EU Framework for Foreign Direct Investment Control

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CHAPTER 7

Reading Between the Lines of the EU Regulation Establishing a Framework for Screening FDI into the Union

Régis Bismuth[*]

§7.01 INTRODUCTION

On 13 September 2017, the European Commission published its proposal for a regulation establishing a framework for screening foreign direct investments (FDI) into the European Union (EU)[1] (hereinafter the 'Regulation Proposal'), more specifically on the grounds of security and public order.[2] This proposal eventually led to the adoption, in March 2019, of Regulation 2019/52 (hereinafter 'the Regulation' or 'Regulation 2019/52').[3]

When released, this proposal seemed quite surprising, particularly when one recalls the sceptical – and at times reluctant – position of the Commission with regards to domestic FDI screening mechanisms. This was, for instance, the case in 2006 when the Barroso Commission decided to scrutinise a new French decree establishing authorisation procedures for foreign investments in certain sectors of activities that

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1. European Commission, Proposal for a Regulation of the European Parliament and the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union, COM(2017)487, 2017/0224(COD), 13 Sept. 2017 https://ec.europa.eu/info/law/better-regulation/initiative/111803/attachment/090166e5b5075ff8_en, accessed 25 Apr. 2018.
2. *See* Arts 3 and 4 of the Regulation Proposal.
3. Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union, OJEU L 79 I/1, 21 Mar. 2019.

affect public policy, public security or national defence.[4] The Commission initiated infringements proceedings to the extent that some of the provisions of the new decree could have been in contradiction with EU treaty rules on the free movement of capital and the right of establishment.[5] The Commission expressed similar concerns, which were subsequently alleviated, when the French Government adopted a new decree on 'economic patriotism' in 2014 extending the list of business sectors (energy, water, transport, telecommunications, infrastructure and public health) in which the Ministry of Economy had the right to screen foreign investments.[6]

These precedents highlighting the suspicions weighing on FDI screening mechanisms under EU law[7] could lead us to raise a somewhat ironic question: would the Barroso Commission have reacted negatively to the 2017 Juncker Commission's proposal establishing a framework for screening FDI into the EU on the grounds of security and public order?

It seems clear that Regulation 2019/452 is the result of an evolution of the Commission's stance with regards to non-EU FDI flows. As such, this chapter first explores this evolution (section 7.02), before analysing Regulation 2019/452 further and criticising it on a number of grounds. To begin, this regulation has limited added value for Member States' existing FDI screening mechanisms (section 7.03). It also imposes on Member States an implied obligation to establish FDI screening mechanisms (section 7.04). Additionally, this regulation could serve as a basis of a 'soft blocking power' – at little expense – for the Commission (section 7.05). Perhaps most important, it rests on Article 207 TFEU, which is a fragile and questionable legal basis for the type of framework envisaged by the Regulation (section 7.06). Lastly, it can be seen as a missed opportunity to the extent that it does not address the key issue of competitive neutrality in FDI transactions (section 7.07).

§7.02 DECIPHERING THE EUROPEAN COMMISSION'S NEW 'PROTECTIVE NARRATIVE'

It is indeed possible to notice some changes in the vocabulary the Commission has used when describing the control of non-EU FDI flows and, more generally, the defence of EU interests in economic globalisation, whilst remaining determined to challenge restrictions on capital flows in an intra-EU context.[8] The Commission sent an important signal in its May 2017 paper on 'Harnessing Globalization,' in which it noted that 'concerns have recently been voiced about foreign investors, notably state-owned

4. Decree n° 2005-1739 of 30 Dec. 2005, [2005] Journal Officiel de la République Française 20779.
5. *See*, European Commission, IP/06/438, 4 Apr. 2006; European Commission, IP/06/1353, 12 Oct. 2006.
6. Decree n° 2014-479 of 14 May 2014, [2014] Journal Officiel de la République Française 8062.
7. *See also* Till Müller-Ibold, 'Foreign Investment in Germany: Restrictions Based on Public Security Concerns and Their Compatibility with EU Law' (2010) 1 European Yearbook of International Economic Law 203.
8. For instance, the Commission initiated infringement proceedings against Bulgaria, Hungary, Latvia, Lithuania and Slovakia which adopted new laws regulating potentially restricting EU individuals and companies from buying farmland (IP/16/1827, 26 Mar. 2016).

enterprises, taking over European companies with key technologies for strategic reasons' while raising the issue of reciprocity by pointing out that 'EU investors often do not enjoy the same rights to invest in the country from which the investment originates'.[9] It is also not a coincidence that the Regulation Proposal was released on the same day as Juncker's State of the Union address, in which he underlined that 'Europe must always defend its strategic interests' and announced, 'we are not naïve free traders'.[10]

It is somehow difficult to determine whether the evolution of the positions of the Commission is genuinely sincere. It must be stressed that the proposal did not call into question the overarching principle of free movement of capital embedded in the TFEU. Besides, on an almost systematic basis, the statements made on behalf of the European Commission on the issue of FDI screening combine a normative dimension ('openness to foreign investment remains a key principle for the EU … ') as well as an economic prescription ('openness to foreign investment remains … a major source of growth.')[11] The Commission has been very careful within the framework of this initiative, positioning itself as a shield that can protect EU citizens and industries from the downsides of globalisation, as well as constantly reaffirming its commitment to the free movement of capital as part of its DNA.

Nevertheless, this 'cautious protective narrative' should not obscure the fact that the Commission does not seem ideologically and politically at ease with this initiative subject to ideological dilemmas as well as divergent political forces. The proposal was neither the result of a proactive strategy for globalisation nor the (even very) early stage of an industrial policy at the EU level.[12] It is not also the result of a genuine initiative of the Commission as it was primarily a request of France, Germany and Italy. In their joint letter sent to the European Commission in February 2017, the French, German and Italian governments expressed their concerns as to the growing number of acquisitions of European companies in strategic sectors carried out by non-EU investors as well as the lack of reciprocity with respect to the admission of FDI or government procurement in certain countries.[13] They updated their position in a document published in July

9. European Commission, Reflection Paper on Harnessing Globalization, 10 May 2017, p. 15, https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf, accessed 25 Apr. 2018.
10. President Jean-Claude Juncker's State of the Union Address 2017, Brussels, 13 Sept. 2017, http://europa.eu/rapid/press-release_SPEECH-17-3165_en.pdf, accessed 25 Apr. 2018.
11. European Commission (n 9) 15. *See also* European Commission, State of the Union 2017, Press Release, 14 Sept. 2017 (citing Vice-President Jyrki Katainen: 'the EU is and will remain one of the most open investment regimes in the world. Foreign direct investment is an important source of growth, jobs and innovation').
12. Besides, as pointed out by the European Parliament, non-EU investments targeting European companies are 'part of strategic industrial policies' of non-EU countries (European Parliament, Proposal for a Union Act on the Screening of Foreign Investment in Strategic Sectors, B8-0302/2017, 26 Apr. 2017).
13. *See* https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5, accessed 25 Apr. 2018. *See also* Proposals for Ensuring an Improved Level Playing Field in Trade and Investment, February 2017, https://www.bmwi.de/Redaktion/DE/Downloads/E/eckpunktepapier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf?__blob=publicationFile&v=4, accessed 25 Apr. 2018.

2017 in which they pointed out that some of these non-EU investments also affect the level playing field since they are 'directly or indirectly subsidised by government agencies'.[14] However, while the Commission's proposal included certain provisions concerning the screening of investment in strategic sectors, it does not deal with the issue of reciprocity and does not clearly address the anti-competitive effects of subsidised acquisitions.

The Commission also had to deal with the disagreement of certain EU Member States over the potential establishment of a screening mechanism at the EU level. It must be noted that only twelve of them have so far put in place FDI screening mechanisms at the national level,[15] differing in scope and design.[16] Nordic countries as well as Ireland, Spain, Portugal and Greece viewed the Regulation Proposal as a protectionist enterprise.[17] The UK government considered that it would 'place additional burden and uncertainty on prospective investors, which is at odds with the UK's stance as an open and liberal investment destination'.[18]

The Commission was therefore in a rather awkward position when drafting this proposal. First, it intended to erect an FDI screening mechanism at the EU level while similar mechanisms established at the domestic level have usually been subject to the scrutiny of the Commission. Second, the initiative was the result of a minority of EU Member States who are willing to tighten the control of non-EU FDI and have raised concerns as to the level playing field and reciprocity in international trade and investment. Third, it is clear that it was difficult to reach a consensus among EU Member States between those supporting the initiative, those hostile towards screening mechanisms supposedly sending protectionist signals, and those not ready to accept that the Commission would exercise certain prerogatives in the field of security and public order which have been the responsibility of EU Member States up to now.[19] Fourth, on top of that, the Commission perhaps saw this initiative as an opportunity to consolidate the new exclusive competence it has acquired in the field of FDI as part of

14. European Investment Policy: A Common Approach to Investment Control, 28 Jul. 2017, https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2017/08/170728_Investment-screening_non-paper.pdf, accessed 25 Apr. 2018.
15. This is the case of Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and the United Kingdom.
16. European Commission, Welcoming Foreign Direct Investment while Protecting Essential Interests, COM(2017)494, 13 Sept. 2017, p. 7, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0494&from=EN, accessed 25 Apr. 2018.
17. Fabrizio Di Benedetto, A European Committee on Foreign Investment?, Columbia FDI Perspectives, No. 214, 4 Dec. 2017.
18. UK Department for International Trade, Explanatory Memorandum, 5 Oct. 2017 [20], https://www.parliament.uk/documents/lords-committees/eu-external-affairs-subcommittee/foreign-direct-investment/EM-foreign-direct-investment.pdf, accessed 25 Apr. 2018.
19. Article 65(1)(b) of TFEU provides that the principle of free movement of capital is without prejudice to the right of Member States 'to take measures which are justified on grounds of public policy or public security'. Pursuant to Art. 4(2) of TEU, 'The Union … shall respect their essential State functions, including … maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.' *See also* Hermann-Josef Blanke, 'Article 4 [The Relations Between the EU and the Member States]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU) – A Commentary* (Springer 2013) 228.

the Common Commercial Policy (CCP) since the Lisbon Treaty pursuant to Article 207 TFEU. Not surprisingly, the Commission chose this provision as the legal basis of its Regulation Proposal, and it was also the legal basis retained in the final text of the regulation – even though, as will be seen later, this choice is questionable.

§7.03 A LIMITED ADDED VALUE FOR MEMBER STATES' EXISTING FDI SCREENING MECHANISMS

An analysis of Regulation 2019/452 should start with one simple question: what is exactly the added value of this regulation compared to currently applicable rules under EU law? Answering this question requires distinguishing the position of Member States and the position of the Commission. As to the Member States, it appears that the Regulation 2019/452 neither enhances the possibility for them of exercising control over non-EU FDI nor compels them to do so.

Regulation 2019/452 specifies the legal framework of Member States' FDI screening mechanisms on the grounds of security or public order. It must be recalled that pursuant to Article 65 TFEU, the freedom of movement of capital set out in Article 63 TFEU is without prejudice to the right of Member States 'to take measures which are justified on grounds of public policy or public security' to the extent that they do not 'constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital'.[20] In a nutshell, the Regulation provides that such mechanisms shall be transparent and non-discriminatory between third countries, shall 'set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules'[21] and 'apply timeframes under their screening mechanisms'.[22] Moreover, foreign investors and undertakings concerned 'shall have the possibility to seek recourse against screening decisions of the national authorities.[23]

Most of the requirements of the Regulation are nothing more than a detailed codification of the principles identified in the Court of Justice's case law on freedom of movement of capital. These include, *inter alia*, the necessity to indicate the specific circumstances in which prior authorisation is required,[24] observance of a principle of proportionality requiring 'that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it',[25] and access to legal redress for any person affected by a restrictive measure.[26] Only a few procedural obligations listed in the Regulation (notification of screening mechanisms under Article 3(7) and cooperation mechanism under Articles 6 and 7) go beyond the existing requirements under the TFEU. To this extent, the

20. Articles 65(1)(b) and 65(3) TFEU.
21. Regulation 2019/452, Art. 3(2).
22. Regulation 2019/452, Art. 3(3).
23. Regulation 2019/452, Art. 3(5).
24. ECJ, Case C-54/99 (*Association Église de Scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*) 14 Mar. 2000, ECLI:EU:C:2000:124 [21].
25. ECJ, Case C-112/05 (*Commission of the European Communities v. Federal Republic of Germany*) 23 Oct. 2007, ECLI:EU:C:2007:623 [72].
26. ECJ, Case C-54/99 (n 24) [17].

Regulation can also be depicted as an attempt to better discipline and control domestic screening procedures.

This raises the question as to whether Article 207 TFEU should have been used as the exclusive legal basis of the Regulation. It seems indeed that, as least with respect to the aforementioned provisions, Article 64(2) TFEU would have been a more appropriate legal basis since it clearly empowers the EU to adopt, through the ordinary legislative procedure, 'the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets'. Rather, the Commission made the choice to ground the Regulation in the CCP on which it has exclusive competence but, according to Opinion 2/15, does not cover non-direct foreign investments.[27] The issue of the appropriateness of the legal basis will also be discussed below.

§7.04 AN IMPLIED OBLIGATION FOR MEMBER STATES TO ESTABLISH FDI SCREENING MECHANISMS

Regulation 2019/452 provides that Member States may 'maintain, amend or adopt mechanisms to screen foreign direct investments on the grounds of security or public order'.[28] It does not clearly indicate whether Member States may 'abolish' existing screening mechanisms, but current debates in the European Parliament show that the insertion of a 'ratchet mechanism' in the final text is conceivable.[29]

The Regulation does not explicitly require Member States to establish an FDI screening mechanism at the national level. Nevertheless, one might wonder whether it is implicitly required under some of its provisions. Under Article 3(7) of the Regulation, Member States have an obligation to notify their existing screening mechanisms to the Commission. But Member States that have not established such mechanisms shall also provide the Commission with an annual report covering foreign direct investments 'that took place in their territory, on the basis of information available to them …'.[30] Member States willing to comply bona fide with this obligation will probably establish at least a mandatory reporting system for statistical purposes.[31]

27. CJEU, Opinion 2/15 (*EU-Singapore FTA*), 16 May 2017, ECLI:EU:C:2017:376 [225–238]. *See also* Nikos Lavranos, 'Mixed Exclusivity: The CJEU's Opinion on the EU-Singapore FTA' (2017) 2 European Investment Law and Arbitration Review 11.
28. Regulation 2019/452, Art. 3(1).
29. *See*, *for instance*, the proposal of the Committee on International Trade: 'Member States may maintain, amend, *tighten up* or adopt mechanisms to screen foreign direct investments …' (European Parliament, Committee on International Trade, Draft Report, COM(2017)0487 – C8-0309/2017 – 2017/0224(COD), 7 Mar. 2018).
30. Regulation 2019/452, Art. 5(1).
31. It is noteworthy to mention that an amendment introduced under the auspices of the Committee on International Trade of the European Parliament – not retained in the final text – specified that the annual report must be provided, 'on the basis of information available to them, *and the efforts made to obtain that information*' (European Parliament, Committee on International Trade (n 29)).

Other provisions of the Regulation suggest that Member States will have to establish a more invasive FDI screening mechanism, not just for informational purposes. Under Article 6 of the Regulation, a Member State which considers that an FDI is likely to affect its security or public order may provide 'comments' to the Member State where the FDI is planned or completed.[32] Likewise, if it considers that an FDI is likely to affect security or public order in one or more Member States, the Commission may issue an 'opinion' addressed to the Member State in which the FDI is planned or has been completed.[33] In both cases, the host state of the investment 'shall give due consideration to the comments' of the other Member States and to the opinion of the Commission.'[34] Also, under Article 8 of the Regulation, where it considers that an FDI 'is likely to affect projects or programmes of Union interest on grounds of security and public order, the Commission may issue an opinion.'[35] The Member State where the investment is planned or has been completed 'shall take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed'.[36]

It seems that a Member State which has not instituted an FDI screening mechanism faces conflicting obligations. On the one hand, it may follow another Member State's 'comments' or the Commission's 'opinion' and condition or prohibit the transaction. However, adopting this approach without a clear legal basis in domestic law could constitute a violation of the obligation that FDI screening mechanisms shall be transparent and 'set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules'[37]. On the other hand, if the Member State disregards such comments or opinions, it fails to give them 'due consideration'. In the case of a programme of Union interest, a Member State without an FDI screening mechanism is not likely to be in the position to 'take utmost account of the Commission's opinion'. In both cases, the Commission may initiate infringement proceedings against that Member State for failure to fulfil its obligations under the regulation. An effective way to avoid this risk would be to establish a full-fledged domestic FDI screening mechanism in order 'to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments'.[38] Such mechanism would be triggered if the circumstances so require under Regulation 2019/452.

§7.05 A 'SOFT BLOCKING POWER' OF THE COMMISSION: AT LITTLE EXPENSE

From the EU's perspective, it seems at first sight that Regulation 2019/452 does not vest the European Commission with substantial responsibilities and prerogatives: Member

32. Regulation 2019/452, Art. 6(2).
33. Regulation 2019/452, Art. 6(3).
34. Regulation 2019/452, Art. 6(9).
35. Regulation 2019/452, Art. 8(1).
36. Regulation 2019/452, Art. 8(2)(c).
37. Regulation 2019/452, Art. 3(2).
38. Definition of 'screening' under Art. 2(3) of Regulation 2019/452.

States shall notify the Commission of their existing screening mechanisms,[39] and inform the Commission of any FDI undergoing screening.[40] The Commission may also request information from Member States[41] and, as pointed out above, issue 'opinions' to Member States where it considers that an FDI is likely to affect security or public order.[42] The Commission has the power to screen – in the restrictive sense of investigating, finding out information or assessing – but does not have the *de jure* power to block transactions on the grounds of security or public order in the same manner as set forth in the context of the Committee on Foreign Investment in the United States (CFIUS). There is no such thing as a *de jure* federal blocking power at the EU level.

Despite this apparently lax regulatory framework under which the European Commission intends to operate, it is possible to identify the various means by which it could exercise a *de facto* control over foreign investments within the EU.

In the practice of screening procedures, formal decisions rejecting an acquisition are fairly rare. For instance, since the creation of the CFIUS and more specifically since the Exon-Florio amendment – adopted in 1988 and granting the US President the power to block 'mergers, acquisitions or takeovers' – only five transactions have been rejected,[43] while many more have been abandoned at the initiative of the acquirer because of concerns raised by members of CFIUS during the review process.[44] Beyond pure formalism, the significance of administrative guidance and moral suasion in such circumstances should not be overlooked. This is perhaps where the future *de facto* power of the Commission under the Regulation is to be found. The Commission's opinion raising security or public order concerns would not bind Member States but would place on them an onus to explain why they are not following the Commission's opinion.[45] This 'soft blocking power' could be used as a strategic tool by the European Commission by modifying the schedule of acquisitions so as to generate a chilling effect for investors having ties with foreign governments and/or opportunities for potential European purchasers.

It also appears that the Commission's soft blocking power would come at little expense as there is an asymmetry of obligations between the loose framework under which the Commission would operate and the detailed obligations of Member States. For instance, there are transparency requirements for the latter but not the former. On the one hand, the Regulation does not specify that the Commission would have the duty to state reasons while issuing an opinion when it comes to project of Union interest. But, on the other hand, it requires the Member States 'to provide an

39. Regulation 2019/452, Art. 3(7).
40. Regulation 2019/452, Art. 6(1).
41. Regulation 2019/452, Arts 7(5) and 9.
42. Regulation 2019/452, Arts 6(3), 7(2) and 8(1).
43. James K. Jackson, The Committee on Foreign Investment in the United States (CFIUS), Congressional Research Service, RL33388, 13 Mar. 2018, p. 7, https://fas.org/sgp/crs/natsec/RL33388.pdf, accessed 25 Apr. 2018.
44. *Ibid*, p. 57.
45. Stephen Adams, Screen Tests: The EU's Proposed New Framework for Foreign Investment, 20 Nov. 2017.

explanation to the Commission in case its opinion is not followed'.[46] Moreover, given that the Commission's opinions would not be legally binding – at least from a formal standpoint – 'member States would ultimately be responsible for the decision to block a foreign investment'.[47]

This has two significant implications. First, from a sole EU law perspective, the soft law dimension of the Commission's intervention implies that its 'opinions' do not 'produce legal effects vis-à-vis third parties' within the meaning of Article 263 TFEU and could not be challenged before the CJEU within the framework of an action for annulment. Second, from an international law perspective, the blocking decision, even though stemming from a Commission's opinion, would be attributable to the Member State. If this decision constitutes a violation of an international investment agreement to which the EU is a party, the Member State concerned shall bear the financial responsibility arising from such a violation.[48] Eventually, the European Commission would be shielded from litigation in relation to its advisory function under the regulation.

§7.06 A FRAGILE AND QUESTIONABLE LEGAL BASIS

The Commission chose to use Article 207 TFEU as the exclusive legal basis of the regulation. It stated in its proposal: 'Foreign direct investment is included in the list of matters falling under the common commercial policy pursuant to Article 207(1) TFEU. In accordance with Article 3(1)(e) TFEU, the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area.'[49] This is also mentioned in the preamble of the Regulation.[50]

As pointed out above, this choice is debatable when it comes to areas that touch upon Member States' screening mechanisms codifying EU rules and principles on freedom of movement of capital. More fundamentally, there is somehow a disharmony – not to say a kind of contradiction – between, on the one hand, EU's exclusive competence with respect to FDI as part of the CCP and, on the other hand, the substance of the Regulation dealing with screening FDI on the grounds of security or public order, which have been the responsibility of Member States thus far. The Preamble of the Regulation itself mentions that it is 'without prejudice to sole responsibility of Member States for safeguarding their national security, as provided for in Article 4(2) TEU. It is also without prejudice to the protection of their essential security interests in accordance with Article 346 TFEU'.[51]

46. Regulation 2019/452, Art. 8(2)(c).
47. Lourdes Catrain and Eleni Theodoropoulou, 'EU Overview' (2017) 5 The Foreign Investment Regulation Review 84.
48. Article 3(1)(b) of Regulation 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJEU L 257/121, 28 Mar. 2014.
49. European Commission (n 1) p. 8.
50. Regulation 2019/452, Preamble [6].
51. Regulation 2019/452, Preamble [7].

The recent CJEU's Opinion 2/15 noted that Article 207(1) TFEU 'refers generally' to FDI 'without drawing a distinction according to whether the acts concern the admission or the protection of such investments'.[52] However, the Court did not suggest that the exclusive competence over FDI under Article 207 TFEU affects the right of Member States to take measures which are justified on grounds of public policy or public security under Article 65(1)(b) TFEU.[53]

Moreover, the Court pointed out that a provision in the EU-Singapore FTA recognising the right to apply measures necessary to maintain public order or to public security 'lays down not a commitment but the possibility of applying a derogation,' under which 'a member State will be able, for overriding reasons relating to public order, public security [etc.] to treat Singapore investors less favourably than its own investors'.[54] In a nutshell, Article 207 TFEU does not grant the EU an exclusive competence over matters concerning Member States' public policy or public security concerns when in relation to FDI. It rather implies, in combination with Article 65 TFEU, the possibility of inserting a public order and public security carve-out for Member States in EU international investment agreements.

While Article 207 TFEU is a questionable legal basis, the framework does not seem, at least as it currently stands, to effectively encroach Member State's latitude to regulate public policy or public security concerns. However, in light of the above, a full-fledged FDI screening mechanism that would be operated at the Commission's level could be contrary to EU treaties.[55] This must be kept in mind if the Commission's intent was to adopt a 'foot-in-the-door' strategy by devising a soft cooperation mechanism that would serve as a basis to expand its authority in the future.[56]

§7.07 A MISSED OPPORTUNITY CONCERNING COMPETITIVE NEUTRALITY IN FDI TRANSACTIONS

In light of the foregoing discussion about the fragile legal basis of the Regulation, one may be led to wonder whether Regulation 2019/452 constitutes a missed opportunity to address issues of reciprocity and of the level playing field in FDI, in particular the absence of specific rules dealing with non-EU investments benefiting from subsidised financing or other types of government support.

52. CJEU, Opinion 2/15 (n 27) [87].
53. *See also*, for a different perspective based on previous case law, Ramon Vidal Puig, 'The Scope of the New Exclusive Competence of the European Union with Regard to "Foreign Direct Investment"' (2013) 40 Legal Issues of Economic Integration 133, 157–160.
54. CJEU, Opinion 2/15 (n 27) [101].
55. The Commission also noted that the option 'to propose an FDI screening mechanism entirely operated at EU level […] could be very difficult to operate […] due to the fact that national security remains the sole responsibility of Member States' (Commission Staff Working Document Accompanying the Regulation Proposal, COM(2017)487, 2017/0224(COD), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0297&from=LT, accessed 25 Apr. 2018).
56. The UK noted that the proposed regulation 'sets an unhelpful precedent both in relation to security matters and in respect of other areas of Member State competence. Should even a small overstep be accepted in this case, it is possible that this could be taken as a precedent to expand further in future' (UK Department for International Trade (n 18) [22]).

With regards to the scope of the EU and Member States' competence with respect to FDI involving non-EU investors, a distinction may be drawn between two types of 'protective measures'. First, as previously mentioned, protective measures adopted for public policy or public security concerns fall within the scope of Member States' prerogatives.[57] Second, under Article 207(1) TFEU, the EU CCP already explicitly includes, in the field of international trade, 'measures to protect trade such as those to be taken in the event of dumping or subsidies'.[58] By way of analogy, the exclusive competence of the EU on this basis shall also include the safeguard of competitive neutrality in the area of FDI. Henceforth, the EU has exclusive competence to establish a screening mechanism aimed at targeting and sanctioning anti-competitive practices in the context of non-EU inward investment, for instance acquisitions made by subsidised foreign firms, through the support of government agencies, state-owned enterprises or sovereign wealth funds.[59]

The Regulation does not deal comprehensively with the issue of subsidised FDI and seems to treat it more as a political issue than an economic one. The Regulation indeed provides that 'in determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account, in particular … whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding'.[60] The presence of foreign sovereign investment and/or foreign sovereign funding can therefore provide a relevant indication to characterise an underlying foreign policy objective – and potentially a risk relating to public policy or public security for the host State. However, the Regulation does not discipline subsidised financing as an unfair competitive advantage from an economic perspective. While drafting the Regulation Proposal, the Commission ignored the joint request of France, Germany and Italy to address the issue of government subsidies in FDI when such countries stressed that 'due consideration should be given to the extent to which the actual acquisition is funded or co-financed by government-controlled or government-influenced agencies, and the extent to which the investor's bid for the target company clearly exceeds the market price'.[61] Such an initiative would have filled a vacuum, to the extent that it is not possible to challenge such economic distortions within the framework of the WTO Agreement on Subsidies and Countervailing Measures (applicable only to trade in goods) and of State aid rules under the TFEU (applicable only to EU Member States).

Interestingly, the US already envisaged to integrate competitive neutrality concerns in its FDI screening mechanism after China National Offshore Oil Corporation

57. *See also* Emanuel Castellarin, *La participation de l'Union européenne aux institutions économiques internationales* (Pedone 2017) 102.
58. *Ibid.*, 324–327.
59. Gary Hufbauer, Thomas Moll and Luca Rubini, Investment Subsidies for Cross-Border M&A: Trends and Policy Implications, United States Council Foundation Occasional Paper No. 2, April 2008, https://www.uscib.org/docs/usc_foundation_investment_subsidies.pdf, accessed 25 Apr. 2018.
60. Regulation 2019/452, Art. 4(2)(a).
61. European Investment Policy: A Common Approach to Investment Control (n 14).

(CNOOC)'s attempt to purchase Unocal in 2005. CNOOC received privileged funding from state-owned entities and its bid was significantly higher than Chevron's offer (the bid was eventually dropped because of vehement political attacks from the US Congress).[62] This led to a debate as to whether the jurisdiction of CFIUS should be extended. The Treasury was indeed 'considering, non-national security issues related to potential distortions from a larger role of foreign governments in markets'.[63] More recently, the US Congress has discussed possibilities of amending the CFIUS framework to better integrate the issue of subsidised financing.[64] One of the options would be to place 'some form of restriction or penalty on foreign direct investors who receive financing at below-market rates or receive some other form of subsidization directly or indirectly by their home government'.[65]

Undoubtedly, the EU has an exclusive competence to devise such an economic defence mechanism under Article 207 TFEU. This could also serve as a basis for addressing concerns with regards to reciprocity, notably the lack of reciprocal access to the Chinese market for EU companies.[66] It is somehow surprising that the EU chose not to go down that road with a crystal-clear legal basis and to ignore the concerns expressed by certain members of the European Parliament on these issues.[67]

62. Ben White, Chinese Drop Bid to Buy US Oil Firm, Washington Post, 3 Aug. 2005.
63. David H. McCormick Testimony Before the House Committee on Financial Services, 3 May 2008, https://www.treasury.gov/press-center/press-releases/Pages/hp861.aspx, accessed 25 Apr. 2018 (adding that 'Through inefficient allocation of capital, perceived unfair competition with private firms, or the pursuit of broader strategic rather than strictly economic return-oriented investments, sovereign wealth funds could potentially distort markets').
64. For instance, the Senate minority leader recently declared that 'Democrats believe that the CFIUS model should extend not just to national security but to economic security. When China attempts to steal our best technology by buying American companies – whether it is robotics, AI, or chips on Qualcomm – we ought to block it. China doesn't play fair' ([2018] 164(44) Congressional Record – Senate, 13 Mar. 2018, S1648).
65. James K. Jackson (n 43) 43–44.
66. Thilo Hanemann and Mikko Huotari, EU-China FDI: Working Towards Reciprocity in Investment Relations, Mercator Institute for China Studies (MERICS), 17 Apr. 2018, https://www.merics.org/en/papers-on-china/reciprocity, accessed 25 Apr. 2018.
67. *See*, for instance, European Parliament, Committee on International Trade, COM(2017)0487 – C8-0309/2017 – 2017/0224(COD), Draft Report by Franck Proust, 12 Apr. 2018, Amendment No. 284 (mentioning *inter alia* the following criteria for screening: 'the presence of significant funding, which may take the form of subsidies, or a political presence in its decision-making centres', 'the investment can reinforce or lead to a monopolistic structure or the control of a value chain', 'access to the sector in the foreign investor's country of origin is open, restricted or banned and there is no reciprocity or a level playing field'); European Parliament, Committee on International Trade, COM(2017)0487 – C8-0309/2017 – 2017/0224(COD), Draft Opinion by Reinhard Bütikofer, 2 Mar. 2018, Amendment No. 208 (mentioning *inter alia* the following criteria for screening: 'The degree of reciprocity in openness to foreign direct investments', 'whether the foreign investor: […] Receives substantial state aid').