Direct Foreign Investments in Europe

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Abstract

The Scope of this paper is to provide an overview of the regulation of Foreign Direct investments (FDI) in the EU. Following the pandemic, the control of FDI in the EU has been increased in several Eu member states. With this work, we provide a brief overview of the national regulations, individuating possible suggestions for better coordination of the Member state FDI control at the EU level in order to balance the internal security needs with the scope of avoiding that these controls could jeopardize the FDIs in the EU.
In the last part of the work, we make some considerations on the FDI's control in a broader geopolitics scenario. We reached the conclusion that it is needed reinforcement of a common and coordinated EU policy of FDI screening in the contest of a coordinated EU defense and foreign policy.

Luciano Vasques [1]

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1 I need to thank Prof. Antonino Alì for the useful suggestions, of course, all mistakes are mine. I also need to thank Patrick Peevey for the preparation of the text in English and Chiara Sciarra that collaborated in the research work.

Introduction

With this work we intend to undertake some considerations regarding the regulatory procedures of foreign direct investments ("FDI") within the European Union.

In recent years there has been a progressive expansion of the supervisory powers of FDI within the Union.
This expansion of the monitoring powers of the FDI, has seen the European Union itself become the protagonist with regards to proposals to the member states regarding a strengthening of its supervisory powers, following concerns that have emerged above all with reference to the changed geopolitical framework and the perceived need to protect the undertakings of European business from acquisitions by subjects and capital, from outside the EU (possibly referable to hostile subjects or states) of security-critical assets and technologies.
These fears and lack of trust in non-EU investors (especially aimed at Chinese companies) consequently have initiated in several member states, some with go-ahead at EU level, a process of expansion of national governmental powers to monitor FDI which has in fact assigned a much wider scope of application to national checks than in the past.
This trend has undergone a significant acceleration following the pandemic, by virtue of fears related to the need to preserve critical EU assets in the context of the restrictions and economic problems caused by the serious health crisis.The reaction of the regulators to the pandemic (likewise taking into account the solicitations from the European Commission) has consequently given rise to a further invasiveness of the monitoring regulations and a correlative expansion of national government control powers in most member states.
FDI supervision, following a process of ever expanding monitoring powers to an ever-increasing number of investment and acquisition

operations, is becoming a mandatory step for almost all acquisition operations that involve companies and, in general, assets of a European nature; this is a factor that today makes it more urgent than in the past to assess whether this enforcement can represent a mechanism of impediment to foreign investments, and whether in the balance between the interest of internal defence and the need not to make investments in Union companies completely uncertain, a point of greater equilibrium can be found.

FDI monitoring, being a matter reserved for individual member states, at EU level, is divided into 27 countries with diverse rules, with evident problems of coordination, both with reference to national control procedures and with regard to the criteria for evaluating the operations on the part of individual government agencies.

In the first section of this paper, having quickly reviewed both the connecting EU regulations and some characteristics of national legislation, some criticality profiles and possible solutions will be identified with a view to greater EU transformation of the FDI monitoring regulations and of the certainty of the exercise of monitory powers in a EU context, suggesting mechanisms of more stringent harmonization and greater connection to the various national legislations.

In a subsequent section of this work, after having outlined in broad terms the path that led to the process of strengthening and more invasive control over FDI within the EU, some considerations will be made on the effective utility of strengthening a system of control of FDI that is so fragmented, specifically taking into account the purposes that this monitoring should have pursued in the context of a broader international framework, assuming that the EU FDI monitoring system, in actual fact, is not, as it is now structured, a suitable tool to deal with the greater conflict between world powers in the context of the changed framework of international trade relations.

Leaving aside, therefore, the opportunity to strengthen these controls, if these are intended to be exercised within the framework of a changed and more conflictional panorama of international relations with old and new world powers, we come to the conclusion that, in order for the FDI monitoring policy to be effective, it should be framed in the context of a unified EU strategy which is consistent with a common EU foreign and defence policy.

In the absence of this Euro-unitary strategy, a simple regulatory burden response, devoid of any unitary direction, we believe can not only structurally discourage investments in the Union, but can also create fractures within itself, further weakening the strength of the EU system, without obtaining as a counterpart any real advantage of a strategic or negotiating nature in relations with the old and new powers present in the international arena.
An Annex will describe the FDI monitoring procedures in Germany, France, Austria and Italy, reporting some precedents of decisions by the control bodies of these countries.

Section I
EU regulatory profiles

1. EU Regulation 2019/452 and the Commission's indications following the pandemic on the intra-Union control of FDI

The process of strengthening and extending FDI controls in Europe stems from the reservations expressed by various member states already before the pandemic, regarding concerns related to foreign investments (especially Chinese).

Keeping in mind that the duties regarding the monitoring of foreign investments carried out for the protection of internal and international security fall within the matters of exclusive national competence, some member states[2] have however requested a EU level intervention aimed at suggesting that all member states have a stricter and more extensive control of foreign direct investments within the EU. The main fear is aimed at Chinese investments in Europe.

The pandemic has generated a significant social alarm and has led the EU Institutions themselves, at the request of many member states, to suggest a further strengthening of checks on FDI by national states, advising those states of the EU still lacking in monitoring FDI to equip themselves with such a monitoring tool.[3]

2 Emblematic is a letter dated February 2017 where the Ministers of the Economy of France and Germany and the Italian Minister of Economic Development highlighted all their concerns regarding the real purposes that some non-EU investors can pursue, with the risk of a filtering process of European assets.

3 See, for example, the letter sent on 25 March 2020 to the President of the European Union by the heads of government of Belgium, France, Greece,

Following the enactment of (EU) Regulation 2019/452 (which entered into force on 11 October 2020 known as the "FDI Regulation"), many member states have expanded the range of operations subject to prior control, both by increasing the number of economic sectors considered strategic (and therefore extending the obligation of notification for transactions that may impact these new sectors), and in some cases widening the scope of the subjects which are required to submit notifications.

In a nutshell, the FDI Regulation has advised individual member states to adopt adequate control measures on investments in EU companies by entities belonging to third party countries, and has planned forms of coordination at Union level of such checks (which are however reserved to the member states), giving the Commission a role as a liaison between the various national procedures.

Following the pandemic, the Commission, with its communication of March 2020, further invited member states to adopt and/or strengthen controls on foreign investments due to the weakening of the European production system, this latter further aggravated by the pandemic, and the feared risk of predatory operations aimed at the acquisition of companies operating in strategic sectors, by hostile parties outside the EU.[4]

The Commission's recommendations aimed at inducing member states to accelerate the process of expanding national monitoring powers on foreign direct investments, are based on the concern that the pandemic

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Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain which states "[w]e also need to make sure that essential value chains can fully function within the EU borders and that no strategic assets fall prey of hostile takeovers during this phase of economic difficulties. First and foremost, we will put all our efforts to guarantee the production and distribution of key medical equipment and protections, to deliver them in an affordable and timely manner where they are most needed ".

4 ALÌ A., The Intersection of EU and its Member States' Security in Light of the Foreign Direct Investments Screening Regulation, La Comunità Internazionale, v. 3 (2020), (2020), p. 439-453.

could have made important production sectors of a series of significant services particularly fragile (for example, pharmaceutical products, medical supplies, the agro-food supply chain, logistics, transport and distribution) whose functioning seemed essential to guarantee European and/or national citizens essential services in a period of serious pandemic crisis.

In particular, following the first serious impacts that the pandemic has caused within the EU, the Commission has urged member states to take precautions, exercising more extensive powers of control over the acquisition of European assets by foreign parties.[5]

Given the difficulty also caused by the various lockdown measures, it was feared that many companies operating in these essential services could find themselves in difficult situations and therefore become much more vulnerable to predators.[6]

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5 This intervention follows directly the invitation made by the European Commission, which, with the Communication of 26 March 2020, urged the member states "... to make full use, as of now, of the mechanisms for controlling foreign direct investments", notwithstanding the interest of the European Union in favouring foreign investments which are factors for increasing competitiveness, innovation and employment within the EU. In legal literature it has been argued that the Golden Power discipline (also invoked by the European Commission) is one of the first and most organic attempts to affirm a new European sovereignty in the global economic arena, possibly also declinable in a protectionist key (NAPOLITANO G. Il regolamento sul controllo degli investimenti esteri diretti: alla ricerca di una sovranità europea nell'arena economica globale, in Rivista della regolazione dei mercati ,2019). It has to be assessed whether certain flights forward by national legislators may have the unwanted objective of undermining some key principles of the European Union by favouring national protectionist positions that are incompatible with the original principles of the European Union.

6 In particular, a company in a situation of economic crisis caused by the pandemic may be forced, in the event that it is unable to cope with hypothetical problems of significant reduction in turnover and a liquidity crisis, to survive either by allowing capital increases by new investors, or by transferring assets of particular economic value, or else by transferring control to another entity (for example through a merger) with substantial capital.

The Commission therefore suggested that member states adopt a screening procedure regarding FDI aimed at preventing the pandemic from favouring "predatory" behaviour by subjects who, having adequate capital and financial capacity, are in a position to more easily acquire the control of companies or strategic production assets at prices that are, moreover, below normal market values.[7] This risk was considered particularly serious when any purchase operations of companies or production assets by potentially hostile non-EU subjects concern supply chains involving primary goods and services, provided that these assets are acquired by subjects not interested in doing or unable to:

a) guarantee the essential level of production of essential goods and/or services, or

b) in the case of subjects related to any hostile powers, found themselves to be in a position to take the opportunity to acquire stable control over national (or intra-Union) assets essential for strategic purposes or to acquire technologies that are critical from a strategic point of view.

At an initial estimate, it should be noted that the FDI regulations, already in force in many member states even before the pandemic and the enactment of the FDI Regulation, had already evolved in several member states, increasingly including within the field of control more and more matters considered as sensitive from the point of view of national defence and internal security. This process of expanding government control on operations has registered, following the Commission's 2020 communications, a further acceleration in many national laws of the EU.

In addition to the expansion of the matters subject to monitoring, there

7 For the concerns of a weakness of national entrepreneurship vis-à-vis large multinationals that, having considerable resources, can easily acquire control of national leaders with often reduced capitalization, see SACCO GINEVRI A., L'espansione dei golden powers fra sovranismo e globalizzazione, Riv. trim. dir. econ., 2019, p. 151 and following and MANCIULLI A., Golden power, intresse nazionale e cultura della sicurezza economica, in AA.VV., Golden power, cit., p. 136 ff. From this point of view, a further type of hostile subject in addition to national states is identified in large multinational companies.

has been a significant expansion of the type of transactions subject to notification.

Considering that FDI monitoring falls within national competences [8], it has come to light that the European code of conduct despite some coordination efforts at EU level, still has strong national peculiarities.

In the following section, without any pretence of systematicity, a framework of the FDI codes in the main European states will be sketched out, taking into account some relevant aspects of the regulations, in order to evaluate the EU discipline as a whole. In Annex 1, the FDI control systems in Italy, Germany,

Austria and France are reported in greater detail and some decisions adopted by the control bodies of these national states, without any pretence of completeness are also noted.

8 Although having a certain degree of discretion, national authorities, when adopting measures for reasons of public security, must not exceed what is adequate and necessary to achieve the objective pursued in accordance with the principle of proportionality Court of Justice, 15 May 1986, Marguerite Johnston/Chief Constable of the Royal Ulster Constabulary, 222/84, EU:C:1986:206, §26 Apparently, Member States seem to enjoy wide margins of derogation from the rights attributed by the treaties for reasons of public order or public security. However, as already explained in various provisions of primary law, secondary law and, above all, in the copious case-law of the Court of Justice, the exceptions provided for in the Treaties concern exceptional and clearly delimited hypotheses and should be interpreted in a restrictive way (ALI' A., The Intersection Of Eu And Its Member States' Security In Light Of The Foreign Direct Investments Screening Regulation, Osservatorio Europeo, 2020, 441.

2. Some profiles of national disciplines[9]

2.1. Operations subject to control - who are the foreign subjects?

A particularly delicate point in the national regulations of the Member States regarding the control of FDI is the notion of "foreign investor".

According to the FDI Regulation, it is assumed that this monitoring mechanism should be applied to transactions that see a company of non-EU nationality as the buyer.

If, however, we compare only the Member States that have FDI legislation in place, it can be seen that there are, on the other hand, different definitions of the notion of foreign investor in the various national regimes.

Some member states define as foreign investors those subjects coming from non-EU countries or outside the EFTA, or from Switzerland (see for example Austrian and German legislation, with some exceptions, and the Czech Republic).

In some countries such as Poland or Lithuania, the monitoring procedures are not applied to acquisitions made by entities who have the nationality of one of the OECD countries.

Conversely, other member states consider any entity with a nationality other than that particular member state to be a foreign investor (for example France, Italy and Slovenia). Therefore, in these jurisdictions a company that is not domiciled there or is a citizen but domiciled abroad

9 Please refer to http://fcp.eui.eu/event/webinar-series-protectionism-and-nationalism-in-the-post-covid-world.
Pursuant to Article 3.8 of Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, the Commission shall make publicly available a list of Member States' screening mechanisms and it shall keep the list up to date. The list of the Member state screening mechanism based on the notification by Member States of screening mechanisms, pursuant to Article 3.7 of Regulation (EU) 2019/452 is available on https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

may be subject to FDI monitoring.

Some states (such as Germany) extend monitoring to any non-national subject only in particularly sensitive sectors such as those relating to armaments and the production of goods and services intended or applicable for military purposes (see Annex 1).

Some member states (among these for example Italy) not only apply the monitoring system to acquisitions involving intra-Union entities, but also do not make a distinction, for some cases, between national and foreign investors and apply this instrument of control to direct investments tout court; therefore, a sort of general control over any type of investment.

This type of national regulation, therefore, does not distinguish between

national or foreign investors, but simply applies this control regime to any transaction that affects particular sectors or critical assets.

Romania provides for FDI control through merger control managed by the Romanian Antitrust Authority. The control of mergers in Romania therefore applies without distinction (if the national thresholds have been exceeded) to all national or foreign acquisitions.

For some time now, the French legal system has had a foreign investment control regime that has been also permanently extended to EU investors, without any specification as to the sectors in which the target company operates.

As for Spain and the Czech Republic, the rules on foreign investments can also apply to EU investors (regardless of the sector), but only where they are controlled, directly or indirectly, by a non-EU entity. In particular, in Spain, a notification obligation also exists for EU investors, in those cases where they have as their ultimate beneficial owner a non-EU subject who holds more than 25% of the shares with voting rights or who, anyway, through any other means, is able to exercise control.

That said, the monitoring powers of some national governments (some introduced precisely as a result of the pandemic such as in Italy) also for intra-EU operations represent a very dangerous tool that allows government control over investments regardless of international foreign

political concerns.

This in principle does not in itself indicate a breach of EU rules, since the competence in matters of national security allows members to define the notion of foreign investment in the way that each national member state deems appropriate. However, as we will see in the following sections, this power, when it concerns intra-EU acquisitions, must be exercised with great caution in order to avoid violations of the EU principles of freedom of circulation.

Moreover, this heterogeneity of the scope of application of the FDI in the European context raises a problem of regulatory complexity.

2.2. What are the critical sectors subject to monitoring?

As regards the critical sectors subject to member states' FDI screening legislation, from an initial comparison of the FDI regulations of 17 member states that have a regulation on FDI, some convergence can be found in considering as critical those sectors related to security, goods and services for military use and defence in general.

The economic areas subject to FDI control are not, however, uniform within the EU. In some member states such as the Netherlands, Denmark and Finland, the control of FDI is still restricted to a few specific, well-identified sectors (linked for example to military and energy infrastructures) while other member states, following the indications of the EU Regulation and Commission Communications in 2020, following the pandemic, have strengthened their FDI control regime by expanding the economic areas considered strategic [10].

In particular, half of the member states that already had a FDI monitoring discipline, after the adoption of the FDI Regulation and also following the issuance of the Communications of the EU Commission of March 2020, adopted new regimes and updated the existing ones, extending the areas of activity subject to control and increasing the type of operations that are to be notified and subjected to national government screening.

10 We refer to the FDI regulation reported in https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

There are a very large number of areas to which some member states attach special importance; for example, sectors such as agriculture and food supply (France); others include high-tech sectors such as semiconductors, robotics, software and cyber-security (i.e. Italy, Germany).

In general terms, many member states identify critical sectors by considering their industrial capacities or their own economic inclination. This obviously results in an inadequate harmonization of economic areas subject to FDI monitoring in some member states.

In addition, there is an imperfect alignment between the disciplines of the member states of the actual definition criteria of the sectors subject to monitoring.

The EU FDI Regulation has defined a very wide range of sectors as potentially critical, suggesting that member states take these matters into consideration with regards to their national regulations for checks of FDI. Several member states (including Italy) have made full reference to the categorization of the EU Regulation; although the latter uses extremely broad and generic definition criteria.

This has resulted in an exponential increase in the number of transactions subject to notification as well as a significant burden for both investors and supervisory authorities in many EU countries.

2.3. What types of transactions are subject to control?

Another profile to compare refers to the materiality thresholds that activate an FDI notification obligation.

Most member states provide for notification obligations not only for transactions that give rise to the acquisition of control of one or more undertakings, but also for the purchase of minority shares in companies even when the latter cannot give rise to any influence on the management of the target.

Therefore, in some EU member states, even the purchase of a minority stake in the share capital or of a percentage of the voting rights in a shareholders' meeting that does not confer any type of control could

still trigger the notification obligations under the FDI regime in various national laws (i.e. Germany, Austria and Italy for purchase of Italian minority stake from non EU entities).

We see several discrepancies between member states on the percentage of minority capital whose purchase triggers FDI notification obligations and, in general, different and non-homogeneous criteria within the EU to identify the type of transaction subject to FDI monitoring in each EU member state.

Some jurisdictions employ a mixed system based on the criterion of the acquisition of control and of percentage-relevant shareholdings (for details on the French, German, Austrian and Italian disciplines, see Annex 1).

In many EU member states there are no de minimis rules based on the value of the transaction.

The Italian legal system provides for de minimis thresholds for transactions involving the banking, insurance and financial sectors, as well as for transactions involving the acquisition of minority shareholdings that do not confer control by non-EU acquired entities.

In Spanish law, the dimensional criterion linked to the value of the transaction and the investment made, although irrelevant for the purposes of applying the FDI regime, is however a decisive factor for the timing of the procedure.11

2.4. Some notes on national FDI monitoring procedures

Some states provide for a single procedure (as in Italy) with a deadline within which the Authority must decide.

Most member states follow the two-stage approach (a first for

11 It is in fact envisaged that, for investments whose value is below 5 million euros, the procedure has a maximum duration of 30 days, while in the case of investments with a value equal to or greater than 5 million euros, the maximum duration is extended to 6 months (see Royal Decree Law No. 8/2020 of March 18, 2020, which intervened on Royal Decree No. 664/1999 of April 23, 1999 and on the Law of July 4, 2003, No. 19/2003).

preliminary assessment and a second eventual one when this may present problematic profiles).

Some member states apply the same length of the procedure to all sectors, while others provide longer time limits for the most sensitive sectors (military defence), even making it easier for authorities to suspend the procedure as well and to have more extended time limits when additional information is needed to evaluate the transaction.

With reference to the coordination of national procedures with the European Commission, although the FDI Regulation has defined a clear timeline for Member States to consult with the Commission and other member states in the context of FDI control procedures, only a very few member states have substantially prepared for a procedural link (and therefore also an adaptation of the timing of the procedure) within the framework of the national FDI screening procedure.

The French procedure, in the first phase, provides for a duration of 30 days and then assigns a further 45 days for more complex cases (see decree no. 1590/2019 of 31 December 2019), while the regulation in force in the Czech Republic provides for a term of 90 days, extendable for a further 30 days.[12]
The German procedure foresees 2 months for the first phase and 4 months for the second phase, while, in some specific sectors, each of the two phases has a maximum duration of 3 months (the Außenwirtschaftsverordnung, decree of 2 August 2013, as amended by the decree of 19 December 2018).

2.5. The Bodies which are competent to evaluate the FDI

With reference to the national authorities which are competent to assess FDI, some member states have entrusted this competence to different branches of the government, more frequently to the ministry of the economy or to another department in charge of economic regulation; other member states, in particular those that have recently

12 The United Kingdom, after the first phase which can last from 20 to 80 days, foresees a second phase which can last from 6 to 8 months (see Enterprise Act 2002).

adopted legislation on FDI screening, have created new ad hoc bodies.

Some member states have created intergovernmental committees (some with the involvement of representatives of national authorities) which operate collectively in the preliminary and deliberative phase.

Two member states - Romania and Poland - have assigned competence over the control of FDI to their respective competition authorities. In Romania, the Competition Council receives notification of mergers and forwards them to the National Defence Council for safeguards and internal security assessments [13].

In Poland, it is the Antitrust Authority that independently conducts FDI monitoring investigations also for internal security profiles as well as for competitive assessments.

3. Certainty and principle of legality of the Union FDI monitoring system

The concurrent competence of several authorities

The most sensitive point concerns what is meant by internal security and how this notion is then declined in the application stage by the national authorities.

While, for example, in the US experience as well as in the Chinese one, the control of FDI is adopted respectively at the federal and central levels; in Europe, on the other hand, we are witnessing the presence of frameworks that present a series of completely uneven peculiarities and characteristics that make the regulatory framework extremely complex.

Potential criticality profiles

In addition to the extreme uncertainty for an operator of how a EU member state can interpret - also due to the peculiarities of each

13 The Eu member states regulations reported in

https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

member state - the notion of internal security, and basically if a given operation is liable to prohibition or in any case is subject to conditions imposed by the national state, an extremely fragmented regulatory framework also remains with reference to i) the very notion of "foreign" operation, ii) the determination of the business areas subject to regulation (the areas defined as sensitive and subject to monitoring), which essentially determines the scope of control, iii) the type of transactions subject to monitoring, iv) the timing of the control procedure and more generally the articulation of the same procedures (for example the single phase or first and second phase of the procedure, duration of the procedure, suspension mechanisms of the procedure and standstill mechanisms), v) the bodies that carry out the supervision (government bodies, independent authorities, collegiate bodies).

These regulatory variables are to be added to the different vision that each member state may have of the national interest in terms of both internal and international security, thus conferring to a potential subject who approaches to invest in Europe, elements of great uncertainty which, for the less problematic operations, mainly result in a significant increase in regulatory burdens, while for operations that may theoretically touch upon an interest of a member state in terms of security, the same possibility that the operation may be prohibited or subject to measures (difficult to hypothesize ex ante). This complicates the factual framework that an investor must evaluate when it is interested in making an investment in the European Union.

Most of the operations have a multi-jurisdictional scope

These variants have a significant impact especially for those transactions (which are now usually the majority) that have repercussions on several jurisdictions and which require multiple filings within most EU member states, having to take into account all the regulatory variants of each state of the EU, where notification of the transaction is required and also assuming a "multiple" risk on the different interpretation of internal interest that each government control body can hypothetically adopt, thus making the picture of the risks that a potential investor must assess before the operation, even more uncertain.

If we compare the Euro-Unitary regulatory framework for controlling

FDI with the experience from overseas, we can see how the FDIs monitoring in the United States, while taking into account the undeniable uncertainties still linked to discretionary assessments of national interest and strategic importance (strongly influenced as well by assessments not linked to rigid ex ante identifiable criteria), are still based on a procedure initiated at the federal level according to more certain procedural rules and timing, while the Euro-unitary system is fragmented into decentralized decision-making centres at the level of a single member state.

Many commentators[14] have noted that the EU system, unlike the US system which does not allow any judicial review of the President's final decision except for mere procedural violations, provides on the other hand for the full justiciability of the decisions of the national supervisory bodies before an independent judge.

We consider that this "advantage" of the EU system compared to the US one should not be over-emphasized, given that the timing that characterizes most if not all investment operations, is difficult to reconcile with a further litigation phase which, in addition to discounting the uncertainty of the outcome of the judgment, imposes completely incompatible schedules; a factor that can only induce investors, in the event of a ban on an operation or approving commitments, even perhaps adopted on the basis of an illegitimate decision, to consider as less expensive its withdrawal in almost all cases, compared to the start of a dispute.

As regards the Italian experience, as far as we know, in the face of several hundred notifications made in the period between 2020-2021, there was only one case of appeal against a decision banning FDI.

Without wishing to enter into a comparison between the various world legislations on FDI monitoring, nor an assessment of how much regulation can affect the attractiveness of investments in the EU, we can as a first approximation point out how, excluding the risk involved with

14 Di Via L., Leone P., Controllo degli investimenti stranieri e antitrust. Un matrimonio che s'ha da fare, Mercato Concorrenza Regole, Fascicolo 1, aprile 2020.

political and strategic decisions that a national state can adopt, by virtue of the foreign and international policy contingencies in which the latter is involved, the Euro-unitary discipline on the control of FDI appears, compared to the disciplines of other jurisdictions, extremely fragmented and characterized by very high costs of a bureaucratic nature and by greater uncertainty linked to the multiplication of decision-making centres, the latter having exclusive jurisdiction to in practice identify the national interest and the bias that may undergone from an operation subject to monitoring.[15]

A further problematic profile concerns the existence, in the laws of some member states, of an application of monitoring also to intra-EU transactions (where the concept of foreign operator is adopted as an operator that does not have the nationality of the member state carrying out the control) which poses not only a problem of regulatory complexity, but also the much more serious risk of triggering internal security assessments that can be articulated on acquisitions made by companies of EU nationality.

4. Suggestions for mitigating the regulatory effects of FDI

4.1 The purchase of control and non-controlling shareholdings

As we have seen, the FDI disciplines of the various member states use different criteria to identify the transactions that give rise to FDI notification obligations.

In principle, monitoring should concern operations that substantially allow the handover of a strategic asset to a foreign entity.

15 STEPHAN F. WERNICKE, Investment Screening: The Return of Protectionism? A Business Perspective, in YSEC Yearbook of Socio-Economic Constitutions 2020, pp 29-41; which highlights how the lack of certainty in the screening procedures of European FDI can make one lose confidence in the integrity of the European legal system.

In the case of the acquisition of business branches, it is the purchase of ownership of a productive asset that must be identified, while in the case of a company, what is detected is the possibility for an entity who enters the company shareholding the ability to exert influence, with the shareholding acquired, on the management of the business of the company in which the shareholdings have been acquired.

For the purposes of determining the influence on the strategic asset, agreements of any kind may also be identified which effectively allow an entity who does not hold the absolute or relative majority of the stakes in the shareholders' meeting nonetheless to exercise an influence on management of the company that owns the strategic asset; e.g. of potential domination contracts, provided for example by German law, of supply contracts which, being the same size with respect to the business of the target company, are the only source of income for the company.

In order to define which transactions are subject to notification, the national regulations had to determine ex ante the type of transactions subject to notification. In this context, as has been seen, criteria have been identified which, although intended in the context of monitoring foreign entities to intercept those entities which may acquire control of potentially strategic assets, nonetheless present a high level of non-homogeneity at EU level.

In the laws of various member states, monitoring is extended to purchasing transactions of minority shareholdings that exceed a certain size of the share capital (Germany, France, Italy for various acquisitions outside the EU) regardless of an effective acquisition of control.

As this is ultimately a criterion of a formal nature for defining notification obligations, it certainly appears appropriate, in order to facilitate operators in establishing whether and where to notify an operation, first of all to adopt a Euro-unitary criterion which is as uniform as possible to identify the transactions subject to scrutiny.

The notion of control developed in merger control

From the point of view of the type of transaction, it is perhaps natural to refer to the notion of acquisition of control that has been developed in the context of monitoring antitrust EU mergers control regulation.

This notion, thanks also to the application that has been articulated in practice for several decades, allows operators to have a certain parameter from which to infer whether an operation is notifiable.

A hypothesis of streamlining could be the reference of the FDI disciplines of all member states to the antitrust notion of control as defined by Regulation (EC) no. 139/2004 and then described in its implementation in the Consolidated Jurisdictional Notice of the European Commission.

This would certainly make it much easier for operators to define notification obligations. A need for greater uniformity in the terms described is particularly felt for transactions involving several member states and which require a multi-filing which, at least as regards the conditions for the notification obligation, would be aligned to a single criterion for the definition of the type of transactions subject to monitoring.

The notion of acquisition of control elaborated in the EU merger control regulation is sufficiently articulated to intercept all the widely understood acquisition operations that allow an influence on another company, an influence that in its minimum meaning concerns the power to have an effect even indirectly (perhaps jointly with other subjects) on the management decisions of another company even with a mere veto rights.

We believe it is clear that outside the broad perimeter of control identified in the EU antitrust merger control, FDI should not pose problems of any kind (the strategic asset cannot be influenced by those who do not control the company or acquire the availability of a company branch) except for the hypothesis that a minority acquisition that does not confer control might be a first step aimed at facilitating a subsequent purchase of control (for example the acquisition of a shares that does not confer control with a view to subsequent acquisitions); but in this case it will be the next operation which, resulting in the

exceeding of the control "threshold", will in any case be subject to notification and related monitoring.

It should also be noted that an already consolidated practice at national and EU level on merger control offers answers for all doubtful cases, such as the complex issues relating to the establishment of joint ventures, to the notion of joint control, as well as to the assessments on de facto control linked to the analysis of the functioning of corporate bodies, of shareholder agreements or voting trust, issues that today have, in most cases, a certain answer regarding the existence or otherwise of the acquisition of control

Extending monitoring to minority shareholdings that do not confer any form of control appears to be a disproportionate measure, given that if the problem is the interference of a hostile subject, surely a mere financial participation that does not confer any power to monitor and control the management of the company should be completely neutral for the purposes of the FDI regulations[16] .

It could be sufficient to expect that the notification obligations exist when a buyer is in an actual condition to exercise a power of control; a general clause that would still include purchases of minority shareholdings in the category of transactions to be notified, provided that the purchaser, holding such shareholdings, is endowed following the operation (thanks to shareholder agreements, statutory rules or agreements that give access to the operation), with even a minimum and partial power of syndication (for example the mere power of veto on managerial decisions) on the management of the company and

16 An issue related to the minority stake could be related to the possibility that a hostile entity by acquiring minority shareholding that does not give rise to any control in a company that holds critical infrastructures or sensitive technologies could anyhow appoint a member of the board of directors (or similar corporate bodies) and have access to sensitive information of the company.

This kind of problem cannot be appropriately solved with the FDI monitoring, but with specific rules of corporate governance of the companies holding critical assets.

therefore a de facto control (circumstances well defined also in detail by the now more than thirty-year applicative practice in the context of the regulation of EU merger control which we believe should be referred to from the point of view of definitions also in the present case).

Moreover, such closure rules (de facto control) on the subject of notification obligations are present in various national FDI laws (for example in German and Austrian legislation), a fact which makes it more evident how the control of mere purchase transactions of shareholdings of minority interests are devoid of any logic of proportionality, aggravating without any reason, regulatory burdens and notification obligations for operators.

4.2. De minimis thresholds?

Another element that could relieve national regulators, concerns the possible determination of de minimis thresholds below which an FDI notification should not generally raise problems of threat to the national state.

In the context of merger control, there are thresholds below which transactions are not subject to notification, assuming that transactions of insignificant economic value do not give rise to problems for competition.

Several national laws on the control of FDI do not provide for minimum thresholds for the scrutiny of the acquisition of national companies by foreign operators.

The reason for this choice was in a certain way also addressed by the European Commission itself 17, which found that strategic assets, even

17 It should be noted that the Commission in point 1 of the Annex to the Communication of 26 March 2020, cit. recommended the elimination of any threshold to avoid the possibility that assets that are strategic but referable to SMEs or start-ups that are in any case strategic, might fall into hostile hands. This observation however leads us not to exclude the need for a minimum threshold for communications, perhaps providing for exceptions targeted for strategic sectors (such as the production of goods and services for military purposes, communication technologies, vaccines and other formulations

of a technological nature, could have a very low value, but nevertheless strategic value or potential for significant development, for example, a patent relating to a new 5G technology or a vaccine.

On this point one could avoid, by providing for the acquisition of specific types of assets (but also of goods not necessarily having an immediate productive value but which represent a strategic value), notification obligations without applying any minimum threshold rule, whenever the buyer is likely to make these goods or assets available to a foreign entity.

For the activities which do not fall within these areas, it could in contrast be possible to generally provide for notification thresholds (perhaps parameterised on the turnover of the target and of the purchasing companies or the value of the transaction) in such a way as to not intercept within the scope of the obligation to notify, non-relevant operations, lightening the bureaucratic burdens for operators and above all preventing the control bodies from being involved in the analysis of non-relevant operations, enabling them to concentrate their resources on those operations of greater importance. A filter mechanism of this kind appears even more necessary following the exponential increase of the areas considered as strategic in several member states.

In order to pursue greater uniformity at EU level, homogeneous de minimis mechanisms could be envisaged, if anything leaving to the member states the faculty to decide the quantitative thresholds to be applied 18.

Such a mechanism, while leaving the discretion to the member states in assessing when a transaction is potentially significant, still allows operators to easily determine whether the thresholds are exceeded and whether or not there is an obligation to notify, given that the calculation criteria of the thresholds would in any case comply with homogeneous

essential for public health).

18 A model could clarify this assumption, to define a *de minimis* threshold, it could be decided to take into account the turnover of the target and the purchasing company according to homogeneous calculation typological criteria, then leaving the quantitative thresholds to the member states to decide.

criteria in each member state.

On this point, the criteria for calculating turnover and determining the thresholds adopted in the context of the control of mergers could represent an interesting model to be used also for the regulation of mechanisms of the de minimis thresholds for FDI notifications.

4.3. Procedures and time-frame

Another profile of relevance, concerns the need for the authorization procedures of national FDI to be homogenized in relation to the filing form model to be used, the timing of the procedure and, as far as possible, the type of assessments that a national authority can be expected to play.

It should be noted that the legislators of some member states have adopted two phases of the procedure, a necessary one (phase 1) where the parties are required to notify the transaction, providing all the information that allows a correct identification of the transaction (for example the identity of the parties and the business involved in the operation, quantitative data of the turnover of the companies, etc.).

In this first phase, the government bodies carry out a summary assessment of the operation and ascertain whether this prima facie presents national security problems.

Once this preliminary assessment has been carried out, the authority may either proceed or issue a clearance (which, in some jurisdictions, is considered issued if the supervisory authority does not decide to initiate a second preliminary phase within a given period), or else proceed to ''an initiation of an in-depth investigation procedure (phase II)" if the transaction presents potentially problematic profiles.

This mechanism represents a first important screening that considerably accelerates the authorisation processes, lightening the burden on the notifying subjects.

When the supervisory authority ascertains a risk that the operation may in some way prejudice national interests, it starts phase II of the procedure giving the authority a longer period to decide, by initiating a more in-depth scrutiny.

As we have seen, only a few member states adopt the criterion of phase I and phase II of the procedure.

From a coordination point of view, it might appear advisable for member states that have an FDI control to proceed with a standardization of control procedures at the EU level, seeking to:

- use similar models for the forms used for notifications and for any requests for information;
- align the timing of the procedure (perhaps by providing a one-stop shop for communicating transactions at Euro-Unitary level);
- adopt uniformly the mechanism of the two phases of the procedure, a factor that would have a deflationary effect on the workload of the supervisory bodies and which would guarantee a greater speed of clearance for all clearly unproblematic operations.

This procedural alignment would be of great help in the case of intra-Union multi-jurisdictional FDI notifications, since this would allow easier determination of the timing of the transaction and the issuing of decisions by national authorities within specific time periods.

4.4. Motivational burdens

A very important profile in the control of FDI is the existence of a risk for internal and international security that may arise for an EU member state from the change of hands of a productive asset from one subject to another headed by a potentially hostile entity.

As we have seen, one of the most critical elements of the Euro-Union system consists in the fact that this assessment is in fact carried out by the individual national government authorities, taking into account not only internal security profiles, but also foreign policy.
The Commission (and the Court of Justice itself) has repeatedly found that such decisions cannot be based on reasons of an economic nature or through mere economic planning by the member state[19]. Thus,

19 With reference to the community regulations, Regulation no. 452/2019 (in recital 10) identifies, in compliance with the freedom of establishment and movement, a first limit within which the foreign investment control mechanisms envisaged by each member state must move. In the Communication from the

purely by way of simplification, a purchase operation of a national company by a foreign entity could not be prohibited or conditioned to the adoption of commitments, for the sole fact that following this operation there could be a decrease in employment levels in the member state. Such concerns, which each member state is entitled to take charge of, should not be addressed with the FDI control instrument.

Having said this, it is clear that the scope of discretion of each member state on the assessment i) of the essentiality and strategic nature of an asset and ii) of the hostility of the country to which the buyer makes reference, has wide margins of discretion and unpredictability.[20] In this

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Commission on certain legal aspects relating to intra-community investments of 19 July 1997, section 4, par. 9, in particular in recital 10, the Commission underlined the incompatibility of national measures capable of affecting fundamental freedoms, allowing possible exceptions only when based on "... objective criteria which are stable and made public and [...] justified by compelling reasons of general interest " and "in compliance with the principle of proportionality". With the Communication of 26 March 2020, the Commission urged the member states "... to make full use, as of now, of the mechanisms for controlling foreign direct investments", without prejudice to, the Commission specified, the interest of the European Union in favouring foreign investments which are factors for increasing competitiveness, innovation and employment within the EU. The Communication with reference to the compatibility of the measures introduced by the States with free circulation of capital pursuant to Article 63 TFEU, clarifies that any restrictions on the movement of capital must be "adequate, necessary and proportionate to the achievement of legitimate public order objectives".

20 The Court of Justice clarified that while it is true that the principles of freedom of establishment and movement of capital may be subject to limitations, it is equally true that these limits must be interpreted and applied in a strictly restrictive manner, in a non-discriminatory procedure, justified by the pursuit of general interests and strictly proportionate to the objective they must achieve and that "public order and public security can [...] be invoked only in the event of an effective and sufficiently serious threat to one of the fundamental interests of the community" and "these reasons cannot be diverted from their function to be used in reality for purely economic purposes [...], that every person affected by a restrictive measure based on such an exception

regard, a harmonized instrument at an intra-unitary level that favours a process of greater intelligibility and predictability of the decisions of the national supervisory bodies could consist in requiring them to have an adequate burden of motivating decisions.

In particular, this burden is less felt for clearance decisions in phase I, while a burden of motivation appears essential for the decision to initiate phase II and for decisions of prohibition or conditional authorizations.

On this point, a harmonized approach at the level of each member state

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must be able to have a legal remedy" Corte Giust ., judgment of 14 March 2000, case C-54/99, Eglise de Scientologie. The Community legislation places among the imperative reasons of public interest that can justify restrictions on the freedoms of movement guaranteed by the Treaties "the reasons of public order or public security" (Article 65 TFEU) referable to health problems (Court of Justice, judgment of 19 May 2009, Commission vs Italy, C- 531/06, EU: C: 2009: 315, point 51). In its decisions, however, the Court recognized that the freedom of establishment may be subject to limitations by the national legislation; so, for example, when the restrictive measure has the purpose of guaranteeing a service of general interest and is acts as an imperative reason of general interest capable of justifying a limitation on the freedoms guaranteed by the Treaties (judgment of 28 September 2006,

Commission v Netherlands, C -282/04 and C-283/04, EU: C: 2006: 608, paragraph 38) (judgment of 20 February 2001, Analir and Others, C-205/99, EU: C: 2001: 107, paragraph 27). The Court, while excluding that purely economic reasons, such as, in particular, the promotion of the national economy or its proper functioning, can serve as justification for obstacles prohibited by the Treaty (Judgment of 21 December 2016 (C-201 / 15, EU: C: 2016: 972, paragraph 72), admits that the provisions of the Treaty relating to the free movement of goods, persons, services and capital must "... be balanced with the objectives pursued by social policy, among which are included, in particular, as is apparent from the first paragraph of Article 151 TFEU, the promotion of employment, the improvement of living and working conditions, which allows for their equalisation in progress, adequate social protection, social dialogue, the development of human resources aimed at allowing a high and lasting level of employment and the fight against marginalization "(Judgment of 21 December 2016, AGET Iraklis (C-201/15, EU: C: 2016: 972, point 77).

that impacts an FDI control would be desirable.

In particular, when a FDI supervisory body decides to initiate phase II, or decides to block or authorize with obligations an acquisition transaction by a foreign entity, we believe that such a national supervisory body should be required to give reasons as regards:

- to the genuinely essential nature of the asset being acquired and
- to the actual risk to internal security that may arise from the change of control of the asset to that particular foreign company that intends to acquire it.

With regard to the motivation referred to in point a), the fact that the asset falls within the areas considered in a general and abstract way as strategic should absolutely not be enough, since we believe it is necessary to concretely demonstrate that the specific productive asset being acquired is actually essential, in the sense that its loss or its management for strategic purposes could have a serious impact on internal security (lack or reduction of essential goods or services, availability of goods or services that could compromise internal or external security).

This first burden of motivation would significantly reduce the risk of large-scale use of the control powers of FDI for regulatory purposes or in any case of intervention in the economy by the member states, in addition making the scope of the exercise of the regulatory power of the individual member states more predictable.

The second burden of motivation (the risk connected with the purchasing subject) also starts from the assumption of the plausibility of the fact that the acquiring company is in any way connected to hostile subjects or is itself a hostile subject and that, in particular, it has instruments which are likely to allow the asset to be used to carry out actions that could put the internal and/or international security of the member state in question in concrete risk[21].

21 Thus, for example, if the target company manages a logistics and supply chain of essential food products, it will be necessary to verify, in a

Having defined the burden of motivation in these terms, while not eroding the decision-making autonomy of the member states on matters that the EU Treaties attribute to the latter's competence, the scope of assessment is placed in the context of greater certainty and predictability, a factor which could make it easier for investors to predict possible decisions by nation states with a greater margin of probability.

The burden of motivation, in the terms briefly described above, could therefore represent a mechanism of procedural harmonization at EU level of great importance that member states could undertake to adopt precisely to make the exercise of control power over FDI more predictable and defined.

4.5. The publication of decisions

Another essential element is the publication of the motivated decisions by the FDI supervisory bodies.

Some member states publish an annual report (Italy) [22], however the

counterfactual hypothesis, what would happen to the supply chain if that service were to cease or be drastically reduced. In particular, it is necessary to verify whether the termination of that service, or the change of hands to a hostile subject, could have a direct impact on the supply of such goods, with real and apprehensible effects on the supply (with shortages that could, for example, deny a significant number of final consumers their food supply and/or with serious effects of shortage of products and any significant increases in the retail price). In this hypothesis, a central profile of the analysis could, for example, concern the precise definition of the service market (of the supply chain) and of the upstream and downstream markets and above all the value of this supply chain in the context of total volumes (and/or of the total value) of the market; for example, if the distribution concerns limited volumes it will be likely that that asset is not strategic in practice, the conclusion is different if the asset moves significant volumes with respect to the total value of the product and geographic markets concerned, so that an elimination of that service could in all likelihood have a significant impact on the service and on final consumers.

22 The report of the FDI in Italy concerning 2020 has been recently published (September 2021) by the Italian government (Presidenza del Consiglio dei Ministri). The 2020 Italy FDI report is available on https://www.governo.it/sites/governo.it/files/GP_RelazioneParlamento_2020.pdf

publication of short-term decisions through the issuing of annual reports would be desirable, as it would allow stakeholders to understand the approach and point of view of the supervisory bodies, not only improving transparency of the decision-making processes, but also its predictability; this especially when a large number of decisions have been arrived at that will make it possible to carry out prospective assessments in a more informed manner regarding the risks that a given transaction may be authorised, prohibited or otherwise authorized with commitments[23].

4.6. Centralized notification system for FDI multi-filing

Another device that could facilitate the coordination of procedures could consist, in the case of a multi-filing operation, in the identification of a single Euro-unitary one-stop office for communicating notifications (for example through a portal specifically dedicated to this) which would then forward notifications to the various competent member states, using a notification form that is as homogeneous as possible.

This arrangement, in addition to allowing the drafting of common filings, can also facilitate the alignment of the timing of the procedure of the various member states (always provided that they adopt a consistent timing of procedures).

23 On this point, see ARESU A., Golden Power e interesse nazionale tra geodiritto e geotecnologia, in AA.VV., Golden Power, Department of Information for Security, 2019, p. 117.
On this point, moreover, cf. NAPOLITANO G., L'irresistibile ascesa del Golden Power e la rinascita dello Stato doganiere, in Giornale di diritto amministrativo, 5, 2019, pp. 549-551, where, while acknowledging a rigorous and "impervious to managerial temptations or discriminatory instincts" application of the FDI discipline in Italy, the difficulty of fully tracing the quality of the interventions adopted up to now by the government is underlined "... lacking a complete catalogue of the individual measures imposed in the various cases "which would allow for the concrete extent and absence of distorting purposes to be verified".

5. FDI control on transactions between companies in the EU

A problem that emerges from the regulations of some member states (which following the indications of the Commission have intervened by reforming their national regulations on FDI), is that the issue of acquisition by hostile non-EU subjects does not typically limit the scope of the government's control over FDI, given that this control is in fact applied in some legislations also to intra-community acquisitions, and also to national operations.

Thus with reference to the Italian legislator following the indications of the Commission, it has intervened precisely by expanding the control to intra-EU and national operations (in addition to having defined as essential a far more extended scope of business areas considered as strategic).

Other member states, for example France, even before the pandemic, considered it consistent with the interests of internal security to monitor acquisitions carried out even by entities of a Euro-unitary nature.

It could be hypothesized, providing a reading consistent with EU principles, that this broader control from the point of view of the "nationality" of the purchasers, could be based on the need to monitor any operations where hostile entities outside the EU could move behind the EU or national entity screen. However, it seems more likely to hypothesize that some national states like Italy [24] in order to protect

24 The Italian law provided that the Presidency of the Council of Ministers is required to assess the possible existence of objective reasons that suggest the possibility that there are links between the buyer and third countries that do not recognize the principles of democracy or the rule of law, that do not respect the rules of international law or that might have relations with criminal organizations. In order to assess the danger of prejudice, the object of evaluation will also be the origin of the purchaser and, in particular, a) whether the purchaser is directly or indirectly controlled by the public administration, including state bodies or the armed forces, of a country not belonging to the European Union, also through the ownership

national assets considered strategic, have decided that they are able to reserve, regardless of the nationality of the purchaser, a power of monitoring and veto for the acquisition of such assets by entities (not necessarily belonging to subjects referable to non-EU states), who for the most disparate reasons are not able to (or in any case for the most diverse reasons do not intend) to guarantee, in a post-concentration scenario, the adequate performance of such services deemed necessary/essential for the national community or that they could use this in a manner deemed dangerous for internal security.

The presence, within the FDI framework of some member states, of monitoring extended also to intra-EU and even national operations has a significant impact, given that in some member states the type of assessment that governmental control could carry out, does not appear potentially aimed only at verifying whether the purchasers of essential assets are hostile powers or governmental enterprises of states that do not guarantee an acceptable level of reciprocity, but is also suitable for monitoring and reviewing the adequacy of the entity who proceeds with the purchase of the control, to guarantee the supply of goods/services offered by the target in a post-merger scenario, or even that the transaction cannot raise general problems of internal public order.

Consequently, such is a power of a regulatory matrix that escapes the purposes of protecting internal security by hostile non-EU subjects and which substantially has the tacit approval of the governmental bodies in a very high number of operations (given the hypertrophic expansion of the areas considered strategic) and with an even wider margin of discretion than that which the FDI Regulation intended to provide for and define.

On the other hand, the inclusion of EU subjects in the governmental controls of some member states, if not carefully defined in the terms proposed, could favour (in conflict with EU internal market rules) forms

structure or substantial financing; b) that the buyer has already been involved in activities affecting security or public order in a member state of the European Union; c) that there is a serious risk of the buyer engaging in illegal or criminal activities.

of veto or limitation on investments from other member states, which could in turn provoke and justify, by a chain effect, similar interventions by the governments of other member states, favouring a national protectionist spiral within the European Union with very serious effects on the right of intra-Union establishment and above all on the very stability of the single EU market and Community trade.

Moreover, if we review the decisions already adopted in the pre-covid crisis FDI control regime, for example in Italy we are confronted with a series of cases where some national governments have prohibited acquisitions by a subject of European nationality or have requested the appointment of members of the board of directors of governmental approval, sometimes imposing, with evident unjustified discrimination, their Italian nationality[25].

Precisely these assessments lead us to fear the risk that such generic government powers also applied to merger operations between intra-Union entities, if not carefully reviewed and calibrated, could raise problems of potential conflict with the rules set out in art. 49 TFEU [26].

We think that the EU regulations should put a limit on this type of control by providing for a screening of operations that do not involve non-EU subjects exclusively when there is a well-founded suspicion that hostile non-European entities may be hidden behind national and European entities. Outside of these assumptions, we believe such a syndicate should be outside the FDI monitoring discipline.

25 THALES ITALIA S.p.a. (transaction involving the transfer of the StarMille business unit of Thales Italia to Sapura Thales Electronics Sdn Bhd VIVENDI S.A. TIM S.p.a., case ITALIA S.p.a., WIND ACQUISITION HOLDING FINANCE s.p.a., H3G S.p.a. - Please refer to Annex I.

26 See footnote 19 for the balance of national interest on one side and the EU's free movement and freedom of establishment principles on the other.

Summary of the procedural harmonization proposals of national FDI monitoring within the Union

Greater harmonization of the FDI regulations of the states of the union in particular we suggest:

i) To use the same criterion at EU level to identify the types of transactions subject to screening, preferably by reference to the notion of acquisition of control developed in an antitrust EU merger control context.

ii) Not to subject to FDI control purchases of equity investments that do not confer control.

iii) To introduce harmonized de minimis thresholds.

iv) To align procedures (timing and a centralised notification system for FDI multi-filing).

v) To introduce more stringent motivation burdens for prohibition decisions and conditional authorizations.

vi) To introduce obligations to publish decisions.

vii) To not bring intra-Union transactions back into the context of FDI controls.

Section II

EU regulatory profiles

1. Internationalization of the economy and instruments of state intervention in the economy

The revaluation of FDI in recent years originated in the United States and was generated by the fear produced by the growth of the Chinese economy and by the investments that the dragon companies have made in the Western world, primarily in the United States, as well as in various European states.

The great fear with regard to Chinese FDI first manifested itself in the United States, which perceived the increasing significance of the acquisition of US assets by Chinese companies, in the context of a strong rise in the Chinese economy, whose development is also strongly linked to the availability of production assets, mainly with a high technological content [27].

The United States (which already in the 1980s and 1990s had had a similar fear of the large expansion of Japanese investments in US assets) [28], starting from the second decade of the 21st century, therefore adopted a policy of greater attention towards Chinese investments, using their own FDI control mechanisms.

27 ANGELA HUYUE ZHANG, Foreign Direct Investment from China: Sense and Sensibility, in Northwestern Journal of International Law & Business, Volume 34 Issue 3 Spring 2014

28 The concerns regarded (after the sep. 11/01) also investments of Islamic countries in the US; CFIUS' put under intense scrutiny proposed acquisition of commercial operations at six U.S. ports by Dubai Ports World in 2006. We refer to "The Committee on Foreign Investment in the United States (CFIUS) Updated October 23, 2019 available on https://crsreports.congress.gov/product/pdf/RL/RL33388/82.

According to some commentators[29], the fear generated by Chinese investments on the other side of the Atlantic stems from the fact that perhaps for the first time an emerging and rapidly growing economy like the Chinese one is seriously questioning the leadership role of the US economy and the centrality in general of traditional Western economies[30].

The loss by Western companies of important assets, especially those of high technological content, it is feared might accelerate this process of moving the centre of the economy to the other side of the Pacific.

Moreover, the particular characteristics of Chinese companies, still inserted in an institutional context in which the central state plays a fundamental role in financing, in the participation in share capital and often in the governance of these companies and where there are no mechanisms of full reciprocity in the FDI for Western investments in China, has provided compelling reasons for subjecting Chinese acquisitions in the United States to a "political" scrutiny and, in general, to a more careful scrutiny of foreign investments.

29 KELAN (LILLY) LU AND GLEN BIGLAISER, The Politics of Chinese Foreign Direct Investment in the USA, in Journal of Asian and African Studies, 2020, Vol. 55 (2) 254–272. See also FRANK BICKENBACH; WAN-HSIN LIU, Chinese Direct Investment in Europe - Challenges for EU FDI Policy, in CESifo Forum, ISSN 2190-717X, ifo Institut - Leibniz- Institut für Wirtschaftsforschung Universität München, München, Vol. 19, Iss. 4, pp. 15-22, 2018.

30 ANGELA HUYUE ZHANG, Foreign Direct Investment from China: Sense and Sensibility, in Northwestern Journal of International Law & Business, Volume 34 Issue 3 Spring 2014. For an analysis of Western fears with reference to Chinese investments, see FRANK BICKENBACH; WAN-HSIN LIU, Chinese Direct Investment in Europe - Challenges for EU FDI Policy, in CESifo Forum, ISSN 2190-717X, ifo Institut - Leibniz- Institut für Wirtschaftsforschung Universität München, München, Vol. 19, Iss. 4, pp. 15-22, 2018.

This discipline, and above all its application made with reference to some operations blocked by the US CIFIUS 31, has been the subject of some criticisms precisely with reference to the suitability of the control tool to remedy actual internal security problems of the United States, assuming that this discipline and often the application made of it, is the effect of fears that are largely irrational and not linked to actual dangers.

American fears have had a great impact in other states of traditional Western economies and especially in some states of the European Union (Germany and France in particular).

The European Union, not insensitive to the concerns expressed by some member states, has adopted a series of initiatives aimed at strengthening the implementation of a FDI monitoring system within the EU as well as (for those member states already equipped with a control system of this kind) an increase in these controls, expanding the economic areas subject to monitoring and in general the scope of application of the monitoring.

The EU politics, strongly conditioned also by North American fears (and by a more conflictual framework of international relations on the subject of trade), has therefore marked precisely on the issue of FDI control a sort of Copernican revolution on the approach up to now followed by the EU not only in reactions to China, but more generally

31 The US regulation provides for a control of foreign investments carried out by a special control body, The Commitee on Foreign Investments (CFIUS), which verifies whether foreign investments in strategic sectors are in potential conflict with the national interest. When the committee does not reach a settlement with the investor, the decision rests with the President of the United States, who will adopt an executive order, exercising his/her unlimited discretion, which may be subjected to judicial review only for procedural aspects. The Committee, established at the behest of President Gerald Ford in 1975, saw a significant expansion of its powers, up to the adoption of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018. See JAMES K. JACKSON, The Committee on Foreign Investment in the United States (CFIUS), CRS Report, February 14, 2020. and GAROFOLI R., Il controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative in NAPOLITANO G. (edited by), Il controllo sugli investimenti stranieri, cit., p. 100.

in matters of foreign investment and openness to capital markets, of which the EU was, in the past, a convinced promoter.

Western economies, in particular the United States and the EU, and international institutions such as the World Bank and the International Monetary Fund (IMF) have, in fact, strongly promoted FDI since the Second World War. Starting from the 1960s, FDI became a phenomenon of increasing importance for the global economy, characterized by the rapid growth of investments coming mainly from Western-style companies[32].

The more developed countries saw in FDI benefits both for the recipient countries of the investments and for the countries from which these investments came, a factor that led the latter to promote FDI both internally and in international relations. The benefits of FDI have entered the standard package of economic policies prescribed by the Washington Consensus, and it was in turn promoted by the World Bank as part of its development programmes.

Governments in developed countries have promoted and supported business investment, launching on domestic and international level regulations and agreements aimed at encouraging the removal of barriers to investment flows [33].

In this context, the EU has been consistent in promoting greater openness to international trade and FDI both internally, favouring the creation of a single European market within the EU, and in the context of relations with non-EU states.

During the 1990s, the European Union promoted the global agreement on investments. Efforts in this direction in any case have continued on the international stage with bilateral investment treaties and regional agreements. Negotiations relating to the Transatlantic Trade and Investment Partnership ("TTIP") also moved in line with the EU's

32 DUNCAN FREEMAN, Il quadro Ue per il controllo degli investimenti esteri: atto simbolico o inizio di un nuovo corso? on the web at https://www.twai.it/articles/il-quadro-ue-per-il-controllo-degli-investimenti-esteri-atto-simbolico-o- start-di-un-nuovo-corso/

33 DUNCAN FREEMAN, quoted footnote 31.

tendency to encourage international trade.

Community and Union policy in commercial reactions with China since 1975, following the establishment of diplomatic relations with the People's Republic of China, have consisted and in part still consist precisely in favouring commercial relations between European and Chinese companies, this also in order to encourage the opening of Chinese markets to European companies[34].

In addition, China has started a process of cautious opening towards market dynamics, a trend highlighted in part by the accession of the People's Republic to the World Trade Organization in 2001, even if more than 20 years after the Asian country's accession to the WTO, there are many reservations regarding China's actual compliance with many of the common WTO rules[35].

Since 2008, the EU, as well as the US and most Western economies have suffered from the effects of the economic crisis and stagnation.

This greater economic weakness of the EU and the US (associated with a rapid change in global economic power, where China as well as other emerging economic and political powers that have taken on a more important geo-political role), underlies the growing concerns about foreign investment.

Briefly, the turning point of the EU and US regulations with regard to FDI is to be identified in the countertrend thereof with respect to an economic policy carried out for several decades by Western economies and aimed, conversely, mainly at favouring trade exchanges, international investments, foreign investments and an

34 ERIK BRATTBERG, PHILIPPE LE CORRE, The EU and China in 2020: More Competition Ahead, in HAL Id: hal-02488557, https://hal.archives-ouvertes.fr/hal-02488557, 22 February 2020.

35 FRANK BICKENBACH; WAN-HSIN LIU, Chinese Direct Investment in Europe - Challenges for EU FDI Policy, in CESifo Forum, ISSN 2190-717X, ifo Institut - Leibniz- Institut für Wirtschaftsforschung Universität München, München, Vol. 19, Iss. 4, pp. 15-22, 2018.

internationalization of the economy, reducing state barriers to the circulation of capital.

The strengthening of the regulatory apparatus of the FDI therefore places itself in evident dystonia, if not in open conflict, with an open vision of the world economy, assigning to national states a role of stronger and more invasive monitoring on one of the fundamental junctions of the international flow of capital[36].

The great fear caused by the pandemic has also accelerated this process[37].

2. The political substratum that has favoured the strengthening of FDI

In a very general way, the process of strengthening the national control powers of the FDI also finds further foundation in the fears that have never subsided over the antisocial effects of an international capitalism that increasingly escapes the limits of the control of the traditional nation states.

In the public opinion of many states, especially those with advanced economies, a general dissatisfaction expressed by a part of society and by various political forces (which in some cases are part or have been part of governments in charge) has never subsided [38], regarding the effects of the globalization of business markets which, while having certainly generated enormous advantages in terms of synergies, of

36 WERNICKE STEPHAN F., Investment Screening: The Return of Protectionism? A Business Perspective, in YSEC Yearbook of Socio-Economic Constitutions 2020, pp 29-41.

37 On this point, see ALÌ A., Il controllo degli investimenti esteri diretti nell'Unione europea e la protezione delle attività strategiche europee nel contesto dell'emergenza da Covid-19 in Acconci, Pia, Baroncini, Elisa, (edited by), Gli effetti dell'emergenza Covid-19 su commercio, investimenti e occupazione. Una prospettiva italiana, Bologna: Department of Legal Sciences, University of Bologna, 2020, p. 183.

38 OECD, Under Pressure: The Squeezed Middle-Class Middleview and Main Findings, 2019, available on the web https://www.oecd.org/els/soc/OECD-middle-class-2019-main-findings.pdf

optimization of resources, are considered to be one of the contributing causes of a series of imbalances and damage to vast production areas within the old continent, as well as in states with advanced economies, including the United States.

It is now well-known that in the last three –decades has been a serious process of impoverishment of entire areas and industrial sectors that have been substantially dismantled following a process of internationalization of companies which has led to the reorganization of production and financial processes in a global context, relocating production activities, abandoning the production of goods or services made obsolete by technological evolution, using less work-intensive forms of production, thanks to the use of increasingly automated production tools.

Briefly, a significant mass of social categories, in the span of a few decades[39], have been completely marginalized by production processes, perceiving precisely the main cause of their misfortunes to be the mechanisms of internationalization of business activity[40].

This phenomenon, widely known and described for several decades now, has triggered, especially in the most advantaged areas of the

39 Guilluy C., La società non esiste La fine della classe media occidentale, Luiss University Press 2019. O'Sullivan M., The Levelling: What's Next After Globalization, HBG, 2019.

40 A typical example being workers in the American automotive sector who for several decades have seen the progressive but inexorable dismantling of production sites in the United States, replaced by production plants in poorer areas of the planet where labour costs or other production costs that were lower. One might think, as regards the old continent and in particular Italy, of the crisis of entire economic productive sectors, such as the production of household appliances, an activity once carried out in production districts of excellence within the national territory, most of them now closed and replaced by other production sites, or absorbed by multinational companies which, having acquired the know-how, patents and brands, have organized production at a global level, being able to abandon obsolete and unsustainable Italian production sites as part of a global trade policy subject to fierce international competition.

world and in the United States in particular, a process that has led to the margins of society or at least to seriously disadvantage, a growing number of people, who have attributed their own misfortunes precisely to economic globalization.

On a political level, this social malaise has had a significant effect, favouring political parties and movements that see in the opposition to processes of an undefined globalization of the economy an enemy to fight, a vision that moreover has sometimes found synergies with opinions aimed at limiting circulation of people, a phenomenon particularly felt in those areas of Europe that are facing the epochal phenomenon of immigration from disadvantaged areas of the world, and which in its most extreme manifestations has also generated or anyway rekindled feelings of opposition to migratory phenomena, by juxtaposing the need for a greater enhancement of an assumed national identity.

In the last decade all the democracies of the old world have had to deal with movements, leaders and political parties which, riding on a general dissatisfaction with the negative effects of the process of globalization of economic activities, propose forms of protection and safeguarding of 'national' entrepreneurial activities, protection that is invoked through interventions by national governments aimed at mitigating the perceived negative effects of an international competition and an increasingly inescapable globalization of the economy.

Moreover, these movements of opinion and political parties exert strong pressure directly (being part of the coalitions that govern the governments of some EU national states) or indirectly (carrying out activities which have a significant impact on public opinion) on these issues, actually inducing many national states to adopt forms of intervention aimed at least at giving the perception that governments are acting to pursue the national interest as opposed to the assumed perverse effects of international competition.

It should also be noted, in the EU context, that for decades as a general trend (also considering the geopolitical factors as stated in the previous paragraph) the intervention spaces of the national states, especially the individual states of the European Union, on economic policy have become increasingly restricted, resulting in fact in it becoming

more and more complex for a single member state to adopt effective measures aimed at mitigating the consequences, perceived by most as "antisocial", of international competition.

In fact, for several decades, new geopolitical balances have been emerging that are capable of seriously questioning the relevance and weight of European nation states in the international arena.

In this context, another very brief mention should be made of the increasing importance of supranational economic entities (for example the big tech companies) capable of exercising, thanks to their economic power, a significant weight in the global economy, sometimes on a par with states.

These phenomena, as generically outlined above, have certainly slowed down the process of the withdrawal of the state from the economy in the EU (a process already started by many member states in the 1980s) and above all the process of the creation of the single European market, weakening the thrust of both the nation states and the European Union itself on the issues of competition and the strengthening of the single market.

It is no coincidence how some political forces that have ridden the wave of dissatisfaction in Europe with a liberal approach to the economy at the international level have often placed the European Union itself in the dock.

These generic assessments are intended to frame the climate in which the regulation of government control over direct foreign investments has developed in recent years, a regulation created for a very limited purpose but which in recent years has assumed a broader role, also due to the emotional pressures produced both by the effects of the serious economic crisis of 2008, and by the loss of centrality of Western economies, and by the fears of the United States and some important European states such as Germany and France, referable to the increasingly important role of China in the context of foreign investments in US and European companies and more recently, by the further concerns raised by the effects of the pandemic on various national economies and by the generalized fear that an excessive and uncontrolled free execution of the international dynamics of the

corporate markets could give rise to further internal security problems, creating a perception therefore of the need for a more stringent control by governments in the period of acquisition of national companies by foreign parties.

It can be assumed that many EU governments are driven by the generalized fear caused by the pandemic and above all are politically motivated to present the strengthened powers of control of foreign investments in a reassuring way for the interests of the community, having introduced more stringent regulations on the subject of FDI.

3. The European Union caught between the Atlantic pact and new fears in a changed international chessboard

The US fears have therefore found adequate support also in many European states and indirectly also on the Union's policy on FDI issues, prompting the Union to a severe review of its orientation of opening up to international competition; a backtrack which is the evident result of the growing concern about China expressed by the whole Western world and by the United States in particular.

This type of European fear linked to China has been highlighted on several occasions; symptomatic of this was the debate held in the European Parliament with the Italian president Tajani, during which the representatives of various political forces present in the EU parliament argued that the investments of the Dragon represented a threat - a conviction, made even more evident by France and Germany, which promoted some changes in sectors ranging from competition to industrial policies[41].

In a letter dated in February 2017, the ministers of the economy of

41 The role of Italy in this debate was (under the Conte 1 government) more nuanced; while some political forces, including government forces (Movimento 5 Stelle), have shown an openness towards Chinese investments, other forces, more attached to the Atlantic pact, have aligned themselves with the general concern of the Western world towards Chinese investments. The new Draghi government appears to be more aligned with US positions with reference to fears aimed mainly at Chinese investments.

France and Germany and the Italian Minister of Economic Development [42] drew attention to the acquisitions of European companies in the technology sectors by non-EU investors whose countries of origin did not guarantee reciprocity for European investors.

Subsequently, the Commission presented a proposal for the Regulation concerning the coordination of national FDI at Union level. The FDI Regulation was thus adopted in March 2019.

With reference to some acquisitions in Europe by Chinese companies, concerns have been raised regarding infrastructure, including energy and transport (as in the case of the Hinckley Point C nuclear power plant which will be completed by EDF), even though in this case the Chinese involvement was of a purely financial nature [43].

The debate regarding the 5G line being built by Huawei [44], although it may pose an investment problem, is well representative of European fears and concerns.

At the EU level, too, as in the United States, the concern to erect more defences against foreign investment is linked to the nature of the investments that the EU attracts and of the sectors most selected by Chinese investors.

For several years it has been noted that one of the main reasons behind Chinese investments in the Union seems to be the acquisition of

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42 Letter available on https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5

43 DUNCAN FREEMAN, quoted footnote 31. See also Case study: Hinkley Point C - it's about the long game, 2016, in https://www.kwm.com/en/knowledge/insights/china-general-nuclear-power-corporation-investment-in-hinkley-point-c-plant-somerset-20160725 see also, UK plans to force sale of Chinese-owned nuclear stake to investors, FT September 28, 21, https://www.ft.com/content/a92bad50-ba5a-44e5-883b-29fac8a4571e

44 See EU Parliament 5G in the EU and Chinese telecoms suppliers, 2019, available on https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637912/EPRS_ATA(2019)637912_EN.pdf, se also the case Vodafone Huawei building network with 5G technology, described in Annex 1 section 6.

technologies rather than productive assets considered together.

As an example, we can identify as symptomatic of this intent, the acquisition of the German Kuka by the Chinese company Midea in 2016 [45], which was followed by a significant political reaction.

More recently, the EU's main fears have focused on the Belt and Road Initiative (which saw a sort of rift on the European front when Italy expressed an interest in participating in this initiative in the absence of adequate consultation with other partners of the Union).

It should be noted that greater government monitoring of FDI has found political support not only in the forces somehow linked to the Atlantic pact, but, as already seen, also in the forces, widely represented in many national parties with significant electoral following, which see in globalization an evil to be countered, with the result that some national legislations have been presented to public opinion not only as a control tool aimed at combating well-defined public order problems to be linked to foreign (non-EU) investments, but a more general instrument for monitoring company acquisitions with a view to government control aimed at preventing, more generally, the undesirable effects of globalization and the opening of markets, with repercussions, even on the strength of the intra-unitary principle of free circulation of capital itself.

The pandemic has generated a significant social alarm and has led the Community bodies themselves, at the urging of many member states, to suggest a further strengthening of controls on FDI by national states, advising those states of the EU still lacking in regulatory control of FDI to equip themselves with such a control tool[46].

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45 *Case described in annex 1 section 6.*

46 See, for example, the letter sent on 25 March 2020 to the President of the European Union by the heads of government of Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain which states "[w] e also need to make sure that essential value chains can fully function within EU borders and that no strategic assets fall prey to hostile takeovers during this phase of economic difficulties. First and foremost, we will put all our efforts to guarantee the production and distribution of key medical equipment and protections, to deliver them in an affordable and timely manner where they are

It should be noted that the Union's fears are addressed not only to China, but also to other non-EU powers, including Russia and the United States itself which, with the Trump administration, launched an extremely aggressive policy on international trade issues including towards its European allies[47].

A further sign of a significant change of direction of the EU with reference to foreign investments is given by the recent processes of EU legislative elaboration that will introduce a screening on public subsidies granted to non-EU companies that invest within the Union or participate in European

public procurement. Up to now, the monitoring of state aid has always been an internal issue within the European Union, in the framework of the project for the establishment and strengthening of the single Union market; with this regulation it was decided to give a place to public subsidies from non-European states aimed at encouraging acquisitions of European companies or participation in European tenders[48].

Even these EU legislative initiatives in progress represent a significant change of direction in terms of the approach to foreign investment with instruments that are however harmonized at EU level.

It should be noted that the tightening of the European regulatory framework on FDI could represent a contributing cause of a process of reducing foreign direct investment in Europe, a process of reduction which, however, has been significantly aggravated due to the pandemic.

The OECD report on global FDI flows (released in April 2021) [49] shows

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most needed ".

47 The (alleged) attempt by the US government to acquire CureVac, a German biotechnology company that could play an important role in the research for a COVID-19 vaccine, was set as an example of potential dangers in order to propose to member states a tightening and expansion of FDI controls.

48 See the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, Brussels, 5 May 2021 (COM/2021/223).

49 OECD report on FDI April 2021, available on https://www.oecd.org/investment/FDI-in-Figures-April-2021.pdf

that global FDI flows fell to $846 billion in 2020, a 38% decline from 2019 and that in 2020, aggregate inflows in Europe fell by 80%, reaching only 73 billion dollars.

The pandemic has accelerated a steady decline and helped drive global FDI flows to their lowest levels since 2005[50].

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50 According to UNCTAD's Investment Report (released June 2021) around the world - in response to the COVID-19 pandemic - existing investment projects have slowed, and prospects for a recession have led multinational corporations to re-evaluate new projects. The decline in FDI was significantly sharper than the decline in gross domestic product (GDP) and trade.
In 2020, aggregate inflows into Europe plummeted by 80% to just $ 73 billion. FDI declined in European countries that have significant flows (in addition to the Netherlands, Switzerland remained in negative territory), but also declined in large economies such as the UK (-57 %), France (-47 %) and Germany (-34 %). FDI to the European Union fell by 73% to $ 103 billion. In addition to the decline in the Netherlands, flows to Italy also contracted strongly due to negative intra-group loans (from $ 10 billion to - $ 1 billion) and negative holdings.
In the case of the Netherlands, the negative inflows are due to the disposal of shares, e.g. disposals of shareholdings in Dutch companies by foreign parent companies and intra-corporate debt movements. In addition to these two countries, FDI inflows declined significantly in Ireland (USD 48 billion), the UK (USD 26 billion) and Canada (USD 24 billion). By contrast, China overtook the United States as the world's top FDI destination, for the second time six years later.
In 2020, European outflows decreased by 77%, accounting for only 13% of global FDI outflows in 2020, compared to more than 30% in 2019 and 2018. This decline was driven by a sharp decline in outflows from the Netherlands, Germany, Ireland and the UK.
Conversely, FDI outflows reached record highs in Luxembourg, doubled in Sweden and went from negative to positive levels in Switzerland.
Equity outflows of FDI also fell to their lowest level since 2005: the decline was more than $ 10 billion in Canada, Germany and Italy, with divestments by investors in Ireland.
The pandemic had a major impact on all types of FDI in 2020, impacting investment across all regions and sectors.
Greenfield project announcements decreased in volume and number, by 33% and 29% respectively. International project finance volumes - down 42 per cent - were also affected, although the number of project finance transactions (more

It can be assumed that at both EU and individual member state level it will become crucial to find a balance among strategic autonomy defence and security requirements from one side with the need not to further marginalize the EU economy in the context of international investments in the setting of a foreseeable economic recovery in a post-pandemic phase on the other [51].

4. Is a changed international scenario and the limitation of FDI as an instrument of political deterrence between old and new powers, a question of internal security or Union defence?

The European and individual member state legislation on FDI monitoring does not mention the strategic issues linked to the overwhelming strength of China and the fears of an impoverishment of the old continent's economic, technological and strategic advantage when compared with the new emerging geo-political forces, even if

indicative of the trend) slowed by only 5 per cent. Globally, the value of net cross-border mergers and acquisitions fell by 6% and the number of deals by 13%, as the sharp decline in the first half of the year was largely offset by a surge in the final quarter. 2020 (UNCTAD Investment Report (published June 2021). After 2018 the Chinese investment in the EU failed significantly. With regard to data concerning Chinese investments in the EU see https://merics.org/en/report/chinese-fdi-europe-2019-update.

51 In 2021, FDI flows to developed economies are projected to increase by 15 to 20%, reflecting the improvement in massive tax incentive packages, the likely rebound from last year's anomalous low, and the advantage, over other economies, of those with wide vaccination coverage. Increased FDI flows to developed economies are more likely to result from cross-border mergers and acquisitions than from new investments in productive assets. Financial markets driven by fiscal and monetary support are likely to stimulate M&A activity, which accounts for the largest share of FDI in developed countries. Cross-border mergers and acquisitions in the first four months of 2021 were already recording higher values than in the same period of 2020. Mergers and acquisitions increased by 24%, mainly due to transactions in the chemical, automotive, information and communication (UNCTAD Investment Report (published June 2021). For data concerning FDI flows in OECD countries see: https://stats.oecd.org/index.aspx?DataSetCode=FDI_FLOW_PARTNER

this is the main motivation behind this real Copernican revolution of the European approach on FDI[52].

The European reaction to a problem of relations of a commercial nature with the major non-EU powers has consisted in the implementation of a strengthening of the screening procedures from a regulatory point of view.

This type of reaction presents, however, a profile of great weakness for the main reason that it ultimately assigns, due to the limits linked to an unfinished process of European integration, to individual member states the competence to assess whether and when to prohibit an acquisition, and therefore to the chancelleries of each member state the delineation of the lines of foreign policy towards for instance China as well as any other old and new power that has appeared or will appear in the international arena.

This fragmentation can in part be reduced thanks to Union coordination mechanisms of FDI control policies and by carrying out an attempt to harmonize national disciplines, this being done also to avoid investment in Europe being characterised by elements of greater uncertainty than in other jurisdictions. (Please refer to section I of this document).

However, the real Achilles heel of the Euro-unitary FDI discipline is that, as it is now formulated, it cannot represent an effective instrument of pressure against China or any new "hostile" power to the European Union, given that the coalition is extremely fragmented, the decision-making processes cumbersome and is allocated in 27 different European chancelleries, each capable of expressing decisions on its own even in contradiction with those of others, on issues of foreign policy and internal and international defence.

It therefore appears quite unrealistic to hypothesize a management of the monitoring of European FDI in the context of a common EU foreign policy strategy in relations with non-EU powers.

52 ALI A., National Security and Trade Wars: Legal Implications for Multelateralism "in ITALIAN YEARBOOK OF INTERNATIONAL LAW, v. 29 (2019), n. 1 (2020), p. 77-90.

In this context of extreme fragmentation, non-EU powers will also be able to have a good chance to weaken the European front, being able to accentuate any different positions of individual member states on foreign policy strategies to be adopted in terms of FDI and/or trade relations with external powers[53].

Moreover, as seen, many national FDI control regulations seem to assume a very broad role of syndication tout court on acquisitions, since the regulatory regime in place could become a mechanism that could also be placed in imperfect alignment with the process of European economic integration, or to generate conflicts between member states[54].

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53 Some authors link the proliferation of disciplines aimed at increasing the "... scrutiny of foreign investments by national governments", also as "... the result of the increasingly evident economic and technological 'cold war', taking place between the United States and China" (Napolitano G., L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere, in Giorn. Amm., 2019, p. 550). In particular, the author points out that there is a risk that "... geopolitical assessments taken in isolation" will expose the individual states to "... become often unaware pawns of the cold war in progress between the United States and China" in the larger planetary game, cluttered up with the giants of the present era (cf. NAPOLITANO G., op.cit., 551). The trend towards a national defence against foreign investments has spread and is further strengthening in all countries; for a comparative vision of the phenomenon. See SCARCHILLO G., Dalla Golden Share al Golden Power: la storia infinita di uno strumento societario. Profili di diritto europeo e comparator, in Contr. impr. Eur., 2015, p. 619 et seq.). For some assessments of the implications of the Golden Power discipline on a "political" and international level, see ARESU A., Golden power e interesse nazionale: tra geodiritto e geotecnologia in AA.VV., Golden Power, edited by DIS (Department of Information for Security), Rome, 2019, p. 116 ff.

54 In some decisions made by the national government authorities, in the context of FDI control, we witness prohibitions against acquisitions which were then associated with government pressures aimed at favouring the purchase of strategic assets by national companies or sometimes by companies controlled by the same state "inspector"; see the German case CureVac/KfW and the French case Photonis/Teledyne (described in section 6 of the Annex). These cases highlight the risk that national governments, in the absence of real coordination at EU level, could be induced not only to prohibit operations,

In short, the sacrifice of a European economic system more reluctant to accept non-EU economic resources, in the context of the Union territory, introduced by a more penetrating regulation of FDI controls, does not seem at least, at present, to provide the benefit of properly managing this power as a deterrent tool for the European Union on the international stage.

Probably a solution could be found in combining the issues on FDI in the context of matters pertaining exclusively to the community bodies, within which a role of effective EU coordination can be played in order to give it a single voice in the context of international relations as well as greater authority and political weight.

However, this solution (which would considerably lighten the problems of fragmentation and absolute unpredictability of the European FDI regulation but which would still require the need to modify the EU Treaties) nevertheless suffers from a serious problem of political legitimacy of the Union bodies, as well as the serious fragmentation that emerges from the absence of a foreign policy as well as a common Union defence policy.

In the absence of such pillars, it is also quite problematic to hypothesize that a EU foreign policy strategy on the control of FDI can be defined that reacts in a timely manner and in an efficient and effective way in the context of the development of international relations within the framework of Union interests and/or individual member states.

It is therefore necessary to complete the process of European integration by allowing the Union bodies, perhaps provided, on the basis of institutional mechanisms, with greater political representativeness, to elaborate and apply a common foreign and defence policy in which to then register a (Union) regulation of control of FDI which we believe should in any case be managed in accordance with a framework of EU-based foreign defence policy choices.

In the absence of these assumptions and of a European strategy, it can be assumed that these new regulatory aggravations introduced by

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in some way, but also to direct the acquisitions of assets deemed strategic, favouring choices also of a national protectionist nature.

the FDI regulation, in addition to discouraging investments in Europe, will add little to the political weight of the European Union and to the objective of slowing down, no matter how, a process of greater marginalization of the European economy in the context of the new geopolitical dynamics.

Summary conclusions Section II

We reached the conclusion that a strengthened FDI control at European level articulated in this way, in the absence of a Union foreign and defence policy appears ineffective and potentially prejudicial to the interests of the Union.

Annex I - summary data of the FDI regime in Germany, France, Austria and Italy

Germany	France	Austria	Italy
1. Description of the legislation			
FDI regulations In Germany, the foreign direct investment screening rules are laid down in the Foreign Trade and Payments Act (Außenwirtschaft-sgesetz - "AWG") and in the attached Ordinance, the Foreign Trade and Payments Ordinance (Außenwirtschaft-sverordnung - "AWV"). The reviews are carried out by the Ministry of Economy and Energy (Bundesministerium für Wirtschaft und Energie - "BmWi" or "Ministry"), which consults the Ministry of Foreign Affairs, the Ministry of Defence and the Ministry of the Interior.	In France, the FDI control regime is governed by the "Code monétaire et financier" ("CMF"), which has been supplemented by subsequent laws, including the recent law no. 2019/486 of 22 May 2019 on the growth and transformation of businesses ("PACTE Law") and subsequent decrees. The reviews are carried out by the Ministry of the Economy ("MoE" or the "Ministry") when the investment is made by a foreign investor; the investment consists of a share/asset deal on condition that thresholds	In July 2020, Austria adopted a new investment control regulation ("ICA"), which replaces the previous section 25a of the Foreign Trade Act ("FTA"), which had a rather limited scope. Section 25a of the FTA only covered foreign investments by Austrian companies operating in the fields of public security and order, such as internal and external security (including the arms industry), energy, transport, water supply, tele-communications, etc.	In Italy, the control of FDI was introduced with the D.L. 15 March 2012, n. 21, which subjected to preventive control by the Presidency of the Italian Council of Ministers acquisition operations by non-EU subjects of assets relevant for defence and national security, as well as assets of strategic importance in the energy, transport and communications sectors (Legislative Decree 15 March 2012, n. 21 converted by Law 11 May 2012, n. 56.).

The German FDI control regime distinguishes between: i) sectorial investment screening (for the acquisition of companies active in the military sector or cybersecurity technology) and ii) general cross-sectoral investment screening (for all other types of company). The industry sector affected by the acquisition determines which procedure will be applied. 1) Sector screening is more rigorous and applies to acquisitions of German companies that: i) manufacture, develop or have effective power over weapons or military equipment or, if such activities have been carried out in the past, still possess know-how or any other access to technologies relating to such goods; ii) Manufacture or develop certain dual-use goods or goods subject to export restrictions;	are exceeded and that the target carries out strategic activities ("Controlled Investments"). The French screening regime was initially based on a very broad definition of investments subject to control, thus giving the Ministry a wide margin of discretion. This approach was condemned by the European Court of Justice as incompatible with the rules of the Treaty on the European Union (TEU) on the free movement of capital. The Court, while acknowledging that a prior authorization system may be justified in some cases, nevertheless stated that the requirement of prior authorization for any foreign direct investment "may harm public order, public health or public security interests"	The control regime of the FTA provided that foreign natural or legal persons (non-EU/EEA and Switzerland) wishing to acquire at least 25% of the voting rights in an Austrian company operating in the sectors listed above, had to obtain prior approval from of the Austrian authorities. However, very few applications were submitted to the Austrian authorities under the previous FDI control regime, as indirect acquisitions were not covered by the screening procedure. Hence, foreign investors could easily circumvent the prior approval requirement by acquiring shareholdings indirectly through EU-based subsidiaries. In July 2020, the ICA came	DPCM n. 179/2020 regulates the strategic asset subject to the FDI control (ii) the Ministerial Decree no. 179/2020 indicates the assets of strategic importance in the energy, transport, and communications sectors, both of which entered into force on January 14, 2021. DPCM 179/2020 provides certain de minimis thresholds for acquisitions of banks (art.8). Within the framework of the renewed concerns connected to the possible risks of FDI, the Italian legislator intervened to increase the areas subject to control; thus in 2017 (Article 14, legislative decree 16.10.2017, n.148, converted into law 4 December 2017, n.172, art. 2 legislative decree 21/2012), there were included in the strategic

iii) Manufacture cryptographic systems with computer security functions authorized to transmit classified information. Any investment in these specific sectors, if the non-German investor acquires 10% or more of the voting rights of a target company (directly or indirectly), must be submitted to BMWi for the review procedure before closing. 2) The general cross-sector investment screening applies to the acquisition of German companies in all sectors not covered by the sector screening procedure. Unlike the sector-specific review procedure, general screening applies only to non-EU and non-EEA / EFTA foreign investors ("Foreign Investors"). The general review procedure also distinguishes two different procedures applicable to: a) investments	is too general and does not allow interested parties to be informed of the extent of their rights and obligations (European Court of Justice, Association Église de Scientology de Paris and Scientology International Reserves Trust v. The Prime Minister, Case C-54/99, March 14, 2000). France subsequently tackled this problem by refining the concept of "foreign investor" and establishing a precise list of business sectors subject to the Ministry's regulatory authority. The CMF now qualifies as a "Foreign Investor": i) any natural person of foreign nationality; ii) any French person not domiciled in France (whose tax residence i outside France);	into force, which largely incorporates the requirements of EU Regulation 2019/452 ("EU FDI Regulation"). The introduction of the ICA aims to strengthen the effectiveness of the Austrian FDI control regime by completely reforming the screening procedure and introducing a cooperation mechanism with the European Commission. The screening procedure provided for by the ICA applies to those direct or indirect investments made by natural or legal persons outside the EU/EEA and not in Switzerland ("Foreign Investors"). The ICA qualifies as a foreign investment in an Austrian company subject to the FDI control regime: i) the acquisition, direct or indirect,	areas subject to government control, a series of new economic sectors such as those with high technology intensity and critical or sensitive infrastructures. With the D.l. 22 of 2019, broadband electronic communication services based on 5G technology were included in the category of strategic activities and, with the subsequent Legislative Decree. n. 105/2019, the sectors subject to preventive monitoring have been expanded to include those mentioned in art. 4, paragraph 1 of the FDI Regulation. The operation of this extension of the strategic areas indicated by the FDI regulation entered into force with a subsequent regulatory intervention by the government

in critical infrastructures; and b) investments in all other sectors. The critical infrastructure review applies when a Foreign Investor acquires more than 10% of the voting rights in a German target operating in: i) Essential facilities, energy sector, te-lecommunications, information technology, transport and traffic, healthcare (including the development/ distribution of essential drugs, medical devices or diagnostics), food, finance, insurance, etc .; ii) Development of specific software for critical infrastructures; iii) media companies; iv) Large cloud computing service providers. Such acquisitions must be communicated by the investor to BmWi prior to closing. With regard to acquisitions	iii) any foreign legal person; iv) any legal person under French law controlled by one or more natural persons / legal persons listed in points i), ii) iii). Therefore, EU and EEA investors are also qualified as foreign investors. Previously, the scope of the review differed depending on the origin (EU/ non-EU) of the investor. The decree of December 31, 2019 (the "Decree") abandoned this distinction. All subjects that control the direct investor are considered investors. The Decree also extended the perimeter of the FDI control regime to four new strategic sectors. Now, for both EU/ EEA investors and non-EU/ EEA investors, the FDI control regime applies when the target	of shares or voting rights in total equal to or greater than 10%, 25% or 50%; ii) the acquisition of control, regardless of specific voting rights; (iii) the acquisition of significant activities of an Austrian company when such acquisition results in a controlling influence over these parts of the company; iv) the acquisition of the entire target. As regards the thresholds relating to voting rights, Foreign Investors must submit an application for authorization to reach or exceed the threshold of 10%, 25%, 50% of the voting rights in an Austrian company operating in highly sensitive sectors, listed in Part I of the	adopted following the pandemic. Following the pandemic, the Italian legislator intervened, D.l. 23/2020 significantly expanding the areas subject to preventive control. With the reform it became clear that the finance, banking and insurance sector are subject to FDI control. (DPR n. 179/2020). The main novelty introduced by the reform introduced following the pandemic is represented by the fact that for the first time, even acquisitions outside the defence and national security sectors, are subject to the obligation of prior notification to the Presidency of the Council of Ministers of equity investments by European operators.

of targets not operating in the critical infrastructure sectors, the Foreign Investor must notify the transaction if it acquires 25% or more of the voting rights of a German company, when the transaction is likely to affect the public order and security on German territory or in another member state. For all other transactions that may be subject to the general screening review procedure, filing is voluntary. The German FDI control regime distinguishes between: i) sectorial investment screening (for the acquisition of companies active in the military sector or cybersecurity technology) and ii) general cross-sectoral investment screening (for all other types of company). The industry sector affected by the acquisition determines which procedure will be applied.	carries out any of the following "Strategic Activities". i) Activities that could prejudice the interests of national defence, public order or public security: production or sale of weapons, ammunition, explosive materials for military use; activities carried out by companies which are detainers of national defence secrecy; activities carried out by entities that have entered into a contract for the supply of goods or services for the Ministry of Defence; activities relating to any means of detection and interception of tele-communications; cryptographic resources and services; gambling activities (except casinos); service activities for assessment centres authorized to	Annex to the ICA (the "Annex"): i) defence equipment and technologies; ii) critical energy infrastructures; iii) critical digital infrastructures (in particular 5G infrastructures); iv) water; v) systems that guarantee data protection; vi) research and development in the pharmaceutical, vaccine, medical devices and personal protective equipment (PPE) sectors (for the latter sector, the 10% threshold was temporarily introduced until 31 December 2022 to deal with the crisis due to the pandemic). Foreign investors must submit an application for authorization to reach or exceed the threshold of 25% and 50% of the voting rights in an Austrian company operating in sectors relevant	Specifically, the D.l. 23/2020 imposes differentiated notification obligations depending on whether the purchaser is a European or non-European subject: As regards the subjective profile of the notification obligation, the D.l. 23/2020 distinguishes three different hypotheses: i) Obligation for any person regardless of nationality. Art. 15, paragraph 1, lett. a) provides for an obligation to notify, in the areas referred to in art. 2, paragraph 5 of Legislative Decree 21/2012, charged to the administrative bodies of the "target" company when the latter adopts acts, resolutions or transactions that have the effect of changes in ownership, control or availability of

1) Sector screening is more rigorous and applies to acquisitions of German companies that: i) manufacture, develop or have effective power over weapons or military equipment or, if such activities have been carried out in the past, still possess know-how or any other access to technologies relating to such goods; ii) Manufacture or develop certain dual-use goods or goods subject to export restrictions; iii) Manufacture cryptographic systems with computer security functions authorized to transmit classified information. Any investment in these specific sectors, if the non-German investor acquires 10% or more of the voting rights of a target company (directly or indirectly), must be submitted to BMWi for the review procedure before closing.	assess the security of IT product systems; activities relating to means intended to combat the illicit use of pathogenic or toxic agents and to prevent the health consequences of such use; activities of processing, transmission or storage of data whose compromise or disclosure could interfere with the exercise of another strategic activity. ii) Activities that could compromise strategic infrastructures or the supply of essential goods/ services: energy; water; transport; production and distribution of agricultural products; Telecommuni-cations; public health; written and digital printing; exercise of the mission of the national police and civil security services; research and development	to public order or public security, listed in part II of the Annex: i) critical infrastructures (such as energy, information technology, traffic and transportation, healthcare, food, tele-communications, data processing or storage, defence, finance, etc.); ii) critical technologies (such as artificial intelligence; robotics; semiconductors; cyber security; defence technologies; quantum and nuclear technologies; nanotechnology and biotechnology); iii) security of supply of critical resources (including energy supply; supply of raw materials; food supply; iv) access to sensitive information, including personal data; v) freedom and plurality of the	assets or their destination. This notification obligation exists regardless of the nationality of the company that acquires control. ii) Obligation of foreign companies (including those whose parent company is based in the European Union) Art. 15, paragraph 1, lett. b) provides for an additional notification obligation for foreign parties (therefore also belonging to the EU) in the event that it makes purchases of significant shareholdings such as to determine the stable establishment of these buyers due to the assumption of control of the target. iii) Obligation for non-EU parties to notify for the purchase of minority shareholdings.

2) The general cross-sector investment screening applies to the acquisition of German companies in all sectors not covered by the sector screening procedure. Unlike the sector-specific review procedure, general screening applies only to non-EU and non-EEA / EFTA foreign investors ("Foreign Investors"). The general review procedure also distinguishes two different procedures applicable to: a) investments in critical infrastructures; and b) investments in all other sectors. The critical infrastructure review applies when a Foreign Investor acquires more than 10% of the voting rights in a German target operating in: i) Essential facilities, energy sector, telecommunications, information technology, transport and traffic, healthcare (including the	relating to critical technologies. The investor must obtain the prior authorization of the MoE for the following operations: i) Direct or indirect acquisition of a controlling interest in a target company based in France ("Stock Transfer Test"); ii) Acquisition of all parts of a company branch of a target with registered office in France ("Asset Transfer Test"); iii) Acquisition of more than 25% of the voting rights in a target company based in France ("Threshold test"); this condition applies only to non-EU / EFTA investors or, to investors who have EU/EEA nationality but who do not reside in an EU/ EEA country.	media. No prior approval is required for foreign investments in an Austrian company with fewer than 10 employees and an annual turnover or balance sheet of less than EUR 2 million (so-called "Start-up exception").	Art. 15, paragraph 1, lett. b) provides for the notification obligation for foreign parties not belonging to the EU. In particular, non-European subjects are obliged to notify for those transactions that involve the acquisition (for any reason) of a value of shares equal to or greater than 10% of the share capital (taking into account the shares or shares already directly or indirectly owned) of a company that operates in one of the strategic sectors and the transaction has a value equal to or greater than one million euros. The notification obligation is also triggered when the thresholds are reached as a result of subsequent operations. Specifically, the subsequent exceeding of

development/ distribution of essential drugs, medical devices or diagnostics), food, finance, insurance, etc .; ii) Development of specific software for critical infrastructures; iii) media companies; iv) Large cloud computing service providers. Such acquisitions must be communicated by the investor to BmWi prior to closing. With regard to acquisitions of targets not operating in the critical infrastructure sectors, the Foreign Investor must notify the transaction if it acquires 25% or more of the voting rights of a German company, when the transaction is likely to affect the public order and security on German territory or in another member state. For all other transactions that may be subject to the general screening review			each of the thresholds of 15%, 20%, 25% or 50% determines the obligation of a new notification. Documents to be served As regards the profile of the types of acts or transactions subject to the obligation of prior notification, the D.l. 23/2020 provides that until 31 December 2020, all acts, resolutions or transactions that are adopted by companies operating in the "strategic" sectors as described above, which have the effect of changing the ownership, control or availability of strategic assets or changing their destination must be notified to the Presidency of the Council of Ministers ("Presidency"). The acts subject to notification must therefore

procedure, filing is voluntary.			also include the resolutions concerning: i) the merger or demerger of the company; ii) the transfer of the registered office abroad; iii) the modification of the corporate purpose; iv) the dissolution of the company; v) the transfer of the company or branches thereof in which strategic assets are included or the assignment of the same by way of security. Reference is therefore made to the notion of transfer of exclusive control of a company or the purchase of a productive asset (sale of a business branch) or the sale of a tangible or intangible asset that could jeopardize the security of the networks of tele-ecommunication. It is not clear whether the purchase of joint control by

			a third party of a production asset also falls within the scope of the notification obligation. The regulation in question, on the other hand, does not seem to exclude the communicability of "intra-group" transactions.

Germany	France	Austria	Italy
2. The screening procedure			
For both sectoral and inter-sectoral operations, BmWi has two months to open an investigation; if BmWi does not initiate the investigation within this period, the transaction is considered approved (de facto clearance). When BmWi initiates an investigation, it will ask the investor for further information on the transaction; from the receipt of the requested information, BmWi has four months to issue the final decision. Regardless of any notification, BmWi is authorized to open an investigation procedure up to five years from the conclusion of the sale contract. In every case of transactions subject to notification (both sectoral	Foreign Investors wishing to make a Controlled Investment must obtain the prior authorization of the MoE through the two-step screening procedure. Phase 1) The MoE, within 30 working days of receiving the authorization request, must notify the Foreign Investor: (i) that the investment is beyond the scope of the review and therefore does not require any prior authorization; (ii) that the authorization is granted without conditions; or (iii) that the investment falls under the control regime, but further consideration is required to determine	The Federal Ministry of Economic and Digital Affairs ("BMDW") is the authority in charge of conducting the screening procedure. The BMDW, during the checking procedure, is assisted by the Investment Control Committee (the "Committee"), composed of a member of the Federal Ministries for European and International Affairs, for Finance, for Climate Protection, for the Environment, Energy, Mobility, Innovation and Technology, for social affairs, health, assistance and consumer protection and by BMDW itself. When the Foreign	The notification must be made by the target company within 10 days from the adoption of the corporate determination that gives rise to the change in control or, in the case of the purchase of shareholdings that confer control, by the purchaser (of non-Italian nationality), within the deadline of ten days from purchase. The President of the Council of Ministers has 45 days to veto the operation or to impose specific measures. Following the notification of the operation, the Presidency of the Council of Ministers can decide within 45 days on the notified

and inter-sectoral investments), a stand-still period is envisaged. During the investigation period, the operation cannot be carried out and any implementation that may have occurred is considered void, until the release of the authorization by BmWi. If, following a sector investigation, the BmWi determines that the screened operation endangers the security policy interests of the Federal Republic of Germany or its military security, the Ministry may prohibit the operation. In the case of general investment screening, the transaction may be prohibited when the BmWi determines that the investment could affect public order or national or EU member state security. The BmWi may prohibit a transaction in whole or in part and may provide for restrictive measures; in any case, the	whether the safeguarding of national interests can be ensured by making the authorization conditional. In the absence of a response from the Foreign Investor at the expiration of the term of 30 working days, the authorization is considered rejected. Phase (2) (possible) When a further review is required, the MoE benefits from an additional 45 business days to approve (even subject to conditions) or reject the Controlled Investment authorization. In the absence of a response from the Foreign Investor within the term of 45 working days, the authorization will be considered rejected. The Foreign Investor or the target company may also submit	Investment exceeds the set thresholds, the Foreign Investor must submit the application to the BMDW, who must convene the Committee for discussion. The Committee provides a non-binding opinion on the case. Even if the obligation to report is mainly the responsibility of the Foreign Investor, the ICA provides (in subsidiarity) an accountability obligation for the target. The BMDW, after receiving the written request, must immediately notify the European Commission in order to start the pan-European cooperation mechanism. The EU Commission and the other member states can provide comments on the investment in question within 35 days (this deadline	operation. Once the forty-five day deadline has expired without the Prime Minister having intervened, the release of clearance on the notified operation is implicitly assumed. During the procedure, the Presidency may formulate a request for additional information to the parties, as well as to third parties; in the first case, the deadline for concluding the procedure is extended by 20 days from the date of receipt of the replies provided by the parties (obviously if the information and generally the replies provided are complete). It may also request information from third parties; in this case, the deadline for closing the proceedings is suspended and a further extension of the

Ministry must make a ruling with a reasoned decision.	a prior request to the MoE in order to determine whether the asset involved in the transaction falls within the scope of the control regime. The MoE may authorize the Controlled Investment subjecting it to conditions, in compliance with the principle of proportionality, in order to ensure that the operation does not prejudice public order, public safety or national security. The general purpose pursued by the MoE when imposing these conditions is: i) to safeguard the knowledge and know-how of the French target and preventing any unwanted appropriation; ii) to ensure the continuity and security of Strategic Activities on French territory and, in particular, to ensure that such activities	can be extended by a further 5 days) from the submission of the notification. After the 35-day deadline, Phase I of the Austrian inspection procedure begins and lasts 30 days. At the end of Phase I, the BMDW can approve the operation or initiate Phase II of the control procedure. If the term of Phase I expires without the BDMW starting Phase II, the Foreign Investment is automatically authorized. Phase II provides for an in-depth investigation and lasts for two months: within this period the BDMW can approve (also imposing conditions) or prohibit the operation. A foreign investment subject to authorization conditions is not valid until	deadline of 10 days is foreseen from the date of receipt of the information provided by third parties. The extension of 20 and 10 days indicated above can be arranged only once; therefore the maximum duration of the procedure is 75 days (added to the days necessary for the subjects to whom the requests have been formulated, to respond fully to it). In the event of consultations with the European Commission regarding an ongoing proceeding (pursuant to the provisions of the FDI Regulation), the Presidency of the Council may order a further extension of the proceeding. No publication of the notifications made or of an

	are not subject to the legislation of a foreign State, which could hinder such continuity and security; iii) to accomodate the internal organization and governance of the French target and (iv) to identify the principles governing the reporting of the investor and the target to the French government. The Foreign Investor may request the modification of the conditions imposed in the following cases: i) in the event of a change in the economic and regulatory circumstances relating to the strategic activity of the target that cannot be foreseen at the time of completion of the transaction; ii) in the event of a change in the shareholding structure of the French target or	authorization is granted. If the transaction has already been fully or partially completed prior to the authorization decision and it is established that the acquisition poses a threat to security or public order, subsequent conditions must be imposed to eliminate that threat. If these conditions are not sufficient to eliminate the threat, the prohibition of all or part of the operation will be ordered. The ICA also provides that anyone who intentionally contravenes the obligation to notify is guilty of an administrative offense and punishable by imprisonment for up to one year or a fine of up to 40,000 euros. The same penalties apply if incorrect or misleading	extract of the transaction is envisaged, just as no communication and publication mechanism is regulated, with reference to clearances or prohibition or authorisation decisions with measures (these decisions are also reported by an annual report published by the Presidency several months after the adoption of the decision); It should be noted that in the event of a failure to provide notification, the Presidency will be able to initiate the procedure ex officio within 45 days of becoming aware of the non-notified operation. In this case, the violation of the notification obligation entails the application of a pecuniary administrative sanction up to double the value of the

	of the control chain; or iii) based on a condition set out in the authorization. The MoE benefits from 45 working days to accept or reject the requested amendment and, if the foreign investor has not received a response within the deadline, the request is considered rejected. If a Controlled Investment is executed without the prior authorization of the MoE, the MoE may issue injunctions by ordering the Foreign Investor: i) to submit the application for authorization; ii) to restore the previous situation; iii) to modify the transaction. The MoE can also impose penalties of up to EUR 50,000.00 per day for non-compliance with the injunction. If necessary, the	information is provided to fraudulently obtain authorization. There are no specific guidelines on the main valuation criteria applicable by the BDMW to decide whether to approve or prohibit a foreign investment. However, the substantive assessment is aligned with the jurisprudential decisions of the CJEU and, in particular, the BDMW could prohibit a foreign investment when: i) the Foreign Investor is directly or indirectly controlled by the government (including state bodies or armed forces) of a third country, including through significant funding; ii) if the Foreign Investor has already been involved in activities affecting public	transaction and not less than 1% of the cumulative turnover achieved by the companies involved in the non-notified transaction, in the last financial year approved. Stand still obligations are not expressly foreseen; however, in these cases the conditionality is mandatory, given that if the Presidency were to raise objections to the operation, this could not only prescribe any commitments, but prohibit the latter. In the event of a prohibition, all the acts carried out to realize the prohibited operation will be null and void as are the corporate resolutions that give rise to the transition of control until the operation is authorized.

	MoE can take precautionary measures such as the suspension of the foreign investor's voting rights or prevent the investor from having the assets. When the Controlled Investment has been carried out without the prior authorization of the MoE, the MoE may impose penalties up to i) double the amount of the irregular investment; ii) 10% of the annual turnover of the target (before the payment of taxes); iii) €5 million for legal persons and €1 million for natural persons.	security or public order in another member state; iii) if there is a serious risk that the Foreign Investor is involved in illegal or criminal activities.	

Germany	France	Austria	Italy
3. The appeal of decisions			
The decision of the BmWi can only be challenged by the investor/ buyer before the administrative court of Berlin, in legal proceedings.	The MoE's decision can be challenged before the French administrative courts, which must give the investor 15 days to submit its observations, unless there is a degree of urgency or there are exceptional circumstances or imminent damage to the public order, public security or national defence.	The decisions of the BDMW can be challenged by the foreign investor in legal proceedings before the Federal Administrative Court, the Higher Administrative Court and the Constitutional Court.	The decisions of the Presidency can be challenged at the Regional Administrative Court of Lazio and (in second degree) at the State Council.

Germany	France	Austria	Italy
4. The impact of the COVID-19 pandemic on the FDI monitoring regime			
After three changes to the German FDI control regime, AWV's 17th Amendment (the "Amendment") finally came into effect on May 1, 2021. The latest changes implement EU Regulation no. 2019/452 ("Reg."). The new Section 55a AWV now includes the previous categories (from 1 to 11), as well as further key future technologies (from 12 to 27) focusing on technology sectors, such as artificial intelligence, autonomous driving, robotics, semiconductors, optoelectronics, 5G technology, aerospace technology, cybersecurity, nanotechnology, quantum technologies and healthcare sectors linked to the COVID-19	The French FDI control regime has recently been modified. In particular, the PACTE Law, and the ministerial decree of 31 December 2019 have expanded the list of Strategic Activities, refined the concept of Foreign Investors both for EU/EEA and non-EU/ EEA investors, and clarified the role of the MoE by introducing a two-step screening process for Controlled Investments. Regarding the Thresholds Test, recent changes have lowered the threshold to 25% from the previous 33.33%, specifying that this condition does not apply to EU/EEA investors. The PACTE Law also conferred	Following the pandemic in July 2020, Austria adopted a new investment control discipline ("ICA"), which replaces the previous section 25a of the Foreign Trade Act ("FTA"), which had a rather limited scope. (see section I)	The main change introduced by the reform introduced following the pandemic is represented by the fact that for the first time, outside the defence and national security sectors, even acquisitions of equity investments by European operators, are subject to the obligation of prior notification to the Presidency. Specifically, the D.l. 23/2020 imposes differentiated notification obligations depending on whether the purchaser is a European or non-European subject.

pandemic. The new Section 55a AWV increases, for some categories (from 8 to 27), the notification thresholds up to 20% of the voting rights. Notification is mandatory for all business segments listed in AWV Section 55a when the required thresholds are met. The amendment also touches on the sector-specific screening procedure and imposes mandatory notification for investments related to all types of listed military equipment, defence material covered by secret patents and cryptographic technology products. With regard to the subsequent acquisition of voting rights, the Amendment provides that notification obligations are limited to the following thresholds: i) 20%, 25%, 40%, 50% or	corrective powers to the MoE in the event of breach of the commitments undertaken by the investor (see paragraph 2). Furthermore, the MoE decree of 27 April 2020 introduced two measures relating to the inspection of controlled investments: i) the biotechnology sector is now subject to checks and ii) from 22 July 2020, the condition of the 25% threshold has been reduced to 10% for listed companies. In France, the French government has strengthened its control by extending until 31 December 2021 the reduced threshold of 10% for the screening of non-EU investments in listed French companies that were put in place during the Covid-19 pandemic and which would have been due		

75% for sectors/ groups subject to mandatory initial notification at 10% of the voting rights (e.g. critical infrastructures, cloud computing services, media companies, objectives related to defence); ii) 25%, 40%, 50% or 75% for sectors/ groups subject to mandatory initial notification at 20% of the voting rights (health sectors linked to the COVID-19 pandemic and new sectors related to technology); And iii) 40%, 50% or 75% for all other transactions falling within the scope of German FDI regulations (initial threshold of 25% of the voting rights). The new rules introduced the principle of "atypical checks", extending the power of auditing to acquisitions below the applicable thresholds (now 10%, 20% or 25% depending on the sector concerned) if the foreign	to expire at the end of 2020. Furthermore, the MoE has prohibited two significant operations.		

investor acquires other means of influence, more particularly positions on the board of directors, veto rights and/or certain information rights. The acquisition of atypical control does not give rise to a notification obligation, but the BmWi could ex-ufficio initiate an investigation.			

Germany	France	Austria	Italy
5. Some summary data and evaluations			
Since 2016, the number of operations examined by the BMWi each year has continuously increased. From January 2016 to December 2018, 185 acquisitions were evaluated by BMWi, of which there were 75 where a Chinese buyer was present. In 2018, BMWi reviewed 78 transactions, almost double the 41 monitored in 2016. From 2018 to 2019, the number continued to grow substantially, reaching 106 cases, with the complexity of revised cases also increasing. According to the BMWi, almost all cases in 2019 and 2020 where safety problems were identified were resolved through contractual arrangements, which are becoming an important		In an official answer to the written parliamentary question no. 3336/J relating to the effectiveness and amendment of the Austrian law on foreign trade, dated 17 April 2019, the minister in charge replied on 17 June 2019, as follows: Since this provision went into effect in 2013, a total of eight applications have been submitted relating to transactions potentially requiring approval under the (then) Section 25a of the Austrian Foreign Trade Act 2011: -Three applications were rejected because section 25a of the Austrian Foreign Trade Act 2011 was not	The Golden Power discipline, especially the one introduced on a transitional basis, has some critical problems. In particular, the hypertrophic extension of the subjects considered as strategic (often without a clear definition of what they are), the extension of the notification obligations also to intra-community transactions and in some cases also to national transactions, the absence of a minimum threshold requirement for notification (except for certain sectors such as banks and insurance companies and for the purchase of minority shareholdings by

tool, especially in negotiations perceived as critical to the German health system. Based on recent and planned AWG and AWV overhauls, the BMWi expects the number to increase by around 40 cases per year over the next few years. In addition, BMWi expects another 130 cases per year from other European authorities under the EU cooperation and notification scheme. The BMWi plans to issue written opinions in a significant number of these cases.		applicable. -In two cases the Austrian minister in charge had reported by official decree that there were no objections to the planned acquisition because there was no reason to fear a threat to the interests of public security and public order in accordance with Article 52 and the article 65 par. 1 TFEU, including provisions of general interest and crisis prevention.	non-EU subjects), has substantially entailed the submission to government control of an extremely high number of acquisitions. The most critical point concerns the breadth and indeterminacy of potentially strategic matters subject to FDI control which prudentially led operators to notify any transaction that, even in a completely theoretical way, could fall within the broad categories indicated by the legislator, also taking into account the severe penalties laid down in the event of failure to provide notification. Furthermore, several operators have found that most of the hundreds of operations notified in the two-year period 2020-2021

			(which on the basis of some data available have increased exponentially) concern operations that clearly do not raise security problems of any kind, thus reporting covering an overly invasive control area. Thinking about a review of the matter, once the emergency period has passed, it would be desirable that the Golden Power control should not concern, perhaps with the exclusion of the sectors relating to armaments and military defence, EU subjects, but only operations where non-EU buyers are involved. It would also be advisable to drastically reduce (or, anyway, give a more precise definition) of the areas subject to preventive control, reducing

			them only to situations of proven national interest, avoiding any form of hypertrophic enlargement of the scope of checks which, given the enormous number of transactions that are likely to be subject to notification, however, would not allow for an adequate investigation to be carried out for all transactions subject to scrutiny. It would be desirable that de minimis mechanisms are envisaged to avoid clearly irrelevant operations being subjected to control. Another criticism addressed to the Italian procedure concerns the lack of transparency regarding the assessments carried out by the Prime Minister and a

			serious lack of reasoning behind the decisions, a factor that does not allow any effective review of the decisions to be carried out and which therefore assigns to the regulator a wide range of discretion and in fact is difficult to appeal against.

Germany	France	Austria	Italy
6. Cases			
KFW case In July 2018, the German federal government had decided to prevent a Chinese investor from acquiring a 20 percent stake in 50Hertz electricity grid operator by arranging an investment by the state-owned Kreditanstalt für Wiederaufbau (KfW) as it had no jurisdiction to block the operation under the FDI regime. The German Federal Government officially confirmed that the acquisition by KfW was aimed at the protection of critical energy supply infrastructures in Germany. CRRC In February 2020, BMWi cleared the takeover of the German locomotive manufacturer Vossloh by Chinese	Photonis/ Teledyne case In December 2020, the MoE blocked the proposed acquisition by the US company Teledyne of the French company Photonis, which specializes in night vision technologies, used by the French military. The Photonis/ Teledyne case reflects the French government's increased sensitivity to national interests and more aggressive approach to law enforcement. Photonis, a French high-tech company, specializes in the design, manufacture and sale of imaging technologies with photosensors. Note that		THALES ITALIA S.p.a. In the case of THALES ITALIA S.p.a. (a transaction which involved the transfer of the StarMille business unit of Thales Italia to Sapura Thales Electronics Sdn Bhd) an operation which provided for the transfer of the business unit - relating to the production of a radio set used by the armed forces - to an Italian subsidiary by a Malaysian group) the Company has been prescribed (Decision 14 July 2016) to adopt management, organisational and technical solutions aimed at ensuring the maintenance of research and development activities in Italy, and also the

train manufacturer CRRC. CUREVAC Following the COVID-19 pandemic, BMWi announced in June 2020 that KfW, a company 80% owned by the German Federal Government and 20% by other German local authorities, will acquire 23% of CureVac, a biopharmaceutical company that focuses on developing vaccines for infectious diseases such as COVID-19 and drugs to treat cancer and rare diseases. The transaction was agreed with the German government precisely to avoid a possible acquisition of CureVac by foreign investors. AIXTRON In May 2016, the Chinese company Fujian Grand Chip Investment (GCI) announced plans to invest in the	Photonis is the exclusive supplier of night vision cameras to the French armed forces. This type of activity clearly presents a high "vulnerability" from the point of view of national security for France. The would-be buyer, US company Teledyne Technologies, manufactures aerospace and defence electronics. In the context of the interest shown by the American Teledyne in the French company Photonis, which specializes in night vision systems, the French Ministry initially verbally opposed any agreement, after which negotiations continued throughout the summer of 2020. The Ministry had set a series of conditions for the approval of the transaction:		appointment, as responsible for the management of strategic activities, of an executive with Italian citizenship. VIVENDI S.A. TIM S.p.a In the case of VIVENDI S.A. TIM S.p.a., having exceeded the threshold of participation in the capital of TIM S.p.A. referred to in Article 1, paragraph 5, of Legal Decree no. 21 of 2012, specific requirements, monitoring and control measures were imposed on the two companies, including the appointment of a member of the c.d.a. of Italian citizenship and of government approval (decree of the Presidency of the Council of Ministers of 16 October 2017). With the Prime Ministerial Decree of 2 November 2017, TIM was also required to

German electronics company Aixtron. In doing so, GCI would have acquired 50.1% of the company's voting rights. The Chinese investor had already successfully applied for authorisation. Subsequently (in October 2016), the Federal Ministry of Economy and Energy (BMWi) revoked the authorization and announced the resumption of the screening procedure. The revocation was based on concerns raised by the United States about its national security interests. The takeover later failed due to a US veto, so BMWi did not have to proceed with the review procedure. KUKA In 2016, the Chinese group Midea announced investment negotiations with the German company Kuka. Kuka develops and manufactures robots for various industries, such	(i) the acquisition of a 10% minority stake in Photonis by the French sovereign investment fund Bpifrance, accompanied by a right of veto on the operations and the management of the European activities of Photonis in France and the Netherlands and (ii) the establishment of an internal security committee comprising representatives of the French Ministry of the Armed Forces and the French Ministry of Economy and Finance, which would not only have had the right of veto, but which would have had the role of preventing Teledyne from accessing strategic information. However, in the end, these negotiations did not reach an agreement and		adopt adequate plans for the development, investment and maintenance of the networks in order to guarantee the continuity of the supply of a universal service. The Government has also imposed a commitment to the continuity and maintenance in Italy of strategic activities, the appointment, for the management of these activities, of Italian administrators of government approval, and other relevant requirements of an organizational and structural nature (for example strict administrative separation and functionality within the target company). ITALIA S.p.A., WIND ACQUISITION HOLDING FINANCE S.p.A., H3G S.p.a. (merger by

as automotive, electronics, energy or healthcare. The announcement sparked a public debate on the influence of foreign investors on German companies and on a potential transfer of technical know-how from Germany to China. However, the BMWi issued the authorization after a preliminary examination, without even entering the second phase of the review procedure. Subsequently, Midea acquired 95% of Kuka's voting rights. This case, along with Aixtron and other cases, led to the 2017 Foreign Trade and Payments Ordinance (AWV) reform introducing stricter rules on the control of foreign investments. LEIFELD In August 2018, the Leifeld case became known as the first formal ban on a foreign investment by the German government based	the French State on 18 December 2020 prohibited the operation with a view to the protection of "... national strategic interests" and for the protection of "... sovereignty of French economic and industrial defence". This is the first time that the French foreign direct investment authorities have publicly prevented a proposed takeover by a US firm. In a press release issued by the French Ministry of Defence after the ban, it was reported that the Ministry "... is now working on an alternative acquisition solution with French industrial and financial players active in the optronics sector". The veto, even in the aerospace and defence sectors, is unusual,		incorporation of WIND Acquisition Holding Finance spa into 3 Italia spa and of WIND Teleco-munication spa into H3G spa) the Council of Ministers with the decision of 22 September 2015, prescinding from the powers relating to the control of FDI, defined some re-commendations for the new company resulting from the mergers (H3GII); in particular, it was asked to report the resolutions and acts adopted in relation to strategic planning in terms of industrial integration and investments. The Government, while not imposing restricted measures, nevertheless advised the resulting merged entity to safeguard employment levels in Italy

on the 2017 AWV reform. Chinese investor Yantai Taihai Corporation had aimed to take over the German company Leifeld Metal Spinning. The target mainly produces sophisticated and seamless metal parts that are used in the aerospace sector, but also in the nuclear sector. Therefore, the investment qualified as subject to cross-sector review, in that it 'manages critical infrastructure'. BMWi - with the approval of other federal ministries - concluded that the takeover would endanger German public order and security. This decision can be seen as a precursor to a more rigorous review of foreign investment in general and Chinese investment in particular. VITAL MATERIAL CO.'S PROPOSED ACQUISITION OF	especially considering the historically close strategic relationship between France and the United States. Typically, the freezing of foreign investment based on national strategic considerations is aimed at buyers from countries with which FDI authorities are not strategically aligned. Carrefour case In January 2021 the French Ministry of Economy vetoed the acquisition of Carrefour by Canadian retailer Couche-Tard, in the name of protecting the French food sector. The Canadian food giant Couche-Tard withdrew its € 16.2 billion offer to acquire European retailer Carrefour SA after the acquisition plan met with stiff opposition		Case Shenzhen / Lpe On March 31, 2021, Mario Draghi's government vetoed the acquisition by the Chinese company Shenzhen Investment Holdings Co. (a company of the Invenland group attributable to Xiang Wei, a Chinese financier active in the global semiconductor sector) of an Italian company - LPE - which operates in the strategic semiconductor industry (Case Shenzhen / Lpe - Act No. 782 - Prime Ministerial Decree of March 31, 2021 for the exercise of special powers, with opposition, for the company Shenzhen Inveland Holdings Co. Ltd., for the acquisition of a stake in the company LPE Spa). Applying golden

PPM PURE METALS GMBH In July 2020, the German federal government vetoed the proposed acquisition by the Chinese company Vital Material Co. of PPM Pure Metals GmbH, part of the French group Recylex and a manufacturer of metals used in semiconductors and infrared detectors, also for military applications. Vital Materials, the world's leading producer of minor metals, has made an offer as part of a rescue project by Pure Metals GmbH. The German Ministry of Defence raised objections to the purchase of Pure Metals GmbH by a Chinese company, as it had produced and marketed some products used in the military sector. The operation was therefore prohibited, not disclosing the fact that PPM had filed for bankruptcy only two months before the planned	from the French government. France ruled out any sale of the Carrefour target for food safety reasons, prompting the Canadian company and its allies to organize a last ditch effort to salvage the deal, but the French minister did not authorize it because food safety is considered strategic for France. Couche-Tard hoped to obtain clearance for the transaction by offering commitments on French jobs and the French food supply chain, as well as retaining the merged entity listed in Paris as well as in Toronto. The plan also included a commitment to maintain the new entity's global strategic operations in France and to have French		power, Palazzo Chigi has banned Shenzhen Investment Holdings Company from taking over 70% of Lpe, a Lombardy based company specializing in the development of epitaxial reactors, high-tech machinery used to make semiconductors. The government's decision can be traced back to a global context in which the semiconductor sector is experiencing considerable difficulty, impacting above all on the automotive sector. This crisis is mainly due to the prolonged production and transport blocks caused by the pandemic, which has forced automotive companies to stop production and consequently to suspend

operation and that this would probably have avoided the bankruptcy and closure of Pure Metals GmbH (a closure which resulted in the loss of around 85 jobs in the city of Langelsheim, in the German Lower Saxony region). IMST GmbH/China Aerospace Science and Industry Corporation (CASIC) At the end of 2020, the German Ministry of Economy issued its second formal ban (out of a total of more than 800 cases investigated since 2004) on the acquisition of a German company by a foreign investor under German FDI rules. The target was IMST GmbH, active in research and production in the area of radio systems, chip design, antennas and EDA software. The target also had key know-how in the fields of satellite/radar communication and 5G technology, also relevant for military	citizens on its board, it stated. According to some commentators, the two recent veto decisions mark the peak of a growing wave of protectionism and are a signal of greater protection of French companies from non-European investors with nationalities also referable to historically allied states of France such as, the United States and Canada.		orders for semi-conductors. When production resumed, chipmakers were overloaded with orders from consumer electronics companies themselves overburdened with orders for devices needed to deal with lockdowns and closures. In fact, President Draghi stated that "the shortage of semiconductors forced many car manufacturers to slow down production last year, so it has become a strategic sector". Fastweb / Huawei Fastweb / Huawei - Act no. 586 - Prime Ministerial Decree of 22 July 2020 - Exercise of special powers over the company Leonardo S.p.a. for agreements with ZTE Corporation and Huawei

applications. The buyer was a subsidiary of the Chinese state defence group Casic. The BMWi's main concern was that the takeover would endanger supply to the German military. The other side of this concern was the supply of arms to China as a non-allied country. Considered to be particularly dangerous was the fact that the target company IMST engaged in the area of 5G technology. The BMWi has long focused on 5G technology and other key technologies for future development. In the present case, BMWi found that IMST's technology can be used to build Germany's 5G network, which is considered a critical infrastructure. The most serious concerns about the ban are based on the know-how IMST has in the field of satellite/radar communications			Technologies Co. Ltd. for the purchase of hardware and software equipment and professional services On 22 October 2020, with a dPCM, the Government exercised the special powers of Golden Power with regards to an agreement between Fastweb and the Chinese company Huawei relating to a supply for the core 5G networks, imposing on the Italian operator (owned by the Swisscom Group, itself controlled by the Swiss Confederation) to diversify its mobile network providers. The decision became necessary, in fact, because Fastweb would have chosen Huawei as the sole supplier of its 5G network. Huawei is one of the most important global

and 5G and the fact that the potential buyer is a Chinese state defence company.			manufacturers of tele-communications equipment and is leading the development of the new 5G wireless technology in Italy. The government's decision confirms that 5G technology poses particular geopolitical and economic problems. The substantial lack of valid and competitive Western alternatives to Chinese technologies in this sector is evident when it is noted that almost all tele-communications operators have tried, over time, to enter into agreements with the Chinese ZTE and Huawei to build their fifth network. generation. The activity of Western executives aimed at limiting these economic operations,

			formally, is almost always based on reasons related to the interest of safeguarding national security. The golden power was also exercised in relation to Tim (for old agreements with respect to which 5G technology can be considered a natural evolution) and Linkem. Linkem, Vodafone, Tim, Wind Tre and Fastweb / Huawei and Zte Linkem, Vodafone, Tim, Wind Tre and Fastweb / Huawei and Zte - C. Dominelli and C. Fotina, " Sette vincoli per i contratti 5G: nuovo golden power all'esordio", in Il Sole 24 Ore, 10.07.2019 As regards Linkem, the special powers were exercised "in relation to the information

			notified by the company relating to contracts or agreements concerning the purchase of goods and services relating to the design, construction, maintenance and management of the networks relating to the services of broadband electronic communication on 5G technology and the acquisition of functional high-tech components for the aforementioned implementation or management", reads the note issued following the Council of Ministers. For Vodafone, the provision concerns "agreements concerning the purchase of goods and services for the construction and management of electronic communications networks based on 5G

			technology". The exercise of special powers over Wind Tre concerns "the agreements entered into with the company Huawei, concerning the purchase of goods and services for the construction and management of electronic communications networks based on 5G technology". And for Fastweb "the information notified by the company relating to the purchase from the company Zte Corporation of the equipment relating to the radio components for the construction of the last section of the 5G Fwa network" Vodafone / Huawei 5G - May 2021 Vodafone Italia has been authorized to use the equipment of the Chinese company Huawei

			to build its network with 5G technology, but it will have to respect the strict conditions that the government has imposed on it through the exercise of golden power. On May 20, 2021, the Presidency authorized Huawei's supply to Vodafone. However, it dictated a series of prescriptions. Huawei, for example, will not be able to intervene remotely to solve any technical problems with the network. In general, government sources - cited by the Reuters news agency - speak of a particularly high level of security that Vodafone will have to ensure. The report of the FDI in Italy concerning 2020 has been recently published (September 2021)

			by the Italian government (Presidenza del Consiglio dei Ministri). The 2020 Italy FDI report is available on **https://www.governo.it/sites/governo.it/files/GP_Relazione Parlamento_2020.pdf.** The reports describe the main FDI monitoring cases in 2020 in Italy.

From a comparison of the disciplines of the four member states Italy, France, Germany and Austria it emerges that in response to the pandemic all 4 states took legislative action to expand the monitoring areas, also following the indications of the FDI Regulation. In France and Italy, transactions subject to checks are identified mainly by referring to the acquisition of control or of assets or companies; in Italy, monitoring was extended after the pandemic also to the purchase of minority shareholdings by non-EU parties when the acquisition operation exceeds certain value thresholds. In Germany and Austria, on the other hand, the notification obligation is mainly referred to acquisitions of company shares, including minority ones; this regardless of the purchase of a control of a company or production asset, therefore monitoring is, in some ways of a more extensive nature that could intercept purely financial transactions. It should be noted that following the pandemic in Austria and Germany, the percentage thresholds for the acquisition of shareholdings that trigger notification obligations were lowered precisely to intercept a greater number of operations as part of FDI control. It should also be noted that in Germany the legislator has included in the notification obligation any operation that in fact allows a person to acquire control even over the business matters of a company. It is also worth noting how the Italian legislation, following the pandemic, has extended FDI controls to acquisitions referable to intra-EU foreign subjects and even to transactions involving national companies, in a certain sense attributing to monitoring a different calibre as compared to the simple monitoring of foreign investments. France also monitored intra-unitary operations, even before the pandemic. On the other hand, the Austrian and German regulations have maintained monitoring in the context of acquisition operations by parties of non-EE/EFTA entities, with the sole exception for Germany with reference to operations relating to some highly sensitive sectors linked to defence and armaments, where control concerns any purchaser whatsoever. The procedures of France, Germany and Austria provide for the articulation of the procedure in phase 1 and phase 2, while in Italy the procedure follows a single phase for any type of operation subject to scrutiny.

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Description of ELF

The European Liberal Forum (ELF) is the official political foundation of the European Liberal Party, the ALDE Party. Together with 46 member organisations, we work all over Europe to bring new ideas into the political debate, to provide a platform for discussion, and to empower citizens to make their voices heard. ELF was founded in 2007 to strengthen the liberal and democrat movement in Europe. Our work is guided by liberal ideals and a belief in the principle of freedom. We stand for a future-oriented Europe that offers opportunities for every citizen. ELF is engaged on all political levels, from the local to the European. We bring together a diverse network of national foundations, think tanks and other experts. At the same time, we are also close to, but independent from, the ALDE Party and other Liberal actors in Europe. In this role, our forum serves as a space for an open and informed exchange of views between a wide range of different actors.

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