024) 23 cit.

a Member State".[51] This is not merely a symbolic change. The emphasis of the amended Regulation is on the effect of an FDI at Union level rather than at Member States level.

The proposed measure turns the EU framework on the screening of the FDIs, laid down in 2019, into a harmonising measure, which is based both on articles 114 and 207 TFEU and also applies to intra-EU investments. A "Union cooperation mechanism on FDIs likely to have a negative impact on security and public order" is set up in Chapter 3 of the Regulation. The Commission's powers are reinforced in this context. The Commission may issue an opinion warning Member States that "several foreign investments or other similar investments if they were to be made, taken together, and having regard to their characteristics could affect the security or public order of the Union projects or programmes of Union interest relevant to security or public order".[52]

Member States that have notified the envisaged or completed FDI must give the utmost consideration to the comments they receive from the Commission or Member States on the negative impact of the proposed investment on security and public order. However, they may disagree on the risks of the proposed investments and authorise them. Before taking this decision, "the Member State where the investment is planned or completed shall organise a meeting to explain the obstacles encountered or the reasons for disagreement and shall endeavour to identify solutions". The Commission shall be invited to these meetings.

An interesting aspect of Chapter 4 of proposed Regulation concerns the information that the Commission or the Member States have to take into consideration in determining that an investment is likely to have a negative impact on security and public order. Relevant information includes the context of the investment: "in particular, whether an investor is controlled directly or indirectly, for example through significant funding, by the government of a third country or is involved in pursuing policy objectives of third countries to facilitate their military capabilities".[53] Other pieces of information on the foreign investor concerns the reasons why he/it is subject to restrictive measures under art. 215 TFEU and any illegal activities carried by him, including the circumvention of the restrictive measures.[54] Thus, screening FDIs is tightly linked to the protection of the security of the Union.

III. Conclusions

The EU has invoked the Union's public order as an autonomous ground to enact CFSP measures; this is an evolution since the Treaties only recognise to Member States the possibility to invoke public order to restrict fundamental freedoms. In Decision (CFSP) 2022/351 it is the *Union*'s public order and not *Member States*' public orders that is at the basis of these measures. The way the Union's public order is invoked in the CFSP

[51] Art. 2(7) of Regulation 2019/452 cit.
[52] *Ibid*. art. 7(3) of Proposal COM(2024) 23 cit.
[53] *Ibid*. art. 13(4)(e).
[54] *Ibid*. art. 13(4)(b) and (d).

contrasts with the way this policy objective is conceived in the context of protective measures to be taken with respect to foreign direct investments concerning strategic infrastructure and critical technologies. The EU has set up a screening mechanism of FDI on grounds of public order and public security which is hybrid in nature. Member States may screen FDI on grounds of public order and security; however, the evolution here is that they are subject to a number of procedural and substantial constraints. The FDI Regulation defines a hybrid mechanism of protection of "public order" which is neither decentralised at Member States's level nor is it centralised at EU level. The Union cannot act through the Commission to autonomously protect European public order by preventing a Member State to accept an FDI that concerns critical technologies and infrastructures. Member States remain responsible for refusing the authorisation to an FDI on grounds of public order and security. However, the system is hybrid since the way Member States protect public order and public security is subject to EU rules. The screening of FDIs is not a national exercise but is based on a collective overview mechanism that seeks to guide national authorities in assessing when an FDI affects "national public order" or "national public security". The FDI Regulation can be considered a measure that sets the path for a future harmonisation of the screening of FDI by Member State. Therefore, it is an instrument that progressively limits the freedom of a Member State to screen FDI on grounds of public order or national security. This trend is confirmed by the recent publication of the Commission's proposal for Regulation which confers more powers on this institution. The proposed measure clearly refers to a Union public order; it further limits the discretion of Member States in making decisions on FDIs since the Commission may assess the impact on Union's public order and security of a foreign investor who is economically active in areas of particular importance for the security or public order interests of the EU (such as artificial intelligence, semiconductors, quantum technologies, energy technologies, space, drones or critical medicines). It remains to be seen whether the Council will keep this long list or will reduce it, thus limiting the harmonization ambitions of the new Regulation.