When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation

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The EU FDI Screening Regulation (the Regulation) is an interesting application of the 'integration by stealth' theory to the sphere of investment screening. The Regulation leads to integration in the sense that, for the first time, the Commission is granted a role in the process of investment screening within the EU. However, Commission involvement comes at the cost of simultaneously strengthening the hands of the Member State screening authorities, leading to a suboptimal policy outcome whereby neither the Commission nor the Member States may have at their disposal the necessary tools to screen investments quickly and thoroughly, as is required to maintain an open investment environment. The shortcomings of the Regulation are likely to trigger calls for further reform. To develop this argument, this article (1) legally examines the main features of the Regulation and (2) explores the interplay of the Regulation with EU free movement rules. The article explains how the Regulation is likely to contribute to an uptake in national screening decisions, but not to a concomitant increase in enforcement opportunities for the Commission or the Court of Justice of the EU. This creates an enforcement gap, which may put pressure on the existing free movement framework and may risk encouraging Member States to develop a national *as opposed to a* common *EU conception of public security and order.*

Keywords: European Union law, European integration, foreign direct investment screening, free movement of capital, freedom of establishment, investment liberalization, functionalism, neo-functionalism, Court of Justice of the European Union, common commercial policy, rule of law, judicial protection, enforcement

1 INTRODUCTION

Under (neo-)functionalist theories of European integration, policies in the EU are the product of Commission efforts to carry forward the integration process.[1] When bargaining amongst the institutions and Member States leads to a suboptimal policy

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1 Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005). *See* similarly, albeit with a greater emphasis on the role of Member States as the primary initiators of the spill-over process: Erik Jones, R. Daniel Kelemen

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outcome, the Commission will be inclined to accept the outcome as long as progress is made towards closer integration. Giandomenico Majone has referred to this strategy as one of 'integration by stealth'. Majone:

> [U]nder the [Union] method policy is largely epiphenomenal – the by-product of actions undertaken to advance the integration process, of efforts to maintain 'institutional balance', of interinstitutional conflicts and intergovernmental bargaining. Absent an effective system of accountability, there are few incentives to engage in efficient problem-solving. The policy that eventually emerges from the attempt to pursue several objectives simultaneously will typically be the best bargain that can be negotiated politically at a given time.[2]

Shortcomings of the instrument enacted become apparent after its entry into force, leading to political pressure for further action by virtue of spill over effects whereby, in Majone's words, 'initial steps toward integration trigger endogenous economic and political dynamics leading to further integration'.[3]

'Integration by stealth' thus has three features: first, integration takes place in the sense that actions undertaken by the EU institutions and the Member States lead to a role for EU institutions; second, the policy outcome is suboptimal in the sense that, due to intergovernmental bargaining, that outcome is not as efficient as it could have been in light of the policy's stated objective(s); third, the policy outcome is not likely to be permanent, as the suboptimal features of the policy outcome result in calls for further EU action and a greater role for EU institutions. In short, Majone identified a feedback loop running from integration over suboptimal policy outcomes towards criticism on those outcomes and, ultimately, further integration.

The recently enacted EU Foreign Direct Investment (FDI) Screening Regulation (the Regulation) is an interesting application of the 'integration by stealth' theory to the sphere of investment screening. Indeed, the Regulation ticks all three of the boxes identified in the previous paragraph. First, the Regulation leads to integration in the sense that, for the first time, the Commission is granted a role in the process of investment screening within the EU. Second, Commission involvement comes at the cost of simultaneously strengthening the hands of Member State screening authorities. This leads to a suboptimal arrangement whereby neither the Commission nor the Member States have at their disposal the necessary tools to screen investments quickly and thoroughly, as is required to maintain an open investment environment (an objective the Regulation presents as being of fundamental importance[4]). More

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& Sophie Meunier, *Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration*, 49 Comp. Pol. Stud. 1010, 1013–1017 (2016).

2 Majone, *supra* n. 1, at 107.

3 *Ibid*., at 42.

4 Recital 2 of the Regulation: '[T]he Union and the Member States have an open investment environment, which is enshrined in the Treaty on the Functioning of the European Union (TFEU) and embedded in the international commitments of the Union and its Member States with respect to foreign direct investment'.

specifically, in a pattern that can be observed also in other areas of Union law such as fiscal policy,[5] the Regulation imposes disciplines on Member States without at the same time providing for specific enforcement mechanisms at EU level, leaving the compound EU polity potentially ill equipped to face the challenges posed to it by a changing geopolitical environment.[6] Third, and finally, it is likely that calls for reform will be made quite soon. Indeed, the responsible commissioner has already expressed his intention to further strengthen the EU screening framework.[7]

To make the above argument, the article proceeds as follows. In section 1.1, I describe how the Regulation represents a meaningful step forward in the European integration process. To this end, I present and legally examine, in order of appearance, the minimum quality requirements provided for in Article 3 of the Regulation, the screening factors in Article 4, the cooperation mechanism in Articles 6 and 7, and the enhanced screening of investments with a Union dimension in Article 8. In section 1.2, I address two shortcomings of the Regulation, which support my contention that the Regulation's policy outcome is suboptimal: (1) the operation of the cooperation mechanism will cost investors more time and money compared to the *status quo ante*, which may very well have a chilling effect on investment; and (2) by empowering Member States to screen investments on grounds of public security and order without simultaneously introducing specific enforcement mechanisms at EU level, the Regulation enters into conflict with the Treaty objective of investment liberalization. In so doing, the Regulation may paradoxically contribute to the emergence or further consolidation of many *national* as opposed to a common *EU* conception of public security. In a concluding section, I summarize the argument and point out how the Commission itself has already indicated the Regulation is but a first step and that a further 'beefing up' of the EU's investment screening regime is desirable. Majone would not be surprised by this conclusion.

1.1 Integration: The main features of the EU FDI screening framework

The Regulation is a relatively short legislative instrument comprising seventeen articles. It has four main components: first, it imposes a number of requirements that Member State screening mechanisms must respect; second, it provides for a non-exhaustive list of factors that may be taken into consideration by Member State

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5 For an analysis, *see* Alicia Hinarejos, *The Eurozone Crisis in Constitutional Perspective* (Oxford University Press 2015), Ch. 3.

6 Sophie Meunier and Kalypso Nicolaïdis have used the term 'geopoliticization' to capture the impact of the twin shocks of a US return to unilateralism and the rise of Chinese state-led capitalism on the EU's trade and investment policy. *See* Sophie Meunier & Kalypso Nicolaidis, *The Geopoliticization of European Trade and Investment Policy*, 57 JCMS: J. Common Mkt. Stud. 103 (2019).

7 *See*, https://www.politico.eu/pro/hogan-beefing-up-investment-screening-is-essential/(accessed 2 Oct. 2019).

screening authorities when reviewing investments; third, it sets up a cooperation mechanism amongst Member States and the Commission to enable a form of peer-review amongst Member States and the Commission to take place; and fourth, it empowers the Commission to perform a 'light touch' screening of certain investments that are likely to affect projects or programmes of Union interest. Each of these features are examined in turn.

1.1[a] *Minimum Quality Requirements*

The Regulation does not require Member States to put in place an FDI screening mechanism.[8] That said, Article 3 of the Regulation does require that existing mechanisms respect a number of requirements, which I will refer to as 'minimum quality requirements'. Some of these requirements codify requirements articulated by the Court of Justice of the EU (CJEU) in its case law on the free movement of capital.[9] These include the necessity to indicate the specific circumstances in which prior authorization is required – a requirement that can be understood as flowing from the principle of legal certainty.[10] Other requirements cannot be found in the Court's free movement of capital case law, however. Examples of such requirements are the obligation to protect confidential information (Article 3(4)), the obligation on Member States to ensure that their national screening mechanisms allow for comments by other Member States to be taken into account in the screening process (Article 3(3)), the obligation to take measures to avoid circumvention of the screening mechanism should it exist (Article 3(6)), and the obligation to provide timeframes to ensure a timely completion of the screening process (Article 3(2) and (3)).

Particularly significant is the requirement in Article 3(5) of the Regulation that '[f]oreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities'. Should 'recourse' be understood as recourse to an independent court or would an internal administrative review suffice? The Commission proposal initially contained slightly different wording: it required the possibility of 'judicial redress' as opposed to 'recourse'.[11] One way

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8 *See* recital 8 of the Regulation.

9 In this sense, *see also* Régis Bismuth, *Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU*, 3 Eur. Inv. L. & Arb. Rev. Online 45, 50 (2018).

10 Case C-54/99, *Association Église de Scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*, EU:C:2000:124, paras 21–22.

11 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, COM(2017) 487 final, 13 Sept. 2017, s. 1: 'The proposed Regulation does not require Member States to adopt or maintain a screening mechanism for foreign direct investment. Its objective is to create an enabling framework for Member States that already have or wish to put a screening mechanism in place, and to ensure that any such screening mechanism meets some basic requirements, such as *the possibility of a judicial redress of decisions*, non-discrimination between different third countries and transparency' (emphasis added).

to give meaning to this slightly different wording compared to the Commission proposal would be to accept that, by replacing 'judicial redress' with 'recourse', the EU legislator did not intend to include access to an independent court for judicial review as a minimum quality requirement. Such an interpretation would, however, meet a constitutional objection. The existence of effective judicial review by a court of law is a cornerstone of the principle of the rule of law as understood by the CJEU.[12] Absent direct access to the CJEU, national courts must ensure that individuals have access to an effective remedy against violations of their rights protected by EU law. This division of labour is reflected in Article 19(1) of the Treaty on European Union (TEU), which charges the CJEU with the responsibility of ensuring that in the interpretation and application of the Treaties the law is observed, whereas the Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.[13] Since the adoption of the Regulation, FDI screening by Member State authorities unambiguously falls within the scope of EU law. Investors affected by a national screening procedure must therefore have access to an effective remedy before a court of law to avail themselves of their rights under the Regulation and EU law more broadly.[14] These rights can be procedural – see the minimum quality requirements in the Regulation[15] – or substantive, for example, the right to the free movement of capital, which I discuss further below. Hence, to ensure that Article 3(5) of the Regulation, a norm of secondary law, has a meaning that is consistent with the rule of law thus understood, it is necessary to interpret 'recourse' as synonymous to 'judicial redress'. This reading would ensure that investors enjoy effective judicial protection. It also, at least hypothetically, opens the door for questions to be asked by national courts to the CJEU on the basis of Article 267 of the Treaty on the Functioning of the European Union (TFEU). This would allow the CJEU to play its own role of ensuring that in

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12 In this sense, *see* Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas ('Juízes Portugueses')*, EU:C:2018:117, para. 36.

13 *See also* Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament ('Les Verts')*, EU:C:1986:166, para. 23, where the ECJ characterizes the EU system of judicial protection as 'complete'. This means that '[w]here the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling'.

14 In this sense, in the context of investment screening and its compatibility with the free movement of capital principle, *see* Case C-54/99, *supra* n. 10, para. 17 ('[A]ny person affected by a restrictive measure based on such a derogation must have access to legal redress').

15 Should investors make use of this possibility, it would be ironic that the Regulation, which aims to endow the Union and its Member States with instruments to protect themselves against opportunistic investment behaviour, ends up strengthening the position of investors vis-à-vis Member State authorities. Pointing to this 'surprising effect' of the Regulation, *see* Jukka Snell, *EU Foreign Direct Investment Screening: Europe Qui Protège?*, 44 Eur. L. Rev. 137, 138 (2019).

the interpretation and application of the Treaties the law is observed. This way, following a long-standing tradition in EU law,[16] the Regulation at the very least invites investors to act as private enforcers of EU law alongside the Commission, which, in addition, has the possibility to launch infringement proceedings against Member States that fail to comply with the Regulation.[17]

1.1[b] *Factors that May Be Taken into Consideration in Determining Whether a Foreign Direct Investment Is Likely to Affect Security or Public Order*

The Regulation is squarely focused on review on grounds of security or public order. Article 4 of the Regulation sets out a list of factors that may be taken into consideration by national screening authorities when they are called upon to assess whether a foreign direct investment is likely to affect 'security or public order' – a criterion which the Commission interprets as equivalent to that of 'public policy or public security' mentioned in the Treaty provisions on the four freedoms.[18] The list is presented as a mere source of inspiration for Member States: Article 4 neither obliges Member States to look at these factors, nor does it prevent them from looking at others. As pointed out by Jacques Bourgeois, this is surprising, since the Regulation – an instrument adopted on the basis of exclusive EU competence[19] – strictly speaking *delegates* a power to Member States to screen investments.[20] By providing for a non-exhaustive, non-binding list of factors, the contours of this delegation of authority remain undefined, which is in itself legally problematic. In the context of the delegation of powers by the EU legislator to the Commission, the CJEU regularly holds that the EU legislator must 'explicitly define the objectives, content, scope and duration of the delegation of power in the legislative act granting such a delegation'.[21] By analogy, the scope of a delegation of authority by the EU to the Member States should be clearly defined.

Despite their voluntary nature, there are reasons nonetheless to believe the above-mentioned factors will have some influence on Member State screening regimes. In particular, Member States that already have a mechanism in place may be inclined to mirror the factors listed in Article 4 of the Regulation. This happened, for example, in France, where the screening mechanism has

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16 On the role of private actors in the enforcement of EU law, *see* e.g., Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 Int'l Org. 41, 60–62 (1993).

17 On the likelihood that Member State courts will ask questions to the CJEU, *see* s. 1.2[b]. Pointing to the role of the Commission in enforcing the quality requirements, *see* s. 1.2[c].

18 *See* e.g., Art. 65(1)(b) TFEU. A Commission representative made this point during an academic webinar on the subject of EU FDI screening held on 29–30 Apr. 2020.

19 Article 207 TFEU. On the choice of legal basis, *see also* the concluding section of this article.

20 Remarks by Jacques Bourgeois during the webinar mentioned in n. 24.

21 *See* e.g., Case C-286/14, *European Parliament v. European Commission*, EU:C:2016:183, para. 30.

been updated to cover the target activities listed in the Regulation.[22] For the same reason, Member States that are yet to enact a mechanism are also likely to turn to the factors listed in Article 4 when designing their own mechanism, if they decide to set up a mechanism. Indeed, with an EU template that has already been adopted by large Member States such as France and Germany, it is difficult to imagine that Member States, which will be legally required to participate in the cooperation mechanism set up by the Regulation, will not look at the same set of factors when establishing their own screening analysis. This is all the more likely, considering that the Regulation does not delve into the meaning that is to be given to the concept of 'public security' in individual cases. Rather, the factors point to targets that may be sensitive (paragraph 1) and investors that may be high risk (paragraph 2).

The Covid-19 pandemic that hit Europe in 2020 provides a first insight into the role which the Commission envisages Article 4 to play. In guidelines addressed to the Member States, the Commission emphasized how public health emergencies such as Covid-19 can be understood as a matter of public security.[23] Health considerations are mentioned in Article 4. This article provides that, in assessing whether an investment is likely to affect security or public order, Member States may consider the investment's potential effects on 'critical infrastructure'. Such infrastructure may include 'critical health infrastructure' and the supply of critical inputs, such as vaccines or respirators, as the Commission points out. In so doing, the Commission gives a helping hand to Member States looking for arguments to oppose investments on grounds of public security or order. As will be discussed in greater detail in section 1.2, there are reasons to be doubtful whether this type of nudging by the Commission will have a meaningful impact. Member State authorities that are keen to block investments would arguably already be in a position to do so; Member States that are not very keen are unlikely to be swayed by the Commission's suggestions.

1.1[c] *The Cooperation Mechanism*

The cooperation mechanism set out in Articles 6 and 7 of the Regulation constitutes the heart of the screening framework the Regulation puts in place. The Regulation distinguishes between Member States that have a screening mechanism in place (Article 6) and those that do not (Article 7). The Regulation imposes information

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22 *See* the activities listed in Art. R. 151-3 of the *Code monétaire et financier*, as amended by *Décret n° 2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France, JORF* n°0001 of 1 Jan. 2020.

23 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 (FDI Screening Regulation), 25 Mar. 2020, C(2020) 1981 final.

sharing requirements on both categories of Member States. Those Member States that do have a mechanism in place are required to inform their peers and the Commission of each investment within their territory that is undergoing screening.[24] If another Member State considers that the investment is likely to affect its own security or public order, or if that other Member State has 'information relevant for [the] screening' at its disposal, it can decide to comment on the investment.[25] The Commission has a similar power: it can issue an opinion if it considers that the investment is likely to affect the security or public order of several Member States.[26] Finally, if at least one third of Member States consider that the investment affects their security or public order, they can – 'where justified', a term that is not explained – compel the Commission to issue an opinion.[27]

Crucially, those Member States that do *not* have a screening mechanism in place are also affected by the peer-review mechanism set up by the Regulation. If another Member State or the Commission become aware of a planned or completed investment that affects, respectively, its own security or public order, or that of several Member States, they can also provide comments or issue an opinion, despite the absence of a national screening mechanism in the host Member State.[28] That said, it cannot be taken for granted that Member States will make great use of the cooperation mechanism by making comments on investments in other Member States.[29] If they do, uncomfortable moments may ensue as doing so would imply that Member States such as Ireland or Cyprus, which are dependent on FDI and who may not be willing to enact a screening mechanism with the view of protecting their reputation as a hospitable environment for inward FDI, may be faced with unsolicited comments from other Member States – comments that may very well call for a response. It may mean, also, that such Member States will face additional pressure to adopt a screening mechanism. Arguably, if the peer review mechanism is to work at all, all Member States must be fully committed to participate in the process. The best way to do so within the framework put in place by the Regulation is by enacting a national screening mechanism. The Commission is very open about this side-effect of the Regulation: in the aforementioned guidelines on the Covid-19 pandemic, the Commission expressly called on Member States without a mechanism to adopt one as soon as possible.[30]

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24 Article 6(1) of the Regulation.
25 Article 6(2) of the Regulation.
26 Article 6(3) of the Regulation.
27 *Ibid*.
28 Article 7(2) of the Regulation.
29 It may be useful to look at the use of infringement actions by Member States against other Member States on the basis of Art. 259 TFEU as a proxy for the willingness of Member States to criticize one another. A search on the CJEU website reveals that, at the time of writing, only three such cases have been brought before the CJEU.
30 Communication from the Commission, mentioned in n. 30, at 2.

In more subtle ways as well the Regulation will pressure Member States to enact their own screening mechanisms. To enable the Member States that wish to make comments and the Commission that wishes, or is obliged, to issue an opinion, the Regulation empowers those Member States and the Commission to request the Member State within the territory of which the investment is to take place to provide certain pieces of information. Article 9 of the Regulation sets out the types of information that can be requested. The list is quite long and the information is fairly detailed.[31] It includes the ownership structure of the foreign investor, information on the ultimate investor and participation in the capital, the approximate value of the investment, the funding of the investment and its source. Apart from the – arguably essential – information on the source of funding, which is to be provided on a best-efforts basis,[32] the Member States, including those Member States without a screening mechanism in place, are under a legal obligation to provide the information.[33] It may prove to be difficult for Member States without a screening mechanism to provide the elaborate information required under the Regulation, reason for which they may feel compelled to adopt their own mechanism in the not so distant future.

As mentioned, the Regulation does not empower the Commission, let alone Member States other than the target Member State, to veto investments. Instead, it requires the Member State within the territory of which the investment takes place to give 'due consideration' to the comments or opinion it received.[34] Recital 17 adds that the Member State must do so 'through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of sincere cooperation laid down in Article 4(3) TEU'. What does it mean to give 'due consideration?' The duty of sincere cooperation requires the EU institutions and the Member States to cooperate in good faith with one another.[35] This is primarily a procedural obligation.[36] In the framework of the external relations of the Union, the CJEU has clarified it can in some instances require Member States to undertake or refrain from undertaking certain actions.[37] In the present context, the duty is likely to

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31 Article 9(2) of the Regulation.

32 Article 9(4)(e) of the Regulation.

33 Note, however, that in 'exceptional circumstances' a Member State can let the Commission and the other Member States concerned know that it cannot provide the requested information. In such a case it will have to give reasons for its failure to do so, and Member States and the Commission will be allowed to make comments or issue an opinion on the basis of the facts available to them. *See* Art. 9(5) of the Regulation.

34 Articles 6(9) and 7(7) of the Regulation.

35 Article 4(3) TEU.

36 *See* e.g., Case C-433/03, *Commission v. Germany ('Inland Waterways')*, EU:C:2005:462, paras 68–69, in which the ECJ sanctioned Germany for failing to consult and coordinate with the Commission in the implementation of a Council decision authorizing the Commission to negotiate a multilateral agreement on the rules applicable to the transport of passengers and goods by inland waterway between the EU and several of its eastern neighbours.

37 Case C-246/07, *Commission v. Sweden ('PFOS')*, EU:C:2010:203.

require a Member State that receives a comment or an opinion to demonstrate that it has taken the comments or opinion seriously. The Member State does not have to agree with its content and ultimate conclusion (otherwise it would lose its ultimate decision-making power, which the Regulation insists it retains), but it must make sure that it is able to explain why it chooses to take a different path than the one recommended to it. Although the Regulation does not require this expressly, Member States are well advised to put this explanation in writing, as the possibility cannot entirely be excluded that the case ultimately comes before the CJEU by means of an infringement action, brought by the Commission[38] or possibly even another Member State,[39] or in the framework of a preliminary ruling procedure.

1.1[d] *The Screening of Investments Likely to Affect Projects or Programmes of Union Interest*

In addition to investments that may threaten the public security or order of one or several Member States, the Regulation also contains a provision on investments with a specific Union dimension. If an investment is likely to affect projects or programmes of Union interest, the Commission may issue an opinion as to whether the investment constitutes a threat to public security or order.[40] Such opinions will be addressed to the host Member State. Whereas Member States will be required to give 'due consideration' to opinions on investments without a Union dimension, they will have to take 'utmost account' of opinions on investments that have a Union dimension.[41] In contrast to investments that are not of Union interest, the Regulation expressly requires that the host Member State provide an explanation to the Commission if its opinion is not followed.[42] As is the case for investments without an EU link, the final decision-making power remains with the host Member State.

Member States that fail to take 'utmost account' of Commission opinions on investments with a Union dimension may become subject to infringement investigations, whereby the Commission could present the Member State's alleged failure to take 'utmost account' of the Commission's opinion as a violation of the Regulation read against the backdrop of the duty of sincere cooperation. To ensure that the distinction between 'due consideration' and 'utmost account' remains meaningful, the CJEU may be compelled to subject Member States' replies to Commission opinions to closer scrutiny if the investment concerned has a Union dimension as compared to investments without such a dimension. Drawing on the

38 Article 258 TFEU.
39 Article 259 TFEU.
40 Article 8(1) of the Regulation.
41 Article 8(2)(c) of the Regulation.
42 *Ibid*.

aforementioned external relations case law in which the CJEU determined that in some instances Member States are under a duty not to act altogether, an argument could be made that the requirement of taking 'utmost account', read against the backdrop of the duty of sincere cooperation, requires Member States to fully comply with the Commission opinion and, if so requested, to block the concerned investment.

The more impactful the Commission's opinions, the more important the scope becomes of the category of investments that are potentially subject to strict Commission review due to their Union dimension. There appears to have been some disagreement amongst the institutions on the discretion the Commission has in defining that scope. The Commission proposal gave the Commission full discretion by empowering the Commission to issue an opinion 'where the Commission considers that a foreign investment is likely to affect projects or programmes of Union interest on grounds of security or public order'.[43] Article 9(1) of the Regulation retains this phrase, which appears to grant the Commission broad leeway to determine which projects or programmes fall within the scope of the Commission's power of review. Paragraph 3 adds, however:

> For the purpose of this Article, projects or programmes of Union interest shall include those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order. The list of projects or programmes of Union interest is set out in the Annex.

Paragraph 3 concludes by stating that '[t]he Commission shall adopt delegated acts in accordance with Article 16 to amend the list of projects and programmes of Union interest'.

Some ambiguity remains as to how free exactly the Commission is to be in defining which investments are to be considered projects or programmes of Union interest. Does the phrase 'shall include' in paragraph 3 imply that the list to be adopted by delegated act is non-exhaustive, thus leaving the Commission with the possibility of extending the category of investments with a Union dimension beyond those described in that paragraph? Or does it imply that the Commission can only add investments to the list that fall within these categories, in which case paragraph 3 should be seen as a delineation of the scope of authority delegated to the Commission?

It is tempting to regard Article 8 of the Regulation as the seed for a more extensive Commission involvement in the screening of foreign investments into the

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[43] Proposal for a Regulation of the European Parliament and the Council establishing a framework for screening of foreign direct investments into the European Union, COM/2017/0487 final, 13 Sept. 2017, Art. 9(1).

EU.[44] Whether a more direct EU role will indeed emerge, will depend on three factors: first, how the CJEU will, if given the opportunity, interpret the requirement to 'take utmost account' of the Commission's opinion; second, how the CJEU would patrol the scope of the Commission's delegated authority to define which investments are likely to affect projects or programmes of Union interest; and third, the scope and breath of the EU's activities, both in terms of the financing of research and development, and in terms of regulatory actions in security-sensitive areas. In this sense as well, the Commission does enjoy a degree of flexibility: by granting financial support to projects or companies (for example in the framework of Horizon Europe) the Commission endows itself with a power to issue opinions of which host Member States must 'take utmost account'.

1.2 A suboptimal policy outcome: Empowering Member States without providing for effective control mechanisms

The framework set up by the Regulation is a textbook example of what Majone refers to as a suboptimal policy outcome. It is suboptimal, firstly, for the straightforward reason that it will add an additional layer of complexity to an already complicated investment screening landscape within the EU. The operation of the cooperation mechanism described in section 1.1[c] is likely to lead to additional costs and greater uncertainty for investors, as it will deprive Member State authorities of their ability to move quickly. Noteworthy, in this regard, is that Member States and the Commission may issue comments or an opinion during a fifteen month period after completion of the investment.[45] This is a very long period compared to the short timeframes provided for under the EU Merger Regulation,[46] for example, or under the FDI screening rules in several Member States.[47] The ensuing uncertainty may very well have a chilling effect on inward FDI, despite the insistence by the EU institutions on their desire to maintain an open investment environment.[48]

The Regulation's policy outcome is suboptimal, secondly, also in a more fundamental sense, however. The Regulation encourages Member States to actively screen inward investments, without simultaneously providing for specific enforcement mechanisms at EU level. In so doing, the Regulation is likely to lead to an

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44 In a similar sense, *see also* Steffen Hindelang & Andreas Moberg, *The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment*, 57 Common Mkt. L. Rev. 1427, 1459–1460 (2020).

45 *See* Art. 7(8) of the Regulation.

46 *See* Art. 10 of Council Regulation (EC) No 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings, *OJ* L 24, 29 Jan. 2004, at 1–22.

47 In France, e.g., the screening process must in principle be finalized within a two month period. *See* Art. R-151-4 of the *Code monétaire et financier*.

48 *See* recital 2 of the Regulation.

uptake in Member State reviews, as discussed in section 1.1[c]. However, for reasons explained in sections 1.2[b] and 1.2[c] below, I neither expect a concomitant increase in opportunities for the EU institutions (Commission and Court) to indirectly control assessments made by Member State screening authorities via the preliminary ruling mechanism, nor do I expect the Commission to be able to fill the gap by means of direct enforcement actions. At best, an increase in Member State screening decisions would put pressure on the free movement of capital principle and thus undermine the open investment climate the Commission aims to protect through the Regulation. At worst, such an increase in the amount of national screening decisions not subjected to control by the EU institutions ends up encouraging Member States to actively develop a national as opposed to a common EU conception of public security. While the Regulation does not expressly aim to harmonize the concept of 'public security', it arguably does not aim to have the opposite effect either.

Before developing these points, it is necessary to briefly discuss the interplay between the Regulation and free movement of capital FDI (section 1.2[a]). As will be shown, the free movement of capital principle (Article 63 TFEU) is likely to apply to most Member State FDI screening mechanisms.

1.2[a] *The Free Movement of Capital Principle Is Likely to Apply to Most Member State FDI Screening Mechanisms*

Member State screening mechanisms are likely to have to comply with the Treaty provisions on the free movement of capital, including Article 63 TFEU, which in its first paragraph provides that 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. This is the case for three reasons: first, the investments under scrutiny by national screening authorities are likely to constitute capital movements in the meaning of Article 63 TFEU[49]; second, Article 63 TFEU prohibits restrictions on the free movement of capital not only between Member States but also between Member States and third countries, which includes foreign investment into the EU; and third, most Member State FDI screening mechanisms are likely to cover not only investments leading to decisive influence of the investor over the target, but also investments leading to lasting and direct links which do not, however, reach the threshold of decisive influence.

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[49] The CJEU relies on Annex I of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Art. 67 of the Treaty to determine the scope of capital movements in the meaning of Art. 63 TFEU. Direct investments are listed as an example of a capital movement. *See* e.g., Case C-483/99, *Commission of the European Communities v. French Republic*, EU:C:2002:327, para. 36.

The third of these three points requires further unpacking. It speaks to a lingering uncertainty on the dividing line between, on the one hand, the freedom of establishment (Article 49 TFEU) and, on the other, the free movement of capital (Article 63 TFEU).[50] In an intra-EU context, the distinction between the freedom of establishment and the free movement of capital principle is not very significant, as the Court's case law on both freedoms is aligned.[51] However, in an extra-EU context, the distinction matters since Article 63 TFEU applies to investment flows between the EU and third countries, whereas Article 49 TFEU protects only EU investors. How to tell in light of which Treaty provision a national measure affecting an investment is to be assessed? And what role does the foreign (i.e., non-EU) origin of the investment play in that assessment? The degree of influence the investor acquires over the target through its investment, not the origin of the investment, determines whether a national measure affecting that investment – such as an FDI screening mechanism – is to be assessed in light of one provision or the other. As the CJEU held for example in the *SECIL* case, national measures that cover only investments that grant the investor a decisive (or definite) influence over the target must be assessed in light of Article 49 TFEU[52] (freedom of establishment), whereas national measures that cover only financial investments that do not aim to influence the management and control of the target, must be assessed in light of Article 63 TFEU (free movement of capital).[53]

What about national screening frameworks that do not fit neatly in any of these two categories because they apply to investments leading to various types of influence over the target(s)? Should they be assessed in light of Article 49 or 63 TFEU? In *SECIL*, the Court held that national legislation 'which does *not apply exclusively* to situations in which the parent company exercises decisive influence over the company paying the dividends must be assessed in the light of Article 63 TFEU' (emphasis added).[54] Given the general language used by the Court in *SECIL* – a

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50 Writing in 2002, Leo Flynn referred to the dividing line as 'the hardest of all to draw'. *See* Leo Flynn, *Coming of Age: The Free Movement of Capital Case Law 1993–2002*, 39 Common Mkt. L. Rev. 773, 788 (2002).

51 In this sense, *see* Leo Flynn, *Free Movement of Capital*, in *European Union Law* 452 (Catherine Barnard & Steve Peers eds, 2d ed., Oxford University Press 2017).

52 The Court drew this distinction in a case involving the tax treatment of dividends. The principles can, however, be applied more broadly. *See* e.g., Case C-464/14, *SECIL – Companhia Geral de Cal e Cimento SA v. Fazenda Pública ('SECIL')*, EU:C:2016:896, para. 32: 'National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Art. 49 TFEU on freedom of establishment'.

53 *Ibid*., para. 33: '[N]ational provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital'.

54 *Ibid*., para. 35.

case on the tax treatment of dividends – the principle appears sound also with respect to other types of national measures, including Member State FDI screening mechanisms.

As suggested earlier, the observation that Article 63 TFEU, rather than Article 49 TFEU, applies to national measures that cover more than only investments leading to decisive influence is relevant to our analysis of the EU FDI Screening Regulation, since Member State FDI screening mechanisms are likely to cover a broader category of investments than merely those investments that grant the investor decisive influence over the target. Even if a Member State screening mechanism covers only 'foreign direct investment' in the meaning of EU law, this would still include foreign investments that do not grant decisive influence in the meaning of the above case law. For FDI, in the meaning of EU law, includes all foreign investments that establish or maintain *lasting and direct links* between the investor and the target, and thus not only those investments that grant the investor *decisive influence*.[55] It is possible for an investment to create lasting and direct links without creating decisive influence, as is the case, for example, with the acquisition by a foreign investor of a meaningful minority of shares of an EU target.[56] Indeed, it is fair to assume that most Member State FDI screening mechanisms will fall in the former category, and will thus have to comply with Article 63 TFEU on the free movement of capital.[57]

The observation that many if not most Member State FDI screening mechanisms – and the screening decisions adopted in the framework of those mechanisms – must comply with Article 63 TFEU has important implications. The Regulation provides that Member State authorities retain the final say over individual investments.[58] Yet, Member States must, in their screening practice, comply with Article 63 TFEU which, as mentioned, prohibits all restrictions on the movement between Member States and third countries. Article 65(1)(b) TFEU requires restrictions on such free movement to be justified by the host Member State. As exceptions to the general rule, the possibility to restrict free movement, including on

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55 In this sense, *see* e.g., Opinion 2/15 ('EUSFTA'), EU:C:2017:376, para. 80: '[D]irect investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity'.

56 For an investment to establish or maintain lasting or direct links, 'the shareholders must be able to participate effectively in the management or control of that company'. 'Participation' is a lower threshold than 'decisive influence' within the company. *See* e.g., Case C-339/19, *SC Romenergo SA and Aris Capital SA v. Autoritatea de Supraveghere Financiară*, EU:C:2020:709, para. 33.

57 Furthermore, as Stephen Hindelang and Andreas Moberg have pointed out, investments that originate outside of the EU but which are channelled through EU-based undertakings would be covered by Art. 49 TFEU and could be subject to investment screening by Member States in order to avoid circumvention. Such investments would thus also be subject to free movement principles. *See* Hindelang & Moberg, *supra* n. 44, at 1451.

58 *See* e.g., Recital 17 of the Regulation.

grounds of public security,[59] should, as a matter of principle, be interpreted narrowly,[60] and their lawfulness is to be controlled by the EU institutions. As the CJEU pointed out, for example, in *Commission v. Belgium* – a case in which Belgium had invoked public security as a justification for a national measure endowing the Belgian government with a 'golden share' in gas distribution company Distrigaz:

> [T]he Court has also held that the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[61]

And indeed, the Regulation does in my understanding put in place the required legal preconditions for the Union institutions, and in particular the CJEU, to make that determination. As mentioned in section 1.1[a], the requirement of 'recourse' should be read against the backdrop of Article 19 TEU and should thus be understood as requiring the Member States to provide for judicial as opposed to administrative redress.

The requirement of recourse to a national court theoretically paves the way for the CJEU to become involved via the preliminary ruling mechanism, and to review individual screening decisions in light of the freedom of capital Treaty provisions. However, as explained in the following subsection, there are not likely to be many opportunities for the EU institutions, and in particular the Court, to control whether a 'genuine and sufficiently serious threat to a fundamental interest of society' in the meaning of the abovementioned *Commission v. Belgium* case is indeed present. This leads to a suboptimal arrangement whereby the Regulation, in its effort to protect the EU and its Member States against threats to its public security and order and despite the Commission's best efforts to the contrary, risks undermining the free movement of capital principle.

1.2[b] *The Regulation Encourages Member States to Screen Investments, But Is Not Likely to Lead to an Uptake in Challenges Before National Courts*

As practicing investment lawyers will not fail to point out, investors are not keen to challenge Member State screening decisions. If an investor senses that an investment

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59 Article 65(1)(b) TFEU.

60 As pointed out by Jan Zglinksi, though, there is much variation in the degree of deference the CJEU shows to Member States that seek to restrict free movement. *See* generally Jan Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (1st ed., Oxford University Press 2020).

61 Case C-503/99, *Commission v. Belgium*, EU:C:2002:328, para. 47. *See* in the same sense Case C-212/09, *Commission v. Portugal*, EU:C:2011:717, para. 83.

is likely to raise public security concerns, it is more likely to abandon the project than to move ahead at whatever cost, including the cost of litigation. Teoman M. Hagemeyer, a judge at the Berlin administrative court (i.e., the court with jurisdiction to rule on challenges against screening decisions in Germany), made the point as follows in a contribution to Verfassungsblog:

> Investment deals fall apart only on a whiff of regulatory encroachment. Experience with [the Committee on Foreign Investment in the United States] and the German [investment screening mechanism] in the Aixtron takeover is only one illustration for this 'power of fact': Public announcement of the German authorities to review the takeover (regarding German-based Aixtron SE) together with its partial prohibition by the US President (regarding the US-based subsidiary Aixtron Inc.) sealed the deal's fate. So, on the one hand, pending review of a particular investment suffices to scare investors to a degree that they withdraw from a takeover altogether. On the other hand, one should not forget that shareholders invested in the target company also face significant devaluation in consequence of pending review or withheld approval.[62]

The expectation that there may not be many appeals brought before national courts has implications for the balance of powers between the EU institutions and the Member States in the context of the EU FDI screening process. While Member State screening decisions are, as discussed, often subject to the free movement of capital Treaty provisions, and Member State screening mechanisms must respect the minimum quality requirements set out in Article 3 of the Regulation, and whereas the Regulation, as discussed, provides for a right to judicial recourse, the Regulation is not likely to lead to an uptake in the number of cases that ultimately finds its way to the CJEU. The Regulation will presumably lead to an increase in the number of national screening decisions by existing screening authorities and by those yet to be established. But the incentive structure investors are faced with will not lead to a greater number of decisions being challenged. Instead, investors are likely to treat Member State screening decisions – if they are taken in the first place – as final decisions.

Due to the de facto final nature of screening decisions, the Regulation may leave the CJEU – as the EU institution ultimately responsible for the enforcement of Article 63 TFEU – with relatively fewer occasions to discharge itself of that responsibility as compared to the *status quo ante*. As mentioned, such an outcome would, at best, put pressure on the free movement of capital principle and thus undermine the open investment climate the Commission aims to protect through the Regulation. In addition, it would make the enforcement by Member State courts of the quality requirements set out in Article 3 of the Regulation somewhat illusionary. At worst, it

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62 Teoman M. Hagemeyer, *Access to Legal Redress in an EU Investment Screening Mechanism* (*Verfassungsblog* 8 Feb. 2019), https://verfassungsblog.de/access-to-legal-redress-in-an-eu-investment-screening-mechanism/ (accessed 25 June 2020).

would mean that the Regulation ends up encouraging Member States to actively develop a *national* as opposed to a *common* EU conception of public security. Moving forward, such a risk is likely to increase as Member States are reassessing the need to engage in industrial policy. As Member States become more active stakeholders in the national economy, they may very well wish to shield national champions from foreign takeovers. FDI screening would be one instrument to do so, despite the prohibition in the Treaties on restricting the free movement of capital on exclusively economic grounds.[63]

1.2[c] *The Commission Is not Likely to Fill the Enforcement Gap*

The Commission is not likely to fill the enforcement gap. The Commission will be able to bring infringement actions before the CJEU if a Member State fails to 'play the game' in a spirit of sincere cooperation, for example by failing to provide the information required under Article 9 of the Regulation, or by failing to give 'due consideration' or to 'take utmost account' of opinions or comments received. However, the infringement action is not always a very effective enforcement instrument. The Commission does not have limitless resources; it cannot pursue every case and thus has to prioritize some cases over others. The Commission has in fact scaled down the number of infringement actions it brings to the CJEU to levels not seen since the early 1990s as it developed a policy of focussing on systemic infringements. As pointed out by Andreas Hofmann, a political scientist, while at its peak in 2006 the Commission referred 254 infringement cases to the CJEU; this number dropped to forty-one in 2017.[64] Further, once initiated, infringement procedures take time.[65] If a procedure leads to a Court finding and, in the event of persistent non-compliance leading to a second infringement action on the basis of Article 260 TFEU, a fine, such a cost would be felt in the (far) future, whereas the benefits of the investment typically materialize quicker. Such benefits may be particularly attractive to Member States faced with economic shocks, when third country state owned enterprises may engage in opportunistic investment behaviour. They may be very enticing, also, when the potential economic benefit of an investment is very substantial compared to the overall size of the national economy.[66]

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63 *See* already Case 72/83, *Campus Oil*, EU:C:1984:256, para. 36.

64 Andreas Hofmann, *Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union*, 40 J. Eur. Integration 737, 739 (2018).

65 For an overview of the procedure, *see* e.g., Laurence W. Gormley, *Infringement Proceedings*, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* 66–70 (András Jakab & Dimitry Kochenov eds, Oxford University Press 2017).

66 A study of thirty-two second judgments in infringement proceedings by Falkner showed that in most (twenty-two) instances in which a first judgment did not lead to compliance, non-compliance appeared to be motivated by cost prevention or vote-seeking. *See* Gerda Falkner, *A Causal Loop? The*

In circumstances such as these, the threat of infringement proceedings may very well not be very effective.

Absent enforcement mechanisms specifically provided for in the Regulation, it is doubtful whether the Commission will be able to compel Member States to share the required information, or to induce them to align themselves in their own screening practices with the assessments the Commission will make as it addresses opinions to host Member States.[67] Similarly, it is not clear – and it will be difficult to verify given the secretive nature of FDI screening processes – whether the list of screening factors provided for in Article 4 of the Regulation will have a meaningful impact on the screening assessment to be conducted by Member State screening authorities. As discussed in section 1.1[b], Member States may very well incorporate these criteria in their national statute book. The Regulation also requires Member States to legally require their national screening authority to take into account the public security of other Member States and the EU as such in their screening analysis.[68] Yet, for the reasons discussed above, it is open to doubt whether a Member State will be willing to block an investment which it does not regard as a threat to its own public security while being aware that it may constitute such a threat to the public security of other Member States or the Union as a whole. Opinions and comments by other Member States and the Commission presumably will not significantly alter this equation, let alone persuade a Member State to block an investment that would bring significant economic benefit to the national economy.

1.3 Conclusion: Banking on spill overs?

The EU FDI Screening Regulation represents a reversal of the policy of investment liberalization which the EU has traditionally pursued. Indeed, the Regulation expressly authorizes, and encourages, Member States to restrict investment flows. Such encouragement was visible, for example, in the Commission's COVID-19 communication, in which it urged Member States to review investments and, if they had not already done so, to set up their own screening mechanisms.[69] As discussed in section 1.2, the Regulation's emphasis on protecting the EU internal market against

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Commission's New Enforcement Approach in the Context of Non-Compliance with EU Law Even After CJEU Judgments, 40 J. Eur. Integration 769, 778 (2018).

67 Highlighting the Commission's ambitions in this sense, *see* Sabrina Robert-Cuendet, *Filtrage des investissements directs étrangers dans l'UE et COVID-19: vers une politique commune d'investissement fondée sur la sécurité de l'Union*, European Papers (2020); European Forum Insight of 13 June 2020; www.eur opeanpapers.eu; ISSN 24998249; at 1, 13, mentioning that the Regulation 'puts forward, without saying so expressly, the idea that a « European national security » exists of which the Commission is the guardian'. Translation from the French by TV. Original: '*Le règlement avance, sans le dire, l'idée qu'il existe aussi une "sécurité nationale européenne" dont la Commission est la gardienne*'.

68 Article 3(3) of the Regulation.

69 Communication from the Commission, mentioned in n. 30, at 2.

opportunistic third country investment behaviour does not sit comfortably with the Treaties' free movement principles. Under these principles, restrictions on the free movement of capital, including those brought about by FDI screening decisions, are exceptions to the general principle of free movement. As exceptions, such restrictions should, in principle, be interpreted restrictively.[70] By actively encouraging Member States to screen investments on grounds of public security and order, the Regulation thus introduced into EU law a tension between the policy objectives of investment liberalization, on the one hand, and of protecting the EU internal market against threats to public security and order, on the other.

A tension between investment liberalization on the one hand, and the protection against investments that may threaten public security or order on the other, is in itself not unique to the EU: in many states across the world we can observe the re-emergence of FDI screening on security grounds,[71] often against a backdrop of long-standing government policies that favour investment liberalization. In contrast to other jurisdictions, however, within the EU the tension has a constitutional dimension. For one, the tension feeds into, and indeed explains, the controversy about the Regulation's legal basis.[72] Pre-Lisbon, the EU could already adopt measures that, to use the exact terms of the Treaty, 'constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries' (current Article 64(3) TFEU). Such measures had to be adopted unanimously within the Council. By bringing FDI within the scope of the EU's common commercial policy (Article 207 TFEU), the Lisbon Treaty framers added a second such legal basis, in addition to Article 64(3) TFEU, which was left unchanged. Crucially, Article 207 TFEU allows the EU to adopt – by means of qualified majority vote rather than unanimity within the Council – measures that restrict the free flow of capital. Thus, Article 207 TFEU may have given the EU the tools to by-pass the constitutional bias in favour of investment liberalization as far as the adoption of secondary legislation is concerned.

By contrast, as discussed in this article, the tension between investment liberalization and the protection of assets on security grounds remains present in the interplay between the Regulation and substantive EU primary law. On this nexus, two conflicting understandings coexist of the nature of the rights of Member States to derogate from the free movement of capital principle on security grounds. On the one hand, Member States can be expected to regard FDI screening as closely

70 Note however that the deference of the CJEU to the Member State varies significantly, depending on the freedom or the policy area at issue. *See* generally Zglinski, *supra* n. 60.

71 *See* e.g., the references in Tomoko Ishikawa, *Global Trend of Tightening FDI Screening: A Race to Build Walls?*, Kluwer Arbitration Blog (27 Aug. 2020), http://arbitrationblog.kluwerarbitration.com/2020/08/27/global-trend-of-tightening-fdi-screening-a-race-to-build-walls/ (accessed 21 Dec. 2020).

72 For a discussion, *see* Hindelang & Moberg, *supra* n. 44, at 1436–1445. The authors conclude that the EU legislator has the option to use either legal basis.

connected to *national* security as opposed to *public* security and order, whereby national security is, in turn, considered a retained Member State competence.[73] This connection with national security may explain why Member States insisted on keeping the final say on whether or not individual investments covered by the Regulation can go through. It may also explain the peculiar arrangement whereby a Regulation adopted on the basis of exclusive EU competence needs to delegate back to the Member States a power which the Lisbon Treaty had transferred to the EU.[74] Finally, it may explain why the Regulation does not contain specific enforcement mechanisms to allow the Commission to see to it that Member States respect the minimum requirements and stay within the limits set out by the CJEU in its free movement of capital case law.

On the other hand, the Commission is likely to regard Member State screening of investments, and the substantive assessments they make in that context, as either subjected to EU free movement principles in the same way as other types of Member State action or – perhaps more likely, considering the choice for Article 207 TFEU as a legal basis – as embedded within a broader constitutional framework wherein the Commission is charged with the responsibility of articulating a common EU conception of public security. The Commission's ambition in this direction is visible in its COVID-19 Communication, mentioned earlier, where it stated that, although the responsibility for screening FDI rests with Member States, 'FDI screening should take into account the impact on the European Union as a whole'[75] and that '[s]trategic assets are crucial to *Europe's* security' (emphasis added).[76]

The development of a common conception of EU public security would be in keeping with the exclusive nature of the competence the EU is exercising in this area. As the Court made clear in an early case on the common commercial policy, in areas of exclusive competence, it falls to the EU institutions to articulate common

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73 Article 4(2) TEU. It is worth remembering that the reference to 'national security' in Art. 4(2) TEU cannot be understood as a recognition of a sphere of Member State activity that falls outside of the scope of EU law entirely. As the CJEU has held on many occasions, also in the exercise of their own competences do Member States have to comply with EU law, including the free movement Treaty provisions. *See* e.g., in the context of health care, *see* Case C-125/16, *Malta Dental Technologists Association e.a. v. Superintendent tas-Saħħa Pubblika e.a.*, EU:C:2017:707, para. 54. The same principle applies by analogy to the area of national security. Only in so far as a national measure pertains to the production of or trade in arms, munitions and war material, can Member States rightfully claim to escape the free movement disciplines entirely (*see* Art. 346 TFEU). For an analysis of the 'retained powers' formula, *see* generally Loïc Azoulai, *The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?*, 4 Eur. J. Legal Stud. 192 (2011).

74 On the peculiar story of FDI's accidental inclusion in Art. 207 TFEU against the preferences of the Member States, *see* Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence Over Foreign Direct Investment*, 55 JCMS: J. Common Makt. Stud. 593 (2017).

75 *See* the Communication mentioned in n. 30, at 1.

76 *Ibid*.

EU interests.[77] For this reason, in the field of trade defence, which also forms part of the common commercial policy, the Commission is charged with the responsibility of assessing whether imposing anti-dumping or countervailing duties is in the 'Union interest'.[78] Interestingly, the Regulation does have features that may, over time, allow the Commission to take up the role of articulating a common EU conception of public security and order, in particular its position at the centre of the coordination mechanism and the expertise it will develop as it starts to issue opinions. At the same time, though, as described in this article, the Regulation encourages Member States to articulate their own conception(s) of public security and order. The advantages the Commission will enjoy in this area (its role at the centre of the cooperation mechanism) are offset by the advantages that Member States continue to enjoy (their final authority to decide on individual investments, which, as discussed, is not likely to be checked by the Commission or the CJEU).

Majone defined a suboptimal policy outcome as one that is 'largely epiphenomenal – the by-product of actions undertaken to advance the integration process, of efforts to maintain "institutional balance", of interinstitutional conflicts and intergovernmental bargaining'.[79] In the context of the EU FDI Screening Regulation, the decision to simultaneously strengthen the position of the Commission *and* that of the Member States arguably is the result of a political compromise resulting from such conflict. In itself, there is nothing wrong with that: political compromise is part and parcel of democratic politics. It is regrettable however that intergovernmental bargaining does not appear to have led to an arrangement whereby the EU came out better equipped to withstand threats to public security or order, whether national or European. Nor is the Regulation in its present form likely to help the EU maintain an open investment climate. Instead, the Regulation risks undermining the latter without contributing to the former policy objective. In this sense, it is fair to characterize the Regulation as a suboptimal policy outcome.

In line with Majone's theory of integration by stealth, the above-mentioned suboptimal policy outcome may very well lead to further integration in the area of FDI screening. Doubts as to the effectiveness of the Regulation's cooperation mechanism have already been expressed openly and regularly. It is particularly striking that Phil Hogan, who until August 2020 held the trade portfolio in the European Commission, had expressed his ambition to reform the Regulation even

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77 *See* Opinion 1/75 ('Local Cost Standard'), EU:C:1975:145, at 1363–1364, where the Court held that the common commercial policy is conceived 'for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other'.

78 Article 21 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, *OJ* L 176 30 June 2016, at 21.

79 Majone, *supra* n. 1, at 107.

before it had entered into force. During his hearing before the European Parliament in October 2019 (i.e., a year before the mechanism was to go online), the then incoming commissioner already stated that '[b]eefing up the screening mechanism I think is essential if we want to protect our critical technologies and our critical infrastructure. We just cannot take a chance on these issues'.[80] In its industrial strategy, published on 10 March 2020, the Commission indicated it will 'make proposals to further strengthen this tool'.[81]

As a skilled policy entrepreneur, it would seem that the Commission is well aware of the existing Regulation's shortcomings – shortcomings which may very well have been left unaddressed in the hope that political support for further integration will materialize moving forward. To put it in the language of functionalist integration theory: the Commission may be banking on spill overs. Debate on possible reforms is thus likely to start in the near future – and with good reason, as this article aims to demonstrate.

[80] Jakob Hanke Vela, *Hogan: 'Beefing Up' Investment Screening Is 'Essential'* *Politico Pro* (30 Sept. 2019), https://pro.politico.eu/news/hogan-beefing-up-investment-screening-is-essential (accessed 14 July 2020).

[81] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Industrial Strategy for Europe*, COM(2020) 102 final, 10 Mar. 2020, at 13.