TOWARDS A COMMON SCREENING SYSTEM OF FOREIGN DIRECT INVESTMENT ON NATIONAL INTEREST GROUNDS IN THE EUROPEAN UNION

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SUMMARY.

ABSTRACT

Until 2009, the legal regime of international investments in the EU was characterised by its very high degree of fragmentation due to the complex division of competences between the EU and its member states. While the former has mainly intervened to promote greater liberalisation of capital markets, member states have usually been concerned with the post-establishment aspects of international investments. Only since 2009, with the entrance into force of the Treaty of Lisbon and the consequent extension of the Common Commercial Policy (CCP) to cover FDI, has the EU has gained full competence in FDI. However, the exclusive competence of the EU as regards FDI is still under construction and its full implementation by the EU will take time.

Fears about Chinese State Controlled Enterprises (SCEs) have increased steadily in Europe over time. There are growing concerns about investment projects from this and other countries, in many cases sovereign-driven investment, targeting certain strategic areas of the EU economy. This situation has supported the debate about the need for a common EU response to foreign investment in certain strategic sectors. Growing concerns about the potential control of large areas of the economy of EU member states by foreign corporations have increased the popularity in some EU countries of national screening systems to determine on the grounds of national interests

what FDI is and is not acceptable: France or Germany are good examples of this move. At the same time, FDI originating from the PRC and other emerging countries has provided a forceful push for the development of a common European screening system to evaluate FDI on national security grounds. EU and national authorities are aware of the fact that foreign investors are in many cases interested in acquiring certain technology or patents rather than in running a firm. In order to prevent this situation, 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 was published by the European Commission on 13 September 2017. This article analyses in depth the Proposal and its relationship with the development of the EU Common Policy on Investment.

Key words.

Foreign direct investment, control of foreign investment, screening systems of evaluation of foreign investment, European commercial and investment common policy, national security.

I. INTRODUCTION

The European Union (EU) is the world's largest exporter of international investment as well as the leading recipient of Foreign Direct Investment (FDI) in the world, with a traditionally open-door policy to FDI.[1] The current 28 EU member states account for almost 50% of all investment agreements concluded worldwide.[2] The EU is an open space committed to free trade and investment.[3] And now, since the entrance into force of the Treaty of Lisbon, it has become a major actor in international investment law.[4]

At various points in European history, there have been surges in direct investors from particular countries. This certainly creates fear among the local competitors and may create some unrest in the government in certain cases. Such surges occurred in the 1960s with US firms and in the 1990s with Japanese and Korean investors.[5] However, in recent years, perhaps because of the economic crisis that many European countries have suffered, the EU is once again becoming a favoured destination for FDI, especially from the People's Republic of China (PRC).[6]

In this most recent surge, fresh capital has been welcomed, especially if it means saving or creating jobs in a very difficult period for many European countries. So far, the climate for Chinese investments has been better in Europe than in the US, and there have been no particular administrative difficulties or no political quarrels.[7] As a consequence, Chinese FDI has increased steadily, and over the past decade all kinds of iconic brands have been acquired by Chinese firms: fashion houses like Aquascutum of London or Sonia Rykiel of Paris, crystal makers like French Baccarat, car producers like Swedish Volvo, food brands like British Weetabix breakfast cereals, or wine producers like the French Gevrey-Chambertin wine from Burgundy.[8]

However, this situation seems to be starting to change. Despite the fact that Chinese investment in the EU started from a low base and that the total value of the investment is still limited,[9] Concern is growing across Europe about

[1] EUROPEAN COMMISSION, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a comprehensive European international investment policy*, COM(2010) 343 final, Brussels 07.07.2010, pp 3–4.
[2] EUROPEAN COMMISSION, above n 1, p 5; J CHAISSE, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15:1 *Journal of International Economic Law* (2012) 51, 53. Regarding the effect of the financial crisis on EU investment, see M GÖTZ, 'Pursuing FDI Policy in the EU - Member States and Their Policy Space' (2015) 2:2 *Journal of Economics and Political Economy* 290, pp 290 and 292–293.
[3] For instance, the EU has a more open policy in terms of market access than the US or Canada; note J HELLSTRÖM, *China's Acquisitions in Europe. European Perceptions of Chinese Investments and their Strategic Implications*, FOI-R--4384–SE, Swedish Defence Research Agency, Stockholm December 2016, p 33.
[4] SW SCHILL, 'The Relation of the European Union and Its Member States in Investor–State Arbitration' in LE TRAKMAN and N RANIERI (eds), *Regionalism in International Investment Law*, OUP, Oxford 2013, p 374.
[5] H ZHANG and D VAN DEN BULCKE, 'China's Direct Investment in the European Union: A New Regulatory Challenge?' (2014) 12 *Asia Europe Journal* 159, p 160.
[6] H ZHANG and D VAN DEN BULCKE, above n 5, p 161. An in-depth analysis of Chinese investment in the EU may be found in Th HANEMANN and DH ROSEN, *China Invests in Europe Patterns, Impacts and Policy Implications*, Rhodium Group, New York June 2012, pp 32–48.
[7] S MEUNIER, 'A Faustian bargain or just a good bargain? Chinese foreign direct investment and politics in Europe' (2014) 12:1 *Asia Europe Journal* 143, p 144.
[8] S MEUNIER, above n 7, p 143.
[9] J HELLSTRÖM, above n 3, p 22.

important sectors of the European economy to potentially coming under foreign control, especially of the PRC. Chinese investments in the EU rose 77% to over €35 billion in 2016. Although FDI from the PRC remains small in absolute numbers, it is deeply linked to the state and this triggers fears about politically driven FDI[10] and the potential acquisition of key sectors of the European economy, among others.[11]

Additionally, the persistence of formal and informal limitations on market access in China for FDI irritates many in the EU and fuels the idea of the absence of real reciprocity.[12] Consequently, the early impression of having struck gold is increasingly turning into a "zero-sum game" in the long term.[13] As mentioned, these fears are not new in Europe: they have arisen from time to time in relation to investors from other countries. However, they are surging today within the context of the narrative of the end of an era and the decline of the West.[14]

II. EU LEGAL FRAMEWORK

1. THE TREATY OF LISBON AND THE NEW COMMON TRADE AND INVESTMENT POLICY

Until 2009, the legal regime of international investments in the EU was characterised by its very high degree of fragmentation[15] due to the complex division of competences between the EU and its member states.[16] While the former has mainly intervened to promote greater liberalisation of capital markets, member states have usually been concerned with the post-establishment aspects of international investments. Only since 2009, with the entrance into force of the Treaty of Lisbon and the consequent extension of the Common Commercial Policy (CCP) to cover FDI, has the EU has gained full competence in FDI.[17]

The ultimate goal of this move is to strengthen the position of the EU as a relevant actor in the international arena and to 'contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and

[10] In relation to this issue and its real meaning and scope, see S MEUNIER, above n 7, pp 146–148; T HANEMANN and DH ROSEN, above n 6, pp 59–60.
[11] See T HANEMANN and DH ROSEN, above n 6, pp 54–58.
[12] 'Chinese foreign investments up 40 percent to record in 2016: study', *Reuters*, 14.01.2017. Regarding the kind of concerns raised by Chinese FDI in Europe, see J HELLSTRÖM, above n 3, pp 25–32 and 35.
[13] S MEUNIER, above n 7, p 144.
[14] This time 'there is an added perception that there is something radically different about Chinese investment and that the economic benefits which historically have followed FDI, such as technological spill-over and higher wages, somehow might not happen this time': S MEUNIER, above n 7, p 144. See also T HANEMANN and DH ROSEN, above n 6, p 62.
[15] S MEUNIER, above n 7, p 151speaks of 'disunity and cacophony' when referring to the system existing prior to the Lisbon Treaty.
[16] F WEISS and S STEINER, 'The investment regime under Article 207 of the TFEU – a legal conundrum: the scope of "foreign direct investment" and the future of intra-EU BITs' in F BAETENS (ed), *Investment Law within International Law. Integrationist Perspectives*, CUP, Cambridge 2013, pp 357–359; J TAVASSI, 'The EU Investment Policy: How to ensure a fair regulation of the concerned interests?' (2012) 13 *The Journal of World Investment & Trade* 645, p 645; F ORTINO and P EECKHOUT, 'Towards an EU Policy on Foreign Direct Investment' in A BIONDI, P EECKHOUT and S RIPLEY (eds), *EU Law after Lisbon*, OUP, Oxford 2012, p 313; A BEVIGLIA ZAMPETTI and C BROWN, 'The EU Approach to Investment' in Z DRABEK and P MAVROIDIS (eds), *Regulations of Foreign Investment. Challenges to International Harmonization*, World Scientific, Singapore 2013, pp 421–436 as regards the role played by the EU in the period before 2009.
[17] S WOOLCOCK, 'EU Trade and Investment Policymaking After the Lisbon Treaty' (2010) 45:1 *Intereconomics Review of European Economic Policy* 22, pp 22–23; C BROWN and M ALCOVER-LLUBIÀ, 'The External Investment Policy of the European Union in the Light of the Entry into Force of the Treaty of Lisbon' (2010–1) *Yearbook on International Investment Law & Policy* 145, pp 146–148 or R LEAL-ARCAS, 'The European Union's Trade and Investment Policy after the Treaty of Lisbon' (2010) 11 *Journal of World Investment & Trade* 463, pp 507–508 regarding the pre-Lisbon situation. Significantly, this extension – which has been rather welcomed by academics, M GÖTZ, above n 2, p 200 – did not receive a great deal of attention. For instance, the Impact Assessment of the Treaty of Lisbon drafted by the British Parliament, a document of 300 pages, devoted nine lines to this issue (para 9.9 at p 217). Note Art. 207(5) TFEU as regards the exclusion of the negotiation and conclusion of international agreements in the field of transport from the scope of the CCP; note A DIMOPOULOS, 'The Common Commercial Policy After Lisbon: Establishing Parallelism Between Internal and External Economic Relations?' (2008) 4 *Croatian Yearbook of European Law and Policy* 108, p 119.

other barriers'.[18] Thus, Article 207(1) Treaty on the Functioning of the European Union (TFEU) (ex Art. 133 TEC) now states that:

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

However, according to Article 207(1) TFEU the CCP 'relates to trade with third States',[19] and consequently:

> the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. … [A]n EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.[20]

Article 3(1)(e) TFEU gives the EU exclusive competence in the area of the CCP, which now includes, among other things, FDI. This exclusive competence makes the progressive disappearance of national investment policies and their transfer to the supranational level unavoidable.[21] In accordance with Article 2(1) TFEU, and because of this exclusive competence, only the EU can legislate and adopt legally binding acts in areas like FDI, where exclusive competence is vested in it.[22] Consequently EU member states no longer have competence to negotiate and conclude international agreements that cover FDI.[23] However, the situation is somewhat unclear and some level of ambiguity and controversy remains.[24]

2. AN EU COMMON POLICY UNDER CONSTRUCTION IN THE FIELD OF FOREIGN INVESTMENT.

However, the exclusive competence of the EU as regards FDI is still under construction and its full implementation by the EU will take time.[25] In addition, the interrelation of the legal framework of the CCP in the area of FDI with other areas of EU law with a different substantive and personal scope, like the right of establishment and the freedom of capital and payments,[26] may still lead to some controversies and doubts as regards the final understanding and scope of the competence granted to the EU, and its 'progressive' – as Article 206 TFEU states[27] – implementation in practice.[28]

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[18] Art. 206 TFEU. Note A DE LUCA, 'New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty. Investment Liberalization v. Investment Protection?' (2010–1) *Yearbook on International Investment Law & Policy* 165, pp 180–181; R LEAL-ARCAS, above n 17, pp 464 and 478.

[19] Opinion 2/15 (Full Court), *EU–Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, para 35.

[20] Opinion 2/15, above n 19, para 36.

[21] J TAVASSI, above n 16, p 646; J CHAISSE, above n 2, pp 62 and 80–83, in relation to the transition phase from the current situation of a plurality of IIAs entered into by the several EU member states, to the new situation characterised by their replacement with a single one.

[22] EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, COM(2010) 344 final, p 2; EUROPEAN PARLIAMENT, *European Parliament legislative resolution of 10 May 2011 on the proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries* COM(2010) 344 – C7-0172/2010 – 2010/0197(COD). See also C BROWN and M ALCOVER-LLUBIÀ, above n 17, p 148; A BEVIGLIA ZAMPETTI and C BROWN, above n 16, p 437.

[23] As well as to re-negotiate existing BITs, see R LEAL-ARCAS, above n 17, pp 479 and 485; J KLEINHEISTERKAMP, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15:1 *Journal of International Economic Law* 85, 106–107.

[24] A DIMOPOULOS, *EU Foreign Investment Law*, OUP, Oxford 2011, p 22; R DOLZER and Ch SCHREUER, *Principles of International Investment Law*, 2nd ed, OUP, Oxford 2012, p 66.

[25] A BEVIGLIA ZAMPETTI and C BROWN, above n 16, p 420.

[26] On the basis of Art. 207(6) TFEU. A DIMOPOULOS, above n 24, pp 78 and 97–98.

[27] Note in this respect the use of the word 'progressive' in Art. 206 TFEU: 'By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the *progressive* abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers' (emphasis added).

[28] R LEAL-ARCAS, above n 17, p 484.

Article 207(6) TFEU makes clear in this respect that the exercise of the exclusive competences conferred by the provision in the field of the CCP 'shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.'[29] In its Opinion 2/15 of 16 May 2017, the Court of Justice of the European Union (CJEU) dealt both with the issue of the definition of FDI and with the delimitation of the effective scope of FDI covered by the provision, two issues that had generated much academic debate.[30]

2.1. MEANING OF INVESTMENT WITHIN THE CONTEXT OF ARTICLE 207 TFEU

2.1.1. EXCLUSION OF PORTFOLIO INVESTMENT FROM THE SCOPE OF ARTICLE 207 TFEU

Article 207 TFEU explicitly refers to 'foreign direct investment'. There is a broad consensus in doctrine that indirect forms of investment and portfolio investment are excluded from the scope of the concept of FDI embodied in Article 207 TFEU.[31]

This was an issue that, for a while, generated a certain amount of debate,[32] but that now has been settled by the CJEU in its Opinion 2/15 of 16 May 2017 on the Free Trade Agreement (FTA) between the EU and Singapore. The Court clearly upholds the exclusion of portfolio investment from the scope of the provision:[33]

> The use, by the framers of the FEU Treaty, of the words "foreign direct investment" in Article 207(1) TFEU is an unequivocal expression of their intention not to include other foreign investment in the common commercial policy.[34]

According to the CJEU, the EU has exclusive competence, 'pursuant to Article 3(1)(e) TFEU, to approve any commitment vis-à-vis a third State relating to investments made by natural or legal persons of that third State in

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[29] See R YOTOVA, 'The new EU competence in foreign direct investment and intra-EU investment treaties: does the emperor have new clothes' in F BAETENS (ed), *Investment Law within International Law. Integrationist Perspectives*, CUP, Cambridge 2013, pp 389–391.

[30] Note W SHAN and S ZHANG, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy' (2010) 21:4 *The European Journal of International Law* 1049, 1059.

[31] As well as other categories of foreign investment such as intellectual property rights, money claims or concession contracts. Note J TAVASSI, above n 16, p 647; A DIMOPOULOS, above n 17, p 110; C HERRMAN and J CRÄMER, 'Foreign Direct Investment – A "Coincidental" Competence of the EU?' (2015) 43 *Hitotsubashi Journal of Law and Politics* 85, 90. The CJEU in its Opinion 2/15 of May 2017 considers 'that non-direct foreign investment may, inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ("portfolio" investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU' (Opinion 2/15, above n 19, para 227).

[32] A REINISCH, 'The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and Other Investment Agreements' (2014) 12 *Santa Clara Journal of International Law* 111, 117 and 136–141; M GÖTZ, above n 2, p 298; R LEAL-ARCAS, above n 17, p 487; PJ CARDWELL and D FRENCH, 'The European Union as a Global Investment Partner: Law, Policy and Rhetoric in the Attainment of Development Assistance and Market Liberalisation?' in C BROWN and K MILE (eds), *Evolution in Investment Treaty and Arbitration*, CUP, Cambridge 2011, pp 206–207. The academic debate in relation to this issue is very broad, note K KAZIMIREK, *The New EU Competence over Foreign Direct Investment and Its Impact on the EU's Role as a Global Player*, Oldenburger Studien zur Europäisierung und zur translationalen Regulierung, Carl-von-Ossietzky-Universität, Ausgewählte Abschlussarbeiten ST 2012/04 Oldenburg, pp 2 and 22–32; J CHAISSE, above n 2, p 60; A DE LUCA, above n 18, pp 195–199, in relation to the existence of an exclusive competence concerning all aspects of protection of investments or A REINISCH (as above this note, p 115, fn 6 and bibliography (2 pages) referred to there. It is significant in this respect that the European Parliament in its Resolution of 06.04.2011 on the future European international investment policy (EUROPEAN PARLIAMENT, *European Parliament resolution of 6 April 2011 on the future European international investment policy*, 2010/2203(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN> accessed 02.02.2018), after welcoming 'this new EU competence and call[ing] on the Commission and the Member States to seize this opportunity to build with Parliament an integrated and coherent investment policy which promotes high-quality investments and makes a positive contribution to worldwide economic progress and sustainable development' (2), asks the 'Commission to provide a clear definition of the investments to be protected, including both FDI and portfolio investment' (11). As previously stated, portfolio investment is excluded from the competence of the EU in this matter.

[33] See Opinion 2/15, above n 19, para 81.

[34] *Ibid*, para 83.

the European Union and vice versa which enable effective participation in the management or control of a company carrying out an economic activity.'[35]

Accordingly, commitments vis-à-vis a third state relating to other foreign investment 'do not fall within the exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU.'[36] Portfolio investment would thus clearly fall outside the exclusive competence of the EU and competence remains shared with the member states.[37]

2.1.2. DEFINITION OF FDI UNDER EU LAW

The Treaties do not provide any accurate definition of 'investment' or of 'FDI', but the Commission and the CJEU use as their term of reference the definition provided by Annex I of Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, which sets out a narrow understanding of the notion. Annex I describes 'direct investment' as:[38]

> 1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings. 2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links. 3. Long-term loans with a view to establishing or maintaining lasting economic links. 4. Reinvestment of profits with a view to maintaining lasting economic links. A – Direct investments on national territory by non-residents. B – Direct investments abroad by residents.[39]

This meaning is further explored in the explanatory notes to the Directive. According to them, direct investment means:

> Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.[40]

In addition to these definitions, the European Commission describes FDI as 'generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out and economic activity'.[41]

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[35] *Ibid*, para 82.
[36] *Ibid*, para 83.
[37] See J CHAISSE, above n 2, p 57; W SHAN and S ZHANG, above n 30, p 1059; A BEVIGLIA ZAMPETTI and C BROWN, above n 16, p 438. The same understanding was upheld by the German Constitutional Court (Second Senate) 30.06.2009, on the Lisbon Treaty, para 379 (English translation <http://www.bverfg.de/e/es20090630_2bve000208en.html> accessed 03.02.2018).
[38] Prior to the entry into force of the Lisbon Treaty, direct investment was considered a sub-category of capital movements. Arts. 63–66 TFEU, which are applicable to free movement of capital and payments, refer to direct investment and cover both direct and portfolio investment. The CJEU in its judgment of 16.03.1999, in Case C-222/97, *Trummer and Mayer*, ECLI:EU:C:1999:143, has clearly stated that although Art. 63 TFEU does not define the terms 'movements of capital' and 'payments', 'it is settled case-law' (para 52) that the Directive 88/361, together with the nomenclature annexed to it, may be used for the purposes of defining what constitutes a capital movement. Note in this respect, LM HINOJOSA-MARTINEZ, 'The Scope of the EU Treaty-Making Power on Foreign Investment: Between Wishful Thinking and Pragmatism' (2016) 17 *The Journal of World Investment & Trade* 86, p 91.
[39] As regards the value of this nomenclature to define the notion of FDI, note CJEU judgments of 16.03.1999, Case C-222/97, *Trummer and Mayer*, above n 38, para 21; of 04.06.2002 in Case C-483/99, *Commission v. France*, ECLI:EU:C:2002:327, para 36; or of 13.05.2003 in Case C-98/01, *Commission v. United Kingdom*, ECLI:EU:C:2003:273, para 39. See also F ORTINO and P EECKHOUT, above n 16, pp 314–315.
[40] The CJEU has accepted this last understanding in its case law, note CJEU judgments of 12.12.2006 in Case C-446/04, *Test Claimants in the FII Group Litigation*, ECLI:EU:C:2006:774, para 181; of 24.05.2007, in Case C-157/05, *Holböck*, ECLI:EU:C:2007:297, para 34; of 23.10.2007 in Case C-112/05, *Commission v. Germany*, ECLI:EU:C:2007:623, para 18; of 18.12.2007, in Case C-101/05, *A*, ECLI:EU:C:2007:804, para 46; of 20.05.2008 in Case C-194/06, *Orange European Smallcap Fund*, ECLI:EU:C:2008:289, para 100; of 04.06.2002 in Case C-483/99, *Commission v. France*, above n 39, para 37; of 14.02.2008 in Case C-274/06, *Commission v. Spain*, ECLI:EU:C:2008:86, para 18; of 13.05.2003 in Case C-98/01, *Commission v. United* Kingdom, above n 39, para 40; or of 26.03.2009 in Case C-326/07, *Commission v. Italy*, ECLI:EU:C:2009:193, para 35.
[41] EUROPEAN COMMISSION, above n 1, p 2. In any case, differentiating between FDI and other kind of investment may be difficult in certain financial operations (note LM HINOJOSA-MARTINEZ, above n 38, p 92).

The CJEU admitted that 'direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control.'[42] This position has also recently been stressed by the Court in its Opinion 2/15 of 16 May 2017, in which it provides a comprehensive definition of FDI:

> It is settled case-law that direct 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. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control.[43]

The two characteristic elements of FDI are thus emphasised by the Directive and the Court: the duration of the investment and the managerial control arising from it.[44]

2.2. SCOPE OF THE EU'S EXCLUSIVE COMPETENCE

A second issue of complexity concerns the scope of the exclusive competence vested in the EU by Article 207 TFEU. The placement of Article 207 within the rules in the TFEU governing the CCP suggests a broad understanding of the competence provided by the Treaty to the EU as regards FDI. That would support its interpretation as a comprehensive exclusive competence[45] in all FDI matters.[46] However, there has been some debate about the real scope of the exclusive competence vested in the EU in the field of FDI.[47]

The CCP is based on principles such as uniformity and liberalisation, and this approach suggests that the competence granted to the EU also refers to market access. Consequently, this competence would be broad and would thus cover both the pre-establishment and the post-establishment phases of FDI,[48] that is, the liberalisation

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[42] CJEU judgment of 13.05.2003 in Case C-463/00, *Commission v. Spain*, ECLI:EU:C:2003:272, para 53. The distinction between direct and portfolio investment has also been considered by the CJEU in its case law, which explicitly distinguishes between them. In its judgment of 22.10.2013 in Cases C-105/12 to C-107/12, *Essent and Others*, ECLI:EU:C:2013:677, the CJEU includes in the notion of 'movements of capital within the meaning of Article 63(1) TFEU ... 'direct' investments, namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking' (para 40; note also CJEU judgments of 28.09.2006, Cases C-282/04 and C-283/04, *Commission v. Netherlands*, ECLI:EU:C:2006:608, para 19; of 08.07.2010, Case C-171/08, *Commission v. Portugal*, ECLI:EU:C:2010:412, para 49). Consequently, non-direct foreign investment may, 'inter alia, take place in the form of the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments), and that such investments constitute movements of capital for the purposes of Article 63 TFEU' (Opinion 2/15, above n 19, para 227). Consider A DIMOPOULOS, above n 24, pp 44–45.

[43] Opinion 2/15, above n 15, para 80. The inclusion of FDI within the scope of the CCP is established by the CJEU, in so far as 'foreign investment reflects the fact that any EU act promoting, facilitating or governing participation – by a natural or legal person of a third State in the European Union and vice versa – in the management or control of a company carrying out an economic activity is such as to have direct and immediate effects on trade between that third State and the European Union, whereas there is no specific link of that kind with trade in the case of investments which do not result in such participation' (para 84).

[44] J TAVASSI, above n 16, p 648. However, as practice shows, it is not always easy to distinguish FDI from other options, like some speculative forms of investment. The Resolution of the European Parliament of 06.04.2011 on the future European international investment policy (above n 32) clearly acknowledges this difficulty: 'D. whereas Articles 206 and 207 TFEU do not define FDI, whereas the Court of Justice of the European Union(1) has specified its understanding of the term FDI, on the basis of three criteria: it should be considered as a long-lasting investment, representing at least 10 % of the affiliated company's equity capital / shares and providing the investor with managerial control over the affiliated company's operations, whereas this definition is in line with those of the IMF and the OECD and is opposed to, in particular, portfolio investments and intellectual property rights; whereas it is difficult to distinguish clearly between FDI and portfolio investments and applying a rigid legal definition to investment practice in the real world will be hard.'

[45] The CCP is an area of exclusive competence according to Art. 3(1) TFEU. Note as regards the issue of exclusivity, EUROPEAN COMMISSION, above n 1, p 2; J CHAISSE, above n 2, p 59; S WOOLCOCK, above n 17, p 22. In relation to the meaning of exclusivity of EU competence in accordance with the Lisbon Treaty, consider A DIMOPOULOS, above n 17, pp 119–122. In relation to the basis for this implementation, note A DIMOPOULOS, above n 24, p 127 ff.

[46] W SHAN and S ZHANG, above n 30, p 1065 and A REINISCH, above n 32, p 118.

[47] See R YOTOVA, above n 29, pp 389–391.

[48] As regards the difficulties that the differentiation of these phases encompasses, see LM HINOJOSA-MARTINEZ, above n 38, p 102.

of FDI (the pre-establishment phase) and issues linked to market access (the admission of FDI),[49] as well as to the promotion of FDI[50] and the treatment and protection of the investment once it has been made.[51]

Nevertheless, there has been, and still is, some controversy over whether the competence vested in the EU covers all sectors[52] and includes all aspects of the post-establishment phase, like protection from expropriation and similar events.[53] The European Commission has accepted that the exclusive competence vested in the EU on the basis of Articles 3 and 207 TFEU would cover all aspects of treatment and protection of FDI.[54] Indeed, the EU is willing to exercise his competence: a good example is the enactment of Regulation (EU) No. 912/2014 of the European Parliament and the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.[55]

In its Opinion 2/15 of 16 May 2017, the CJEU dealt with the issue of the inclusion of the protection of FDI within the CCP and, therefore, with the existence of an EU exclusive competence in this issue. The Council and some of the member states that submitted observations to the Court contended that, even if Chapter 9 of the FTA between the EU and Singapore relates to direct investment, 'it cannot fall within the common commercial policy, given that that chapter concerns only the protection of direct investments and not their admission.'[56] However, the Court explicitly stated that 'Article 207(1) TFEU refers generally to EU acts concerning "foreign direct investment", without drawing a distinction according to whether the acts concern the admission or the protection of such investments.'[57] It also held that provisions on protection of investors once the investment is made have direct and immediate effects on trade, 'since they concern the treatment of the participation of entrepreneurs of one Party in the management or control of companies carrying out economic activities in the territory of the other Party.'[58]

It was also alleged that section A of Chapter 9 of the FTA between Singapore and the EU includes provisions that enable member states to assess whether the application of the proposed agreement is consistent with their requirements relating to public order and public security and with other objectives of public interest, or which concern property law, criminal law, tax law and social security.[59] This fact was mentioned by the Council and some member states as an argument against the existence of an exclusive competence of the EU in relation to the protection of investors in the post-investment phase. However, the CJEU considered this fact to be completely irrelevant in so far as these provisions do not lay down an international commitment concerning public order, public security or other public interests, but only recognise the possibility of applying a derogation – which must be necessary and not constitute a disguised restriction – enabling the member states to treat Singaporean investors less favourably than its own investors.[60]

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[49] A DE LUCA, above n 18, p 168. There are also some controversies in relation to the establishment phase because of the fact that FDI would partially overlap with EU competence regarding trade on services (A DIMOPOULOS, above n 17, p 113) and also because it is said that FDI-related capital movements should be excluded from the scope of Art. 207 TFEU, and then would fall under shared competence (A DIMOPOULOS, above n 24, p 95).

[50] R LEAL-ARCAS, above n 17, p 504. Regarding the need to create an EU Investment Promotion Agency, note J GUIMÓN, 'It's time for an EU investment promotion agency' in KP SAUVANT, LE SACHS, K DAVIES *et al*, *FDI Perspectives: Issues in International Investment*, Vale Columbia Center on Sustainable International Investment, Columbia University, New York 2011, pp 17–19.

[51] 'This would extend the EU authority over most, if not all of the territory previously regulated by Member States in their BITs': CG BENEDICT, 'The Multilateralization of Investment Protection under the Lisbon Treaty: Fears and Hopes of Investors' (2009) 24:2 *ICSID Review – Foreign Investment Law Journal* 446, 448. Note too J CHAISSE, above n 2, pp 58–59; S WOOLCOCK, above n 17, p 24; A DE LUCA, above n 18, p 168; W SHAN and S ZHANG, above n 30, pp 1060–1065; R LEAL-ARCAS, above n 17, pp 488–489; L SCHICHO, *Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?*, College of Europe/Collège d'Europe, European Legal Studies/Etudes européennes juridiques, Research Papers in Law 2/2012, Bruges 2012, p 4.

[52] FDI in transport should be excluded in accordance to Arts. 207(5) and 218 TFEU (A DIMOPOULOS, above n 24, p 96).

[53] J TAVASSI, above n 16, p 648; A DIMOPOULOS, above n 17, pp 113–117; A DIMOPOULOS, above n 24, pp 95–96; PJ CARDWELL and D FRENCH, above n 32, pp 207–209. As regards the debate on the exclusion of the broad competence in relation to expropriation, on the basis of Art. 345 TFEU, see A BEVIGLIA ZAMPETTI and C BROWN, above n 16, pp 437–438; LM HINOJOSA-MARTÍNEZ, above n 38, p 103 ff, focuses the debate not on the assumption of the competence but on its limits. Note also Opinion 2/15, above n 15, para 107.

[54] See in this respect A DE LUCA, above n 18, p 168; M GÖTZ, above n 2, p 298.

[55] Note A DIMOPOULOS, above n 24, p 126, or A DIMOPOULOS, 'The Involvement of the EU in Investor–State Dispute Settlement: A Question of Responsibilities' (2014) 51 *Common Market Law Review* 1671, 1671–1673.

[56] Opinion 2/15, above n 15, para 85.

[57] *Ibid*, para 87.

[58] *Ibid*, para 95.

[59] *Ibid*, para 97.

[60] *Ibid*, paras 101 and 102.

Accordingly, the provisions of section A of Chapter 9 of the FTA between Singapore and the EU do 'not encroach upon the competences of the Member States regarding public order, public security and other public interests, but obliges the Member States to exercise those competences in a manner which does not render the trade commitments entered into by the European Union under Article 9.3.1 and Article 9.3.2 of that agreement redundant.'[61]

The CJEU finally held that the provisions on investment protection fall within the CCP in so far they relate to FDI, and consequently come under the exclusive competence of the EU. However, the Court also accepted that, in the case of the FTA between the EU and Singapore, this set of provisions refers both to FDI and to non-direct foreign investment, and that the EU lacks exclusive competence 'to conclude an international agreement ... in so far as it relates to the protection of non-direct foreign investments.'[62] Rather, this is a competence shared with member states.

III. BASIS FOR A NEW COMMON SYSTEM OF EVALUATION OF FOREIGN DIRECT INVESTMENT

As early as 2010, the European Commission provided some clues in relation to the new EU Common Investment Policy.,[63] in the Communication *Towards a comprehensive European international investment policy*, where some ideas on this are provided.[64] The EU has committed to achieving a 'stable, sound and predictable' environment for FDI by establishing clear standards of investment protection,[65] instituting an 'activist' approach to ensure that 'EU relations with third partners constitute a "two-way street"' guided by the principles and objectives of EU external action,[66] and maintaining open criteria for the selection of both developed and less developed partner countries,[67] among other guidelines.[68]

Nevertheless, the entry into force of the Treaty of Lisbon and the assumption of exclusive competence by the EU as regards FDI has taken place at the same time as the serious financial crisis. Because of the crisis, calls for 'economic patriotism' are becoming very popular in many European countries and a more hostile attitude towards international trade and FDI on the part of certain politicians, social sectors and the media can be seen in many countries around the world, including in Europe.[69]

No major change in approach to FDI has yet taken place in the EU member states.[70] However, this may yet happen. The concepts of 'economic patriotism' and 'economic security' do not necessarily contradict the extension of the new CCP to FDI, in so far as both can certainly refer to a single country as well as to a whole economic area. To what extent the EU may embrace this position is still to be seen. Certain potential future actions that have been recently been announced seem to lean in this direction, but this is still to be seen.[71]

Leaving aside the specific and very important question of the consequences of the assumption of exclusive competence by the EU in the area of FDI and the impact that this may have on the validity and role of Bilateral

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[61] *Ibid*, para 103.
[62] *Ibid*, para 238.
[63] W SHAN and S ZHANG, above n 30, p 1071 ff; C HJÄLMROTH and S WESTERBERG, *The Contribution of Trade to a New EU Growth Strategy. Ideas for a More Open European Economy. Part 1: A Common Investment Policy for the EU*, Kommerskollegium – National Board of Trade, Stockholm (no year), pp 19–22.
[64] As regards the Communication, consider C HERRMAN and J CRÄMER, above n 31, pp 100–101. 'The Commission has indicated that it does not currently plan to develop a model investment treaty, preferring instead to establish general objectives and principles' (US DEPARTMENT OF STATE, *Investment Climate Statements 2014 – European Union*, p 13m <https://www.state.gov/documents/organization/231644.pdf> accessed 01.02.2018).
[65] EUROPEAN COMMISSION, above n 1, p 4; J CHAISSE, above n 2, pp 64–69.
[66] EUROPEAN COMMISSION, above n 1, p 4. Including the promotion of the rule of law, respect for human rights and sustainable development in accordance with Arts. 21 and 205 TFEU; note EUROPEAN COMMISSION, above n 1, p 9.
[67] EUROPEAN COMMISSION, above n 1, pp 6–7.
[68] Note EUROPEAN COMMISSION, *Negotiations and agreements* (<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_other-countries> accessed 15.02.2018). Several FTAs that include some investment provisions have been established in recent years and two of them (specifically those with Vietnam and Canada concluded in 2015 and 2016 respectively) now introduce significant novelties in the area of investment arbitration. Regarding the situation before these two agreements, note J CHAISSE above n 2, pp 74–76.
[69] In the sense of providing special advantages to firms controlled by domestic private capital or by the state. See M GÖTZ, above n 2, pp 292–293.
[70] Although this is considered a 'never ending' war (see M GÖTZ, above n 2, p 293).
[71] Note 'Investissements étrangers en Europe: vers une sécurité économique commune?', *Les echos*, 26.02.2017 (<https://www.lesechos.fr/idees-debats/cercle/cercle-166788-investissements-etrangers-en-europe-vers-une-securite-economique-commune-2067795.php> accessed 03.02.3018).

Investment Treaties (BITs) entered into by the member states before the entry into force of the Lisbon Treaty,[72] this change in the approach to FDI may lead to the scope of International Investment Agreements (IIAs) entered into by the EU being increased to cover both the pre-entry and post-establishment phases of FDI. It may also foster a move towards focusing on the pre-establishment phase through the potential development of a common EU screening system for FDI on national security or related grounds.

The various IIAs negotiated by the 28 EU member states before the entry into force of the Treaty of Lisbon related primarily to the treatment of investors 'post-entry' or 'post-admission' of FDI, and as a general rule no commitments were made in them as to the conditions of entry for FDI.[73]

Under the existing BITs, investment is usually admitted and initially established through a reference to the domestic law of the parties to the agreement. These kinds of provisions preserve the rights of each party to the agreement to regulate the admission of FDI. That is the approach historically used in the model BITs of certain EU member states. For instance, Article 2(1) of the German Model BIT of 2008 clearly states that:

> Each Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation.

A similar approach, with almost identical wording, was also included in Article 2 of the French Model BIT of 2006[74] and Article 2(1) of the UK Model BIT of 2005/2006,[75] but not, for instance, in Article II(1) of the Italian Model BIT of 2004.[76] Within the Legislation the investment has to respect includes national and EU provisions governing the admission (the right of entry of the investment) and establishment (the conditions under which the investment will be implemented by the investor) of the foreign investment.[77]

Based on the exclusive competence now vested by the TFEU in the EU in relation to FDI, the EU now seems willing to change this situation. It seems inclined to shift from the single 'post-establishment approach' to a new generation of EU IIAs dealing with both phases of FDI, the pre-establishment and the post-establishment phases, and consequently to grant pre-establishment rights to foreign investors, both in the service and non-service sectors.[78]

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[72] See Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12.12.2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40 (in relation to the Regulation, consider L PANTALEO, 'Member States' Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment' (2014) 19:2 *European Foreign Affairs Review* 307, 309 ff). Regarding the situation of this network of agreements once the EU has assumed exclusive competence on this issue and the transitional regime proposed, note C BROWN and M ALCOVER-LLUBIÀ, above n 17, pp 149–155, especially pp 153–155; S HINDELANG, 'Member State Bits – There's Still (Some) Life in the Old Dog Yet: Incompatibility of Existing Member State BITs with EU Law and Possible Remedies – A Position Paper' (2010–1) *Yearbook on International Investment Law & Policy* 217, 234–241; W SHAN and S ZHANG, above n 30, pp 1065–1071; A REINISCH, above n 32, pp 119–122; R LEAL-ARCAS, above n 17, pp 488 and 505–506; A BEVIGLIA ZAMPETTI and C BROWN, above n 16, pp 440–441; L SCHICHO, above n 51, p 8 ff; SW SCHILL, above n 4, pp 375–376. The debate referred both to the role played by BITs entered into by EU member states before the entry into force of the Treaty of Lisbon and to the evaluation of their content and their compatibility with the EU. In relation to this issue, various kinds of proposals made. Note especially EUROPEAN COMMISSION, above n 22, pp 2 and 9 ff, and the European Parliament legislative resolution of 10.05.2011, on the Proposal, above n. 22, as well as COUNCIL OF THE EUROPEAN UNION, *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council Meeting, Luxembourg 25.10.2010, pp 9 and 10 (<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> accessed 02.02.2018). The topic has been explicitly dealt with by the CJEU in its Opinion 2/15 of 16.05.2017 (above n 15, paras 245–256, especially paras 255–256).

[73] EUROPEAN COMMISSION, above n 1, p 5; A DE LUCA, above n 18, pp 203 and 208–209.

[74] 'Each Contracting Party shall promote and admit on its territory and in its maritime area, in accordance with its legislation and with the provisions of this Agreement, investments made by nationals or companies of the other Contracting Party.'

[75] 'Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital'.

[76] This reference to the national legislation of the host country is also included in many BITs concluded by other EU member states; note A DE LUCA, above n 18, p 204, fn 165.

[77] Note *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25 – Award of 16.08.2007, paras 102–103 at pp 41–42, <http://www.italaw.com/sites/default/files/case-documents/ita0340.pdf> accessed 02.02.2018. Consider A DE LUCA, above n 18, p 205 as regards case law and p 207 in relation to the distinction between right of entry and of establishment.

[78] J CHAISSE, above n 2, p 69 (in relation to the potential existence of a future EU BIT, note *ibid*, p 63). The EU has attempted to fill this existing gap in the new agreements entered into with third countries, which now include rules on investment market access and investment liberalisation, in its 'new generation' of trade agreements (EUROPEAN COMMISSION, above n 1, p 5. Consider also J CHAISSE, above n 2, pp 69–70 in relation to the EU-CARIFORUM Economic Partnership Agreement of

This move may also be accompanied by the creation of a common EU system of evaluation of FDI on national security grounds. This possibility now has the support of some EU member states and was endorsed by President Jean-Claude Juncker on 13 September 2017 in his annual state of the Union address.

IV. TOWARDS A COMMON EU SYSTEM OF EVALUATION OF FOREIGN INVESTMENT ON NATIONAL SECURITY GROUNDS?

The granting of exclusive competence to the EU in the field of FDI implies, according to Article 2(1) TFEU, that only the EU is now competent to legislate or adopt binding instruments in this area. This would directly prevent member states, for instance, from negotiating BITs with third states.[79] However, many open issues remain as regards the potential creation of an EU common screening system of FDI on national security grounds and its compatibility with existing national systems.

The exclusive competence of the EU in this area, as previously stated, is still under construction and, as happened with the CCP, will presumably take some years firstly to be fully designed and secondly to be implemented.[80]

1. FREE MOVEMENT OF INVESTMENT AND FREE MOVEMENT OF CAPITAL WITHIN THE EU

Investments are traditionally classified under EU law as one of the sorts of financial transactions that fall under the wider concept of capital movements.[81] The EU now has exclusive competence in relation to FDI, but the free movement of capital and payments constitutes the necessary prerequisite for foreign investment activity in the EU host country.[82] There is consensus that the EU enjoys shared competence to regulate capital movements relating to foreign investment between member states and with third countries, in accordance with the regulatory scope of Article 63 TFEU.[83]

Certainly, as the European Commission believed, the TFEU's chapter on movement of capital and payments would complement the EU's exclusive competence under the CCP, and would then provide for the existence of an implied exclusive competence to conclude international agreements on the protection of investment in general.[84] However, this possibility is in doubt,[85] and sound questions have been raised as to whether the scope of the EU's exclusive competence in FDI also encompasses capital movements in relation to FDI within the EU and between EU member states and third countries.[86]

Two sets of primary rules come into contact here: the rules of the future common investment policy of the EU developed in the framework of the CCP, an area in which the EU has exclusive competence under Articles 3(1)(3) and 207 TFEU, and the provisions of the TFEU on the free movement of capital and payments, in some cases

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2008, especially Art. 76.): Arts. 7.10 and 7.11 of the FTA between the EU and Korea, Art. 2, section 1, Chapter I of the EU–Vietnam Free Trade Agreement, and Arts. 8.4 and 8.5 of the Comprehensive Economic and Trade Agreement between Canada and the EU are good examples of this.

[79] A DE LUCA, above n 18, p 170.

[80] In dealing with all these problems, guidance may be provided by the previous experience in shaping the European CCP: note A DIMOPOULOS, 'The Development of EU Trade and Investment Policies. Drawing Lessons from Past Experiences' (2010–1) *Yearbook on International Investment Law & Policy* 243, 259 ff; A DIMOPOULOS, above n 17, p 1672.

[81] LM HINOJOSA-MARTINEZ, above n 38, p 90.

[82] References to the right of establishment embodied in Articles 64(2) and 65(2) TFEU show the importance of the freedom of capital movement for the establishment in the EU of investors coming from third countries (A DIMOPOULOS, above n 24, pp 78–79). Regarding the different scope of application of the rules on the right of establishment and freedom of capital and payments and the way this affects its interplay, note *ibid*, pp 82–84.

[83] On the basis of Art. 4(2)(a) TFEU. Note A DIMOPOULOS, above n 24, pp 76 and 78; LM HINOJOSA-MARTINEZ, above n 38, pp 109–111.

[84] A DE LUCA, above n 18, p 169; EUROPEAN COMMISSION, above n 1, p 8. The Commission states that 'to the extent that international agreements on investment affect the scope of the common rules set by the Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied' on the basis of Art. 3(2) TFEU (EUROPEAN COMMISSION, above n 1, p 8).

[85] See LM HINOJOSA-MARTINEZ, above n 38, pp 107–109.

[86] A DIMOPOULOS, above n 17, p 113; F ORTINO and P EECKHOUT, above n 16, pp 315–317. And even if it is ultimately accepted that the competence vested in the EU encompasses this issue, Art. 207(4) and (6) TFEU explicitly admit the existence of internal limitations on the scope and exercise of EU competences in relation to trade and economic relations with third countries (A DIMOPOULOS, above n 17, pp 122–123).

related to FDI, which are embodied in Chapter IV of Title IV TFEU and which create a shared competence between the EU and member states. Member states are precluded from adopting measures that may interfere with the free movement of capital between EU member states and between them and third countries (under Article 63 TFEU).[87] However, Chapter IV also provides them with a certain level of autonomy to limit this freedom on certain objective but vague grounds set out in Article 65 TFEU, among them, on grounds of public policy or public security.[88]

Despite the potential possibilities offered to the EU in this area by the AETR principle,[89] the prospective relationship between these two sets of provisions, which are different in nature, object, regulation and scope and interact in the area of FDI, may cause some problems and uncertainties in the future. This is particularly the case in relation to the creation of a common EU instrument on the control of FDI on national security grounds and its potential interconnection with the existing national systems of evaluation.[90] In fact, the different EU stakeholders have adopted somewhat different position on this issue.[91]

2. THE COMPATIBILITY OF NATIONAL SYSTEMS OF EVALUATION ON NATIONAL SECURITY GROUNDS WITH EU LAW

The compatibility of national systems of evaluation with EU Law Article 63 TFEU explicitly prohibits, as a matter of principle, any restrictions on the free movement of capital or payments, either foreign or domestic, between member states and between them and third countries. In accordance with this provision, free movement of capital includes capital flows related to both foreign direct and portfolio investment.[92] This general rule is nevertheless later qualified by Articles 64, 65 and 66 TFEU, which provide for the adoption of certain restrictions on this principle on different grounds[93] which, additionally, must be narrowly interpreted.[94]

In addition to the grandfather clause embodied in Article 64(1) TFEU,[95] Article 65(1)(b) *in fine* TFEU recognises member states' right to take measures restricting the free movement of capital and payments on grounds of 'public policy or public security'. The provision affords EU state members the 'possibility of placing restrictions, in specific cases and where the circumstances justify it, on the exercise of a right directly conferred by the Treaty'.[96]

However, it is necessary that measures adopted on this basis do not, in any case, constitute 'a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63'.[97] The application of this provision and, consequently, of any measure liable to 'hinder or make less attractive'[98] the exercise of any fundamental freedoms guaranteed by the TFEU, must fulfil the four conditions set forth by the CJEU's case law:

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[87] As regards the meaning and extension of this power, see A DIMOPOULOS, above n 24, pp 76–77.
[88] In accordance with Art. 65(1)(b) TFEU.
[89] In relation to this principle, see R HOLGAARD, *External Relations Law of the European Community Legal Reasoning and Legal Discourses*, Kluwer, Alphen aan den Rijn 2008, pp 55–67; F ORTINO and P EECKHOUT, above n 16, pp 317–318.
[90] Note A DIMOPOULOS, above n 24, pp 80–81, in relation to the CJEU approach to the interrelation between FDI and free movement of capital rules.
[91] See F WEISS and S STEINER, above n 16, pp 361–367.
[92] In relation to which no exclusive competence is provided in accordance with Art. 207 TFEU and no exclusive competence is said to exist. W SHAN and S ZHANG, above n 30, p 1064.
[93] Note C HJÄLMROTH and S WESTERBERG, above n 63, pp 11–12.
[94] M TRYBUS, 'The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions' (2002) 34 *Common Market Law Review* 1347, p 1350.
[95] In accordance with which EU member states can apply any restriction on the movement of capital to or from third countries 'involving direct investment' that existed on 31.12.1993. See LM HINOJOSA-MARTINEZ, above n 38, p 90; S HINDELANG, above n 7, pp 276–286. This provision has been considered by the CJEU in its judgment of 14.12.1995, Joined Cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera and Others*, ECLI:EU:C:1995:451, which states that this provision is 'precisely worded, with the result that no latitude is granted to the Member States or the Community legislature regarding … the categories of capital movements which may be subject to restrictions' (para 44).
[96] CJEU judgment of 05.02.1991, Case C-363/89, *Roux v. Belgian State*, ECLI:EU:C:1991:41, para 30.
[97] Art. 65(3) TFEU. See A DIMOPOULOS, above n 24, p 77; A JONES and J DAVIES, 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10:3 *European Competition Journal*, 453, p 472 ff.
[98] CJEU judgment of 30.11.1995, Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, para 37.

> they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[99]

Further, in *Test Claimants in the FII Group Litigation* the CJEU stated that there may be different levels of justification as regards restrictions on capital coming from third countries or from member states:

> it may be that a Member State will be able to demonstrate that a restriction on capital movements to or from non-member countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.[100]

The right of the EU to regulate the movement of capital and payments between member states and between member states and third countries – including the right of the EU and member states to adopt some justified restrictions to it – and its relationship with FDI had already been called into question before the CJEU prior to the entry into force of the Treaty of Lisbon, at a time when the EU did not yet have exclusive competence in FDI.[101] Specifically, the CJEU already considered the issue of the compatibility with EU law of some existing national 'system[s] of prior authorization for investments which are such as to represent a threat to public policy, public health or public security'.[102]

Prior to the entry into force of the Treaty of Lisbon, the CJEU explicitly accepted the compatibility of these national systems with Articles 63 and 65(3) TFEU, subject to certain conditions. In principle, the Court accepts that any legislation that makes FDI subject to prior authorisation constitutes a restriction on the movement of capital within the meaning of Article 63(1) TFEU.[103] However, at the same time, it accepts the compatibility of such national systems with EU law, so long as the system conforms to certain basic principles clearly established by the Court. Consequently, they should meet high standards of predictability, transparency and due process.[104] That means:

(1) that any of these systems must aim to protect a legitimate general interest, and
(2) foresee strict time limits for the exercise of opposition powers;
(3) the specific assets or management decisions targeted must be listed; and
(4) the system must use objective and stable criteria subject to an effective review by the courts.[105]

This ultimately means that the specific circumstances in which prior revision is required must be defined. The system must also ensure the principle of legal certainty. It must indicate to the investor the specific circumstances in which prior authorization is required, so that investors may be apprised of the extent of their rights and obligations. In addition to the principles in which the system is grounded, the evaluation of the system must be made in accordance with Article 65(1)(b) TFEU, which constitutes an exception to Article 63(1) TFEU. The Court takes the view that, in principle, member states are free to determine the 'requirements of public policy and public security in the light of their national needs'.[106] However, if these requirements derogate from the fundamental

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[99] CJEU judgment of 30.11.1995, Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* above n 98, para 37. Also consider COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication on Intra-EU investment in the financial services sector* [2005] OJ C 293/2, 5, vid. S HINDELANG, above n 7, p 228 ff.

[100] CJEU judgment of 12.12.2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, above n 40, para 171.

[101] In relation to the transfer clauses included in certain BITs concluded by Sweden, Austria and Finland. These clauses guaranteed to investors the right to circulate invested-related capital without delay. The CJEU considered them to be incompatible with the EU's right to regulate the movement of capital and to include restrictions to it in exceptional circumstances in accordance with Arts. 64–66 TFEU, in so far as they can frustrate in the abstract the power of the European institutions to adopt restrictions on the free movement of capital and payments in accordance with the TFEU. Note CJEU judgments of 03.03.2009, Case C-249/06, *Commission v. Sweden,* ECLI:EU:C:2009:119, paras 37 and 38; of 03.03.2009, Case C-205/06, *Commission v. Austria,* ECLI:EU:C:2009:118, paras 36 and 37; and of 18.11.2009, Case C-118/07, *Commission v. Finland,* ECLI:EU:C:2009:715. Consider W SHAN and S ZHANG, above n 30, pp 1052–1054; A DE LUCA, above n 18, p 173 and A REINISCH, above n 32, pp 130–131 in relation to the future EU Model BIT.

[102] CJEU judgment of 14.03.2000, Case C-54/99, *Eglise de scientologie,* ECLI:EU:C:2000:124, para 13.

[103] CJEU judgment of 14.03.2000, Case C-54/99, *Eglise de scientologie*, above n 102, paras 14 and 15.

[104] S HINDELANG, above n 7, p 242.

[105] COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common European Approach to Sovereign Wealth Funds* COM/2008/ 115 final, Brussels 27.02.2008, p 6. Consider CJEU judgment of 01.10.2009, Case C-567/07, *Woningstichting Sint Servatius,* ECLI:EU:C:2009:593, para 39, which speaks of the need for any system to be based on 'objective, non-discriminatory criteria which are known in advance and which are capable of adequately circumscribing the exercise by the national authorities of their discretion, a matter which falls to be determined by the national court.'

[106] *Ibid*, para 17.

principle of free movement of capital they must be 'strictly' interpreted and their scope cannot be determined 'unilaterally' by each member state 'without any control by the Community institutions'.[107]

In line with this approach, public policy and public security may be relied on, 'only if there is a genuine and sufficiently serious threat to a fundamental interest of society … Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends'.[108] Therefore, measures that restrict the free movement of capital may be justified on 'public-policy', 'public-security' or related grounds only if they are necessary for the protection of the interests that they aim to guarantee, and only in so far as those objectives cannot be attained by less restrictive measures.[109] Additionally, they 'must not go beyond what is necessary to attain that objective'.[110] In the specific case of the control of FDI on 'public order' or 'public security' grounds, the difficulty in identifying and blocking capital once it has entered a member state may make it necessary, before the investment is made, to prevent transactions that could adversely affect public policy or public security.[111] Nevertheless, the CJEU has explicitly acknowledged in this regard that the 'mere acquisition of a holding of more than 10% of the capital of a company operating in the energy sector or any other acquisition conferring significant influence on such a company cannot, as a general rule, be regarded as a real and serious enough threat to security of supply'.[112]

Significantly, the Court has not provided any global notion of 'public policy' or 'public security' in relation specifically to Article 65(1)(b) TFEU.[113]

From the existing CJEU case law it follows that the reference to 'public policy' or 'public security' must be strictly interpreted,[114] without providing it with a 'self-judging' nature.[115] According to the CJEU, the concept of 'public policy':

> presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of the society.[116]

'Public security', on the other hand, would refer to the fundamental interests of an EU member state to maintain essential public services and to safeguard the functioning of its institutions.[117]

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[107] *Ibid*, para 17; CJEU judgments of 04.06.2002 in Case C-483/99, *Commission v. France*, above n 39, para 48; or of 13.05.2003 in Case C-463/00, *Commission v. Spain*, above n 42, para 72.

[108] CJEU judgment of 14.03.2000, Case C-54/99, *Eglise de scientologie*, above n 102, para 17. In similar sense, CJEU judgments of 16.01.2003, Case C-388/01, *Commission v. Italy*, ECLI:EU:C:2003:30, para 22; of 17.03.2005, Case C-109/04, *Kranemann*, ECLI:EU:C:2005:187, para 34; or of 11.09.2008, Case C-141/07, *Commission v. Germany*, ECLI:EU:C:2008:492, para 60. This idea is also supported as regards prospective limitations on other freedoms set forth by the EU treaties. That is the case, for instance, of the freedom of establishment.

[109] CJEU judgment of 14.03.2000, Case C-54/99, *Eglise de scientologie*, above n 102, para 18. Consider A JONES and J DAVIES, above n 97, p 474.

[110] CJEU judgments of 11.10.2007, Case C-451/05, *ELISA*, ECLI:EU:C:2007:594, *para* 82; of 31.03.1993, Case C-19/92, *Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:914, para 32; or of 21.12.2011, Case C-271/09, *Commission v. Poland*, ECLI:EU:C:2011:855, para 58.

[111] CJEU judgment of 14.03.2000, Case C-54/99, *Eglise de scientologie*, above n 102, para 20. In fact, the CJEU admits that in the case of FDI 'which constitute[s] a genuine and sufficiently serious threat to public policy and public security, a system of prior declaration may prove to be inadequate to counter such a threat' (*ibid*, para 20).

[112] CJEU judgment of 26.03.2009, Case C-326/07, *Commission v. Italy*, above n 40, para 48.

[113] As regards the relationship between Art. 65(1)(b) and Arts. 36 or 52(1) TFEU, see S HINDELANG, above n 7, pp 225–226.

[114] CJEU judgments of 09.06.1982, Case 95/81, *Commission v. Italy*, ECLI:EU:C:1982:331, para 26; of 28.10.1975, Case 36/75, *Rutili v. Ministre de l'intérieur*, ECLI:EU:C:1975:137, para 27; or of 06.11.1984, Case 177/83, *Kohl v. Ringelhan*, ECLI:EU:C:1984:334, para 19.

[115] CJEU judgments of 28.10.1975, Case 36/75, *Rutili v. Ministre de l'intérieur*, above n 114, para 27; of 04.12.1974, Case 41/74, *Van Duyn v. Home Office*, ECLI:EU:C:1974:133, para 18; or of 04.10.1991, Case C-367/89, *Richardt*, ECLI:EU:C:1991:376, para 19.

[116] CJEU judgment of 27.10.1977, Case 30/77, *Regina v. Bouchereau*, ECLI:EU:C:1977:172, para 35. In the same sense, CJEU judgments of 28.10.1975, Case 36/75, *Rutili v. Ministre de l'intérieur*, above n 114, para 28; or of 26.11.2002, Case C-100/01, *Oteiza Olazabal*, ECLI:EU:C:2002:712, para 39. As regards the notion of public policy rules, note CJEU judgment of 23.11.1999, Cases C-369/96 and C-376/96, *Arblade*, ECLI:EU:C:1999:575, para 30.

[117] CJEU judgment of 10.07.1984, Case C-72/83, *Campus Oil*, ECLI:EU:C:1984:256, para 35. As regards both concepts, see S HINDELANG, above n 7, pp 225–228.

'Public order' and 'public security' would then be concepts that refer to matters of a non-economic[118] and non-military character[119] and would include, for instance, the 'external security of a Member State'.[120] Any measures adopted on these grounds 'must be justified by objective circumstances corresponding to the needs of public security',[121] and cannot be 'extended any further than is necessary for the protection of the interests which it is intended to secure'.[122] In addition, when secondary EU legislation exists, the CJEU has limited the possibility for EU member states to actually invoke these kinds of provisions embodied in the EU treaties.[123]

The new exclusive competence of the EU in FDI – irrespective of the problems that its implementation may entail in relation to its final goals and scope – has not yet led to the creation of a common EU system of control of FDI on national security grounds. Consequently, the EU legal 'scramble' remains,[124] and no piece of legislation on this issue has yet been prepared. In contrast with this lack of action on the EU level, Germany, for example, has established a system of screening of foreign investment which, as will be seen later on, clearly differs from the French or British ones.[125]

3. BASIS FOR A COMMON SYSTEM OF EVALUATION ON NATIONAL SECURITY GROUNDS

The development of a common EU system to evaluate FDI on national security grounds is not a new idea. Some proposals have been around for a long time, and the Commission has now announced that such a system will be implemented in the future. Nevertheless, this is not likely to be an easy task and some theoretical and practical problems remain.

In 2007, German Chancellor Angela Merkel called on the EU to develop a system of control of FDI in line with that existing in the US to evaluate certain FDI projects on national security grounds.[126] In 2010, in an interview with the German *Handelsblatt*, EU Commissioner Michel Barnier voiced concerns about the PRC's growing investments in the EU and argued for the need to establish a new EU authority with the power to block foreign M&As of some strategic European businesses and with the goal of protecting Europe's advanced technology, mentioning the US Committee on Foreign Investment in the United States (CFIUS)as a potential reference.[127]

Proposals for a common EU screening system on FDI in line with the American CFIUS – going by the name CFIEU[128] – have already been made by some authors.[129] Ideas have also been put forward about systematically screening state-driven investments that aim to acquire essential high technology, supporting the use of competition rules more broadly in relation to Mergers and Acquisitions (M&As) entered into by foreign SCEs,[130] fostering the

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[118] CJEU judgments of 19.12.1961, Case 7/61, *Commission of the EEC v. Italy*, ECLI:EU:C:1961:31, para 329, letter d; of 28.10.1975, Case 36/75, *Rutili v. Ministre de l'intérieur*, above n 114, para 30; or of 04.06.2002, Case C-367/98, *Commission v. Portugal*, ECLI:EU:C:2002:326, para 52. The CJEU in its judgment of 10.07.1984, Case C-72/83, *Campus Oil*, above n 117, qualifies this approach stating that: 'in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security' (para 35). Note A JONES and J DAVIES, above n 97, pp 477–478.

[119] Which are covered by Art. 348 TFEU. See M TRYBUS, above n 94, p 1353. Consider also CJEU judgment of 13.07.2000, Case C-423/98, *Albore*, ECLI:EU:C:2000:401, paras 21–22.

[120] CJEU judgments of 04.10.1991, Case C-367/89, *Richardt*, above n 115, para 22; or of 13.07.2000, Case C-423/98, *Albore*, above n 119, para 18. Regarding the meaning of the notion, see M TRYBUS, above n 94, p 1350.

[121] CJEU judgment of 10.07.1984, Case C-72/83, *Campus Oil*, above n 117, para 36.

[122] CJEU judgment of 04.10.1991, Case C-367/89, *Richardt*, above n 115, para 20. On the idea of proportionality, see M TRYBUS, above n 94, p 1351; S HINDELANG, above n 7, pp 228–234.

[123] Note CJEU judgments of 05.10.1977, Case 5/77, *Tedeschi v. Denkavit*, ECLI:EU:C:1977:144, para 35; or of 07.06.2007, Case C-50/06, *Commission v. Netherlands*, ECLI:EU:C:2007:325, para 51.

[124] In the words of S MEUNIER, above n 7, p 156.

[125] SK PUDNER, 'Moving Forward from Dubai World – The Foreign Investment and National Security Act of 2007' (2008) 59 *Alabama Law Review* 1227, pp 1297–1298.

[126] See 'Merkel seeks European-wide vetting of foreign acquisitions', *Financial Times*, 19.7.2007 (<http://www.ft.com/cms/s/0/124b70a2-3590-11dc-bb16-0000779fd2ac.html?ft_site=falcon&desktop=true#axzz4drNsLkVV> accessed 10.2.2018)

[127] See H ZHANG and D VAN DEN BULCKE, above n 5, p 162.

[128] E FORCHIELLI, 'Chinese Investment in the EU: A Challenge to Europe's Economic Security', The German Marshall Forum of the United States Paper Series, Brussels 01.2015, p 2.

[129] See L EAKER and T SUN, 'Chinese Investment in the European Union and National Security' (2014) 9:1 *Frontiers of Law in China* 42, 59–63.

[130] S MEUNIER, above n 7, p 152. Regarding some precedents, note H ZHANG and D VAN DEN BULCKE, above n 5, pp 162 and 168–171.

establishment of reciprocity as a ground for bilateral trade and investment,[131] and requiring foreign companies to register their intention to acquire EU firms or broaden surveillance procedures to cover more than public contracts or defence suppliers.[132] Exploring further negotiations with China for the sake of more open market access and trade relationships,[133] as well as the potential use of the European Programme for Critical Infrastructure Protection as a tool for market access in certain key sectors and industries, have also been mentioned.[134]

Nevertheless, the Commission considered from the outset in its Communication on *A Common European Approach to Sovereign Wealth Funds* that the designation of an EU committee on foreign investments to mirror arrangements in the US, the creation of an EU-wide screening mechanism or the acceptance of a 'golden shares' mechanism for non-EU foreign investment would send a misleading signal of the EU stepping back from its commitment to free trade and free circulation of capital and investment.[135]

However, fears about Chinese SCEs have increased steadily in Europe over time. Despite the fact that in 2012 only 2.2% of inbound FDI in the EU originated from China,[136] there are growing concerns about investment projects from this and other countries, in many cases sovereign-driven investment, targeting certain strategic areas of the EU economy. In fact, at the end of 2013, the Chinese outwards FDI stock towards the EU was around 75 times that of 2004.[137] Moreover, instead of being mostly focused on the UK and Belgium, as was traditionally the case (87.6% of Chinese outwards FDI in the period 2002–2008 was directed to these two countries), it is now rapidly spreading to almost all EU member states, thus expanding the feeling of alarm throughout the whole EU.[138]

China is a significant source of FDI in the EU, and the special political and economic status of the country, as well as its particular position in the international arena, raise enormous concern in many European governments and among their populations.[139] However, China is also a critical export market for many EU firms.[140] The acquisition of leading high-tech EU firms by foreign companies has increased concerns about China and other emerging economies taking industrial leadership away from European companies through the systematic acquisition of key European firms and assets, in many cases through opaque state-controlled companies that have unfair access to low-cost capital and other subsidies.[141] A systematic acquisition of leading technology generating large-scale technology transfer was implemented as part of the Made in China 2025 policy, which aims to make the country[142] into a technological giant by that date.[143] In addition, Europe fears delocalisation, the dismantling of the acquired firm and reassembling it somewhere else, with consequent huge job losses.

The debate about the possibility of developing a common European system of evaluation of FDI on national security, public policy or related grounds already exists and will probably increase in the near future. The expected growth of FDI coming to the EU from China and other parts of the world may trigger economic patriotism and foster populism and the politicisation of the debate. This in turn may lead to a more expansive interpretation of the notions of 'national security' and 'economic security of the EU' in relation to FDI in Europe.[144] The current situation of rising mistrust of foreign investment, nationalism and protectionism may give way to overreactions in several European countries, and this may have far-reaching consequences for the EU both internally and externally.

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[131] On these proposals, see J WÜBBEKE, M MEISSNER, MJ ZENGLEI *et al*, *Made in China 2015. The making of a high-tech superpower and consequences for industrial countries*, MERICS Mercator Institute for China Studies, No. 2, Berlin 12.2016, pp 61–62; J LAMBERT and PA MARTIN, *Les investissements extracommunautaires et le contrôle des intérêts stratégiques européens*, Assemblée nationale. Commission des Affaires Européennes, Rapport d'information n. 1602, Paris 01.2014, p 26.

[132] TH MORAN, *Can Europe 'Be Open But Not Stupid' on Foreign Acquisitions by China?*, Trade and Investment Policy Watch, Peterson Institute for International Economics, Washington 27.03.2017, p 1.

[133] T HANEMANN and DH ROSEN, above n 6, pp 66–69.

[134] Consider in this respect H ZHANG and D VAN DEN BULCKE, above n 5, pp 167–168.

[135] COMMISSION OF THE EUROPEAN COMMUNITIES, above n 105, p 7.

[136] E FORCHIELLI, above n 128, p 1.

[137] Y MA and H OVERBEEK, 'Chinese foreign direct investment in the European Union: explaining changing patterns' (2015) 1:4–5 *Global Affairs* 441, p 442.

[138] Y MA and H OVERBEEK, above n 137, pp 444–445; B GAVIN, *China's Expanding Foreign Investment in Europe. New Policy Challenges for the EU*, Briefing Paper 2012/7, European Institute for Asian Studies, Brussels 11.2012, pp 7–10.

[139] T HANEMANN and M HUOTARI, *Chinese FDI in Europe and Germany. Preparing for a New Era of Chinese Capital*, Mercator Institute for China Studies and Rhodium Group, Berlin 06.2015, p 33.

[140] T HANEMANN and DH ROSEN, above n 6, p 53.

[141] TH MORAN, above n 132, p 1; T HANEMANN and M HUOTARI, above n 139, pp 39–-40.

[142] T HANEMANN and M HUOTARI, above n 139, p 41.

[143] Regarding the project, see J WÜBBEKE, M MEISSNER, MJ ZENGLEI *et al*, above n 131, p 6 ff.

[144] T HANEMANN and M HUOTARI, above n 139, p 30.

In fact, the situation in the EU as regards the evaluation of FDI, or at least of certain FDI projects, is evolving quickly. This is because of an increasing feeling that the EU is the single biggest commercial and economic power that lacks any tool to control '*des investissements stratégiques*'.[145] The possibility of a common European system to control FDI in certain strategic areas of the European economy was suggested by the German Minister of Economy after the acquisition of Kuka by the Chinese investment fund Midea in 2016. The Minister proposed that EU institutions should have the power to block FDI proposals targeting the acquisition of EU companies that 'dispose of key technology of particular importance for industrial development'.[146]

The need for a common EU response to foreign investment in certain strategic sectors, above all sovereign-driven investment affecting key areas of the economy, was also stressed in 2017 in a joint letter sent by Germany, France and Italy to the EU Trade Commissioner Cecilia Malmström, calling on the EU to create an instrument to block foreign investors from strategic purchases of European technological firms.[147] This proposal addressed the concerns expressed by some EU member states, especially Germany, that have seen a large increase in the number of M&As in some high-tech sectors of their economies. These three countries 'are worried about the lack of reciprocity and about a possible sell-out of European expertise, which we are currently unable to combat with effective instruments'.[148] Moreover, on 23 February 2017, the French and German Ministers of Economy announced the future EU common control of FDI based on the notion of 'economic security'.[149]

In line with this approach, proposals have already been made for the common European system to be focused on the protection of the 'economic security of the EU', with the goal of protecting strategic economic sectors or firms, whereas the various national screening systems would refer to the control of FDI on public order and national security grounds.[150] However, the notion of the 'economic security of the EU' is broader than 'national security' and permits the evaluation of FDI on purely economic or competitiveness grounds, and may thus potentially open the door to protectionism.[151]

Whether the reference to the 'economic security of the EU' constitutes a valid ground for evaluating FDI proposals,[152] to what extent this two-tiergear system will ultimately be accepted by the EU,[153] and whether the various national screening agencies would be able to cooperate to draw up a common definition of what constitutes a "national security threat"are all questions that will certainly be discussed in Europe in the future. In any case, reference to the 'economic security of the EU', although broad enough to grant to the EU an ample level of discretion in the process of evaluating FDI proposals,[154] may run counter to the EU and US's commitment to 'Narrowly-Tailored Reviews of National Security Considerations'. Their statement on this explicitly says that governments should ensure that their reviews, 'if any, of the national security implications of foreign investments focus exclusively on genuine national security risks.'[155]

Growing concerns about the potential control of large areas of the economy of EU member states by foreign corporations, many of them SCEs,[156] have increased the popularity in some EU countries of national screening systems to determine on the grounds of national interests what FDI is and is not acceptable. At the same time, FDI originating from the PRC and other emerging countries has provided a forceful pushpush for the development of

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[145] J LAMBERT and PA MARTIN, above n 131, p 25.

[146] See K POPŁAWSKI, 'Capital does have nationality: Germany's fears of Chinese investments', OSW Centre for Eastern Studies – Commentary, No. 230, Warsaw 25.01.2017, p 7.

[147] 'Germany, Italy and France Push for E.U. Powers to Block Strategic Investors', *Handelsblatt Global – European Business and Finance News*, 14.02.2017 (<https://global.handelsblatt.com/companies-markets/germany-italy-and-france-push-for-e-u-powers-to-block-strategic-investors-704844> accessed 03.02.2018). In relation to these potential risks, note T HANEMANN and DH ROSEN, above n 6, pp 70–73.

[148] 'Germany, Italy and France Push for E.U. Powers to Block Strategic Investors', *Handelsblatt Global – European Business and Finance News*, 14.02.2017, above n 147.

[149] 'Investissements étrangers en Europe: vers une sécurité économique commune?', *Les echos*, 26.02.2017 (<https://www.lesechos.fr/idees-debats/cercle/cercle-166788-investissements-etrangers-en-europe-vers-une-securite-economique-commune-2067795.php> accessed 03.02.2018).

[150] 'Investissements étrangers en Europe: vers une sécurité économique commune?', *Les echos*, 26.02.2017, above n 149.

[151] T HANEMANN and DH ROSEN, above n 6, pp 66–67.

[152] Critical of this approach, ThH MORAN, *CFIUS and National Security: Challenges for the United States, Opportunities for the European Union*, Draft Paper, Peterson Institute for International Economics, Washington 21.02.2017, p 17.

[153] And, remember, the shared competence in relation to free movement of capital; see J LAMBERT and PA MARTIN, above n 131, pp 25–26.

[154] See J LAMBERT and PA MARTIN, above n 131, p 26, on the existence in the field of national security of the '*raison d'État*', the difficulties of making public '*les motivations réelles d'une décision*' and the difficulties this encompasses from an EU legal culture standpoint.

[155] Statement of the European Union and the United States on Shared Principles for International Investment, No. 7 (<http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> accessed 13.02.2018).

[156] See L EAKER and T SUN, above n 2353, pp 56–59; see J LAMBERT and PA MARTIN, above n 131, p 10.

a common European screening system to evaluate FDI on national security grounds. EU and national authorities are aware of the fact that foreign investors are in many cases interested in acquiring certain technology or patents rather than in running a firm.

Lastly, President Juncker announced during his annual state of the Union address on 13 September 2017 that common rules on control of foreign investment on national security grounds are going to be developed by the Commission. In his speech he was explicit in this respect:

> Let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed.[157]

However, the creation of this framework is not likely to be easy. The development of a common system to evaluate FDI on national security grounds may raise delicate issues relating to the balance of competence between the EU and the member states, and it may cause some problems for the EU's claim that it offers an open environment to trade and FDI .[158] Additionally, even today, when the EU has gained exclusive competence in FDI, some problems may arise in relation to the movement of capital linked to FDI from third countries and the right given to the EU member states to adopt measures restricting the free movement of capital and payments[159] in accordance with Article 65(1) and (2) TFEU. Specifically, there may be tensions as regards the issue of the existence of national mechanisms of control of FDI on 'public policy' or 'public security' grounds, validly established on the basis of Article 65(1)(b) and (3) TFEU, and their interaction with the exclusive competence of the EU in FDI. Issues may also arise around the determination of the exact grounds on which the evaluation of FDI in certain areas of the EU economy will be made.

The OECD Regulatory Restrictiveness Index provides a scale ranging from 0 (full openness to FDI) and 1 (total prohibition of FDI). Between these two extremes fall a wide range of situations depending on what measures states put in place to evaluate FDI. This included equity restriction (limitations on foreign ownership), screening and restrictions on approval (evaluation or notification procedures) and operational restrictions (e.g. movement of key personnel).[160] In relation to the EU, the index shows the lack of full harmonisation the EU member states' policies on inwards FDI. However, in general, and despite the existence of some limitations, the member states have a very open attitude to inwards FDI.[161]

Furthermore, it should not be forgotten that almost all regional and national investment promotion agencies in Europe compete with each other to have foreign enterprises established in their territories.[162] The need for greater coordination between the various national screening systems of evaluation of FDI on national security grounds has also been stressed.[163] The EU is said to 'have the right' to protect certain strategic areas of the European economy,[164] but this right may potentially affect the national interests of member states. How to balance these two elements is something still to be determined.

Some preliminary ideas have already been provided and difficulties have already arisen. President Juncker and other members of the European Commission have now pledged the commitment of the EU to continue as one of the most open investment areas in the world. Openness to foreign investment is deeply enshrined in the EU treaties. However, the Commission is also well aware that in some cases foreign investors might seek to acquire strategic assets that allow them to control or influence European firms whose activities:

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[157] EUROPEAN COMMISSION, *State of the Union 2017 - Trade Package: European Commission proposes framework for screening of foreign direct investments*, Press release, Brussels, 14.09.2017, <http://europa.eu/rapid/press-release_IP-17-3183_en.htm> accessed 13.02.2018.
[158] A JONES and J DAVIES, above n 97, p 456.
[159] As well as the freedom of establishment (Art. 52(1) TFEU); note C HJÄLMROTH and S WESTERBERG, above n 63, pp 10–11. The right of establishment as well as the right to provide services apply solely to EU nationals; note Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, ECLI:EU:C:1994:384, para 81.
[160] Note C HJÄLMROTH and S WESTERBERG, above n 63, p 12.
[161] H ZHANG and D VAN DEN BULCKE, above n 5, pp 163–164.
[162] H ZHANG and D VAN DEN BULCKE, above n 5, p 162.
[163] Consider T HANEMANN and M HUOTARI, above n 139, pp 42–43.
[164] See J LAMBERT and PA MARTIN, above n 131, p 10.

> are critical for our security and public order. This includes activities related to the operation or provision of critical technologies, infrastructure, inputs or sensitive information. Acquisitions by foreign state-owned or controlled companies in these strategic areas may allow third countries to use these assets not only to the detriment of the EU's technological edge, but also to put our security or public order at risk.[165]

In order to prevent this situation, 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 was published by the European Commission on 13 September 2017. The Commission states that:

> while the Union's openness to foreign direct investment will not change, it has to be accompanied by vigorous and effective policies to, on the one hand, open up other economies and ensure that everyone plays by the same rules, and, on the other hand, to protect critical European assets against investment that would be detrimental to legitimate interests of the Union or its Member States.[166]

The Commission is proposing a new legal framework 'to enable Europe to preserve its essential interests'.[167] This legal framework would be complex and would have different interrelated levels:

Firstly, the various national screening systems would remain.[168] The Proposal establishes 'a framework for the Member States, and in certain cases the Commission, to screen[169] foreign direct investments in the European Union, while allowing Member States to take into account of their individual situations and national circumstances.'[170] The objective is to provide 'the Member States and the Commission with the means to address risks to security or public order in a comprehensive manner, and to adapt to changing circumstances, whilst maintaining the necessary flexibility for Member States to screen foreign direct investments on grounds of security and public order taking into account their individual situations and national circumstances.'[171]

In determining whether FDI may affect security or public order, both member states and the European Commission should be able to consider:

> all relevant factors, including the effects on critical infrastructure, technologies, including key enabling technologies, and inputs which are essential for security or the maintenance of public order, and the disruption, loss or destruction of which would have a significant impact in a Member State or in the Union. In that regard, Member States and the Commission should also be able to take into account whether a foreign investor is controlled directly or indirectly (e.g. through significant funding, including subsidies) by the government of a third country.[172]

The proposed Regulation does not require member states to adopt or maintain a screening mechanism for FDI. It takes into account the existing variation between member states in relation to screening of FDI and provides legal certainty to them.[173] Consequently, its goal '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

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[165] EUROPEAN COMMISSION, above n 157.
[166] EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union*, COM(2017) 487 final, 2017/0224 (COD) {SWD(2017) 297 final}, p 2.
[167] EUROPEAN COMMISSION, above n 157.
[168] EUROPEAN COMMISSION, above n 166, Recital 7 and Art. 3(1) of the Proposal: 'Member States may maintain, amend or adopt mechanisms to screen foreign direct investments on the grounds of security or public order, under the conditions and in accordance with the terms set out in this Regulation.'
[169] Art. 2(3) and (4) of the Proposal define 'screening' ('a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments') and 'screening mechanism' ('an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures for the screening of foreign direct investments on grounds of security or public order').
[170] EUROPEAN COMMISSION, above n 166, p 2. Art. 2(1) of the Proposal defines FDI as 'investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity'.
[171] EUROPEAN COMMISSION, above n 166, Recital 8 and Art. 5 of the Proposal.
[172] EUROPEAN COMMISSION, above n 166, Recital 12 and Art. 4 of the Proposal.
[173] EUROPEAN COMMISSION, above n 166, pp 2–3.

between different third countries and transparency.'[174] Therefore, at the least, time limits on the screening should be established and foreign investors should be given the ability to seek judicial redress in relation to screening decisions.[175]

Additionally, a mechanism 'which enables Member States to cooperate and assist each other where a foreign direct investment in one Member State may affect the security or public order of other Member States should be set up'.[176]

Secondly, the European Commission would carry out screening on grounds of security or public order for cases in which FDI in member states may affect projects or programmes of Union interest.[177] This includes projects and programmes in the areas of research (Horizon 2020), space (Galileo), transport (Trans-European Networks for Transport, TEN-T), energy (TEN-E) and telecommunications.[178] This new EU-level investment screening framework must ensure transparency and predictability for investors and national governments, and will not affect EU countries' ability to adopt new review mechanisms or to remain without such national mechanisms. Thus, the proposed Regulation provides for a complementary tool to protect such projects and programmes alongside existing sectoral EU legislation.[179] Despite this system, member states will have the last word in any investment screening.[180]

Thirdly, it aims to establish a cooperation mechanism between the member states and the Commission 'to inform each other of foreign direct investment that may threaten security or public order and to exchange information in this regard'.[181] This cooperation mechanism could be activated when a specific foreign investment in one or several member states may affect the security or public order of another. It should ultimately increase the awareness of member states and the Commission about planned or completed FDI projects that may affect security or public order.[182]

In any case, these ideas are very preliminary and basic, and much work lies ahead before a fully operative EU screening system is implemented.[183]

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[174] EUROPEAN COMMISSION, above n 166, p 3. Systems developed 'on grounds of security or public order, including transparency obligations, the rule of equal treatment among foreign investment of different origin, and the obligation to ensure adequate redress possibilities with regard to decisions adopted under these review mechanisms' (EUROPEAN COMMISSION, above n 157).

[175] EUROPEAN COMMISSION, above n 166, Recital 13 and Art. 6 of the Proposal.

[176] EUROPEAN COMMISSION, above n 166, Recital 14 and Arts. 7, 8 and 10 of the Proposal. That implies that 'Member States should be able to provide comments to a Member State in which the investment is planned or has been completed, irrespective of whether the Member States providing comments or the Member States in which the investment is planned or has been completed maintain a screening mechanism or are screening the investment. The comments of Member States should also be forwarded to the Commission. The Commission should also have the possibility, where appropriate, to issue an opinion to the Member State in which the investment is planned or has been completed, irrespective of whether this Member State maintains a screening mechanism or is screening the investment and irrespective of whether other Member States have provided comments' (*ibid*).

[177] Art. 3(2) and (3) of the Proposal.

[178] Consider Arts. 9, 10 and 12 of the Proposal (above n 166). See EUROPEAN COMMISSION, *Annex to 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) 487 final; ANNEX 1 {SWD(2017) 297 final}.

[179] EUROPEAN COMMISSION, above n 166, p 2, consider also pp 3–8.

[180] EUROPEAN COMMISSION, above n 157.

[181] EUROPEAN COMMISSION, above n 166, p 2. 'To achieve the envisaged cooperation among Member States and the Commission and to allow for a meaningful screening either by another Member State concerned or by the Commission in case projects or programmes of Union interest may be affected, the proposed Regulation requires Member States to inform other Member States and the Commission about any foreign direct investment that is undergoing screening within the framework of their national screening mechanisms. The proposed cooperation mechanisms will allow a Member State to raise concerns as regards a foreign direct investment in another Member State and to provide comments. The Commission may also issue a non-binding opinion on such foreign direct investment. Finally, it is proposed that Member States and the Commission may request on a case-by-case basis some basic information in relation to a specific foreign direct investment to be able to further assess whether such investment affects or threatens to affect security or public order' (*ibid*, p 3).

[182] EUROPEAN COMMISSION, above n 166, p 2. Note also Recitals 17–19.

[183] Is is said that, 'EU Nordic members have already declared that they will oppose the Commission's proposal which, in their view, could harm free trade. Similarly, Greece, Portugal and Spain also are dissatisfied with the proposal. They might prefer an EU body for monitoring non-EU FDI that would neither grant screening power to the Commission, nor affect existing national mechanisms. Other member states could oppose any EU intervention on FDI for opposite reasons. Indeed, some of them may wish to keep FDI screening on security grounds under their exclusive control, given their "sole responsibility" in protecting their national security, as recognised by Art. 4(2) of the Treaty on EU (TEU), although this provision should be

V. OTHER MECHANISMS OF CONTROL

In addition to what has been set out above, there are some additional mechanisms of control of FDI proposals on national security grounds in the framework of the EU that differ in nature and scope.

Firstly, it is important to bear in mind that Article 346 TFEU includes two blanket exceptions to the Treaty on the 'essential interests' of the member states. No member state is obliged to supply information that it considers 'contrary to the essential interests of its security' and, additionally, any member state 'may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.'[184]

Secondly, in the current absence of a fully developed common investment policy, the EC Merger Regulation of 2004 explicitly grants EU member states the right to adopt appropriate measures 'to protect legitimate interests' other than those taken into consideration by the Regulation that are compatible with EU law.[185] The use of competition rules to control FDI through M&A projects by way of a reference to some 'non-competition' factors – like public interest or public policy – is quite common in the EU member states.[186]

According to Article 21(4)(II) EC Merger Regulation, these legitimate interests are '[p]ublic security, plurality of the media and prudential rules'.[187] This possibility embodied in the Regulation is objectively important in so far as, even if the European Commission approves a takeover by a foreign firm of a European enterprise, individual member states could still have the ability to block this acquisition if they believe that their public security is endangered.[188] However, in addition to this, this possibility is also important in so far as reference to the rules on competition is considered as a step previous to the use of any national system specifically designed to control FDI.

There are also cases in which the rules on competition achieve an objective other than that for which they were originally designed. Instead of being used to ensure the free functioning of the market, they are granted – either alone or in addition to any prospective national system of control of FDI on national security or related grounds – the additional task of assessing the foreign control or ownership of national firms, in general or in some specific areas of the economy with a public policy or national security focus.

There have already been examples of EU competition rules being used to evaluate FDI proposals on these grounds. The first was in the 2006 proposed joint venture between the Chinese SOE General Nuclear Power Group (CGN) (90% owned by the Supervision and Administration Commission of the State Council and 10% owned by the provincial government of Guangdong) and the French EDF. For the first time, the DG Competition came to the conclusion that CGN should not be considered to be separate from Supervision and Administration Commission of the State Council. The control of CGN by the Chinese government was so substantial that all Chinese SOEs in the energy sector should be treated as one single entity. That meant that when calculating CGN's turnover, the combined revenue of all Chinese State Owned Enterprises (SOEs) in the energy sector, and not just CGN's turnover, was taken into account. Consequently, the operation was considered to be above the €250 million threshold for merger clearance.[189]

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interpreted restrictively' (F DI BENEDETTO, 'A European Committee on Foreign Investment?', *Columbia FDI Perspectives on topical foreign direct investment issues*, No. 21, New York 04.12.2017 p 1).

[184] Regarding this provision and the enclosed exceptions, consider M TRYBUS, above n 94, p 349 ff.

[185] Art. 20(4)(I) and Rec 19 Council Regulation (EC) No 139/2004 of 20.01.2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/01.

[186] A JONES and J DAVIES, above n 97, pp 464–465. Note, for instance, CJEU judgment of 06.03.2008, Case C-196/07, *Commission v. Spain*, ECLI:EU:C:2008:146, as regards the conditions imposed by Spain on the acquisition of ENDESA by E.ON.

[187] See A JONES and J DAVIES, above n 97, pp 485–491.

[188] B DE MEESTER, *International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State*, Leuven Centre for Global Governance Studies Institute for International Law, Working Paper No 20, Leuven January 2009, p 15.

[189] Case No COMP/M.7850 - EDF / CGN / NNB GROUP OF COMPANIES, Commission Decision of 10.03.2016 declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004 (<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1501224653067&uri=CELEX:32016M7850> accessed 28.07.2017), pp 11–12.

Finally, EU substantive rules also exist as regards the acquisition of shares in the financial sector. The Credit Institutions Directive 2006/48/EC permits national authorities to examine and, if need be, oppose plans by both natural or legal persons to obtain or to increase a 'qualified holding' in a credit institution.[190]

According to Article 4(11) of the Directive, a 'qualified holding' 'means a direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking'. The competent national authorities have a maximum of three months to oppose such a plan 'if, in view of the need to ensure sound and prudent management of the credit institution, they are not satisfied as to the suitability of the person concerned. If they do not oppose the plan, they may fix a maximum period for its implementation.'[191]

Similar conditions are placed on acquisitions in insurance and investment firms.[192] For the sake of transparency, EU legislation also requires notification to be given every time that a significant participation is taken or that there is a change in a corporation whose securities are traded on a regulated market.[193]

VI. THE FUTURE TO COME.

The situation referred to so far stresses the risk of having different strategies towards FDI and sovereign FDI in the several EU member states. There are mixed competences, no reference to what sectors should be protected from foreign acquisition, and because of the vague wording of Article 65(1)(b) TFEU,[194] on which the various prospective national systems finally rest, no precision in the meaning of the notions of public order and public security.[195]

The European common investment policy is still under construction. It seems that it will be necessary to wait a while in order to fully assess the scope of this new policy, and to have it completely implemented... Some EU member states have implemented screening systems for FDI, though these vary in nature, scope and structure, as well as in their goals and levels of development.[196] Of the states that have done so, France and Germany have traditionally been some of the major recipients of FDI in the EU. Both of them have created systems to control FDI, especially FDI from particular countries and in certain areas of the economy.

The persistence of these very different national systems is a clear example both of the still-embryonic condition of the EU common investment policy and of the long road still ahead.

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[190] Art. 19(1)(I) Directive 2006/48/EC of the European Parliament and of the Council of 14.06.2006 relating to the taking up and pursuit of the business of credit institutions (recast) [2006] OJ L 177/01.
[191] Art. 19(1)(II) Directive 2006/48/EC, above n 190.
[192] Note B DE MEESTER, above n 188, p 16, fns 79 and 80.
[193] Art. 9(1)(I) DIRECTIVE 2004/109/EC of the European Parliament and of the Council of 15.12.2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L 390/38, and Art. 11(5) Commission Directive 2007/14/EC of 08.03.2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2007] OJ L 69/27. There is also legislation on the control of the investor (either national or foreigner) once the investment has been made: note Arts. 2 and 5 Directive Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16m or Arts. 12(3)(III) and 17(1) Directive 2006/48/EC, above n 190, in relation to the supervision of activities of financial institutions.
[194] And Art. 346 TFEU.
[195] CHAISSE J, CHAKBABORTY D and MUKHERJEE J, 'Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies' (2011) 45:4 *Journal of World Trade* 837, p 860.
[196] Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the UK. (EUROPEAN COMMISSION, above n 157; A DE VERDUN and S BARDASI, 'Le pouvoir de police des investissements étrangers: un pouvoir réglementaire', *La semaine juridique – enterprise et affaires*, 23 05.06.2014, pp 9, 11; see J LAMBERT and PA MARTIN, above n 131, p 25; H ZHANG and D VAN DEN BULCKE, above n 5, p 165).