

Assessing the EU Framework Regulation for the Screening of Foreign Direct Investment—What Is the Effect on Chinese Investors?

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Abstract

An increase of Chinese investment into the territory of the European Union has raised EU regulators' concerns regarding the public security of the EU. As a result, the new Framework Regulation 2019/452 establishing a framework for the screening of FDI into the EU was adopted as a legal instrument aimed at their control, applicable from 11 October 2020. Adopted within the scope of Common Commercial Policy of the EU, the Framework Regulation, however, might not become an effective legal measure, as its application by Member States both in light of the freedom of movement of capital and the relevant CJEU jurisprudence raises significant legal questions. This article broadly discusses the newly introduced cooperation mechanism between Member States and the European Commission, as well as the relevant effect of the Framework Regulation upon Chinese investment and the pending negotiations of the EU-China BIT.

Keywords

foreign direct investment – security screening – European Union – framework regulation – state-owned enterprises

1 Introductory Remarks

On 19 March 2019, Regulation (EU) 2019/452 of the European Parliament and of the Council established a framework for the screening of foreign direct

investment (FDI) into the territory of the European Union (EU).¹ Being adopted as regulation, it will be binding in its entirety and directly applicable in all Member States, as provided by Article 288 of the Treaty on the Functioning of European Union (TFEU).² Furthermore, the Framework Regulation constitutes the first legal basis for the regulation of FDI into the EU or, to be precise, the territory of its Member States. This is despite the fact that Member States have been the recipients of inward FDI (IFDI) since the formation of the European Economic Community (EEC), the direct predecessor of the EU.

The Influx of investment from the United States during the 1960s–1970s and from Japan and South Korea in the 1980s–1990s³ did not trouble EU regulators. Member States acknowledged the beneficial technological and know-how spill over effects of IFDI.⁴ EU regulators did not adopt legislative measures so as to “draw the boundaries and thresholds” that the foreign investors would have been obliged to fulfil.

However, the purpose of the Framework Regulation is to address growing concern among Member States regarding the number of acquisitions of EU companies by outside investors, in particular enterprises incorporated in the People’s Republic of China (PRC), either owned by the State (SOE) or private individuals (POE). The Framework Regulation addresses five strategic sectors, which shall be regarded as sensitive in light of the EU’s Common Commercial Policy (CCP). In fact, a significant majority of these sectors have been introduced in response to investment activity by Chinese investors. The Framework Regulation is regarded as a first step towards the establishment of the EU FDI screening mechanism with the direct objective of protecting strategic EU interests.⁵ However, in the author’s opinion, the Framework Regulation not only can be regarded as such, but moreover should be assessed as a political declaration

1 O.J. L 79I, 21.3.2019, p. 1–14.

2 Consolidated version of the Treaty on the Functioning of European Union, Article 288 para. 2, O.J. C 326, 26.10.2012, p. 47–390.

3 Haiyan Zhang, Daniel van den Bulcke, “China’s direct investment in the European Union: a new regulatory challenge?”, *Asia Europe Journal* 12 (2014): p. 159–177, 160.

4 Ibid.; see also Geoff Wu, “Are the current EU regulations on FDI screening mechanisms effective in dealing with the challenges of Chinese outbound FDI (OFDI) or are there alternative EU legislative documents which may prove to be more suitable for addressing concerns regarding Chinese OFDI?”, Dissertation for the Degree of L.L.M. International Commercial Law at the University of Nottingham (2019).

5 See Carlos Esplugues, “A Future European FDI Screening System: Solution or Problem?”, *Columbia FDI Perspectives*, no. 245 (February 11, 2019): p. 2, <http://ccsi.columbia.edu/files/2018/10/No-245-Esplugues-Final.pdf>; Stephan W. Schill, “The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further

of the EU legislator rather than an effective legal instrument, reflecting growing economic nationalism and protectionism in Europe.⁶ It will be argued that the adopted legal provisions do not specifically deter IFDI from PRC, since they do not impose any concrete legal obligations upon Member States nor provide for recourse at the EU level for decisions taken by Member States with regard to the allowance of the FDI.

2 Strategic Goals of EU Investment Policy

Further, the adoption of the Framework Regulation needs to be analysed in the light of the principle of reciprocity of investment, underlining the importance of fair and equal treatment of EU investors by third states. The screening of the IFDI into the EU may be limited in the event that third states grant EU investors better access to their markets. In addition, the adoption of the Framework Regulation may strengthen the EU's bargaining power in bilateral negotiations with either United States or PRC,⁷ so as to reach a better compromise with regard to the reciprocal treatment of investors. In the view of the author, the Framework Regulation will constitute such "bargaining chip", however it might also "backfire" and be used by the EU's trade partners to extend the access of foreign investors to the EU internal market. Notably, the adoption of the Framework Regulation might impede the final stage of negotiations between the EU and PRC regarding a Bilateral Investment Treaty, especially in the event of the United Kingdom's abandonment of the EU which has resulted in the (re)appearance of another powerful economic player in the region.

On one hand, the EU focuses on becoming the rule-maker in international investment policy, while pursuing its objectives as stipulated in Article 21 of the Treaty on European Union (TEU).⁸ This is particularly relevant with respect to "integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade"⁹ and promotion of "an international system based on stronger multilateral cooperation and good

External Investment Liberalization", *Amsterdam Law School Legal Studies*, Research Paper No. 2019-17 (2019): p. 3.

6 UNCTAD, "Chapter III. Recent Policy Developments and Key Issues", in *World Investment Report 2018: Investment and New Industrial Policies* (2018): p. 79, 83–84.

7 Schill, "The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization": p. 20.

8 Consolidated version of the Treaty on European Union, Article 21, O.J. C 326, 26.10.2012, p. 13–390.

9 TEU, Article 21(e).

global governance”.¹⁰ As such, the EU clearly intends to foster the development of international investment law with regard to protection of democracy, rule of law and human rights.

On the other hand, another strategic objective is strengthening its position in external relations, in particular its negotiation power. As such, the Framework Regulation constitutes one of the steps undertaken by the EU to protect the internal market from economic hazard and abuse by third state investors. This would not have been possible prior to the adoption of the Lisbon Treaty, when the EU demonstrated its regulatory influence through its participation in the World Trade Organisation (WTO) and Organisation for Economic Co-operation and Development (OECD).¹¹ Along with the adoption of the Lisbon Treaty, Member States decided upon the integration of FDI with the common commercial policy (CCP) of the EU. Despite the debatable scope of competence of the EU with regard to FDI, the Court of Justice of the European Union (CJEU) has taken the position that it ranges from the pre-establishment phase of an investment to substantive post-establishment protection.¹² At the same time, it is clear that the CCP does not cover portfolio investment¹³ and Investor-State Dispute Settlement.¹⁴ Thus, there are lingering doubts as to whether Free Trade Agreements (FTA) concluded by the EU with third states should be concluded as mixed agreements, where ratification of all the parties is a pre-condition for their definitive entry into force.¹⁵ Upon failure to gain consensus, there exist two possibilities: to either (1) renegotiate the whole FTA with the third state, or (2) provisionally ratify the FTA by Member States along with parallel presentation of a declaration as to which provisions will not be applied. Both solutions politically undermine the negotiation power of the EU, resulting in distrust from the counterparty-third state.

10 TEU, Article 21(h).

11 See general remarks Matthias Ruffert, “Capital, Free Flow of”, in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2014): paras. 17–19.

12 See CJEU, Opinion 2/15—Free Trade Agreement between the European Union and the Republic of Singapore (May16, 2017): paras. 78–110.

13 Ibid., paras. 238 and 243.

14 Ibid., para. 293.

15 See Hannes Lenk, “More Trade and Less Investment for Future EU Trade and Investment Policy”, *Journal of World Investment and Trade* 19 (2018): p. 305–319, 306 and 317–319; Guillame van der Loo, Ramses A. Wessel, “The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions”, *Common Market Law Review* 54 (2013): p. 735–770; Gesa Kübek, “The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States”, *European Foreign Affairs Review* 23 (2018): p. 21–40; see further Schill, “The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization”: p. 6.

Since the official Communication in July 2010, where the European Commission underlined the new objectives for FDI to become “the new frontier for the common commercial policy”¹⁶ and the EU’s “maximum leverage in negotiations”,¹⁷ the EU managed to conclude three FTAs: EU-Canada Comprehensive Economic and Trade Agreement (CETA),¹⁸ EU-Singapore FTA of 12 October 2018,¹⁹ EU-Vietnam FTA of 24 September 2018.²⁰ All of these FTAs fulfil the requirement of “effective and ambitious investment protection and market access”²¹ as well as it is the “investor protection ... [that] remain[s] the first priority of investment agreements.”²² Furthermore, they contain provisions regarding the critical change in Investor-State Dispute Settlement from investor-state arbitration to a permanently established investment court, characterized as two-tiered²³ and clearing the decks for a more far-reaching idea of the EU to establish the permanent international investment court at a multi-lateral level.²⁴ This notion is crucial for the following analysis of the Framework Regulation, as its factual application might constitute one of major bargaining chips freely handled by the EU to its most important counterparties, including specifically PRC and the pending negotiation of the EU-PRC BIT.

In addition, the European Commission’s proposal to correlate the investment policy with the general objectives of promoting sustainable development and human rights, as well as good governance as set out in Article 21 TEU,²⁵ although of “decent reflection”, factually lack the important

16 European Commission, “Towards a Comprehensive European International Investment Policy”, COM(2010)343 final (July 7, 2010): p. 2.

17 Ibid., p. 11.

18 Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, O.J. L 11/23 (October 30, 2016).

19 Free Trade Agreement between the European Union and the Republic of Singapore, 2018/0094 (NLE), 7972/1/18 REV 1 (October 12, 2018).

20 Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (August 4, 2015), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

21 Council of the European Union, “Conclusions on a Comprehensive European International Investment Policy”, 3041st Foreign Affairs Council meeting (October 25, 2010): para. 16.

22 European Parliament, “Resolution of 6 April 2011 on the Future European International Investment Policy”, (2010/2203(IN1)), 2012 O.J. L 296 E/34, para. 15.

23 CETA, art. 8.18 and 8.21–8.43; EU-Singapore Investment Protection Agreement, Chapter 3, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961>; EU-Vietnam Investment Protection Agreement, Chapter 3, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

24 G.A., *Submission of the European Union and its Member States to UNCITRAL Working Group III. Possible reform of investor-State dispute settlement (ISDS)*, U.N. Doc. A/CN.9/WG.III/WP.159 (January 24, 2019), <https://undocs.org/en/A/CN.9/WG.III/WP.159>.

25 European Commission, “Towards a Comprehensive European International Investment Policy”: p. 9.

notion of enactment. To the contrary, factual motives underlying the adoption of the Framework Regulation are absent adequate considerations for sustainable development. As has been underlined by *Guenther Oettinger*, EU Digital Economy Commissioner, “[e]verybody has to play by the same rules. Clearly, there are many countries, including big ones such as China, that make market access or corporate takeovers difficult or effectively impossible.”²⁶ This statement reflects the necessity of reciprocity in international investment relations between major players, including PRC whose markets access is of significant importance to the EU.²⁷

However, it also raises doubts as how sustainable development in the EU is preserved by the Framework Regulation. Since Article 21 TEU is only of internally binding provision for the Member States and imposes certain obligations upon the EU, both sustainable development and fulfilment of the principle of reciprocity should be addressed in the BIT negotiations between the EU and PRC and not the Framework Regulation. Indeed, the European Commission has itself indicated that “[i]n view of the rapidly changing economic reality, growing concerns of citizens and Member States, the proposal is exceptionally presented without an accompanying impact assessment”.²⁸ As such, it might be asked whether the EU has complied with its obligations stipulated in Article 21 TEU by not evaluating the due impact assessment with regard to the IFDI, in particular with regard to sustainable development of the EU and its Member States.

3 Nature and Concerns over Chinese Investment into the EU

The Chinese IFDI into the EU, along with the PRC’s economic statecraft, have drawn not only considerable academic attention,²⁹ but also the concern of

26 Shenzhen Daily, Germany seeks tighter control over foreign investment (October 25, 2016, 08:53 A.M.), http://www.szdaily.com/content/2016-10/25/content_14054346.htm.

27 Schill, “The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization”: p. 10.

28 European Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union”, SWD (2017) 297 final (2017): p. 10, <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF>.

29 See. Robert D. Blackwill, Jennifer M. Harris, *War by Other Means: Geoeconomics and Statecraft* (Belknap Press: An Imprint of Harvard University Press, 2016); Mingjiang Li ed., *China’s economic statecraft: Co-optation, cooperation and coercion* (WSPC, 2017); William J. Norris, *Chinese economic statecraft: Commercial actors, grand strategy, and state control* (Cornell University Press, 2016).

national authorities of Member States. Therefore, the analysis in this section will be divided into three sub-sections. First, the development of PRC's statecraft is a foothold of the legal analysis. Second, special emphasis should be put on the development of IFDI into the EU, in particular through the analysis of recent cases and decisions of national authorities; and, third, how the adoption of the Framework Regulation is correlated with "combating" the development of Chinese IFDI.

3.1 *Chinese Economic Statecraft*

To commence the analysis, a proper definition of economic statecraft shall be presented. This should be understood as "state manipulation of international economic activities for strategic purposes".³⁰ With regard to the Chinese perspective, *Reilly* pointed out that PRC's economic activities in the EU are dependent on three strategies: (1) reciprocity; (2) strategy engagement; and (3) designing each strategy to "advance a specific type of policy objective".³¹ Nonetheless, in the author's view, there should be added three more factors, *i.e.* significant role played by the SOEs, as well as economic expansion of companies incorporated in PRC due to better allocation of resources and use of markets,³² and the desire of the PRC's authorities to make the state a "globally competitive manufacturing superpower largely independent of foreign technology",³³ as pronounced by the PRC in 2015 along with the "Made In China 2025" strategy.

PRC's authorities aim to have at least one domestically incorporated company in every crucial economic field that would be able to compete with international giants. It has achieved this goal in certain areas such as telecommunication (*e.g.* 5G mobile transfer as proposed by Huawei), banking (*e.g.* Industrial and Commercial Bank of China) or insurance service (in particular PingAn).³⁴ However, there remain certain economic markets where PRC's companies have not (yet) been classified as important players, *e.g.* in the area

30 William J. Norris, *Chinese economic statecraft: Commercial actors, grand strategy, and state control*: p. 4.

31 James Reilly, "China's economic statecraft in Europe", *Asia Europe Journal* 15, Issue 2 (2017): p. 173–185, 173.

32 Yushuan Li, "China's Go out Policy—A review on China's promotion policy for foreign direct investment from a historical perspective", Centre for Economic and Regional Studies of the Hungarian Academy of Sciences—Institute of World Economics Working Paper No. 244 (2018): p. 13.

33 Max J. Zenglein, Anna Holzmann, "Evolving Made In China 2025 China's industrial policy in the quest for global tech leadership", *Merics Papers on China* No. 8 (2019): p. 7, https://www.merics.org/sites/default/files/2019-07/MPOC_8_MadeinChina_2025_final_3.pdf.

34 According to Brand Finance's Global 500 report for 2020, Huawei entered the top 10 of most valuable brands chart, ICBC reached 6th position and PingAn was classified as

of legal services—despite the fact that in the domestic arena Chinese legal firms are considered to provide highly professional legal services. This general view has not yet been translated internationally, including within the EU. This might be a consequence of the fact that the majority of PRC's businesses in the EU have been concentrated on strategic asset and market seeking,³⁵ and legal services are not considered as such.

Key actors in the PRC's economic statecraft are SOEs, which are considered to play a significant economic role.³⁶ SOEs are to be considered the core of the PRC's domestic economy and means of implementation of Chinese global strategies,³⁷ including IFDI into the EU. *Morrison* points out that the marrow of Chinese SOEs global expansion is the promotion of their international operation and enhancement of international competitiveness.³⁸ On the contrary, EU actors have expressed concerns over the potential political purposes of the PRC's authorities in the process of continued IFDI into the EU.³⁹ *Hooijmaaijers* further indicates that there is a risk of "state manipulation of international economic activities for strategic purposes."⁴⁰

However, certain arguments can be made in support of a permissive approach to most Chinese investment. First, as it will be indicated below in the analysis of chosen cases, the IFDI into the EU made by investors from PRC do not necessarily result in the immediate integration of the acquired companies with the investors. Second, there is no declared policy of Chinese IFDI that indicates sinister political intentions of the PRC's authorities to threaten the

9th most valuable brand worldwide, https://brandfinance.com/images/upload/brand_finance_global_500_2020_preview.pdf.

- 35 See Jeremy Clegg, Hinrich Voss, "Inside the China-EU FDI Bond", *China & World Economy* 19, Issue no. 4 (2011): p. 99–101; see further Geoff Wu, "Are the current EU regulations on FDI screening mechanisms effective in dealing with the challenges of Chinese outbound FDI (OFDI) or are there alternative EU legislative documents which may prove to be more suitable for addressing concerns regarding Chinese OFDI?": p. 7.
- 36 Yongheng Deng, Randal Morck et al., "Monetary and Fiscal Stimuli, Ownership Structure, and China's Housing Market", National Bureau of Economic Research Working Paper No. 16871 (2011): p. 1, 20.
- 37 Ming Du, "The Regulation of Chinese State-owned Enterprises in National Foreign Investment Laws: A Comparative Analysis", *Global Journal of Comparative Law* 5 (2016): p. 118–145, 119.
- 38 Wayne M. Morrison, "China's Economic Conditions", Congressional Research Service, (May 4, 2013): p. 20.
- 39 Frank Bickenbach, Wan-Hsin Liu, "Chinese Direct Investment in Europe—Challenges for EU FDI Policy", 19 CESifo Forum (2018): p. 15, <https://www.ifo.de/DocDL/CESifo%20Forum-2018-4-bickenbach-liu-chinese-FDI-december.pdf>.
- 40 Bas Hooijmaaijers, "Blackening Skies for Chinese Investment in the EU?", *Journal of Chinese Political Science* 24 (2019): p. 451.

EU's integrity or public security. Third, as presented in *Zhao's* analysis, there have been examples of Chinese SOEs undertaking investment activities independently from governmental pressure.⁴¹ On the contrary, "China's path in overseas investment is following a similar pattern to the US and Japan."⁴²

Furthermore, certain scholars have argued that POEs now commonly act on behalf of the PRC's authorities, instead of SOEs, in the area of FDI.⁴³ According to the work of *Milhaupt* and *Zheng*, approximately 5% of Chinese POEs are controlled by the State through the phenomenon of 'state capture'.⁴⁴ As such, "drawing a stark distinction between SOEs and (...) (POEs) misperceives the reality of China's institutional environment (...)." ⁴⁵ Moreover, the institutional environment does not allow the drawing of unequivocal differences between SOEs and POEs in the areas such as market dominance, receipt of state subsidies, execution of state purposes, or proximity to the central government.⁴⁶ Nevertheless, there is no effective legal basis at the EU level (including the Framework Regulation) that would provide an objective test allowing for the determination of state control over POEs, especially one exercised by the PRC. Moreover, suitable conclusions with regard to PRC's statecraft are dependent on the analysis of Chinese IFDI into the EU.

3.2 *Chinese IFIDs into the EU*

To commence the analysis, there is a necessity to present the relevant historical background of Chinese IFDI into the EU. Until 2009, such investment constituted barely 1% of total flows into the EU.⁴⁷ While there was steady growth from 2003 to 2011, when PRC's IFDI stock into the EU rose from 1.46% to

41 Zhao Hongtu, "The myth of China's overseas energy investment", *East Asia Forum Quarterly* (March 4, 2015), <https://www.eastasiaforum.org/2015/03/04/the-myth-of-chinas-overseas-energy-investment/>.

42 Ibid.

43 See. Sophie Meunier, Brian Burgoon et al., "The politics of hosting Chinese investment in Europe—An introduction", *Asia Europe Journal* 12, Issue 1 (2014): p. 143–158; Thilo Hanemann, Mikko Huotari, "A new record year for Chinese outbound investment in Europe", *Merics Papers on China* (February 2016): p. 5, https://www.merics.org/sites/default/files/2018-07/COFDI_2016_web.pdf; Alessia A. Amighini, Roberta Rabellotti et al., "Do Chinese state-owned and private enterprises differ in their internationalization strategies?", *China Economic Review* 27 (2013): p. 312–325.

44 Curtis J. Milhaupt, Wentong Zheng, "Beyond ownership: State capitalism and the Chinese firm", *Georgetown Law Journal* 103, Issue 3 (2015): p. 665–722.

45 Ibid., p. 665.

46 Ibid., p. 665.

47 Jeremy Clegg, Hinrich Voss, "Inside the China-EU FDI Bond": p. 100.

5.76%,⁴⁸ the number of takeovers made by Chinese investors in 2018 within the territory of Europe, and not only EU, has dropped by 21% when compared to 2017. Moreover, the investment volume dropped by 46% and was estimated around USD 31.2 million.⁴⁹ According to *Yi Sun*, Head of China Business Services for Germany, Austria and Switzerland at EY, there are several factors determining the decline: (1) desire of the government of PRC to prevent the outflow of cash, (2) concentrating the investment in so-called core sectors, (3) economic slump in PRC, (4) growing opposition to investors from PRC in certain areas of Europe.⁵⁰ Nonetheless, at the same time it shall be noted that, indeed, the FDI made by investors from PRC have become diversified throughout the years, ranging from large investment into the automotive sector in 2014 and 2015, to transport, utilities and infrastructure in 2017,⁵¹ as well as into communications technology and energy.⁵² In 2018 these types of investments have been defunded to a significant extent, in particular with respect to transport.⁵³

The EU has become cautious about IFDI from PRC since the acquisition of KUKA Aktiengesellschaft, a German robotics company, by Midea, a Chinese home-appliances technological giant, in 2016.⁵⁴ From August 2015, when Midea acquired 5.4% of KUKA's stock, continuing into February 2016 to reach 10.2%,⁵⁵

48 Haiyan Zhang, Daniel van den Bulcke, "China's direct investment in the European Union: a new regulatory challenge?": p. 161.

49 EY, "Acquisitions in Europe by Chinese companies continue to fall sharply—significant increase in Switzerland", Press Release (February 5, 2019): p. 1, [https://www.ey.com/Publication/vwLUAssets/ey-news-release-acquisitions-in-europe-by-chinese-companies-continue-to-fall-sharply-significant-increase-in-switzerland/\\$FILE/ey-news-release-acquisitions-in-europe-by-chinese-companies-continue-to-fall-sharply-significant-increase-in-switzerland.pdf](https://www.ey.com/Publication/vwLUAssets/ey-news-release-acquisitions-in-europe-by-chinese-companies-continue-to-fall-sharply-significant-increase-in-switzerland/$FILE/ey-news-release-acquisitions-in-europe-by-chinese-companies-continue-to-fall-sharply-significant-increase-in-switzerland.pdf).

50 *Ibid.*, p. 2.

51 Thilo Hanemann, Mikko Huotari, and Agatha Kratz, "Chinese FDI in Europe: 2018 Trends and Impact of new Screening Policies. A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS)", *Merics Papers on China* (March 2019): p. 12–13, https://www.merics.org/sites/default/files/2019-03/190311_MERICS-Rhodium%20Group_COFDI-Update_2019.pdf.

52 Thilo Hanemann, Mikko Huotari, "Record Flows and Growing Imbalances. Chinese Investment in Europe in 2016", *Merics Papers on China* no. 3 (January 2017): p. 5, https://www.merics.org/sites/default/files/2018-07/MPOC_3_COFDI_2017_web.pdf.

53 *Ibid.*, p. 13.

54 KUKA signs investor agreement with Midea and recommends acceptance of the offer, Press release (June 28, 2016), <https://www.kuka.com/-/media/kuka-corporate/documents/press/news/2016/06/press-release-kuka-signs-investor-agreement-with-midea-and-recommends-acceptance-of-the-offer.pdf>.

55 Reuters, *China's Midea raises stake in Germany's Kuka to 10.2 pct.*, (February 4, 2016, 11:01 AM), <https://www.reuters.com/article/kuka-ma-midea-group/chinas-midea-raises-stake-in-germanys-kuka-to-10-2-pct-idUSFWN15j0oR>.

the acquisition process raised concerns of leading German politicians. *Markus Ferber*, Member of the European Parliament, expressed that there exists a “need to think about whether (...) to give such a key enterprise to the Chinese, or try to keep it in the European hands.”⁵⁶ Following that, German chancellor *Angela Merkel* stated that Germans “expect reciprocity on the Chinese side too.”⁵⁷ Further, various political voices called for European investment in KUKA which could have effectively stopped the process conducted by Midea, yet no European investor was found that could have equalled the Chinese bid. As a result, on 28 June 2016 KUKA and Midea reached a fixed 7.5 years investment agreement, according to which the latter committed not to delist KUKA and not to conduct corporate reorganization of KUKA, which is the standard procedure of Chinese investors in such agreements. Eventually, on 8 August 2016, the transaction was approved by German authorities, and a spokesman for the German Ministry of Economics admitted that no evidence was presented which would confirm that the transaction threatened the public security and order of Germany.⁵⁸

Another case that requires brief analysis is the failed acquisition of the German semiconductor company Aixtron by Fujian Grand Chip Investment Fund LP, which in May 2016 offered up to €676 million for the company facing financial troubles after its share price significantly dropped in 2015. While the CEO of Aixtron expressed satisfaction after receiving the offer from the Chinese investor,⁵⁹ German authorities withdrew a previously granted clearance certificate to FGC and decided to reopen the review proceedings.⁶⁰ The decision of German screening authorities followed the United States’ concerns over the potential usage of Aixtron’s equipment for the production of

56 Guy Chazan, *Berlin and Brussels wary of Chinese robotics bid*, Financial Times (June 13, 2016), <https://www.ft.com/content/acbda1cc-3186-11e6-bd40-04585c31b153>.

57 Ibid.

58 Deutsche Welle, *Berlin approves Kuka sale to Midea* (August 17, 2016), <https://www.dw.com/en/berlin-approves-kuka-sale-to-midea/a-19479483>.

59 Stephan Scheuer, Anja Müller, *Chinese Firm Bids €676 Million for Aixtron*, Handelsblatt (May 24 2016, 10:08 AM), <https://www.handelsblatt.com/today/companies/fujian-grand-offer-chinese-firm-bids-676-million-for-aixtron/23538068.html?ticket=ST-3130486-pk56BdMUozWtnyZeXss-ap5>.

60 Aixtron, *AIXTRON SE: Withdrawal of Clearance Certificate and reopening of review proceedings by the Ministry of Economics pertaining to the takeover by Grand Chip Investment GmbH* (October 24, 2016, 06:39 AM), https://www.aixtron.com/en/investors/news/AIXTRON%20SE%20Withdrawal%20of%20Clearance%20Certificate%20and%20reopening%20of%20review%20proceedings%20by%20the%20Ministry%20of%20Economics%20pertaining%20to%20the%20takeover%20by%20Grand%20Chip%20Investment%20GmbH_n894.

electronic chips for PRC's nuclear program.⁶¹ This transaction further drew concerns at the EU level regarding IFDI into the EU from PRC. First, *Sigmar Gabriel*, Vice Chancellor and Economy Minister of Germany, clearly underlined the necessity for reciprocal relations with the PRC by stating that “[i]f you want to invest in other parts of the world, you can’t block those countries from investing in your own.”⁶² Following this reciprocity issue, *Guenther Oettinger*, EU Digital Economy Commissioner, underlined that “[i]t’s absolutely right to initiate this debate at the European level. Everybody has to play by the same rules. Clearly, there are many countries, including big ones such as China, that make market access or corporate takeovers difficult or effectively impossible.”⁶³ Moreover, German authorities were not alone in expressing concern over the FGC’s investment in Aixtron; U.S. President Barack Obama decided upon banning the acquisition of Aixtron’s subsidiary, Aixtron Inc.⁶⁴ As a result, the Chinese investor dropped the original transaction and German authorities officially closed the screening procedure, as there was nothing to subject to the screening analysis.

However, two important remarks should be made about Aixtron’s case. First, it cannot be unequivocally assessed how the screening procedure conducted by the German authorities would have ended in the absence of the intervention of U.S. authorities. Hence, supposition might be made that there might have occurred the final decision according to which there were no threats to German public security resulting from this transaction. Yet, the U.S. authorities’ interference successfully deterred FGC from continuing the negotiations and subjection to the screening mechanism. Second, since the transaction would have been a positive result for Aixtron itself, its further investigation by German authorities despite FGC’s withdrawal could have allowed for a detailed impact assessment to be made by the European Commission for the purposes of introducing the Framework Regulation, which did not eventually take place.⁶⁵

61 Thomas Sigmund, *U.S. Said to Intervene in Aixtron Deal*, Handelsblatt Exclusive (October 26, 2016, 06:00 PM), <https://www.handelsblatt.com/today/politics/handelsblatt-exclusive-u-s-said-to-intervene-in-aixtron-deal/23541918.html>.

62 Die Welt, *Gabriel wirft China Foulspiel bei Übernahmen vor* (October 29, 2016), <https://www.welt.de/wirtschaft/article159131595/Gabriel-wirft-China-Foulspiel-bei-Uebernahmen-vor.html>.

63 David McLaughlin, *Obama Blocks Chinese Takeover of Aixtron as U.S. Security Risk*, Bloomberg (December 2, 2016, 23:01 PM), <https://www.bloomberg.com/news/articles/2016-12-02/obama-blocks-chinese-takeover-of-aixtron-as-u-s-security-risk>.

64 Ibid.

65 European Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union”: p. 10.

3.3 *Influence of the Framework Regulation upon Chinese IFDI into the EU—Assumptions and Possible Effects*

In spite of the submission by the European Commission in the proposal of the Framework Regulation that the EU itself is committed to “build an open, sustainable, fair, and rules-based order through international cooperation”⁶⁶ and wants to “maintain an open investment environment”,⁶⁷ the provisions of the Framework Regulation may not be sufficient to pursue these goals effectively. Nonetheless, there are clearly-identifiable, long-term policies of the Framework Regulation.

First, the adoption of the Framework Regulation allows the European Commission to establish a unified approach towards foreign FDI (not only Chinese).⁶⁸ Yet, on the other hand, it is not entirely enforceable at EU level and is reliant on Member States.⁶⁹ Furthermore, since Chinese corporations tend to target Southern and Eastern Member States,⁷⁰ in particular those which are less developed than Germany or France, their approach to IFDI might indeed interfere with the public security of the EU, yet at the same time boost their economic development, impeding the attempts of the EU regulators to adopt a unified approach towards third state investors. As such, the provisions of the Framework Regulation might be abused by those Member States as a bargaining chip against the EU, *i.e.* they would eventually block the IFDI threatening the EU’s public security in exchange for more preferential treatment at the European stage, regarding their share in EU’s budget or abandonment of certain activities against them, such as the long-lasting contentious issues of compliance in Poland.

Second, despite the fact that the Framework Regulation does not constitute an effective measure explicitly seeking to reduce growing IFDI into the EU, in particular those from PRC, *Schill* points out that its adoption would allow the EU to negotiate its screening powers in exchange for fair access to third state’s markets granted to the EU investors on the basis of reciprocity. Nonetheless, as analysed below,⁷¹ Article 63 TFEU, as a primary source of law of the EU,

66 Ibid., Legislative Financial Statement.

67 Ibid., p. 3.

68 Schill, “The European Union’s Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization”: p. 20.

69 Framework Regulation, Article 6(g) *a fortiori*.

70 Thilo Hanemann, Mikko Huotari, “Chinese FDI in Europe and Germany Preparing for a New Era of Chinese Capital. A Report by the Mercator Institute for China Studies and Rhodium Group”, *Merics Papers on China* (June 2015): p. 14, https://rhg.com/wp-content/uploads/2015/06/ChineseFDI_Europe_Full.pdf.

71 See below, Section 3.

effectively constitutes the internal obstacle for the EU to strengthen its negotiation position towards third states counterparties, including the BIT with the PRC. To the contrary, third states might “press on” certain provisions in the FTAs which would allow their nationals to effectively evade “excessive” screening of the IFDI. As such, the aforementioned two factors further undermine the significance of the Framework Regulation.

Finally, the question arises as to how the Framework Regulation could effectively improve the already existing screening in the Member States in comparison to the practice of national authorities before its adoption. As shown in the example of KUKA’s acquisition by Midea, despite strong political opposition towards the positive finalisation of the agreement, the due process of law applied within the framework of German national screening law did not result in a negative finding regarding the transaction. Therefore, it is unclear whether the introduction of the cooperation mechanism, as analysed below, *de facto* improves the decision-making process of national authorities. And, as underlined by Tingley, those are the political actors that eventually are most likely to actively protest against Chinese FDI in security sensitive industries, especially in the event that EU investors are prohibited from equal access to PRC’s market,⁷² as a result of the fair application of the principle of reciprocity. Bearing in mind questionable differences between Chinese SOEs and POEs when it comes to the execution of national policies, it is highly likely that from the perspective of the EU, as the recipient of the IFDI, both these types of investors will be subjected to exactly the same type of screening mechanism. Hence, significant issues might arise with regard to the notion of governmental control over such foreign investors as stipulated in Article 4(2)(a) of the Framework Regulation. In the event of a positive assessment that the foreign investor from PRC, even if incorporated at the state of origin as a POE, might eventually be recognised as acting under the control of PRC’s government and as a result banned from conducting an FDI. There, however, arise two practical issues related to that legal problem, *i.e.* (1) the decision regarding investment lies within competences of the national authorities of the selected Member State, and (2) the decision is undertaken with regard to one particular type of an FDI and does not preclude such investor either from investing in a different area of the market or acquiring stocks in smaller European corporations, concurrently exempting the transaction from the likelihood of affecting public security or public order.

72 Dustin Tingley, Christopher Xu et al., “The political economy of inward FDI: Opposition to Chinese mergers and acquisitions”, *Chinese Journal of International Politics* 8, Issue 1 (2015): p. 27–57.

In addition, it is of vital significance to identify the Framework Regulation as a background for the BIT negotiations between the EU and PRC. While the former concentrates on the adoption of certain legal rules allowing for the exchange of information between Member States as to applied screening mechanisms,⁷³ the BIT would concentrate on the creation of an investment environment between the EU and PRC, as well as legal certainty in that matter.⁷⁴ Hence, the provisions of the BIT, mutually developed by the parties, might eventually lessen the cooperation mechanism between Member States. Also, as pointed out by *Anders Fogh Rasmussen*, former Danish Prime Minister and former Secretary General of NATO, “[a] Europe-wide early warning system [Framework Regulation] will not make up for the lack of national screening rules in 15 EU states. The measures are discretionary and far less stringent than those we see in any other G7 nation.”⁷⁵ Hence, the Framework Regulation may not effectively address the concerns raised with respect to Chinese investors, in the absence of a consensus at the national level as to the appropriate screening required.

4 Subject, Scope and Regime of the Framework Regulation

The Framework Regulation has been adopted by the EU legislator, based upon the notion of the CCP,⁷⁶ with the general purpose of regulating the coordination of the screening of FDI throughout the whole territory of the EU. The wording of Article 207(1) TFEU stipulates that FDI falls within the scope of the CCP of the EU,⁷⁷ and the exclusive competence of the EU with respect to the CCP.⁷⁸ However, pursuant to Article 346(1)(b) TFEU:

any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war

73 European Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union”: p. 2.

74 See Sophie Meunier, “Divide and conquer? China and the cacophony of foreign investment rules in the EU”, *Journal of European Public Policy* 21, Issue 6 (2014): p. 996–1016, 1008.

75 Anders Fogh Rasmussen, *China's investment in Europe offers opportunities—and threats*, Financial Times (November 20, 2017), <https://www.ft.com/content/9e7428cc-c963-11e7-8536-d321d0d897a3>.

76 Framework Regulation, Preamble rec. 6.

77 TFEU, Article 207(1).

78 TFEU, Article 3(1); see also Framework Regulation, Preamble rec. 6.

material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

As such, the identification of the Framework Regulation as establishing a framework for cooperation between Member States of the EU shall be regarded as a successive step taken by the EU legislator with regard to the already existing national screening mechanisms adopted by 14 Member States⁷⁹ before 19 March 2019 (the date of adoption of the Framework Regulation). Although mentioned in Article 207(1) TFEU, FDI has not been classified until for the purposes of the Framework Regulation. Its article 2(1) defines it as an:

investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investment which enable effective participation in the management or control of a company carrying out an economic activity.⁸⁰

The legal definition covers basically every type of investment, either executed by means of financial aid, merger of undertakings, acquisition of (effective) control over an undertaking, or any facilitation of capital to entrepreneurs operating within the territory of the EU. Nonetheless, the fact that the EU legislator has not decided upon providing the definite scope of activities that fall into the definition of an FDI does not prejudice the FDI itself from being definable. This process is aided by the interpretation of Article 63(1) TFEU. It is clear from its *verbatim* interpretation that “all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”⁸¹ As a result, this provision stipulates a right to a non-discriminatory market also to residents of third states, so as to “achieve the objective of free movement of capital (...) to the greatest extent possible.”⁸² Analysed previously by the CJEU, this provision has been acknowledged to cover both portfolio investment and other economic activities which are to

79 European Commission, “List of screening mechanisms notified by Member States. Last update 28 February 2020”, https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.

80 Framework Regulation, Article 2(1).

81 TFEU, Article 63(1).

82 TFEU, Article 64(2).

be qualified as FDI.⁸³ Therefore, the definition of FDI shall be supplemented with following list of economic activities listed in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty of Rome (predecessor of Article 63 TFEU):

I – DIRECT INVESTMENT

1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.
2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.
3. Long-term loans with a view to establishing or maintaining lasting economic links.
4. Reinvestment of profits with a view to maintaining lasting economic links.

A – Direct investment on national territory by non-residents

B – Direct investment abroad by residents

II – INVESTMENT IN REAL ESTATE (not included under I)

A – Investment in real estate on national territory by non-residents

B – Investment in real estate abroad by residents⁸⁴

The CJEU has widely acknowledged that Directive 88/361/EEC can be used to determine the scope of Article 63 TFEU.⁸⁵ Bearing in mind the relevance of this Article to the purposes of the Framework Regulation, the scope of the definition of the FDI should be interpreted with regard to that legal background. Finally, as foreign investors can benefit from the freedom of movement of capital granted by Article 63 TFEU, the factual negotiation power of the EU when concluding FTAs with third states with regard to the principle of reciprocity is weakened by the primary sources of the EU legal system. As such, the EU, while conducting negotiations with third states, including the BIT with PRC, is a hostage of its own market's openness to foreign investors. Therefore,

83 See Joined Cases C-282/04 and C-283/04, *Commission v. Netherlands*, 28 September 2006, para. 19, where CJEU identified the direct investment to take the form of "participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control" and portfolio investment as "acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking."

84 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, O.J. L 178, 8.7.1988, p. 5–18, Annex I.

85 See Joined Cases C-52/16 and C-113/16, *Segro and Horváth*, 6 March 2018, para. 56; Case C-370/05, *Festersen*, 25 January 2007, para. 23; Case C-222/97, *Trummer and Mayer*, 16 March 1999, para. 21; Case C-464/98, *Stefan*, 11 January 2001, para. 5; Case C-386/04, *Centro di Musicologia Walter Stauffer*, 14 September 2006, para. 22.

the adoption of a Framework Regulation aimed at the *de facto* unification of screening mechanisms of the Member States, however lacking legal measures for the effective enforcement, further weakens the EU's position in such negotiations and allows third states to effectively avoid broad cooperation with regard to the principle of reciprocity. As a consequence, the logical question arises as to why would third states would allow the EU investors to freely access all areas of their domestic market when their investors will face only slight limitations on the territory of the EU?

4.1 *Exceptions of Public Policy and Public Security*

Pursuant to Article 63(1) TFEU, all prohibitions on the movement of capital are prohibited, which also applies to residents of third countries. Nevertheless, Article 65(1)(b) TFEU allows the Member States to “take measures which are justified on grounds of public policy or public security”⁸⁶ and which do not “constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments (...)”⁸⁷ Moreover, Recital 4 of the Preamble to the Framework Regulation confirms that the “[Framework] Regulation is without prejudice to the right of Member States to derogate from the free movement of capital as provided for in point (b) of Article 65(1) TFEU.” These exceptions have been analysed by the CJEU. In the judgment of 23 October 2007, Case C-112/05, *Commission v. Germany*, it has been underlined that they shall be regarded “to the extent that there are no [EU] harmonising measures providing for measures necessary to ensure the protection of those interests.”⁸⁸ As such, CJEU classified these interests as covering environmental protection, town and country planning and consumer protection.⁸⁹ Nonetheless, in the same judgment, the CJEU excluded from this scope purely economic interest.⁹⁰ Naturally, the national measures aimed at protection of legitimate interests must “observe the principle of proportionality, which requires 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.”⁹¹ Further, the CJEU noted that “public policy and public security

86 TFEU, Article 65(1)(b).

87 TFEU, Article 65(3).

88 Case C-112/05, *Commission v. Germany*, 23 October 2007, para. 72.

89 Case C-400/08, *Commission v. Spain*, 24 March 2011, para. 74.

90 *Ibid.*, para. 74.

91 Case C-112/05, *Commission v. Germany*, 23 October 2007, para. 73; see also Case C-483/99, *Commission v. France*, 4 June 2002, para. 45; Joined cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera and others*, 14 December 1995, para. 25; Case C-54/99, *Association Église de Scientologie de Paris, Scientology International Reserves Trust*, 14 March 2000, para. 18.

may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.”⁹²

4.2 *Right to Recourse*

Moreover, individuals affected by restrictive measures that cannot be legally justified must be granted with effective legal remedies.⁹³ With respect to remedies, the Framework Regulation in its Article 3(5) grants foreign investors and concerned undertakings with the right to seek recourse against a screening decision of national authorities. The Framework Regulation itself does not provide for a specific procedure allowing them to enjoy such a right. As such, the recourse can only be made on the basis of legal instruments allowed by the domestic legislation of a particular Member State. Hence, the right to seek remedies may be effectively enforced only in those Member States that have introduced not only domestic legislation for the screening of FDI, but those which provide for such right to recourse.

4.3 *The Relevance of Merger Regulation for the Screening of FDI*

Finally, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation) is also highly relevant to the screening of FDI in the territory of the EU.⁹⁴ The purpose of Merger Regulation is the determination as to whether the mergers and acquisitions of companies incorporated in the EU are compatible with the internal market and do not preclude the existence of effective competition. In particular, Merger Regulation grants the European Commission with the exclusive competence to control concentrations with the Community dimension.⁹⁵ Nonetheless, Member States “may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security ... shall be regarded as legitimate interest[] within the meaning of the first subparagraph.”⁹⁶ As such, the notion of public security shall be recognized by default as one of the principles regulating the screening of FDI in the form of concentrations of undertakings. By adopting

92 Case C-54/99, *Association Église de Scientologie de Paris, Scientology International Reserves Trust*, 14 March 2000, para. 17; see also Case 36/75, *Rutili v Minister for the Interior*, 28 October 1975, para. 28; Case C-348/96, *Calfa*, 19 January 1999, para. 21.

93 Case C-54/99, *Association Église de Scientologie de Paris, Scientology International Reserves Trust*, 14 March 2000, para. 74.

94 O.J. L 24, 29.1.2004, p. 1–22.

95 *Ibid.*, Article 1(2) and (3) in conjunction with Article 21(2).

96 *Ibid.*, Article 21(4).

the Framework Regulation, the EU has decided upon extending the existing mechanism of control by allowing the Member States to invoke the exception of public security with regard to control of FDI with respect to both the concentration and form of financial investment.

5 Review Process and Screening Criteria

In addition, the Framework Regulation introduces a broad catalogue of requirements for national screening mechanisms, albeit does not create a mandatory screening mechanism at the EU-level, nor does it introduce a requirement for the Member States to adopt screening mechanisms at the domestic level. According to Article 3(1), “Member States *may* maintain, amend or adopt mechanisms to screen foreign direct investment in their territory on the grounds of security or public order.”⁹⁷ However, the Framework Regulation introduces the elaborated cooperation mechanism between Member States, and between Member States and the European Commission,⁹⁸ which in fact constitutes a *de facto* screening mechanism at the EU-level. The only difference, in comparison to the domestic legislation, is that neither Member States nor European Commission can effectively invoke the Framework Regulation to enforce any remedies aimed at prevention of the FDI to be completed in the cooperation mechanism, whereas national authorities of interested Member States may invoke their domestic legislation to do so. Certainly, in the event where the FDI constitutes a concentration with a Community dimension in the light of the Merger Regulation, the European Commission will exercise rights granted to it by that legal act, and not the Framework Regulation.

5.1 *Screening Mechanisms at the Domestic Level*

The Framework Regulation does not limit the right of any Member State to screen particular FDI into its territory.⁹⁹ As such, protection of public order and public security fall within the sole responsibility of that Member State.¹⁰⁰ As mentioned above, the Framework Regulation does not impose obligations upon Member States to adopt any screening mechanism in its domestic legislation. In spite of that, it sets out particular principles for either already existing domestic screening mechanisms (so that they are to be amended by

97 Framework Regulation, Article 3(1) [emphasis added].

98 Framework Regulation, Article 1(1).

99 Framework Regulation, Article 1(3).

100 Framework Regulation, Preamble rec. 17 para. 2.

national legislators) or for those that will be introduced after its direct application, *i.e.* 11 October 2020. As such, the Framework Regulation introduces following principles:

- transparency of the procedure related to screening, *inter alia* its timeframes;¹⁰¹
- non-discrimination between third countries;¹⁰²
- application of timeframes under domestic screening mechanism so as to allow for the diligent assessment of comments of other Member States and opinion of the European Commission as issued pending cooperation mechanism;¹⁰³
- protection of confidential information, including commercially-sensitive information;¹⁰⁴
- granting of a recourse to judicial review of administrative decisions;¹⁰⁵
- introduction of measures allowing for the identification and prevention of circumvention of applicable screening mechanisms and decisions.¹⁰⁶

Especially with regard to the last principle it has to be noted that the Framework Regulation *iterum* imposes such obligation upon Member States that already have adopted the screening mechanism in their domestic legislation and not necessarily upon those who have not. Further, the Framework Regulation imposes a one-time obligation upon all Member States to notify the European Commission of their existing screening mechanisms by 10 May 2019, as well as to notify the European Commission about any newly adopted screening mechanism within 30 days of its entry into force. As of 24 June 2019, the European Commission published a list of 14 Member States which have adopted certain screening mechanisms in their domestic legislation. To date, the most relevant is the list of 28 February 2020, according to which 15 Member States have adopted domestic procedures allowing for the assessment of FDI into their territories.¹⁰⁷

5.2 *Factors to Be Taken into Consideration and Annual Reporting*

Article 4 of the Framework Regulation provides a non-exhaustive list of factors, demonstrated by the wording “in particular”, which may be taken into consideration by both Member States and the European Commission when

101 Framework Regulation, Article 3(2).

102 *Ibid.*; see also TFEU, Article 63(1) and Article 65(3).

103 Framework Regulation, Article 3(3).

104 Framework Regulation, Article 3(4).

105 Framework Regulation, Article 3(5).

106 Framework Regulation, Article 3(6).

107 European Commission, “List of screening mechanisms notified by Member States. Last update 28 February 2020”.

assessing the probability of an FDI to have a negative effect upon the public security and public order. Such factors shall be assessed with regard to five most “critical areas of infrastructure” from the perspective of the EU internal market and include:

- critical infrastructure, either physical or virtual (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, as well as land and real estate crucial for the use of such infrastructure);¹⁰⁸
- critical technologies and dual-use items (such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum and nuclear technologies, nanotechnologies and biotechnologies);¹⁰⁹
- supply of critical inputs (*e.g.* energy, raw materials or food security);¹¹⁰
- access to sensitive information (including personal data or the ability to control such information);¹¹¹ and
- freedom and pluralism of media.¹¹²

This extensive list of sectors of the EU economy as enumerated above does not correspond to the claimed purposes of the enactment of the Framework Regulation, which is aimed at combating growing foreign acquisitions of EU companies by outside investors, in particular Chinese investors. While it is legitimate to include the additional protection of personal data, especially in light of General Data Protection Regulation,¹¹³ it has been indicated before that Chinese investors do not invest their money and assets into areas such as media or food security, but mainly automotive, transport and public utilities.¹¹⁴

Further, since the Framework Regulation is merely of contextual character and does not impose any obligation upon Member States to adopt the screening mechanism, its *de facto* legal direct effect as stipulated in Article 288 TFEU is not prominent. It is because despite the fact that FDI fall within the CCP of

¹⁰⁸ Framework Regulation, Article 4(1)(a).

¹⁰⁹ Framework Regulation, Article 4(1)(b), which further stipulates that critical technologies and dual use items shall be interpreted in light of their definition as stipulated in Article 2 pt. 1 of Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, O.J. L 134, 29.5.2009, p. 1.

¹¹⁰ Framework Regulation, Article 4(1)(c).

¹¹¹ Framework Regulation, Article 4(1)(d).

¹¹² Framework Regulation, Article 4(1)(e).

¹¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. L 119, 4.5.2016, p. 1–88.

¹¹⁴ See above, Section 1.

the EU and their regulation falls within the sole competence of the EU,¹¹⁵ such competence can only be exercised within the boundaries set by the provisions of freedom of movement of capital, in particular Articles 63 and 65 TFEU.

In the event where screening is being conducted or is to be commenced, Article 4 of the Framework Regulation further introduces three factors that may be taken into account with regard to screening of FDI into any of the above five sectors of the economy. Those include an assessment as to whether:

- the foreign investor is controlled by a third country government, state bodies or armed forces (including by means of ownership or significant funding);¹¹⁶
- the foreign investor has been involved in activities affecting security or public order of any Member State;¹¹⁷ or
- there is a serious risk that the foreign investor engages in illegal or criminal activities.¹¹⁸

With regard to the notion of control by a third country government, the problem lies within the meaning of control over the investor that is to be exercised by the third country government—whether it shall be understood as direct funding, exercise of such control through voting rights, or through placement of governmental officials as the majority of management board of such company. The EU legislator provided a vague definition of this in Recital 13 of the Preamble of the Framework Regulation, according to which:

it should (...) be possible for Member States and the [European] Commission to take into account (...) whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes.¹¹⁹

Nevertheless, the EU legislator has not further developed this definition of state control over the foreign investor. Therefore, the analysis of this feature shall be commenced with the introduction to the definition of foreign investor. In light of Article 2 pt. 2 of the Framework Regulation, a foreign investor can be “a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment”.¹²⁰ As a result,

115 TFEU, Article 3(1)(e).

116 Framework Regulation, Article 4(2)(a).

117 Framework Regulation, Article 4(2)(b).

118 Framework Regulation, Article 4(2)(c).

119 Framework Regulation, Preamble rec. 13.

120 Framework Regulation, Article 2 pt. 2.

for the purposes of the determination of control over a foreign investor by the third state, one should adopt a distinct test allowing for the determination of the level of such control over acts of individuals and of the undertakings.

As such, the control of the state over conducts of private individuals or corporations (*i.e.* investors) might be assessed in light of Article 8 Draft articles on Responsibility of States for Internationally Wrongful Acts¹²¹ and the interpretation of the notion of control as “planning, direction and support”, as provided by the International Court of Justice in the *Nicaragua* judgment¹²² or overall control test, as provided by the International Criminal Tribunal for the Former Yugoslavia in *Tadić* judgment.¹²³ However, with regard to the actions of companies, there has to be either the corporate veil¹²⁴ between the company and the State, *i.e.* company shall be regarded as State-owned or controlled, or there must be evidence that the corporation when acting exercises public powers¹²⁵ of the State, so as to achieve a particular result, enjoys its ownership interest or control.¹²⁶ It is also of particular importance to indicate that both ‘control tests’ allow to attribute the state control over actions of both SOEs and POEs and, as a result, to hold that particular state responsible for their actions. Thus, PRC could possibly be held responsible for actions of POEs, since there is no clear market distinction between them and SOEs.¹²⁷

Last but not least, beginning from 31 March 2021, Member States will have an obligation to submit to the European Commission an annual report concerning FDI that took place in their territory in the preceding year and aggregated information on any requests received by other Member States in the context of the cooperation mechanism,¹²⁸ as well as the application of their screening mechanisms in the event that they have adopted national

121 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1. (Nov. 2001), Article 8.

122 Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶86 (June 27).

123 Prosecutor v. Tadić, Case No. IT-94-I-A, ¶117 (Int’l Crim. Trib. for the Former Yugoslavia, November 11, 1999).

124 Barcelona Traction, Light and Power Company, Limited, Second Phase (*Belgium v. Spain*), Judgment, 1970 I.C.J. Rep. 32, ¶56–58 (Feb. 5).

125 Phillips Petroleum Company Iran v. The Islamic Republic of Iran, Phillips Petroleum Co. Iran v. Iran et al., 21 IRAN-U.S. C.T.R., at 79 et seq., p. 79 (1989).

126 *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran*, IRAN-U.S., 10 IRAN-U.S. C.T.R., p. 228 (1986); see also *American Bell International Inc. v. The Islamic Republic of Iran*, 12 IRAN-U.S. C.T.R., p. 170 (1986).

127 See above, Section 3.1.

128 Framework Regulation, Article 5(1).

screening mechanisms.¹²⁹ As such, while the first obligation is addressed to all Member States, the latter one will be imposed only on (so far) these 15 Member States that have implemented screening mechanisms. At the same time, the European Commission will be obliged to submit an annual report regarding the implementation of the Framework Regulation, which will be directed to the European Parliament and Council and made available to the public.¹³⁰ The obligation of the European Commission however shall not be regarded as a one-off obligation to be executed in 2021, but every consecutive year after receipt of the reports from Member States. This is because although there might not be new national screening mechanisms established by Member States, they still have to comply with the cooperation mechanism.

6 Cooperation Mechanism

A significantly innovative notion of the Framework Regulation is the introduction of the cooperation mechanism between: (1) Member States; and (2) Member States and the European Commission. This mechanism is applicable both to FDI undergoing screening¹³¹ and those not (yet) subjected to such.¹³² The underlying purpose for this solution is the general exchange of information and assistance in the matter of FDI which could affect the security or public order in another Member State,¹³³ and only that.¹³⁴ Further, by means of the Framework Regulation, the EU legislator aims at equipping Member States with the right to provide comments to that particular Member State in which the investment is planned or has already been completed.¹³⁵ The cooperation mechanism is to be undertaken through so called “contact points” established by both each Member State and the European Commission.¹³⁶

Pursuant to Article 6(1) of the Framework Regulation, any Member State is required to notify both the European Commission and other Member States of any foreign direct investment subjected to the undergoing screening on its territory.¹³⁷ According to the European Commission’s statement in

129 Framework Regulation, Article 5(2).

130 Framework Regulation, Article 5(3).

131 Framework Regulation, Article 6.

132 Framework Regulation, Article 7.

133 Framework Regulation, Preamble rec. 16.

134 Framework Regulation, Preamble rec. 18.

135 Ibid.

136 Framework Regulation, at Articles 6(10), 7(9) in conjunction with Article 11(1).

137 Framework Regulation, at Article 6(1).

the proposal of the Framework Regulation, for those Member States which have a screening mechanism prescribed by their national legislation there should be an obligation “to inform other Member States and the [European] Commission about any foreign direct investment that is undergoing screening within the framework of their national screening mechanisms.”¹³⁸ This further supports the argument that, while the Framework Regulation does not impose any obligation on the Member States to adopt screening mechanisms,¹³⁹ it does however impose obligation on those Member States which already have such mechanisms, *i.e.* to amend the national legislation in such a way as to enable its compliance with the Framework Regulation, as it is introduced *e.g.* in Article 3(6).¹⁴⁰ Notification prescribed by Article 6(1) should include:

- the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital;
- the approximate value of the foreign direct investment;
- the products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed;
- the Member States in which the foreign investor and the undertaking in which the foreign direct investment is planned or has been completed conduct relevant business operations;
- the funding of the investment and its source, on the basis of the best information available to the Member State; and
- the date when the foreign direct investment is planned to be completed or has been completed.¹⁴¹

Further, as a part of such notification, Member States undertaking screening should also provide the relevant information concerning compliance of the foreign direct investment with the Merger Regulation, if applicable. In particular, if a foreign direct investment constitutes a concentration within the meaning and scope of application of the Merger Regulation, the application of the Framework Regulation should be without prejudice to the application

138 European Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union”: p. 3.

139 Framework Regulation, Article 3(1).

140 According to Framework Regulation, Article 3(6), “Member States which have a screening mechanism in place shall maintain, amend or adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions.”

141 Framework Regulation, Article 9(2).

of Article 21(4) of the Merger Regulation¹⁴² (concerning the adoption of appropriate measures by the Member States so as to protect legitimate interests other than those taken into consideration by Merger Regulation and compatible with the general principles and other provisions of Community law).¹⁴³ In addition, when referring to the general idea underlying the list of information that should be provided, the European Commission in its proposal of the Framework Regulation has underlined the general purpose:

to facilitate the cooperation with other Member States and the screening of foreign direct investment by the European Commission, Article 10 [of the Proposal and Article 9 of the Framework Regulation] establishes an obligation on all Member States, irrespective of whether they have a screening mechanism, to ensure a minimum level of information on foreign direct investment falling under the scope of the Regulation.¹⁴⁴

Notification to be submitted by the requested Member State may also include a list of Member States whose security or public order could be affected by the FDI.¹⁴⁵ However, this is a rather vague provision—why should a particular Member State become concerned about either security or public order of another Member State? Further, this has to be considered as impractical, as despite the mutual underlying principles of the EU, particular Member States' public orders differ from each other. For example, the key principles underlying the public order of France might not necessarily correspond with the ones underlying the public order of Poland. Upon 15 days following the receipt of described information, other Member States and the European Commission should notify the Member State undertaking the screening on their intention to provide comments or opinion.¹⁴⁶ Accordingly, the notification might also include their duly justified request for additional information, which will be limited to those necessary so as to enable the issuance of the comments or opinion.¹⁴⁷ Both comments and the opinion should be addressed

142 Framework Regulation, Preamble rec. 36.

143 Merger Regulation, Article 21(4).

144 European Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union": p. 14.

145 Framework Regulation, Article 6(1).

146 Framework Regulation, Article 6(6).

147 Ibid.

to concerned Member State within the period of 35 calendar days upon the receipt of the relevant information.¹⁴⁸ Only when Member States or the European Commission have requested additional information can this period be extended up to 20 days.¹⁴⁹

It is further important to indicate that pursuant to Article 9(5) of the Framework Regulation a Member State requested to submit the additional information, in exceptional circumstance, is entitled to notify the requesters of its inability to provide such.¹⁵⁰ Further, notification should duly justify the reasons for not providing requested information and explain the best efforts which have been undertaken to obtain them.¹⁵¹

With regard to the cooperation mechanism between Member States, it has to be noted that any Member State which considers the FDI, either undergoing screening in another Member State or not, as likely to affect its security or public order, or which possesses relevant information for either screening or the investment itself, is entitled to provide comments to a Member State undertaking screening or benefiting from that investment.¹⁵² Such comments are to be simultaneously sent to the European Commission which subsequently will notify other Member States in this matter.¹⁵³ The practical issues, as mentioned before, are both the determination of governmental control over foreign investors and the likelihood of particular FDI to affect public security or public order. Bearing in mind the topic of this article, it is crucial to make a note of vague distinction between Chinese SOEs and POEs,¹⁵⁴ which might significantly broaden the scope of banned transactions notably with the former ones, although not be limited to them, and eventually stimulate Chinese investors to either invest in smaller projects (EU corporations) so as not to affect the public security, or limit the capital flow into the EU. As such, the notion of governmental control as prescribed by Article 4(2)(a) of the Framework Regulation might constitute an effective factor, if not the only of such importance, allowing for either better screening of IFDI into the EU from PRC or limitation of the investment process. It is of particular importance for the national authorities of Member States not to abuse this notion and comply

148 Framework Regulation, Article 6(7).

149 Ibid.

150 Framework Regulation, Article 9(5).

151 Ibid.

152 Framework Regulation, Articles 6(2), 7(1).

153 Ibid.

154 See above, Section 3.3.

with international norms allowing for the identification of state control over actions of corporations, including POEs, or private individuals.¹⁵⁵

On the other hand, the cooperation mechanism between Member States and the European Commission differs in: (1) the basis underlying the commencement of the assistance, *i.e.* security or public order of more than one Member State; and (2) the manner of assistance—it is for the European Commission's to issue an opinion which is addressed to a particular Member State either undertaking screening or benefiting from FDI.¹⁵⁶ Moreover, the European Commission can issue such an opinion either irrespective of whether potentially affected Member States have provided any comments, or following them—however with regard to such solution it is crucial that at least one third of Member States consider a particular FDI likely to affect their security or public order.¹⁵⁷ It is further important to notice that the threshold will total ten Member States or, following the United Kingdom's exit from the Community, nine. As a following remark, both comments of other Member States and European Commission's opinion should be duly justified in any of the discussed cooperation mechanisms.¹⁵⁸

In addition, the Framework Regulation provides a self-checking cooperation mechanism where a Member State undertaking the screening of an FDI or benefiting from it might, upon consideration that such investment is likely to affect its security or public order, either request the European Commission to issue an opinion or other Member States to provide comments. This however, bearing in mind the political discussion regarding the sovereignty of Member States, should not be considered as a mechanism that will be commencing the cooperation procedure. This will rather occur upon the initiative of other Member States or the European Commission.

A Member State undertaking the screening or benefiting from the FDI is required to give due consideration to the comments of other Member States and to the opinion of the European Commission.¹⁵⁹ However, the practical problem is how to assess the “due consideration” to be given by concerned Member State—the answer to that cannot be found within the content of the Framework Regulation which only cross-references the national legislation and duty of sincere cooperation prescribed by Article 4(3) of the Treaty on

155 See above, Section 5.2.

156 Framework Regulation, Articles 6(3), 7(2).

157 *Ibid.*

158 *Ibid.*

159 Framework Regulation, Articles 6(9), 7(7).

European Union.¹⁶⁰ Thus, the final screening decision is taken by the Member State undertaking the screening,¹⁶¹ which has been justified by the EU legislator that it “remains the sole responsibility of the Member State where the foreign direct investment is planned or completed”.¹⁶²

Last but not least, additional comments with regard to an FDI not undergoing screening certainly should be made. As indicated by the European Commission:

[a]ffected Member States may provide comments and the [European] Commission may address comments to a Member State in which a foreign direct investment is planned or is completed, even if that Member State does not maintain a screening mechanism or does not conduct a screening of that investment.¹⁶³

Thus, the polarity of the solutions adopted is required to be discussed. First, Article 7(5) of the Framework Regulation introduces a unique entitlement of the Member States and the European Commission to request the Member State, where the FDI is planned or has been completed, to submit the information referred to in Article 9,¹⁶⁴ and discussed above. Such requests should be:

- duly justified and limited to information necessary to provide comments or to issue an opinion;
- proportionate to the purpose of the request, and
- not unduly burdensome for the concerned Member State.¹⁶⁵

Second, Member States comments and the European Commission are granted 35 calendar days following the receipt of requested information to complete and send respectively the comments or opinion.¹⁶⁶ However, in the event that the European Commission’s opinion follows the comments of other Member States, it is granted an additional 15 calendar days for the issuance of that opinion,¹⁶⁷ totalling 50 calendar days.

¹⁶⁰ Framework Regulation, Preamble rec. 17.

¹⁶¹ Framework Regulation, Articles 6(9), 7(7).

¹⁶² Framework Regulation, Preamble rec. 17.

¹⁶³ European Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union”: p. 13.

¹⁶⁴ Framework Regulation, above, n. 1, Article 7(5).

¹⁶⁵ *Ibid.*

¹⁶⁶ Framework Regulation, Article 7(6).

¹⁶⁷ *Ibid.*

Third, pursuant to Article 7(8) of the Framework Regulation, Member States and the European Commission are allowed to provide comments and the opinion within the prescribed time of 15 months upon the completion of the foreign direct investment in any of the Member States,¹⁶⁸ which has not been subjected to the screening.

Fourth, it has to be noted that this type of cooperation mechanism can be commenced retroactively, *i.e.* despite the applicability of the Framework Regulation since 11 October 2020,¹⁶⁹ the provisions of Article 7 can be applied to an FDI completed since 10 April 2019.¹⁷⁰

7 Assessment for the Effect on “Projects or Programmes of EU Interest”

Apart from the cooperation mechanism, the Framework Regulation further grants the European Commission with certain discretionary powers with regard to the screening of FDIs which are likely to affect projects or programmes of EU Interest. These have been defined as those which “involve a substantial amount or a significant share of EU funding, or which are covered by Union law regarding infrastructure, critical technologies or critical inputs which are essential for security or public order.”¹⁷¹ With regard to that, where the European Commission finds that any FDI in a particular Member State might affect projects or programmes of EU interest, in the field of the security and public order, it is entitled to issue an opinion addressed to that concerned Member State.¹⁷² Such opinion, although of no binding force,¹⁷³ for the purposes of the Framework Regulation has been defined as a “tool to protect projects and programmes which serve the Union as a whole and represent an important contribution to its economic growth, jobs and competitiveness.”¹⁷⁴

In addition, while the cooperation mechanism prescribed by Articles 6 and 7 of the Framework Regulation remain applicable, EU legislator has decided upon three major modifications to the procedure itself, *inter alia*:

168 Framework Regulation, Article 7(8).

169 Framework Regulation, Article 17 s. 2.

170 Framework Regulation, Article 7(10) *a contrario*.

171 Framework Regulation, Article 8(3).

172 Framework Regulation, at Article 8(1).

173 TFEU, Article 288 s. 5.

174 Framework Regulation, Preamble rec. 19.

- any Member State, incl. the concerned one, may indicate either in its notification or comments its consideration of whether a particular foreign direct investment is likely to affect the projects and programmes of EU interest;
- the European Commission is required to address the opinion to other Member States;
- Member State is obliged to take “utmost account” of the European Commission’s opinion and provide explanations to the European Commission if the opinion is not followed.¹⁷⁵

In the proposal of the Framework Regulation, with regard to the importance of projects and programmes of EU interest, the European Commission has pointed out that:

Member States to which an opinion is addressed and that are conducting a screening of the foreign direct investment under their screening mechanisms, shall integrate the [European] Commission’s opinion in their screening process. Those Member States to which an opinion is addressed and that are not conducting a screening should consider ways of taking it into account whether through their screening mechanism or, in the absence of such screening mechanism, in their broader policy making.¹⁷⁶

Thus, the European Commission has underlined that the Member States should not only take into consideration its not-binding opinions, but also commit themselves on their own account to either take into consideration the Union’s interest while conducting the screening procedure, or in general in their policy making. This is because the Framework Regulation does not impose on the Member States the obligation to adopt the screening procedure in their national legislation.¹⁷⁷ This further raises the question concerning who should be responsible for the assessment of the particular FDI, either pursued or already completed, affecting the interest of the EU—should it be the European Commission, concerned Member State or a third authority? Since the procedures prescribed by Articles 6 and 7 (and discussed above) apply *mutatis mutandis* to the assessment of FDI likely to affect the interest

175 Framework Regulation, Article 8(2).

176 European Commission, “Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investment into the European Union”: p. 14.

177 Framework Regulation, Article 3(1).

of the EU,¹⁷⁸ the conclusion has to be made that this should be the concerned Member State's responsibility for the finally made decision in this matter.¹⁷⁹

Another question is how to execute such responsibility with regard to the interest of the Union. Both the Framework Regulation and the European Commission's proposal do not provide the relevant answer to such question, therefore a legal analysis with regard to the provisions of the TFEU should be conducted. First, FDIs fall within the scope of the CCP of the EU.¹⁸⁰ Second, the EU contributes, "in the common interest, to (...) the progressive abolition of restrictions on international trade and on foreign direct investment (...)"¹⁸¹ Hence, a particular Member State, not fulfilling its obligations regarding the protection of the common interest of the EU (*e.g.* by breaching the principle of sincere cooperation) by allowing a particular FDI on its territory and benefiting from it, might be considered to be held responsible by means of infringement action, *i.e.* the European Commission might be entitled to bring such matter before the CJEU.¹⁸² As a result, the CJEU might find the concerned Member State liable for breach of its Treaty Obligations (in this matter, Article 206 TFEU in conjunction with Article 4(3) TEU) and obliged by the CJEU to undertake necessary measures to comply with the judgment.¹⁸³ Hence, a possibility of the CJEU obliging the Member State to block the foreign direct investment on its territory might be considered as possible. Nonetheless, such a solution would raise further problems regarding *e.g.* discrimination of particular investor or forced expropriation of business.

Projects and programmes of EU interest have been listed in an Annex to the Framework Regulation. The Annex currently lists eight EU projects and programmes: (1) European GNSS programmes (Galileo & EGNOS); (2) Copernicus; (3) Horizon 2020; (4) Trans-European Networks for Transport (TEN-T); (5) Trans-European Networks for Energy (TEN-E); (6) Trans-European Networks for Telecommunications; (7) European Defence Industrial Development Programme; (8) Permanent structured cooperation (PESCO).¹⁸⁴

178 Framework Regulation, Article 8(2).

179 Framework Regulation, Article 6(g).

180 TFEU, Article 207(1).

181 TFEU, Article 206.

182 TFEU, Article 258.

183 TFEU, Article 260(1).

184 Framework Regulation, Annex.

8 Conclusion

To conclude, the new Framework Regulation shall not be regarded as an innovation in the context of EU's legislative actions. The lack of material obligation imposed on national legislators limits its ability to safeguard the interests of the Member States of the EU or its internal market from the investment mostly made by the investors from PRC. It has been adopted in response to the IFDI from the PRC, which both dropped dramatically throughout 2017 and 2018¹⁸⁵ and enjoy the benefits from the freedom of movement of capital expressed in Article 63 TFEU. As such, it is the primary source of EU law that effectively limits the application of the Framework Regulation.

Second, the sectors of economy addressed by the EU legislator, although broad, do not necessarily align with FDI into the EU or Member States, in particular that provided by Directive 88/361/EEC. While Article 4 of the Framework Regulation indicates that they are critical for the economy of the EU, foreign investors very rarely invest their capital in the manner envisioned by the EU legislator, *e.g.* in the public media or personal data protection.

Nonetheless, there are three significant features relating to the newly introduced Framework Regulation cooperation mechanism. First, it is crucial to indicate that undertaking screening of FDIs is not an obligation of Member States pursuant to Article 3(1). Second, the Framework Regulation introduces two substantial types of cooperation mechanism, *i.e.* between Member States and Member States and the European Commission, as well as a subsidiary self-checking mechanism commenced by the Member States either undertaking the screening of an FDI or benefiting from it. Third, the EU legislator decided to provide a special treatment of the an FDI which might affect projects or programmes of the EU interest, in particular the notion of the CCP.

In addition, the EU legislator, by deciding upon the contextual character of the Framework Regulation, has left significant margin of appreciation to the Member States regarding both the adoption of screening mechanisms in the national legislation and the procedural aspects of the screening itself. That further leads to the significant problem regarding the responsibility of the Member States for nonfulfillment of the Treaty obligations, *e.g.* Article 4(3) of the TEU and Article 207 of the TFEU. As such, this might result in doubts among the foreign investors as to whether the EU will remain to be a profitable area to invest, in particular due to legal uncertainty of possible discrimination or expropriation due to the decisions of the hosting Member State. These decisions may be imposed by the authorities at the EU level, such as

¹⁸⁵ See above, Section 1.

judicial decisions of the CJEU pending the infringement procedure against that Member State. Moreover, application of screening mechanism by Member States, in particular less developed ones, might take the form of a bargaining chip between them and the European Commission, in particular in the event where the IFDI are to infringe the public security of the EU or affect projects of EU interest.

Last but not least, the adoption of the Framework Regulation pending negotiations between EU and PRC on the BIT limit the former's negotiation power. From the strategic point of view, adoption of such a legislative act *de facto* aimed at PRC's investors could have been avoided, and eventually presented during the negotiations. As such, the EU has weakened its position against PRC which might result in the latter one demanding abandonment of excessively scrutinized screening mechanisms towards its investors, without the concurrent guarantee of fair and equitable access for the EU investors to the Chinese market, where fulfilment of the principle of reciprocity has been the driving factor for the EU political powers, led by Germany.