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Direct Foreign investments in Europe:

Direct foreign investments screening in the EU, among national member states competence and the needs of coordination at EU level

Abstract

Direct foreign investments in Europe, pandemic fears and hyper-regulation, Union coordination of the protocol and marginal evaluations of the role of the European FDI as an instrument in the context of the Union integration process - ideas for some reform proposals.

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Chapter 1

Introduction

In recent years, there has been a progressive expansion of the supervisory powers of foreign direct investments ("FDI") within the European Union, but given that FDI monitoring falls within national competences, the EU regulations despite some coordination efforts at EU level, still has strong national peculiarities.

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.

Following the issue 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 produce notifications[1].

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 activities in the context of the restrictions and economic problems caused by the serious health crisis.

The pandemic has generated a significant social alarm and has led the Community bodies 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 Union still lacking in monitoring codes of conduct of FDI to equip themselves with such a monitoring tool[2].

1 ALÌ ANTONINO, The intersection of EU and its Member States' security in light of the Foreign Direct Investments Screening Regulation" in LA COMUNITÀ INTERNAZIONALE, v. 3 (2020), (2020), p. 439-453.

2 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

The Commission's recommendations aimed at inducing member states to accelerate the process of expanding national monitoring powers on foreign direct investments, is based on the concern that the pandemic 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[3] [4].

The reaction of the national member state regulators to the pandemic (likewise taking into account the solicitations from the EU 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 being 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.

At an initial estimate, it should be noted that the FDI regulations, already present 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

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 ".

3 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.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. 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 Rivistadellaregolazionedeimercati.it, 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 EU.

4 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.

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

Considering that FDI monitoring falls within national competences, it has come to light that the EU regulations despite some coordination efforts at EU level, still has strong national peculiarities.

Chapter 2

The several FDI member states' regulation are not particularly homogeneous and this could give rise to several problems.

In the light of the need for a more consistent and uniform EU regulation of FDI, we suggest possible regulatory proposals that could make the FDI control within the EU more predictable for investors and more homogeneous at the EU level, reducing the transactional costs and certain inconsistencies among national regulation.

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[5] 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.

5 In Germany, the foreign direct investment screening rules are laid down in the Foreign Trade and Payments Act (Außenwirtschaftsgesetz - "AWG") and in the attached Ordinance, the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung - "AWV"). The reviews are carried out by the Ministry of Economy and Energy (Bundesministerium für Wirtschaft und Energie - "BmWi"), 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.

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.
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 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 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. Following the pandemic, the Italian legislator intervened, D.l. 23/2020 significantly expanding the areas subject to preventive 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.

Chapter 3

The use of the definition of 'control' developed in the EU 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 mergers in the Euro-unified area.

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.

Chapter 4

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 interest.

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[6], which found that strategic assets, even of a technological nature, could have a very low value, but nevertheless strategic value or potential for significant development, for example, think of 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 thresholds rule, whenever the buyer is likely to make these goods or assets available to a foreign person.

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

6 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 essential for public health).

mechanisms could be envisaged, if anything leaving to the member states the faculty to decide the quantitative thresholds to be applied[7].

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 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.

7 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 Mmmber states to decide.

Chapter 5

Procedural issues

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.

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 Union 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" mechanism 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.

Another essential element is the publication of the motivated decisions by the FDI supervisory bodies[8].

8 On this point, see ARESU A., Golden Power e interesse nazionale tra geodiritto e geotecnologia, in AA.VV., Golden Power, published for the 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".

Chapter 6

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 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[9]. In this 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, or in any case, is no need to adjudicate decisions, while a burden of motivation appears essential for the decision to initiate phase II and for decisions of prohibition or conditional authorizations.

9 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 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).

On this point, a harmonized approach at the level of each member state 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 hand 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[10].

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.

10 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 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.

Chapter 7

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).

Chapter 8

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[11].

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.

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.

11 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.

Chapter 9

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 this is the main motivation behind this real Copernican revolution of the European approach on FDI[12].

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 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.

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.

12 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.

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.

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[13].

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[14].

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 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 Union 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

13 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.

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

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 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.

Conclusion

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

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 operations back into the context of FDI controls.

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.

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