

THE EU AND FDI: WHAT TO EXPECT FROM THE NEW SCREENING REGULATION

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ABSTRACT

The dramatic increase in Chinese foreign direct investment (FDI) in Europe has heightened EU security concerns. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 is a response to those concerns. The Regulation is a framework for the coordination of and communication between Member States on the issue of FDI screening. While the Regulation does not require that Member States adopt FDI screening mechanisms or amend existing mechanisms, it enjoins Member States to keep the Union apprised of incoming FDI and provides other Member States and the Commission with the opportunity to raise their concerns regarding specific FDI transactions that may threaten security or public order in the Union. The premise underlying the Regulation is that greater awareness of the security risks in certain incoming FDI will prompt Member States to react—by blocking the incoming FDI and, in the longer term, bolstering their own domestic screening legislation.

This paper provides an overview of the Regulation and its proposed cooperation mechanisms. It further provides a comparison between the Regulation and the CFIUS framework in the United States. Finally, this paper considers the effectiveness of the Regulation in light of the changed security and economic context brought about by the Covid-19 pandemic.

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INTRODUCTION

Chinese foreign direct investment (FDI) in Europe has increased dramatically in recent years: from € 700 million in 2008 to € 35 billion in 2016.¹ Despite Chinese regulatory measures to reduce outbound capital flows in 2016 and the ongoing Covid-19 pandemic, Chinese investment within the borders of the European Union has remained significant and relatively consistent.²

Without mentioning China or its investors, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 is a framework for FDI screening that allows Member States and the Commission to raise awareness of the security implications of incoming FDI. The Regulation coordinates responses to FDI that may threaten security interests or public order within the Union.³ The Regulation does not require that Member States have FDI screening mechanisms or that they block specific incoming FDI transactions if the Commission or a fellow Member State raises concerns. The decision of whether to accept an incoming FDI rests solely with the Member State receiving the investment. Nonetheless, the doctrine of sincere cooperation requires the Member State receiving the FDI to duly consider Union concern before deciding to accept the FDI transaction.

This paper will (I) present the strategic context in which the Regulation was proposed and its objective, (II) analyze the mechanisms introduced by the Regulation and (III) provide a comparison of the EU framework to the screening framework of the United States under FIRRMA. Finally (IV), the paper will consider the Regulation in light of the new economic and security challenges posed by the Covid-19 pandemic.

OVERVIEW OF REGULATION 2019/452

Context

According to the OECD's restrictiveness index, the EU has one of the most open investment regimes in the world.⁴ At the end of 2017, third country investors held € 6.295 billion in FDI stocks in the EU.⁵ By 2019, the foreign direct investment involved a large number of European firms using advanced and dual-use technologies.⁶ According to the European

1. Thilo Hanemann & Mikko Huotari, *EU-China FDI: Working Towards Reciprocity in Investment Relations*, MER-ICS Papers on China 10, Apr. 2020.

2. See *id.*; Elisabeth Braw, "[China is Bargain Hunting and Western Security Is at Risk](#)", *Foreign Policy*, Apr. 15, 2020; see also Cindy Lo, *et al.*, *China's New Restrictions on Outbound Investments and Remittance*, Allen & Ovary, Dec. 30, 2016 (analyzing Chinese restrictions on outbound FDI).

3. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019 O.J. (L 791), <https://eur-lex.europa.eu/eli/reg/2019/452/oj> [hereinafter "Regulation"].

4. *European Parliamentary Research Service Briefing: EU Framework for FDI Screening*, at 2 (Apr. 2019) (citing data from the OECD Regulatory Restrictiveness Index, <http://www.oecd.org/investment/fdiindex.htm>).

5. European Commission Press Release IP/19/2088, EU foreign investment screening regulation enters into force (Apr. 9, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2088.

6. *EU Framework for FDI Screening*, *supra* note 4, at 2.

Parliamentary Research Service (EPRS), foreign investors targeting these firms were “at times opaque state-owned enterprises, conglomerates or private firms with close government links.”⁷ The Commission recognized that foreign investment in the EU could be motivated by politics and strategy as much as financial gain:

there is a risk that in individual cases foreign investors may seek to acquire control of or influence in European undertakings whose activities have repercussions on critical technologies, infrastructure, inputs, or sensitive information. This risk arises especially but not only when foreign investors are state owned or controlled, including through financing or other means of direction. Such acquisitions may allow the States in question to use these assets to the detriment not only of the EU’s technological edge but also its security and public order.⁸

Investors from China, Hong Kong and Macau stand out for the number of their recent acquisitions.⁹ The European Political Strategy Centre observed in July 2016 that “screening for security acquires more importance as China shows increasing interest in assets with cross-country security implications such as utilities, transportation or telecommunication infrastructure.”¹⁰

Dr. Valbona Zeneli of the George C. Marshall European Center for Security Studies has inferred a “diversified Chinese strategy” in its investments in Europe.¹¹ In Western Europe, Chinese investors target “strategic assets and research and development networks.”¹² In Southern Europe, the focus appears to be large-scale manufacturing and infrastructure in the wake of the debt crisis.¹³ Notable developments in that region include the acquisition of the Italian tire manufacturer Pirelli for € 7.1 billion in 2015 and a controlling stake in the Greek port of Piraeus in 2016.¹⁴ In Central, Eastern and Southeastern Europe, Chinese investors focus particularly on transportation networks that can advance the Belt and Road Initiative.¹⁵ In addition, national FDI regulations in many Member States in these regions are less stringent, making them attractive investment springboards into other EU Member States.¹⁶

Prior to the Regulation, the EU did not have a unified mechanism with which to address security and public order concerns posed by FDI.¹⁷ EU competition law permits

7. *Id.*

8. *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee of the Region Welcoming Foreign Direct Investment while Protecting Essential Interests*, at 5, COM (2017) 494 final (Sep. 13, 2017), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2017:0494:FIN:EN:PDF>.

9. *Commission Staff Working Document on Foreign Direct Investment in the EU*, at 2, SWD (2019) 108 final (Mar. 13, 2019). For an analysis of the trends in Chinese FDI in Europe from 2013/2014, see generally Agatha Kratz, *et al.*, *Chinese FDI in Europe: 2019 Update*, MERICS Papers on China, Apr. 2020.

10. European Political Strategy Centre, *Engaging China at a Time of Transition*, at 5 (July 15, 2016), https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_16.pdf.

11. Valbona Zeneli, “*Mapping China’s Investment in Europe*”, *The Diplomat*, Mar. 14, 2019.

12. *Id.*

13. *Id.*

14. *Id.*; see “*ChemChina makes €7.1bn bid for Pirelli*”, *The Guardian*, Mar. 23, 2015; George Georgiopoulos, *et al.*, “*China, Greece agree to push ahead with COSCO’s Piraeus Port investment*”, Reuters, Nov. 11, 2019.

15. Zeneli, *supra* note 11.

16. *Id.* For a Member State-by-Member State analysis of European relations with China, see François Godement & Abigaël Vasselier, *China at the Gates: A New Power Audit of EU-China Relations*, European Council of Foreign Relations 98-125, Dec. 2017.

17. *EU Framework for FDI Screening*, *supra* note 4, at 2.

merger control reviews and international investment agreements remedy asymmetric market access.¹⁸ However, security and public order issues fall largely outside the scope of both tools and have essentially been addressed at the national level.¹⁹ As of August 2020, 14 EU Member States have national security review mechanisms to screen incoming FDI.²⁰ These domestic mechanisms employ different minimum thresholds for screening and apply to different sectors.²¹ In many ways, Member States' widely varying FDI regulations illustrate their diverging objectives: some Member States are more receptive to Chinese investment hoping for "windfall from Chinese-financed projects" while others are more wary.²² However, given the "cross-border effects" of FDI, the EPRS questioned whether "the decentralized and fragmented system of monitoring FDI inflows in the EU" was effective.²³

In 2017, France, Germany and Italy jointly submitted a letter to the European Commission urging the Commission to propose legislation for investment review at the EU level:

In the field of investment, when other countries put up hurdles to direct investment by European companies or only allow such investment under certain discriminatory conditions whilst, at the same time, European companies are being acquired as part of other countries' strategic industrial policies, there is no level playing-field. The playing-field is even less level if such investment is subsidised by state bodies.

The right of private-sector actors to decide when to invest or sell (shares in) companies is extremely important and merits full protection. At the same time, however, it is also important to prevent any damage to the economy through one-sided, strategic direct investment made by foreign buyers in areas sensitive to security or industrial policy, and to ensure reciprocity.²⁴

In June 2018, the European Council called "for the legislative proposal on the screening of foreign investments to be adopted as soon as possible."²⁵ At the EU-China Summit on March 12, 2019, the European Commission announced its intention to integrate a EU-wide FDI screening mechanism as one step towards "a level playing field" with China.²⁶ The

18. *Id.*

19. *Id.*

20. List of screening mechanisms notified by Member States (last updated July 28, 2020) https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf. Denmark, Germany, Spain, France, Italy, Latvia, Lithuania, Hungary, the Netherlands, Austria, Poland, Portugal, Romania and Finland have FDI screening legislation.

21. *EU Framework for FDI Screening*, *supra* note 4, at 2.

22. Godement & Vasselier, *supra* note 16, at 15.

23. *EU Framework for FDI Screening*, *supra* note 4, at 2.

24. See Letter from France, Italy and Germany to the European Commission (Feb. 2017) (published by the German Federal Ministry for Economic Affairs and Energy), https://www.bmwi.de/Redaktion/DE/Downloads/E/eckpunktepapier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf?__blob=publicationFile&v=4.

25. *European Council Meeting – Conclusions*, ¶ 17, EUCO 9/18 (June 28, 2018), <https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf>. Nonetheless, the European Council called for the continued negotiation of "ambitious, balanced and mutually beneficial trade agreements with key partners across the world, promoting its values and standards." *Id.*

26. European Commission and HR/VP contribution to the European Council: EU-China – A strategic outlook, at 5, JOIN (2019) 5 (Mar. 3, 2019), <https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf>.

Commission described the Regulation as “a powerful instrument to detect and raise awareness of foreign investment in critical assets, technologies and infrastructure.”²⁷ Regulation 2019/452 was adopted by the European Parliament and the Council of Ministers on March 19, 2019 and will enter into force on October 11, 2020.²⁸

Objective

The objective of the Regulation is two-fold: to avert risks to security and public order that a foreign direct investment in one Member State may pose to another Member State or the Union as a whole while maintaining the EU’s openness to FDI. In the statement unveiling the proposed Regulation, the Commission affirms its openness to FDI. The Commission states that foreign investment “boosts productivity and makes [European] companies more competitive by improving resource allocation, bringing in capital, technologies and expertise, increasing competition, stimulating innovation, and opening new markets for EU’s exports.”²⁹ Indeed, the EU’s openness to foreign investment is enshrined in its founding treaties.³⁰

While preserving the EU’s openness to foreign investment, the Regulation allows Member States and the Commission to stay informed of potential security threats posed by incoming FDI and provides all parties with legal mechanisms by which to voice their concerns. A smaller Member State receiving a high influx of FDI may not have the capacity to “appropriately review” all incoming investments.³¹ In such a situation, fellow Member States and the Commission can draw that Member State’s attention to a security risk that would otherwise have gone unnoticed.

To achieve both goals, the Regulation is organized as an information-sharing regime. The Commission and Member States raise awareness among one another of potential threats without requiring any additional legal restrictions on incoming FDI.

Accordance with the EU and GATS Treaties

The Regulation straddles a fine line between the exclusive competences of the Union and the exclusive competences of the Member States. Foreign direct investment falls within the common commercial policy as it is listed under TFEU Article 207(1).³² Per TFEU Article 3(1) (e), the Union has *exclusive* competence over the common commercial policy.³³

27. *Id.* at 10.

28. Regulation art. 17.

29. *Communication Welcoming Foreign Direct Investment while Protecting Essential Interests*, *supra* note 8, at 4-5. The Commission explicitly affirmed that “EU openness to foreign investment is not going to change.” *Id.* at 5.

30. Consolidated Version of the Treaty on the Functioning of the European Union art. 63, 206, May 9, 2008, O.J. (C115) 47 [hereinafter TFEU].

31. *Engaging China at a Time of Transition*, *supra* note 10, at 5.

32. TFEU art. 207(1): “The common commercial policy shall be based on uniform principles, particularly with regard to...foreign direct investment...”

33. TFEU art. 3(1): “The Union shall have exclusive competence in the following areas: (a)...(e) common commercial policy.”

However, Member States' FDI screening legislation is aimed specifically at blocking those foreign investments that could implicate Member States' national security interests. National security interests fall squarely within the *exclusive* competence of the Member States per TEU Article 4(2).³⁴ For this reason, the Regulation affirms that the decision to accept or deny a particular incoming FDI rests solely and ultimately with the Member State receiving the FDI.³⁵ Neither Member State comments nor Commission opinions are legally binding on the Member State recipient.³⁶

The Regulation also complies with other EU treaty obligations regarding the free movement of capital and the freedom of investment. Under TFEU Article 63(1), restrictions to the "movement of capital between Member States and third countries shall be prohibited."³⁷ However, an exception on public security or public policy grounds is provided under TFEU Article 65(1)(b) so long as the measure is compatible with the general principles of EU law, including legal certainty and proportionality.³⁸ The Regulation provides legal certainty because it requires Member States to publish their individual screening mechanisms and conduct them in a non-discriminatory manner.³⁹

Finally, the Regulation is not in conflict with EU Member States' WTO obligations because the GATS permits derogation from Member States' obligations if there is an essential security interest at stake per Articles XIV(a) and XIV bis.⁴⁰

MECHANISMS INTRODUCED BY THE REGULATION

The principal rights and responsibilities introduced by the Regulation are mandatory information-sharing by Member States, the right of Member States and the Commission to raise concerns in response to incoming FDI in the Union, and the ability to respond to both screened and unscreened FDI. The role of the European Parliament, the Council and non-EU states is limited. Furthermore, there may be some harmonization of Member States' FDI screening mechanisms in the long-term.

34. TEU art. 4(2): The EU "shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

35. Regulation art. 1(3): "Nothing in this Regulation shall limit the right of each Member State to decide whether or not to screen a particular foreign direct investment within the framework of this Regulation." See also EU-Singapore FTA, Opinion 2/15, CJEU (Dec. 21, 2016).

36. TFEU art. 288: "Recommendations and opinions shall have no binding force."

37. TFEU art. 63(1), see also *Proposal for a Regulation of the European Parliament and the Council establishing a Framework for Screening of Foreign Direct Investments into the European Union*, at 4, COM (2017) 487 final (Sep. 13, 2017), <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF>.

38. TFEU art. 65(1): "The provisions of Article 63 shall be without prejudice to the right of Member States: (a)... (b)...to take measures which are justified on grounds of public policy or public security." See also *Proposal for a Regulation*, *supra* note 37, at 4.

39. Regulation art. 3(2): "Rules and procedures related to screening mechanisms...shall be transparent and not discriminate between third countries. In particular, Member States shall set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules."

40. *Id.* ¶ 35. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. XIV(a), XIV bis, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994). The GATS General and Security Exceptions permit a Member State to derogate from the terms of the treaty if "necessary to protect public morals or maintain public order," or to protect interests related to international security or a Member State's defense apparatus. *Id.*

- *Mandatory Information-Sharing*

The Regulation provides two modes of information-sharing between Member States and the Commission. If a Member State screens an incoming FDI, it must notify the Commission and other Member States as soon as possible⁴¹ as well as provide information, including the ownership of the investor, the investor's source of funding and the investor's business plan.⁴² Additionally, all Member States are required to submit an annual report with "aggregated information" on all FDI (both screened and unscreened) to the Commission.⁴³

- *The Right to Raise Concerns*

The Regulation provides separate mechanisms by which Member States and the Commission may raise security or public order concerns in response to incoming FDI in a Member State.

A Member State that perceives its own security and public order to be threatened can issue a non-binding *comment* to the Member State receiving the FDI.⁴⁴ In determining the effect of an FDI, the Member State may consider a non-exhaustive list of factors provided in Article 4 of the Regulation.⁴⁵ The concerned Member State may also solicit comments from fellow Member States.⁴⁶ The Member State receiving the FDI is required to duly consider the concern raised by a fellow Member State pursuant to its obligation of "sincere cooperation."⁴⁷ However, the Member State is free to accept the FDI if it so chooses.⁴⁸

The Commission may issue two types of non-binding *opinions* in response to a perceived threat: a standard opinion and an Article 8 opinion. If the Commission perceives that an FDI threatens the security and public order of *more than one* Member State,⁴⁹ or if the Commission has relevant information to share concerning an FDI,⁵⁰ the Commission can issue an opinion pursuant to Articles 6 or 7 of the Regulation. If an FDI is likely to affect the listed projects or programs of Union interest on grounds of security or public order, the Commission may issue an Article 8 opinion.⁵¹ Like Member States, the Commission may consider the non-exhaustive list of factors provided in Article 4. If the Commission issues a standard opinion, the Member State recipient is required to give it "due consideration."⁵² However, if the Commission issues an Article 8 opinion, the Member State receiving the FDI is required to give the opinion even greater consideration.⁵³ If the Member State chooses to disregard an Article 8 opinion, the Member State must provide an explanation to the Commission.⁵⁴

41. Regulation art. 6(1), 7(1).

42. Regulation art. 9(2).

43. Regulation art. 5(1).

44. Regulation art. 6(2).

45. Regulation art. 4.

46. Regulation art. 6(4).

47. Regulation, para. 17 citing the Consolidated Version of the Treaty on European Union art. 4(3), Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter TEU]. See also Regulation art. 6(9), 7(7).

48. Regulation art. 6(9).

49. Regulation art. 6(3).

50. Regulation art. 6(3).

51. Regulation art. 8(1).

52. Regulation art. 6(9), 7(7).

53. Regulation art. 8(1)(c) (stating that the Member State shall take "utmost account" of the opinion).

54. Regulation art. 8(1)(c).

- *Screened and Unscreened FDI*

The Regulation also provides separate mechanisms for screened and unscreened FDI. If a Member State screens an incoming FDI, it must notify the Commission and other Member States as soon as possible.⁵⁵ Comments and opinions must be issued within 35 calendar days of receipt of the information concerning the transaction.⁵⁶

If a Member State does not screen an incoming FDI, Member States and the Commission may still respectively issue comments or an opinion as late as 15 months following completion of the investment.⁵⁷ However, there is a 35-calendar day deadline imposed once the Commission and Member States acquire the information on which to base their opinion or comments.⁵⁸

- *Other Involvement of EU Institutions and non-EU States*

In addition to issuing opinions, the Commission has the right to amend the list of projects or programs of Union interest listed in the annex by delegated act⁵⁹ after consultation with designated experts from all Member States.⁶⁰ The Council and the European Parliament may revoke this power from the Commission at any time.⁶¹

Beyond this control over the Annex, the Council and European Parliament have limited involvement in the FDI framework. They receive an annual report prepared by the Commission which is a compilation of the reports submitted by Member States.⁶² The European Parliament may also invite the Commission to committee meetings to explain issues related to the implementation of the Regulation.⁶³ In its report on the Regulation proposal, the European Parliament tried to create more of a role for institutional actors.⁶⁴ However, these suggested changes were not integrated into the final draft of the Regulation.

Non-EU states are not afforded any role in the screening process. However, a non-EU state, such as the United States, might exert pressure on the Commission or a Member State through informal, diplomatic channels in order to urge the Commission or a Member State to issue an opinion or comments.⁶⁵ However, the opinion or comment would have to be framed as a Union concern so as to be “justified” on the grounds listed in Articles 6, 7 or 8 of the Regulation.⁶⁶

55. Regulation art. 6(1).

56. Regulation art. 6(7).

57. Regulation art. 7(7).

58. Regulation art. 7(7).

59. Regulation art. 8(4).

60. Regulation art. 16(4).

61. Regulation art. 16(3).

62. Regulation art. 5(3).

63. Regulation art. 5(4).

64. See *Report on the 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) 497 (June 4, 2018), https://www.europarl.europa.eu/doceo/document/A-8-2018-0198_EN.html. The European Parliament proposed making the contact points (under Article 11) “institution-based contact points.” It also requested that more detailed reports be presented to the European Council and Parliament.

65. See Jason Jacobs, “Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening the United States and European Union”, *Int’l J. Legal Info.* 47 (2019) 105, 106 (stating that “the US will have to exert direct pressure on the Member States where such transactions take place if it wishes to intervene.”).

66. Regulation art. 6(2), 6(5), 7(2), 7(5).

- *Harmonization of Member States' FDI Screening Mechanisms*

The Regulation does not require Member States to “maintain, amend or adopt” any FDI screening mechanism.⁶⁷ However, in the long term, greater awareness of security risks may induce a harmonization of Member States’ screening mechanisms. Those Member States that do not screen incoming FDI will likely adopt screening legislation.⁶⁸ Those Member States with a screening framework already in place may adopt more restrictive measures.

COMPARISON OF THE EU FRAMEWORK TO CFIUS IN THE UNITED STATES

A comparison between the US and EU FDI screening mechanisms may serve as a useful point of reference in understanding the impact of the Regulation. The Committee on Foreign Investment in the United States (CFIUS) is an interagency US body that aids the president in assessing the national security aspects of incoming FDI. CFIUS is authorized to review, block or modify foreign acquisitions of and investments in US businesses that may impact US national security. CFIUS has significant flexibility in determining what constitutes a national security interest. However, those investments subject to scrutiny generally involve critical technology, critical infrastructure or the collection of sensitive data on US citizens.⁶⁹ The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded CFIUS’ jurisdiction and scope of review and appears targeted towards Chinese investors.⁷⁰

There are three notable similarities between the framework in place in both the EU and the US. First, the US and EU each have a broad, non-exhaustive list of factors by which to determine if a particular FDI poses a potential security threat.⁷¹ This affords both CFIUS and the EU significant latitude in selecting FDI transactions for review. Second, both the US and EU require a similar disclosure of information pertaining to the investment by the foreign investor, including ownership structure, funding source and the approximate value of the investment.⁷² Third, both the Regulation and FIRRMA provide for information-sharing between different states: under FIRRMA, the US has the right to share information about incoming FDI with “allies and third parties”⁷³ and, under the Regulation, the foreign investor’s information may be shared with other Member States and the Commission.⁷⁴

67. Regulation art. 3(1).

68. See Jones Day, *White Paper: Screening of Foreign Direct Investments in the EU Under the New FDI Regulation* 3-4, Apr. 2019, <https://www.jonesday.com/en/insights/2019/04/screening-of-foreign-direct-investments>.

69. Foreign Investment Risk Review Modernization Act of 2018, Subtitle A of Title XVII, Sec. 1703. [hereinafter FIRRMA]. See also Congressional Research Service, *The Committee on Foreign Investment in the United States (CFIUS)*, at 11-13 (Dec. 17, 2019), <https://fas.org/sgp/crs/natsec/RL33388.pdf>.

70. Jacobs, *supra* note 65, at 108.

71. To illustrate this similarity, compare Regulation art. 4 with FIRRMA, Subtitle A of Title XVII, Sec. 1703.

72. To illustrate this similarity, compare Regulation art. 9(2) with Contents of Voluntary Notice, 31 CFR § 800.402. While the US legislation is more detailed, it is not necessarily more intrusive in terms of the information requested of the foreign investor. See also Jacobs, *supra* note 65, at 116.

73. FIRRMA, Subtitle A of Title XVII, Sec. 1713.

74. Regulation art. 9.

There are several notable differences between the Regulation in the EU and FIRRMA in the United States.

- *Binding Determinations*

CFIUS is empowered to block or suspend an incoming FDI.⁷⁵ In contrast, the Regulation only permits the Commission and Member States to raise concerns to the Member State receiving the FDI. The Member State must duly consider the concerns, but has the right to disregard them.

- *Judicial Review*

In addition, determinations by the US president are generally binding.⁷⁶ Only the *process* by which “the disposition of a transaction is determined” may be judicially reviewed to ensure that the process complies with the constitutional rights of the parties involved.⁷⁷ In contrast, FDI in the EU that is blocked by a Member State’s national screening mechanism is subject to review.⁷⁸ The language of the Regulation does not suggest narrow grounds for review.

- *Discrimination with respect to Countries of Origin*

While Article 3(2) of the Regulation expressly prohibits “discrimination between third countries,”⁷⁹ FIRRMA leaves open the possibility of discrimination of investors of certain nationalities. The “sense of Congress” provision within FIRRMA allows CFIUS to discriminate among investors of certain countries that are of “special concern” and have a “demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US leadership in areas related to national security.”⁸⁰

- *Safe Harbor Provision*

Unlike the Regulation, CFIUS provides foreign investors with a “safe harbor” option.⁸¹ If a foreign investor voluntarily submits its investment for review and is cleared, then the foreign investor is granted a “safe harbor” from screening and challenge after completion of the investment⁸² unless there were some fraud involved in the application submitted to CFIUS.⁸³

By contrast, the Regulation can leave certain foreign investors in limbo for up to 15 months. If an investment is screened at the domestic level, review by the Commission and fellow Member States will take approximately 35 days.⁸⁴ But if an investment is *not* screened at the domestic level, another Member State or the Commission may issue a comment or an opinion up to 15 months after the investment has been completed.⁸⁵ The

75. FIRRMA, Subtitle A of Title XVII, Sec. 1713. See Jacobs, *supra* note 65, at 115.

76. Congressional Research Service, *supra* note 69, at 2. See Jacobs, *supra* note 65, at 116.

77. *Id.*

78. Regulation art. 3(5): “Foreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities.”

79. Regulation art. 3(2).

80. Congressional Research Service, *supra* note 69, at 2. See FIRRMA, Subtitle A of Title XVII, Sec. 1702(c)(1).

81. Jacobs, *supra* note 65, at 113.

82. *Id.*

83. 50 U.S.C. app § 2170(b)(1)(D)(iii).

84. Regulation art. 6(7).

85. Regulation art. 7(7).

Member State receiving the FDI is required to give due consideration to the comment or opinion—even after completion of the investment—and may require the foreign investor to withdraw the investment.

- *Takeaway*

The EU framework appears more accommodating to Chinese foreign investors as compared to the US framework. CFIUS is likely to target any prospective investment by Chinese-owned entities for screening whereas discrimination between third countries is expressly prohibited under the EU screening framework.⁸⁶ Overall, the EU provides more substantial judicial recourse if a foreign investor perceives any unfairness in the screening process, which in turn serves as an added incentive for EU Member States to deal fairly with foreign investors.

EFFECT OF THE COVID-19 PANDEMIC

At the virtual EU-China Summit on June 22, 2020, European Commission President Ursula von der Leyen reiterated the need to “achieve a real level playing-field” with China “be it in terms of trade, climate, technology, and the defence of the multilateralism.”⁸⁷ Clearly, the objectives underlying the Regulation are unchanged. However, the Regulation will enter into force in October 2020, which will be in the midst, or even a projected height, of the Covid-19 pandemic and likely the start of a deep recession. As such, FDI in the EU will likely become both a more pressing and divisive issue.

The Covid-19 pandemic is causing Member States to adjust the definition of “security and public order” under the Regulation. Economic woes may also induce Member States to admit incoming FDI despite security concerns expressed by other Member States or the Commission.

- *A Broader Definition of “Security and public order”*

As suggested by the Regulation’s Annex and recent interventions by CFIUS, “security and public order” generally concern companies with access to sensitive personal data, ties to the defense industry as well as critical infrastructure, artificial intelligence and other dual-use technologies.⁸⁸ However, the Covid-19 pandemic has broadened the definition of “security and public order” to include critical medical equipment, such as ventilators and personal protective equipment (PPE).⁸⁹ Similarly, medical research may also have new

86. See Jacobs, *supra* note 65, at 108.

87. European Commission Press Release IP/20/1159, EU-China Summit: Defending EU interests and values in a complex and vital partnership (June 22, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1159.

88. See Regulation Annex for a list of sensitive EU projects and programs. Access to sensitive personal data is also a concern. For example, in 2019, CFIUS required Kunlun (a Chinese-owned company) to divest Grindr, which has access to users’ personal information including messages and HIV status. See Echo Wang, “[China’s Kunlun Tech agrees to U.S. demand to sell Grindr gay dating app](#)”, Reuters, May 13, 2019.

89. See Braw, *supra* note 2. Ventilators are of particular note as they are produced predominantly by US and European companies. See Jamie Bell, “[The seven biggest medical ventilator manufacturers across the world by market share](#)”, *NS Medical Devices*, Mar. 24, 2020.

security implications in the race to discover and produce a vaccine.⁹⁰ In a Communication to Member States on March 25, 2020, the Commission urged Member States to remain vigilant of “attempts to acquire healthcare capacities (for example, the production of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment.”⁹¹

The Regulation has the flexibility to accommodate a broader range of “security and public order” concerns. The advantage of an information-sharing regime is that Member States can discuss and deliberate on evolving threats while individual Member States can adopt specific legislation at the national level to quickly and effectively respond to a changing security context.⁹² Furthermore, the Commission can—at any time—amend the Annex to the Regulation to include other projects and programs of Union concern.⁹³

- *Reevaluation of Priorities in the Face of Recession*

If the pandemic brings on a recession, Member States may be more receptive to FDI despite the risks posed by certain investors to sensitive sectors. As of April 2020, banks reported a marked increase in requests from Chinese companies eyeing potential acquisitions in Europe.⁹⁴ *Bloomberg* has noted particular interest in “regions perceived as China-friendly, including southern Europe.”⁹⁵

The idea underlying the Regulation’s information-sharing regime is that a Member State—in the spirit of “sincere cooperation”—would heed the concerns of fellow Member States and the Commission.⁹⁶ However, if the EU enters a recession and European-owned companies suffer, a Member State with a struggling economy may welcome certain FDI regardless of Commission or fellow Member State objections, exacerbating regional divisions between Members on the issue of Chinese investments. If the priorities of vulnerable Member States shift such that they are willing to accept certain FDI over pushback from within the EU, the Regulation may prove less effective at protecting European security interests.⁹⁷

90. In May 2020, the FBI and U.S. Department of Homeland Security warned of Chinese hackers attempting to steal American vaccine research. David Sanger & Nicole Perlroth, “[U.S. to accuse China of Trying to Hack Vaccine Data, as Virus Redirects Cyberattacks](#)”, *The New York Times*, May 13, 2020.

91. 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), at 1, C 2020 1981 (Mar. 25, 2020), https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

92. For example, on March 17, Spain announced new authorization requirements for foreign investors. “[China’s Corporates Are Gearing Up in Europe for M&A Bargains](#)”, *Bloomberg*, Apr. 7, 2020. In April, Germany also announced new regulations to protect domestic firms from non-EU takeovers. Patrick Donahue, “[Germany Plans to Tighten Rules on Foreign Takeovers](#)”, *Bloomberg*, Apr. 7, 2020.

93. Regulation art. 8(4), 16(4).

94. “China’s Corporates Are Gearing Up in Europe for M&A Bargains”, *supra* note 92.

95. *Id.*

96. On March 27, the Commission issued guidelines to “preserve EU companies and critical assets, notably in areas such as health, medical research, biotechnology and infrastructures” and urged cooperation between Member States even in advance of the information-sharing regime. Coronavirus: Commission issues guidelines to protect critical European assets and technology in current crisis, IP/20/528 (Mar. 27, 2020), https://eeas.europa.eu/delegations/china/76628/coronavirus-commission-issues-guidelines-protect-critical-european-assets-and-technology_en.

97. See Braw, *supra* note 2 (calling the regulation “toothless”).

CONCLUSION

Achieving a program for the coordination of FDI screening across EU Member States is no easy feat. The EU must balance openness to investment against security objectives. Furthermore, under European primary law, individual Member States have exclusive authority over their national security concerns. Therefore, EU institutions cannot *force* Member States to block specific incoming FDI. EU institutions must simply trust that a Member State – once informed of a security concern – will refuse a particularly risky incoming FDI. Further complicating FDI screening is the Covid-19 pandemic, which has significantly altered the paradigm for which the Regulation was originally crafted and brought diverging regional approaches to Chinese FDI to the forefront of the European dialogue. There will be much to follow this October when the Regulation enters into force as EU Member States and institutions are implementing the new measures against the effects of the pandemic.

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