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Ewa Bujak[*]

ESCAPING INTO ECONOMIC SECURITY: HOW CAN THE EUROPEAN UNION USE FOREIGN DIRECT INVESTMENT SCREENING IN TIMES OF CRISIS? LESSONS FROM THE UNITED STATES[1]

Abstract: *The rapid transformation of the international economic order from a liberal arrangement of economic interdependencies to a geoeconomic competition between states changed attitudes regarding foreign investment. This arguably protectionist turn toward national security is an attempt to safeguard against multidimensional consequences of crises. To protect the EU's strategic autonomy, Regulation 2019/452 came into force in 2019, laying the foundations for the European Foreign Investment Screening framework. Soon afterwards, FDI screening served as an instrument in the EU's policy for addressing and mitigating risks rapidly arising from an international crisis: the COVID-19 pandemic. This experience influenced another recent measure – the European Economic Security Strategy (EESS) – together with the proposal for the New FDI Screening Regulation.*

This article argues that the experience of the COVID-19 crisis inspired dualistic changes in FDI screening, transforming it into a protector of European economic security. The EESS and the proposal for the New FDI Screening Regulation are juxtaposed against the United States's experience in controlling FDI for the aim of assessing FDI screening as a tool for safeguarding European economic security in light of the EU's inexperience in the matter.

[*] PhD candidate; Doctoral School of Kozminski University (Poland); email: bujake@kozminski.edu.pl; ORCID: 0000-0001-7235-1385.

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Keywords: economic security, COVID-19 pandemic, FDI screening, European Economic Security Strategy, national security review

INTRODUCTION

The rapid transformation of the international economic order, from a liberal arrangement of deep economic interdependencies to a geoeconomic competition between states – fueled by a rising fear of foreign control over crucial economic sectors – changed states' attitude toward foreign investment. Even though the vast economic benefits of limitless foreign investment flows are not disputed, states more and more often prioritize the threats related to national security which can arise from them. This protectionist, as some argue, turn to national security is an attempt to safeguard and shield from the cross-sectorial consequences of crises. Nowadays, states reshape their domestic laws to reflect the new, challenging economic reality. At the behest of fear centered on national security, trade and investment laws are tightened to mirror the state's geopolitical shift. Laws relating to foreign investment are amended for the purpose of gaining more control over investment within the state's territory. States thereby strive to benefit from "safe foreign investment," in accordance with their individual definitions of national security.

1. FOREIGN INVESTMENT SCREENING IN THE EUROPEAN UNION – A BRIEF BACKGROUND

This phenomenon is also present in the European Union (EU). As a tool for safeguarding its strategic autonomy, Regulation 2019/452 came into force in 2019, laying the foundations for the European Foreign Investment Screening framework (FDI screening).[2] In this regard, the EU followed in the footsteps of the G7 countries. In fact, the EU's FDI screening framework was introduced relatively late compared to some of them, including its Member States (MSs), which were pioneers in controlling inward foreign investment on national security grounds in Europe. Germany, Italy and France had their domestic FDI screening regimes long before that idea emerged at the European level. Soon after the EU FDI screening framework took effect, foreign direct investment screening served as an instrument

[2] For a similar view that FDI screening is a tool aimed at protecting the EU's strategic autonomy, *see* S. Robert, *Foreign Investment Control Procedures as a Tool for Enforcing EU Strategic Autonomy*, 8(2) European Papers 513 (2023). The EU's strategic autonomy, however, is not to be associated with protectionism. *See* C. Alcidi, T. Kiss-Gálfalvi, D. Postica, E. Righetti, V. Rizos, F. Shamsfakh,, *What Ways and Means for a Real Strategic Autonomy of the EU in the Economic Field? Final Report*, Centre for European Policy Studies, Brussels, 2023, p. 16. *See also* J. Hillebrand Pohl, *Strategic Autonomy as a Means to Counter Protectionism*, 22 ERA Forum 183 (2021), in which EU strategic autonomy is considered "protection against protectionism".

in the EU's policy for addressing and mitigating the risks that were rapidly arising from an international crisis: the COVID-19 pandemic.[3] Based on its experience of using FDI in times of crisis, in 2023 the EU issued another measure with a similar objective: the European Economic Security Strategy (EESS). This measure offers a comprehensive framework of tools that may prove useful in future crises faced collectively by the Union, partially relying on the MSs' domestic mechanisms. Thus, FDI screening was framed in a new context and gained a new purpose. Apart from protecting the public security of the MSs, it was now tailored to protect European economic security. The new measure, though partially based on the existing mechanism, represents the Union's shift from openness to protectionism, as well as an important step in the protection of its collective security (European security) from FDI-related threats.[4]

1.1. Research problem and its significance

The inclusion of FDI screening in the EESS challenged the original nature of the mechanism. The old MS-centered tool is now intended to protect a collective European interest. Public security gives way to economic security. The suitability and effectiveness of FDI screening in addressing crises through protecting European economic security is thus unknown. The need and intention to protect economic security through FDI screening creates a challenge not yet faced by the EU or part of its political and legal practice. Furthermore, as FDI screening is at the heart of the EESS, its effectiveness in addressing crises in the new context is fundamental for the protection of European economic security, as well as for the effectiveness of the Strategy as a whole.

For these reasons, it can be helpful to root the EU's new application of FDI screening in the context of other states' experience in the matter. For this purpose, the long experience of the United States (US) in using foreign investment screening for the protection of economic security is presented. This article's aim is to juxtapose the EESS and its new FDI Screening Regulation against the US's experience for the purpose of assessing FDI screening as a tool for safeguarding European economic security.

[3] It should be additionally noted that FDI screening was a crucial tool in dealing with the consequences of yet another crisis-inducing event: the Russian aggression against Ukraine in 2022. The EU's response to the war in Ukraine was an important step in the shaping of the new purpose of FDI screening – an instrument to protect collective European interests. However, due to word count restrictions, and to maintain consistency and due diligence, the Russian aggression against Ukraine and the related response from the EU will not be covered in this article.

[4] The term "European security" is used to describe the security of the EU as a whole and the collective security of the MSs. It thus pertains to public security and does not include economic or any other kind of security, such as energy security. Equally, the term "European security interests" is refers to the security interests of the Union as a whole or the collective security interests of the MSs. Both terms are therefore synonymous. When a statement is limited to economic security, the paper uses the term "European economic security."

1.2. Structure, assumptions and limitations

The article initially briefly denotes how, under EU Regulation 2019/452, FDI screening's primary aim was to protect MSs' public security. Then it demonstrates that the EU's experience of a crisis inspired dualistic changes in the nature of FDI screening, as the COVID-19 pandemic enabled European security interests to be protected by the MSs' domestic FDI screening mechanisms. A crisis-induced transformation of FDI screening is analyzed subsequently in light of the COVID-19 pandemic. Both subjective and objective changes of the mechanism's nature are portrayed since, due to this crisis, the MSs' domestic screening mechanisms have begun to protect European security. This is based on the European Commission's Guidance concerning foreign direct investment and free movement of capital from third countries, as well as the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452. The transformed scope of the FDI screening argument would subsequently lead to claims that, based on the EESS, the EU aims to protect European economic security. The EESS is analyzed in the context of how FDI screening was transformed into a protective mechanism for European economic security. An analysis of the Commission's Proposal for a New FDI Screening Regulation is also included, with a particular emphasis on the planned interference in MSs' competences for protecting their essential security interests. Lastly, the US's experience in protecting economic security with FDI screening is presented. The US perspective is used to offer remarks as to the future application of the EU's FDI screening for safeguarding European economic security.

This article assumes that the EESS can be and is meant to be used in times of crisis, possibly induced by FDI-generated threats. Furthermore, the paper has the following limitations. The definition and interpretation of public security in the context of the EU, as well as of national security in the context of the US are not analyzed. Similarly, in both contexts, the definition of economic security is not subject to consideration. Lastly, as the paper is centered around security, the criterion of the public order as grounds for FDI screening, as specified in EU Regulation 2019/452, is not discussed. The analysis is limited solely to public security.

2. EU'S EXPERIENCE OF CRISIS AS AN INSPIRATION FOR DUALISTIC CHANGES TO THE FDI SCREENING MECHANISM

In 2019, the EU's foreign direct investment screening framework came into effect. Preceded by the domestic legislation of several MSs, this mechanism was aimed at addressing and mitigating diverse threats arising from foreign direct investment. Regulation 2019/452 primarily provided an enabling framework for MSs to screen foreign direct investment on the basis of public security, but it also equipped the

Commission with the competence to control foreign investment that is potentially detrimental to the EU's programs and projects.[5] Even though the new FDI screening mechanism was ultimately calibrated to protect primarily the national security interests of the MSs, it soon was effectively used by the Commission to protect against crises threatening the MSs collectively. FDI screening played an important part in addressing, at the European level, a major recent crisis: the COVID-19 pandemic in 2020. This crisis inspired profound changes in the EU's FDI screening mechanism, in both its subjective and objective scopes. Even though the legal text of Regulation 2019/452 remained unchanged, the dualistic transformation of the EU's screening mechanism constituted a founding pillar that subsequently enabled the protection of European economic security through the EESS in 2024. COVID-19 revealed that FDI can threaten not only the public security of the MSs, but also European security. According to the Commission, such threats included a "risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment."[6] This part of the article aims to demonstrate the two-stage path the FDI screening mechanism took from a MS-centered and public-security-protective measure to a European-at-heart mechanism safeguarding the Union's economic security. The aim is to indicate that the experience of a crisis caused a dualistic change in the nature of FDI screening. The subjective and objective changes to the scope of FDI screening is analyzed in the context of the crises that have inspired and triggered them. Through a brief portrait of Regulation 2019/452, the initial part of this section sets the contexts for the subsequent analysis, as it depicts EU FDI screening as a mechanism that primarily serves the public security interests of the MSs.

2.1. Pre-pandemic regulatory framework – original FDI screening as an instrument to protect the public security interests of the MSs

Regulation 2019/452, constituting a legislative basis for the EU's FDI screening framework, was adopted on 19 March 2019.[7] The mechanism entered into force

[5] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*, Brussels, 13 September 2017 COM(2017) 487 final (Proposal for Regulation 2019/452).

[6] Communication from the Commission, *Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452* [2020] OJ C 991/1 (COVID-19 Guidance). The MSs' expected response was not limited to the health care industry.

[7] Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79 I/1.

in April 2019, with its full application set for 11 October 2020. The European Commission had realized the necessity of gaining control over foreign direct investment within the Union's territory two years earlier, as the Regulation Proposal was issued in 2017. The Proposal's issuance marks a turning point in the Commission's attitude toward foreign investment control mechanisms, as it continuously upheld its rather anti-regulatory position despite numerous warnings.[8] The Commission rejected proposals for a common European screening mechanism, including an establishment of an EU committee on foreign investments that would imitate the Committee on Foreign Investment in the United States (CFIUS).[9] The justification relied mainly on the argument that the MSs as well as the Union already possessed sufficient measures to protect against threats arising from foreign investment.[10] The Commission was very hesitant toward foreign investment control mechanisms "based on too broad a notion of 'national security', especially when covering economic grounds."[11] Even though the European economic landscape underwent significant changes, mainly because of the rapid growth of Chinese investment, this reluctancy remained dominant in both the Commission's narrative and legislative

[8] Foreign investment sparked EU-wide concerns as early as in 2008, when investments made by sovereign wealth funds (SWFs) grew rapidly. *See* J. de Kok, *Towards a European Framework for Foreign Investment Reviews*, 44(1) European Law Review 24 (2019), p. 8. Investments carried out by state-owned and state-funded SWFs raised concerns regarding the functioning of market economies – though evidently not severe enough, as the European Commission decided not to take any action at the European level. *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 27 February 2008, *A common European approach to sovereign wealth funds*, COM(2008) 115 final, pp. 3–4 (Communication on the SWFs); A. de Luca, *The EU and Member States: FDI, Portfolio investments, golden powers and SWFs*, in: F. Bassan (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Edward Elgar Publishing, Cheltenham: 2015. A few years later the Commission rejected criticism raised by Antonio Tajani and Michel Bernier, who urged for higher scrutiny over Chinese direct investment rapidly emerging in Europe. Again, even though potential threats arising from Chinese foreign investments were acknowledged by senior EU officials, no action was taken to address them (de Kok, *supra* note 8). For more on EU FDI screening regulation, *see generally* J. Velten, *The Investment Screening Regulation and its Screening Ground "Security or Public Order": How the WTO Law Understanding Undermines the Regulation's Objectives*, CTEI Working Papers 2020/1; T. Verellen, *When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation*, 48(1) Legal Issues of Economic Integration 19 (2021); *Framework for Screening Foreign Direct Investment into the EU: Assessing Effectiveness and Efficiency*, OECD Publishing, Paris: 2022.

[9] Communication on the SWFs, p. 7; H. Schweitzer, *Sovereign Wealth Funds: Market Investors or "Imperialist Capitalists"? The European Response to Direct Investment by Non-EU State-Controlled Entities*, n: Ch. Herrmann, J.P. Terhechte (eds.), *European Yearbook of International Economic Law*, Springer, London: 2011, p. 94.

[10] Communication on the SWFs, pp. 6–8; A. de Luca, *The EU and Member States: FDI, Portfolio investments, golden powers and SWFs*, in: F. Bassan (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Edward Elgar Publishing, Cheltenham: 2015, p. 183; F. Godement, J. Parello-Plesner, A. Richard, *Policy Brief: The Scramble for Europe*, European Council on Foreign Relations, London: 2011, p. 5.

[11] de Kok, *supra* note 8, citing A. Tajani, *Parliamentary Questions – Answer Given by Mr Tajani on Behalf of the Commission*.

actions. This anti-regulatory shell only slowly started to break in 2017, which ultimately resulted in an unprecedented step toward regulating public security threats arising from foreign investment: the Proposal for Regulation 2019/452.[12]

Even though the Commission's approach gradually changed as the share of Chinese direct investment in the EU increased, the first official step to address risks to public security arising from foreign direct investment was not taken until 2017. Although the Proposal was strongly criticized and though it is, in fact, doubtful whether it truly manifested the Commission's own change of mind – having originated as an initiative of Germany, France and Italy – its revised version unprecedently allowed for mitigating public security risks of foreign investment.[13] The final Regulation 2019/452 established an FDI screening framework which, at its core, was a protective mechanism for public security of the MSs. Protection of the Union's interests was largely limited. Even though the mechanism was established

[12] It is important to note that as early as 2016, the European Political Strategy Centre (EPSC) pointed out the need for a harmonized approach to foreign investment, as well as the possibility of implementing a common European review of foreign investment based on the US Committee on Foreign Investment (*Engaging China at a Time of Transition: Capitalizing on a New Era of Chinese Global Investment and Foreign Policy Initiatives*, 16 EPSC Strategic Notes Issue 1 (2016), available at: https://tinyurl.com/7hf3c53s (accessed 30 June 2025)). It should be further noted that the proposal for Regulation 2019/452 was not the earliest document to demonstrate the shift in the Commission's attitude towards regulating threats arising from foreign investment. It had also been manifested in the Commission's *Reflection Paper on Harnessing Globalization*, issued in early 2017. There it was confirmed that "concerns have recently been voiced about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons. [...] These concerns need careful analysis and appropriate action" (European Commission, *Reflection Paper on Harnessing Globalization*, Brussels, 10 May 2017, COM(2017) 240 final); *see also* European Commission, *White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025*, 1 March 2017, COM(2017)2025. *See also* Bismuth's interpretation of the Proposal as "surprising particularly when one recalls the sceptical – and at times reluctant – position of the Commission regarding domestic FDI screening mechanisms" (R. Bismuth, *Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU*, 3(1) European Investment Law and Arbitration Review 45 (2018), p. 46).

[13] Bismuth, *supra* note 12, p. 48. *See also* C. Esplugues, *A Future European FDI Screening System: Solution or Problem?*, 245 Columbia FDI Perspectives 1 (2019). A comprehensive analysis of the Proposal and its legislative path towards Regulation 2019/452 is outside of the article's scope. It should be emphasized, however, that the Proposal was significantly revised during negotiations with the MSs. The primary Proposal was to a much greater extent "European," as it was broadly aimed at the protection of "critical European assets against investment that would be detrimental to legitimate interests of the Union or its Member States" (*see ibidem*, p. 2). Moreover, the originally proposed FDI screening framework was a "policy response to protect legitimate interests with regard to foreign direct investments that raise concerns for security or public order of the Union or its Member States" (*see ibidem*). The originally proposed Regulation 2019/452 was thus aimed at safeguarding the security interests of the Union. For this purpose, the Proposal included competences of the Commission to "screen foreign direct investments that are likely to affect projects or programmes of Union interest on the grounds of security or public order" (*see* ibidem, Art. 3(2)). However, the Commission's efforts to protect European interests through FDI screening were ultimately rejected, as the adopted Regulation 2019/452 did not include an "independent Union level FDI Screening mechanism whenever 'Union interests' are at stake" (S.W. Schill, *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, 46(2) Legal Issues of Economic Integration 105 (2019), p. 106).

at the European level, its primary aim was firmly MS-centered, as the framework for FDI screening was built on the premise that the MSs had sole responsibility for protecting their national security.[14] The principal constatation of protecting primarily the public security of the MSs was achieved on the basis of five pillars: making public security grounds for FDI screening and thus a justification for possible domestic legal measures against certain foreign investment;[15] establishing the double voluntariness of domestic FDI screening;[16] rooting the framework in MSs' sole responsibility for protecting national security;[17] giving MSs the competence to issue comments if a foreign investment in a different MS is likely to affect its public security as part of the cooperation mechanism;[18] and vastly limiting the competences of the Commission, including solely the listed European projects and programs and non-binding opinions.[19] The FDI screening framework was established almost entirely for the purpose of safeguarding MSs' interests of public security.[20] National, and not European, interests were thus primarily protected. Under Regulation 2019/452, only limited interests of the Union (selected European projects and programs) were protected by the MSs through their domestic FDI screening mechanisms.[21]

The EU FDI screening framework, which emerged from Regulation 2019/452, was a mechanism that arguably allowed solely for the protection of MSs' interests of public security. The European Commission had no powers to use FDI screening for the protection of the interests of the Union, including its security. It was the experience of two major crises striking Europe shortly after the Regulation's adoption that inspired dualistic changes to the nature of the FDI screening mechanism.[22] These changes, under the legally unchanged Regulation 2019/452, in turn

[14] Art. 1(2) of Regulation 2019/452.

[15] *Ibidem*, Art. 1(1), 3(1).

[16] The MSs' voluntariness in deciding whether to screen a certain foreign direct investment (*ibidem*, Art. 1(3)) and their voluntary adoption of the domestic FDI screening mechanism (Art. 1(3)); *see also* Preamble (8).

[17] *Ibidem*, Preamble (7), Art. 1(2).

[18] *Ibidem*, Art. 6(2).

[19] *Ibidem*, Art. 8, 7(7), 7(2).

[20] Contrary to the original Proposal, the European Commission had no powers under Regulation 2019/452 to influence MSs' decision to either adopt a screening mechanism or to screen a certain FDI. Even though the Commission had the competence to issue opinions regarding FDI on MSs' territory, the opinions were non-binding and limited to instances when unscreened FDI is "likely to affect security or public order in more than one Member State" (*see* Art. 7(2)). This competence did not serve the purpose of protecting the security of the Union nor the interests of the Union as a whole. Moreover, even with regard to the projects or programs of the Union's interests, the only power the Commission had was to issue a non-binding opinion and wait for the MSs to decide whether to protect the Union's interest, through the domestic screening of a particular FDI.

[21] *Ibidem*, Art. 8.

[22] *But see supra* note 3.

facilitated the possibility of protecting first European interests and, subsequently, European economic security.

2.2. European Commission guiding FDI screening during the pandemic: COVID-19 as a trigger for dualistic changes in FDI screening's scope

The EU FDI screening framework was not adopted as a response to a crisis, nor for the purpose of protecting against crises.[23] However, the experience of a crisis did lead to significant changes in the mechanism's hitherto purely domestic nature. The experience of the COVID-19 pandemic allowed the Commission to use FDI screening to safeguard the Union's common security interests. Because the crisis threatened MSs collectively, the protection of European interests (i.e., the collective interests of the MSs) became necessary for the protection of the domestic interests of public security. In light of the COVID-19 pandemic, the protection of MSs' public security demanded that European security be protected. Consequently, FDI screening's scope dualistically changed. Firstly, it was subjectively extended to include European interests. Secondly, its objective scope transformed to safeguard not only MSs' public security, but also European security and, later, European economic security. The collective interests of the MSs, and thus European interests, were now equally, if not primarily, protected. This change in the mechanism's nature transpired without amendments to Regulation 2019/452 but was instead initiated by the Guidance issued by the European Commission in response to the COVID-19 pandemic.[24] This transformation allowed for the protection of not only Union projects and programs, but common European security, through domestic FDI screening mechanisms of the MSs.

The experience of the COVID-19 pandemic inspired and allowed European security to be protected by the domestic FDI screening mechanisms of the MSs under the unchanged Regulation 2019/452. Ultimately, the COVID-19 pandemic facilitated the protection of European economic security through FDI screening in the 2024 EESS.

As mentioned above, the EU FDI screening framework was adopted in 2019, but was to be applied from October 2020. Between the Regulation's entry into force and its application, circumstances for both the Union and the MSs changed rapidly and drastically, in the face of a crisis: the COVID-19 pandemic. The crisis brough

[23] Neither the Proposal for Regulation 2019/452 nor the Regulation itself directly indicated why, suddenly, the EU decided to start legally responding to public security-related threats arising from FDI. It is widely accepted, however, that the rise of Chinese investments in Europe, including Chinese takeovers or attempted takeovers of European companies in crucial economic sectors, directly influenced the emergence of the EU FDI screening framework.

[24] It can be argued that only when faced with crises induced by the COVID-19 pandemic was the Commission able to achieve its original aim of Regulation 2019/452 – protecting Union security. *See supra* note 12.

a broad set of various challenges, including the resilience of healthcare industries and the fulfillment of healthcare-related needs of citizens. As part of its response to this crisis, the European Commission issued a Guidance to the MSs concerning foreign direct investment and the free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452. The issuance of this Guidance, being a direct response to the COVID-19-induced crisis, dualistically changed the nature and scope of FDI screening.

In the document, the Commission specified how FDI screening can be used by the MSs as a tool for addressing and mitigating risks of foreign investment during the pandemic. The document was not, however, a mere instruction for MSs on how to use FDI screening in times of crisis. The language and content of the Guidance indicate its much higher importance. The document changed the nature of FDI screening in two dimensions. Firstly, it made what was hitherto the sole matter of the MSs a common European issue. Secondly, it laid the foundations for the EESS through emphasizing the economic consequences and economic risks of the COVID-19 crisis and framing FDI screening as a relevant protective tool against them.

As mentioned above, the relevance and importance of FDI screening in times of crisis was specified by the Commission in relation to the COVID-19 pandemic.[25] FDI screening's application does not seem surprising.[26] What is surprising is that these foreign investment-born risks are placed by the Commission in the European context. FDI's risks are portrayed in the Guidance as risks for the security of the whole Union and not solely for the public security of a particular MS: "[a]cquisitions of healthcare-related assets would have an impact on the European Union as a whole."[27] Surprisingly, the Commission does not specify what it means that something is a threat to European security and not to the public security of the MSs, but expresses the desire to protect against such threats either way.[28] Even the document's title reflects this "Europeanness," as the Guidance was issued for "the protection of Europe's strategic assets."[29] These strategic assets "are crucial to Europe's security and are part of the backbone of its economy and, as a result, of

[25] *See supra* note 5.

[26] Especially since the Commission specified in its Guidance that "today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools" (COVID-19 Guidance, p. 1).

[27] *Ibidem*. The Commission expressed further: "The risks to the EU's broader strategic capacities may be exacerbated by the volatility or undervaluation of European stock markets."

[28] The purpose of this paper is not to define and distinguish between the FDI-related threats to European security versus MSs' public security. The statement presented above – "FDI's risks are portrayed in the Guidance as risks for the security of the whole Union and not solely for the public security of a particular Member State" – is an analysis of the Guidance, not my opinion.

[29] COVID-19 Guidance, p. 1.

its capability for a fast recovery."[30] Consequently, a MS's decision to screen a certain FDI, preceded by an analysis of its impact on the MS's public security, ceases to be a purely domestic issue (as it was under Regulation 2019/452). It becomes a primarily European matter because, during the COVID-19 pandemic, the MS's decision of whether to screen a certain FDI (and thus whether to protect its public security) directly affects European security, understood as the common security of all the MSs. In the Commission's view, MSs need to be vigilant to "ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens."[31]

As the COVID-19-related risks of foreign investment are primarily risks to the Union as a whole rather than to a particular MS, in the Commission's view, FDI screening needs to be remodeled to reflect this new, European perspective. As the risks changed, the mechanism of protection against them had to be transformed. To be able to address and effectively protect against these "European risks," FDI screening had to be moved from the domestic to the European realm. As a result of this necessity, during the COVID-19 pandemic, national FDI screening gained a new function: protecting European security. The previous FDI screening, being a protective mechanism for the public security of the MSs, had to change into a mechanism for protecting European interests. "FDI screening should take into account the impact on the European Union as a whole, in particular with a view to ensuring the continued critical capacity of EU industry, going well beyond the healthcare sector."[32] Its scope was consequently transformed. Following the Guidance, when screening a particular FDI through domestic mechanisms, MSs had to look beyond their own public security, beyond their domestic circumstances, beyond their borders and assess the FDI's potential for threatening the other MSs and the whole Union. The MSs' public security became European security. It can thus be argued that European security has become new grounds for FDI screening, though not specified in Regulation 2019/452. On the basis of Commission's Guidance, MSs' domestic FDI screening directly protects European security.[33] For this purpose, the Commission urged the MSs to "make full use already now of its FDI screening mechanisms to take fully into account the risks to critical health

[30] *Ibidem*, p. 2.

[31] *Ibidem*.

[32] *Ibidem*, p. 2.

[33] It should be noted that very limited European interests were already protected by domestic FDI screening mechanisms of the MSs on the basis of Regulation 2019/452. What changed under the COVID-19 Guidance was the scope of these interests. Because of the pandemic-induced "European risks" arising from foreign investment, the MSs were called by the Commission to use their domestic screening to protect European security, and not solely "projects and programmes of Union's interest."

infrastructures, supply of critical inputs, and other critical sectors."[34] Furthermore, MSs who did not yet have an FDI screening mechanism in place were called upon to "to set up a full-fledged screening mechanism" for the purpose of assessing FDI's "risk to security or public order in the EU" and, meanwhile, use any other mechanisms to achieve this aim.[35]

It should be also noted that the Commission directly connected the EU's economy with FDI-induced risks to European security. In fact, the whole crisis caused by the COVID-19 pandemic is addressed in the Guidance solely in the economic context.[36] Even though the term "European economic security" is not used by the Commission in the Guidance, European strategic assets, protected by domestic FDI screening on the grounds of European security, are considered "the backbone" of the EU's economy.[37] Thus, it can be stated that FDI screening, transformed through the Guidance, protects the EU's economy. This transformation, triggered by the experience of a crisis, in turn, had subsequently led to yet another change in the scope of FDI screening – protecting European economic security – as specified in the EESS, issued in early 2024.

2.3. The result: European security emerging as a value protected by FDI screening

Even though the COVID-19 Guidance did not amend Regulation 2019/452 through creating new binding legal obligations for the MSs, the paper argues that it transformed the scope of the FDI screening mechanism to protect European security interests.38 Because the COVID-19 crisis threatened the MSs collectively, to protect their public security, the MSs had to broaden their FDI screening to include European security. The European Commission's Guidance, though not binding, facilitated and enabled what was necessary for an effective defense against FDI-induced threats: protecting European security through domestic FDI screening mechanisms in an effort to safeguard MSs' public security.39 The experience of

[34] *Ibidem*, p. 2.

[35] *Ibidem*.

[36] *Ibidem*, p. 1 ("The COVID-19 related emergency is having pervasive effects on the economy of the European Union"). *See also* Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, *Coordinated economic response to the COVID-19 Outbreak*, COM(2020) 112 final, p. 1, where COVID-19 is called a "major economic shock to the EU."

[37] COVID-19 Guidance, p. 2.

[38] *But see* C. Bian, *Investment Screening Put to the Test of the COVID-19 Pandemic: Typology, Legality and Externality*, 31(2) Asia Pacific Law Review 380 (2023), p. 384. For a similar view, particularly as regards the term "EU national security," *see* Robert, *supra* note 2.

[39] Interestingly, the very thought of screening foreign investment for the purpose of protecting European security had already been expressed in 2016 by the EPSC (*Engaging China... supra* note 12).

a crisis consequently inspired the profound dualistic changes to the FDI screening mechanism.

Following the COVID-19 Guidance, a few MSs revised their domestic FDI screening regulations. More importantly though, during the pandemic, the MSs relied on their FDI control measures to block foreign transactions for the purpose of protecting national security. Many of those actions were aimed at Chinese FDI. Interestingly, these are not limited to the healthcare sector, contrary to what might be expected during the COVID-19 pandemic. In December 2020, reports surfaced that Germany had opposed an acquisition by China Aerospace and Industry Group (CASIC) of the German company IMST GmbH, which specializes in satellite and radio communications technology. Though the official documents were not released, Reuters reported the vitality of IMST's know-how to national security, especially as "in various cases, IMST's products and services were also the subject of deliveries to the Bundeswehr armed forces."[40] In March 2021, Italy relied on its "golden power" to veto the acquisition of a domestic semiconductor company by Chinese Shenzhen Investment Holdings Co.[41] Even though Italy had the mechanism in place since 2012, it was used exceptionally, thus making all the more profound the decision to protect national interests and domestic semiconductor production.[42]

3. FDI SCREENING AIMED AT PROTECTING EUROPEAN ECONOMIC SECURITY: THE EESS

The COVID-19 crisis inspired and facilitated changes to the scope of FDI screening. As demonstrated above, since 2020, FDI screening was used to protect not only the public security of the MSs, but also European security. The COVID-19 emergency conveyed the importance of mechanisms aimed at safeguarding European interests and the common interests of the MSs in times of crisis. With the transformation of FDI screening allowing for the protection of European security interests, in 2023 the

[40] M. Nienaber, *Reuters, Germany Blocks Chinese Takeover of Satellite Firm on Security Concerns: Document*, Reuters, 8 December 2020, available at: https://www.reuters.com/article/world/germany-blocks-chinese-takeover-of-satellite-firm-on-security-concerns-document-idUSKBN28I282/ (accessed 30 June 2025).

[41] G. Lampo, *Italy's Exercise of Foreign Investment Screening Power against Chinese Takeover*, 1(2) The Italian Review of International and Comparative Law 433 (2022). The "golden power" refers to Italy's domestic FDI screening regime.

[42] Italy's FDI screening was revised to be in line with the EU's FDI Screening Regulation. The decision to prevent Shenzhen Investment Holdings Co. from acquiring 70% of LPE S.p.A was all the more important as the FDI control powers had not been invoked by the Italians since 2017. For details on the transaction, *see Italy's FDI Screening "Golden Power" Reflects Increasing Security Awareness*, datenna, available at: https://www.datenna.com/resources/the-italian-golden-power-increasing-concerns-towards-external-investments/ (accessed 30 June 2025); G. Fonte, *REFILE-Italy Vetoes Takeover of Semiconductor Firm by Chinese Company Shenzhen – Sources*, Reuters, 8 April 2021, available at: https://tinyurl.com/2dkt2zu3 (accessed 30 June 2025).

European Commission issued another document expanding the scope of European interests protected by MS's domestic mechanisms: the EESS.[43] The core aim of the EESS is to protect and enhance European economic security through a variety of mechanisms and tools to better face "new and emerging risks that have arisen in the more challenging geopolitical context."[44] Rooted in various crises, including the COVID-19 pandemic, the European Commission aims to use mechanisms specified in the EESS to protect European economic security in times of crisis and against potential crises. One of these mechanisms is FDI screening, the scope of which, upon inclusion in the EESS, was extended to protect European economic security. This change in the scope of FDI screening is at the center of this subsection, which demonstrates how the FDI screening mechanism will serve its newly added function and protect European economic security in times of crisis. This part of the paper concerns the most evolved form of the FDI screening mechanism, which was transformed from an instrument primarily protecting MS public security under Regulation 2019/452 toward one that safeguards European security, as enabled and demanded by the COVID-19 crisis, and then remodeled into a guardian of the European economic security – not as a fully independent and self-standing mechanism, but rather a part of a broader, more complex strategy.

FDI screening was classified as a mechanism for European economic security as early as June 2023, when the EESS was issued by the European Commission and the High Representative. In the EESS, FDI screening is framed as a part of the second pillar of the new strategy: "Protecting economic security."[45] This meant that FDI screening would be one of the tools protecting against economic security risks, in a broader direction toward "completing traditional approaches to national security with new measures to safeguard [...] economic security" for the aim of warranting "prosperity, sovereignty and safety."[46] For the purpose of ensuring the effectiveness of European economic security through FDI screening, in the EESS the Commission committed to revising the existing foreign direct investment screening framework.[47]

In line with this commitment, on 24 January 2024 a new proposal for the regulation on the screening of foreign investments was issued by the European Commission.[48] Basing on the experience of the COVID-19 crisis, which "underlined the

[43] European Commission, *Joint Communication to the European Parliament, the European Council and the Council on "EESS"*, Brussels, 20 June 2023, JOIN (2023) 20 final.

[44] *Ibidem*, p. 1. These risks, potentially leading to a crisis, are caused by and connected to "rising geopolitical tensions" and "certain economic flows."

[45] *Ibidem*, p. 6.

[46] *Ibidem*, p. 1. In the document, the citation is placed in the context of the EU.

[47] *Ibidem*, p. 8.

[48] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council*, Brussels, 24 January 2024, COM(2024) 23 final (Proposal for a New FDI Screening Regulation / New FDI Screening Regulation).

need to be able to identify risks to, and better protect EU critical assets from, certain investments," a few shortcomings of the existing framework were identified in the new proposal.[49] These contributed to the inefficiency of the existing mechanism, and thus the insufficiency of the existing solutions for protecting European economic security. It included the fact that not all MSs had adopted a domestic FDI screening mechanism, which, in turn, created "vulnerabilities because potentially critical FDIs remain undetected."[50] Consequently, strategic European assets, and thus European security, are not sufficiently protected from threats and risks arising from FDI. The Proposal for a New FDI Screening Regulation was intended to fill these gaps through revising the existing screening framework, which would ensure the efficiency of protecting European economic security through FDI screening. The three core pillars, on which the new regulatory framework is built, are the existence of a screening mechanism in the domestic legal system of all MSs; the identification of a "minimum sectoral scope where all Member States must screen foreign investments"; and the extension of "EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country."[51] These amendments to Regulation 2019/452, including the generally upheld characteristic of the existing framework, constitute a basis for the protection of European economic security through FDI screening.

Even at first glance, it is visible that the Commission proposed profoundly deep changes to the existing framework. Two of the above specified amendments transform MSs' discretion regarding adopting a domestic screening mechanism as well as choosing its scope. Consequently, it can be argued that the New FDI Screening Regulation is based on the Commission's direct interference in MSs' rights to protect their essential security interests.[52] Indeed, on the basis of the New FDI Screening Regulation, the Commission imposes the obligation to adopt the domestic FDI screening mechanism and defines its scope. The protection of European economic security demands withdrawal from voluntary FDI screening in favor of compulsory domestic screening.[53] The obligatory FDI screening would ensure the impermeability of the whole mechanism and ensure that European economic security is not endangered by a potentially concerning FDI which does not undergo any screening because of the discretionary decision of a MS, as was

[49] *Ibidem*, p. 1.

[50] *Ibidem*.

[51] European Commission Press Release, *Commission proposes new initiatives to strengthen economic security,* Brussels, 24 January 2024.

[52] It should be emphasized that in Art. 1(4) of the Proposal for a New FDI Screening Regulation, equally as in Regulation 2019/452, "sole responsibility [of a MS] for its national security" was preserved.

[53] Compare the language of Art. 3(1) of Regulation 2019/452 with Art. 3(1) of the Proposal for a New FDI Screening Regulation.

possible under Regulation 2019/452. In Art. 4 of the Proposal for a New FDI Screening Regulation, the Commission unprecedently set out a list of requirements for the domestic mechanisms of MSs, including a rule that "the screening authority shall be empowered to start screening foreign investments by its own initiative for at least 15 months after the completion of a foreign investment that is not subject to an authorization requirement."[54] Fundamentally, however, in Art. 4 the Commission defined the minimal scope of the domestic FDI screening mechanisms. For the protection of European economic security, the MSs were obliged to screen FDI "in EU companies participating in projects or programmes of EU interest"[55] provided for in Annex I, as well as "investments in EU companies active in areas of particular importance for the security or public order interests of the EU set out in Annex II."[56] Such a somewhat surprising solution being incorporated into the Proposal for a New FDI Screening Regulation is in direct correlation with the core purpose of the EESS. It guarantees and formally obliges the MSs to protect European economic security through compulsory screening of certain categories of FDI specified unilaterally by the Commission. It can be consequently stated that in the proposed New FDI Screening Regulation, European security interests are directly, and moreover, obligatorily protected by the MSs. The need to protect European economic security facilitated a fundamental change in the FDI screening mechanism – it not only officially connected European security with protection from risks arising from FDI, but, primarily, it obliged the MSs to go beyond their domestic realms of public security and formally compelled them to protect European interests. It should be emphasized, however, that the New FDI Regulation did not equip the Commission with competences to veto an FDI, nor to interfere with MSs' discretion in screening a certain investment, nor, ultimately, to change a MS's FDI screening decision. In this regard, the Commission's competences have not changed since the original FDI Screening Regulation.[57]

Even though the New FDI Screening Regulation is merely a proposal that has not been adopted, it is already visible that the protection of European economic security brought profound changes to the existing FDI screening framework, once again, fundamentally changing the mechanism's scope and nature to reflect its

[54] Art. 4(2)(c) of the Proposal for a New FDI Screening Regulation. For the full list of requirements, *see* Art. 4(2)(a)–(i).

[55] As specified above, Regulation 2019/452 also provided for the protection of European interests in the form projects and programs specified in Annex I. Under the old Regulation, however, the MSs were under no obligation to screen FDI relating to the projects and programs of Union interests. Under the proposed new Regulation, on the other hand, the MSs were required to do so and to formally include the legal basis for such screening in their domestic screening mechanisms (*ibidem*, Art. 4(4)).

[56] *Ibidem*.

[57] In the sense that under the New FDI Screening Regulation, the Commission's competences are still limited to issuing nonbinding opinions.

new purpose and function. Regardless of whether these – rather radical – changes are finally enforced as a new Regulation, the EU has no experience in applying FDI screening for the purpose of protecting economic security. This inexperience, further exacerbated by the accompanying fundamental change in the nature of FDI screening, carries the risk of ineffective protection of European economic security. For this reason and in this context, the final subsection of this paper offers insight into how the US was protecting its economic security through its domestic FDI screening regulations. The reference juxtaposes the EESS and the New FDI Screening Regulation with the US's experience in the matter in order to identify any potential shortcomings of the EU framework. The "lessons" from the US's protection of economic security through FDI-related legal regulations are presented dualistically. Firstly, the way the US's domestic FDI control regime was transformed to incorporate the protection of economic security is assessed. Secondly, insight to the practical application of the new legal regulations reveals potential challenges and good practices. The two dimensions constitute a starting point for the final concluding assessment of the EESS.

4. PROTECTION OF ECONOMIC SECURITY IN THE LEGAL EXPERIENCE OF THE UNITED STATES[58]

A debate over the necessity of protecting economic security has been ongoing in the US since the 1987 Congressional discussions on the Exon-Florio amendment.[59] Though initially framed as economic interests or the "economic well-being of the United States," the economic dimension of national security and its susceptibility to FDI-related threats has been discussed repeatedly in Congress over the years.[60]

[58] It is important to note that the phrase "FDI screening" is not applicable in the US context. It is replaced with a materially similar phrase: "national security review of FDI." For this reason, this subsection relies on nomenclature appropriate to the US context.

[59] 20 October 1987 Exon-Florio Hearing in the House of Representatives, p. 32; Omnibus Trade and Competitiveness Act of 23 August 1988, 102 Stat. 1425 (1988), which included the Exon-Florio amendment to the Defense Production Act of 1950, 64 Stat. 798 (1988).

[60] Through the long history of reviewing FDI on national security grounds, both the interpretation and the domestic US approach to economic security changed repeatedly and often radically. At every stage, however, discussions were centered around the question of whether national security should be interpreted broadly to the extent that it would include economic security. During initial discussions on the Exon-Florio Amendment, the protection of economic interests was quickly abandoned. It gained momentum in 2007 during Congressional debates on reforming CFIUS, ultimately leading to the passage of the Foreign Investment and National Security Act of 2007 (FINSA). Then, a strong conviction that "in our constituents' minds, national security and economic security are linked" was voiced by Representative Blackburn (*see* House Financial Committee, 7 February 2007 Hearing, p. 20). During discussions on FINSA, Representative Bachus – one of the co-sponsors of the bill – argued that foreign investment "poses a serious threat to our economic security" (House Financial Committee, 7 February 2007 Hearing, *Introductory Statement by Representative Bachus*, p. 3). Though considerations on the definition of economic security

However, only in 2018 did economic security begin to be protected by the national security review of FDI and covered by the statutory authority of CFIUS – an interagency committee authorized to review FDI on the grounds of national security. That year, the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) profoundly transformed the previous US FDI review system, centered around the relatively weak and ineffective CFIUS, to allow for the protection of economic security, among other things.[61] Two main factors contributed to that change.[62] Firstly, China had emerged as "a true great power competitor to the United States."[63] FIRRMA was a response to the "Chinese threat," which has shaken the founding paradigm of CFIUS and the national security review of FDI governed by it, ultimately leading to national security being reconnected with economic security based on FIRRMA.[64] Secondly, Donald Trump assumed the Office

are beyond the scope of this article, it is important to mention that the notion's understanding was subject to heated debates in Congress in 2007. Many voiced often contradictory opinions. Fundamentally, the relationship between national security and economic security was debated, some suggesting that the notions are separate. For example, the Chairman of the proceedings clearly considered the notions distinct when he criticized "identifying their own economic wellbeing with national security" when referring to some groups in society (*ibidem*, p. 4). His statement additionally highlights the lack of consensus on nomenclature: "economic security," "economic wellbeing," "economic interests," and "economic factors" seemed to be used synonymously. Only many years later, when discussing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), did the "economic security" narrative become prevalent.

[61] Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII of Public Law 115–232 (13 August 2018). For more on FIRRMA and the history of the national security review of FDI in the US, *see* A. Thompson, *The Committee on Foreign Investment in the United States: An Analysis of the Foreign Investment Risk Review Modernization Act of 2018*, 19(2) Journal of High Technology Law 361 (2019); J. Barrington, *CFIUS Reform: Fear and FIRRMA, an Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 Tennessee Journal of Business Law 77 (2019), p. 6.

[62] The change is sometimes identified as a paradigm shift, with the two specified factors allowing for the new paradigm to emerge. *See* W. Moreland, *FDI Like You're FDR: CFIUS Review under the Biden Administration's Rooseveltian Conception of National Security*, 12(3) Journal of National Security Law and Policy 627 (2022).

[63] *Ibidem*, p. 628. Now, in 2025, China is openly considered a threat to US national security. In his memorandum "America First Investment Policy" issued in February 2025, President Trump directly named China a "foreign adversary" and announced the usage of "all necessary legal instruments, including CFIUS" to prevent investors of Chinese origin to invest in critical US technologies. The 2018 motto, "Economic security is national security," continued on by President Biden, is now as relevant as ever (D.J. Trump, *America First Investment Policy,* The White House, 21 February 2025, available at: https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/ (accessed 30 June 2025)). *See also* J.R. Biden, Jr., *Interim National Security Strategic Guidance*, The White House, 3 March 2021, p. 15, available at: https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/03/nsc-1v2.pdf (accessed 30 June 2025).

[64] Moreland calls this new perspective on national security (one which includes economic security) a comeback to the "Rooseveltian conception of national security," which "is essential to the American constitutional system's survival" (Moreland, *supra* note 62, p. 63). Though not stipulated directly in the text, from its legislative history it is clear that FIRRMA was aimed at mitigating risks of Chinese investment. In one of the first Congressional hearings preceding the enactment of the new law, China was described as a "threat to national security" (Hearing before the Subcommittee on Monetary Policy and Trade of the Committee on Financial Services U.S. House of Representatives One Hundred Fifteenth Congress Second

of the US President, and his principal motto for strategic policy was, "Economic security is national security."[65]

Firstly, and fundamentally under FIRRMA, the notion of national security as a core protected value includes economic security. Economic interests, conceptualized as economic security, are to be taken into account when considering national security. This represents a profound shift in a paradigm governing the US national security review of FDI centered around CFIUS, which had been based on a sharp distinction between national security and the economy.[66] How is the US's economic security protected from FDI-related threats under FIRRMA? Primarily, FIRRMA's enactment was fueled by the need to protect the US economy from Chinese investment. Economic interests threatened by Chinese FDI became an issue of national security.[67] To protect these interests, conceptualized as economic security, the national security review of FDI had to change. To accommodate the protection of economic security, FIRRMA brought amendments to five major areas of the former framework governed by FINSA and introduced unprecedented solutions. In the next part of the paper, FIRRMA will be portrayed through the dualistic lenses of protecting economic security from Chinese FDI.

Session of 9 January 2018, Serial No. 115–67, *Evaluating CFIUS: Challenges Posed by a Changing Global Economy*, p. 2. (Evaluating CFIUS's Hearing)). Note that some scholars claim that the national security review of FDI governed by CFIUS had always addressed, and not merely in 2018, threats to the US economy. For example, Rose argues that "the history of CFIUS has always been a series of political reactions to political *and* economic concerns" (P. Rose, *FIRRMA and National Insecurity*, 45 Public Law and Legal Theory Working Paper Series 1 (2018), p. 4).

[65] D.J. Trump, *National Security Strategy of the United States of America*, The White House, 18 December 2017, available at https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf (accessed 30 June 2025); P. Navarro, *Why Economic Security Is National Security,* White House, 10 December 2018, available at: https://trumpwhitehouse.archives.gov/articles/economic-security-national-security/ (accessed 30 June 2025). It should be additionally mentioned that Donald Trump assuming the Office of President and the subsequent pursuance of the "economic security is national security" policy was preceded by growing antagonism towards Chinese investment on US soil, often with strong governmental ties and funding. The antagonism resulted in Presidential divestment orders – Ralls Corporation and Fujian Grand Chip Investment Fund (by President Obama) – and reached its climax during President Trump's presidency, ultimately leading to the passage of FIRRMA, which was, arguably, aimed directly at Chinese FDI. For more on the Ralls-Fujian takeover, *see* A.S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21(5) George Mason Law Review 1347 (2014).

[66] Moreland, *supra* note 62, p. 63. The paradigm shift is adequately conceptualized by one of the witnesses during Congressional hearings preceding FIRRMA's enactment: "The highest priority for public officials is, of course, ensuring the national security. Our national security depends, however, on the innovation and the productivity of our economy" (Evaluating CFIUS's Hearing, p. 11).

[67] See numerous conjoint references to economy and national security in assessing Chinese foreign practices during Congressional hearings leading to and on FIRRMA's legislative proposals (Evaluating CFIUS's Hearing, pp. 7, 10).

4.1. FIRRMA

As stated above, FIRRMA was a direct legal response to the emergence of the "Chinese threat" to national security. The rapid growth of inward Chinese FDI, presidential divestment decisions aimed at companies of Chinese origin, and heightened political antagonism toward China, coupled with Chinese foreign policy, contributed to the need to revisit the national security review of FDI hitherto governed by FINSA. How did FIRRMA help protect economic (and, naturally, national) security from threats arising from Chinese investments? It amended FINSA's framework as follows.[68]

4.1.1. Expansion of CFIUS' jurisdictional mandate

The most profound amendment entailed the expansion of CFIUS jurisdiction to cover a new scope of transactions. This change manifests in two ways. Firstly, FIRRMA freed CFIUS from reviewing solely those transactions which result in an acquisition of a controlling interest.[69] Since the passage of FINSA in 2007, CFIUS was limited to authority over transactions resulting in "foreign control." The term "control" was not statutorily specified, as Congress left CFIUS with the power to define it.[70] Until 2018, CFIUS could only review, and thus use its powers to ultimately block, a transaction resulting in a foreign entity having the power to "direct the decisions of the acquired American entity."[71] FINSA's framework was consequently governed by the paradigm that only foreign investments resulting in an acquisition of a controlling interest would potentially be concerning from a national security standpoint. However, the emergence of Chinese FDI revealed that national security, including US economic interests, can be threatened by transactions which do not result in control of an American company. Under FIRRMA,

[68] The subsequent analysis is not intended to provide an exhaustive portrait of FIRRMA. As the US experience in protecting economic security from FDI-originating threats serves solely as a reference point for evaluating the EESS and the New FDI Regulation, the analysis will be limited to amendments crucial from the standpoint of economic security. One such omitted amendment was the introduction of a mandatory filing. Under the previous framework governed by FINSA, all filings were voluntary. Since 2018, certain types of transactions, mainly regarding critical technology and those tied to government, had to be reported to the Committee.

[69] It was argued that foreign investors had, increasingly, used complicated investment structures and different kinds of transactions to use CFIUS's jurisdictional gap, thus avoiding its review process (M. Kennedy, *CFIUS Re-Enhanced: The Foreign Investment Risk Review Modernization Act of 2018 and China*, Developments in Administrative Law & Regulatory Practice 327 (2018), p. 332).

[70] *FINSA H.R.* 556 Sec. 2(2). The term "control" has the meaning given to such term in regulations which the Committee shall prescribe. For more on FINSA, *see* K.E. Young, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act that Needs Revision*, 15(1) University of California Davis 43 (2008).

[71] M. de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ("FINSA") in Foreign Investment in the U.S.*, 2(1) Law Raza 1 (2011), p. 10.

CFIUS's authority to review FDI became much more flexible and broader, which facilitated the protection of economic security. Since 2018, CFIUS has been able to review "any investment by a foreign person in any United States critical technology or United States critical infrastructure company that is unaffiliated with the foreign person." Passive investments have been defined narrowly by Congress in order to, arguably, prevent future litigation.[72]

The second jurisdictional change was giving CFIUS the authority to review transactions of "critical technology," as well as real estate purchases in close proximity to military installations and any other "facility or property of the United States Government that is sensitive for reasons relating to national security."[73] The protection of critical technology and critical infrastructure is at the heart of FIRRMA. Fundamentally, national security is to be defined as including "its application to critical infrastructure."[74] To that end, directly in FIRRMA's text, Congress offered guidance on considerations to be made during the examination of national security risks.[75] CFIUS was particularly urged to take into account the "cumulative control" or a "pattern of recent transactions" tied to either foreign government or a foreign person, over critical infrastructure, critical technology or an energy asset, or critical material.[76]

Furthermore, FIRRMA expanded the scope of covered transactions to include investments which afford the foreign person "access to any material nonpublic technical information in the possession of the United States business."[77] This legal solution enabled protection against Chinese FDI in particular, which – through attempting to acquire critical technology – directly threatened the US's economic security. Lastly, under FIRRMA, CFIUS took jurisdiction over joint ventures and "any other action designed to be a circumvention" of its jurisdiction.[78]

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[72] *See* Rose, *supra* note 64, p. 14 (claiming that the narrow interpretation directly corresponds to United States Court of Appeals for the District of Columbia Circuit, *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296 D.C. Cir. 2014).

[73] FIRRMA 50 U.S.C. 4565(a)(5)(B)(ii).

[74] *Ibidem*, 4565(a)(1).

[75] *Ibidem,* Sec. 1702(c). Other amendments to the existing framework included a new procedure within CFIUS, the so-called "declarations" or "light filing"; straightening of the regulation of particular transactions or of mitigation agreements for reducing national security risk; and expanding previous CFIUS review timelines; introducing CFIUS's special hiring authority and funding. Furthermore, FIRRMA introduced the concept of a "country of a special concern" and an obligation.

[76] FIRRMA Sec. 1702(a)(c)(2). The issue of cumulative control and a pattern of transaction was later addressed and developed by President Biden in his Executive Order 14083, issued in 2022.

[77] FIRRMA Sec. 1703(a)(4)(D)(i)(I).

[78] *Ibidem*, Sec. 1703(a)(4)(B)(i) and Sec. 1703(a)(4)(B)(v).

4.1.2. Legal solutions tailored to specifically address Chinese FDI

As FIRRMA was primarily aimed at economic concerns stemming from Chinese FDI, the second most important change was the introduction of solutions specifically addressing it. Firstly, FIRRMA relies on the term "country of a special concern." During its assessment, CFIUS may take into account "whether a transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US technological and industrial leadership in areas related to national security."[79] The final text of FIRRMA does not include a definition of a "country of a special concern," but the Senate's version of the bill defined it as "a country that poses a significant threat to the national security interests of the United States."[80] The House version of FIRRMA included an even more detailed definition, linking it with US foreign trade and anti-terrorism practices.[81] Importantly, under FIRRMA, CFIUS was not obliged to sustain a list of such countries, giving the Committee more flexible authority and more leeway in exercising it.

The argument that FIRRMA was aimed primarily at combating threats from Chinese investments is further strengthened by the obligation of reporting to Congress on Chinese investments in the United States. Every two years, the Secretary of Commerce was required to inform Congress about the "[t]otal foreign direct investment from the People's Republic of China in the United States, including total foreign direct investment disaggregated by ultimate beneficial owner," as well as "a breakdown of investments from the People's Republic of China in the United States" specified by different categories.[82] The Secretary in particular is obliged to specify "a list of companies purchased through government investment by the People's Republic of China."[83]

4.1.3. New filing procedure – Declarations

Another fundamental change brought by FIRRMA was the new filing procedure and its so-called declarations.[84] Instead of a traditional written notice, the parties may submit a shorter notice – a declaration – including basic information on the transaction. Such a "lighter-touch filing" is not to exceed five pages.[85] After the

[79] *Ibidem*, Sec. 2(b)(1).

[80] FIRRMA, Senate version, Congressional Record, November 8, 2017, S7111.

[81] *See* Rose, *supra* note 64, p. 13 (citing FIRRMA's version of the House: 50 U.S.C. 4565(a)(3)(C)(i)(I)).

[82] FIRRMA 50 U.S.C. 4565 Sec. 1719 (b).

[83] *Ibidem*.

[84] *Ibidem*, 4565 Sec. 1706.

[85] Rose, *supra* note 64, p. 14. The "light filing" nomenclature is used by the Committee. See *Summary of the Foreign Investment Risk Review Modernization Act of 2018,* U.S. Department of the Treasury, available at: https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf (accessed 30 June 2025).

Committee receives a declaration, it can take all sorts of actions, such as requesting the filing of a traditional written notice and greenlighting the transaction. CFIUS should take action within 30 days of receiving a declaration. The new filing procedure is arguably friendly to foreign investors, as submitting a declaration, which is voluntary, may speed the CFIUS review process in case a transaction is greenlit at the declaration stage.[86]

The above-listed amendments to the US national security review of FDI profoundly modernized and transformed the way in which national security is protected from risks arising from FDI. Being a direct implementation of President Trump's "economic security is national security" policy, these changes incorporated in FIRRMA's text responded to the need to protect economic security. The need to safeguard this realm of national security triggered normative and practical transformation of the past mechanism, simultaneously increasing its rigorous effectiveness in protecting US national security from various threats arising from – mostly Chinese – FDI.

4.1.4. Challenges of FIRRMA's FDI review

As described above, FIRRMA had substantially amended the past national-security-based FDI review. Even though the changes equipped CFIUS with broader and stricter authority to accommodate the protection of economic interests, among other things, the regime is not without challenges. Those are best revealed by practice. After FIRRMA expanded its powers, CFIUS reviewed an unprecedented number of transactions.[87] The main challenge of the new regime is the assertion of jurisdiction over a wider scope of transactions.[88]

Even though FIRRMA significantly expanded the scope of transactions to fall within CFIUS's jurisdiction, CFIUS asserts its jurisdiction over a broader class of transactions for the purpose of protecting national security. An example of such a practice is the attempted acquisition of the South Korean Magnachip Semiconductor Corporation by the Chinese private equity company Wise Road Capital.[89]

[86] Traditional written notice is to be reviewed by the Committee within 45 days; under the declarations procedure, action is to be taken within 30 days.

[87] *Annual Report to Congress*, Committee on Foreign Investment in the United States, Washington: 2020, p. 6.

[88] Other, more foreign investor-centered challenges include judicial review of CFIUS's actions, especially regarding retrospective review of already completed transactions, which raises due process claims. This controversial matter recently resurfaced when an acquisition of US Steel by Japanese Nippon Steel was blocked by President Biden.

[89] For more on CFIUS's practice, *see generally* E. Leaf, *Tiktok, Tick-Tock: How Committee Foreign Investment in the United States (CFIUS) Can Mitigate Threats Posed by Foreign-made Software Applications*, 6 Administrative Law Review 343 (2021); P. Connell, T. Huang, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States,* 39 Yale Journal of International Law 131 (2014); A. Feder, *A Bull in a China Shop: How CFIUS Made TikTok a National Security Problem*, 5(2) Cardozo International & Comparative Law Review 627 (2022).

CFIUS asserted jurisdiction over the transaction even though no US business was to be acquired. Controversies surrounding CFIUS jurisdiction over the Magnachip acquisition are rooted in the definition of "United States business." According to FIRRMA, a US business "means a person engaged in interstate commerce in the United States."[90] However, when the Committee issued its regulations implementing the new law, the Committee omitted "interstate commerce" from its definition of a "United States business."[91] When practitioners challenged them on it, CFIUS responded that "the proposed definition tracks the language of FIRRMA and is not intended to suggest that the extent of a business's activities in interstate commerce in the United States is irrelevant to the Committee's analysis of national security risk."[92] Though not stated directly, it can be argued that since FIRRMA, the Committee perceives its jurisdiction as not being limited to the "extent of [a US business's] activities in interstate commerce in the United States."[93] In other words, the omission can be interpreted as CFIUS jurisdiction being extended to business activities not relating to matters of interstate commerce. Potentially, this could be the basis for broadening Committee's jurisdiction outside of its limits provided in FIRRMA. This controversial issue was precisely what emerged in the Magnachip–Wise Road Capital acquisition. The Committee was not notified of the transaction's intent because Magnachip's business activity was located outside of the United States.[94] Despite that, CFIUS asserted jurisdiction over Wise Road Capital's investment and shortly after issued an interim order blocking the transaction until a review could be concluded.[95] Apparently, the transactions raised national security concerns and, as a result, the parties decided to withdraw from the merger. The Committee's actions regarding the acquisition were controversial. As Magnachip's business activities in the US were practically non-existent, CFIUS asserting its jurisdiction represents an aggressive interpretation of its FIRRMA-based jurisdictional authority. If the

[90] FIRRMA 50 U.S.C. 4565 Sec. 1703 (13).

[91] Department of the Treasury Office of Investment Security, *31 CFR Parts 800 and 801 RIN 1505–AC64, Provisions Pertaining to Certain Investments in the United States by Foreign Persons*.

[92] Department of the Treasury Office of Investment Security, *31 CFR Parts 800 and 801 RIN 1505–AC64 Provisions Pertaining to Certain Investments in the United States by Foreign Persons*, 85(12) Federal Register 3112 (2020), p. 3119 https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf (accessed 30 June 2025).

[93] *Ibidem*. In its previous Regulations, CFIUS defined a "US business" as "any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce." B.L. Van Grack, J. Brower, *CFIUS's Expanding Jurisdiction in the Magnachip Acquisition*, Lawfare, 11 October 2021, available at: https://www.lawfaremedia.org/article/cfiuss-expanding-jurisdiction-magnachip-acquisition (accessed 30 June 2025).

[94] For more details on Magnachip's business activities and its location, *see* Van Grack, Brower, *supra* note 93.

[95] P. Hastings, *Magnachip CFIUS Case Underscores Focus of U.S. Government on Semiconductor Supply Chain Security*, LEXOLOGY, 17 September 2021, available at: https://www.lexology.com/library/detail.aspx?g=5e5c8f05-b535-41b4-91bf-5388841bb5d2 (accessed on 30 June 2025).

Committee continues to interpret its jurisdiction so broadly, practically any transaction – even one with an extremely limited US connection – could be subject to the national security review, even though it falls out of CFIUS' jurisdiction. This tendency toward jurisdictional expansion can potentially lead to the statutorily stipulated CFIUS jurisdiction being insufficient to protect US national security, including its economic interests. It can also presage that CFIUS will be used more and more often primarily as a political tool, with flexible and highly adaptive competences. This would allow for maximum protection of national security interests, through an appropriate interpretation of the regulations, enabling jurisdiction over a virtually unlimited scope of potentially dangerous transactions.[96]

As portrayed above, FIRRMA revolutionized the way FDI is reviewed for the purpose of protecting national security. Aimed at addressing threats arising mainly from Chinese investment and at accommodating the protection of economic interests, CFIUS jurisdiction became unprecedently wide. Since 2018, practically any transaction with a foreign element could be reviewed by the Committee and thus prevented from moving forward. Under FIRRMA, national security includes economic security and the previous framework thus became wider and stricter. Despite the tightening of the old regime governed by FINSA, FIRRMA's solutions seem to be insufficient for efficient national security protection, as CFIUS had specifically interpreted its powers to include an even broader category of transactions.

CONCLUSION

As demonstrated above, FDI screening established under Regulation 2019/452 profoundly transformed because of the experience of a crisis. It started as a mechanism purely aimed at protecting MSs' public security, but it was transformed through the COVID-19 emergency into a mechanism that protected European security. Even though Regulation 2019/452 was not amended, the COVID-19-induced threats arising from FDI prompted the MSs, somewhat accidentally, to protect European security through their domestic FDI screening mechanisms. The previous scope of FDI screening was transformed to also protect European security interests. Based on the experience of a crisis, in light of changing geopolitical and geoeconomic international dynamics, in 2023, the European Commission yet again, but consciously this time, amended the scope of FDI screening. The mechanism gained a new purpose: it was now set to be directly used for the protection of European economic security, as specified in the EESS. Protecting European economic security, through a mechanism legally and practically unsuitable for this purpose, demanded changes

[96] Strong politicization of the review process is yet another challenge of the FIRRMA-based regime.

to its legal basis. Therefore, in early 2024, the Commission issued a Proposal for a new framework for FDI screening, which, if adopted, would replace Regulation 2019/452. In the Proposal, which was aimed at accommodating FDI screening to protecting European economic security, the Commission planned a deep – and quite surprising – interference into the MSs' competences, particularly relating to the protection of national security and their essential security interests. In the Commission's view, safeguarding the EU's economic security demanded that compulsory FDI screening be introduced in all its MSs, as well as normative safeguards for European interests in their domestic legal systems. The latter is supposed to be achieved through defining the minimal scope of FDI screening directly in the New FDI Screening Regulation. Because the practical application of FDI screening in protecting European economic security raises concerns, exacerbated further by the EU's bold proposal and lack of experience in that regard, the US's experience can serve as a useful reference. Surprisingly, even though economic security was a part of the earliest discussions on the US's national security review of FDI, only in 2018 was it formally added to CFIUS's authority. Moreover, it occurred in the context of a rapidly growing threat to US national security from Chinese investments, which enabled national security to be connected with economic security. The need to protect US economic security through its national security review of FDI influenced and justified profound changes to the mechanism itself, including a significant broadening of CFIUS jurisdiction, as well as the inclusion of rules directly regarding the protection of critical technology – aimed precisely at Chinese FDI. In other words, the US's decision to protect its economic security through the existing mechanism of reviewing FDI resulted in a significant tightening of its national security review of FDI. Juxtaposing the US's experience with the EU's (hitherto liberal) rules, justified by maintaining an open investment environment, it can be argued that, for the purpose of effectively protecting European economic security, the Proposal for a New FDI Screening Regulation should have been, or in the future should be, made even stricter. Possibly, the old idea of establishing an EU committee on foreign investments that would imitate CFIUS should be reevaluated and reconsidered. Perhaps, simply moving FDI screening fully to the European level, by establishing a specialized Committee, would guarantee and enable the fully effective protection of European economic security, as the US's experience clearly indicates.