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DOI
10.1007/17280_2024_30
Publication date
2024
Document Version
Final published version
Published in
National Security and Investment Controls

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Link to publication

Citation for published version (APA):
de Kok, J. (2024). Foreignness in EU Investment Screening Law. In J. H. Pohl, T. Papadopoulos, & J. Wiesenthal (Eds.), *National Security and Investment Controls* (pp. 59-101). (Springer Studies in Law & Geoeconomics; Vol. 3). Springer. https://doi.org/10.1007/17280_2024_30

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Foreignness in EU Investment Screening Law

Jochem de Kok

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Abstract Concerns regarding foreign direct investments (FDI) from China have played a central role in the adoption and development of the EU framework for FDI screening. The official discourse regarding these concerns initially focussed on economic interests but shifted to security following the introduction of the FDI Screening Regulation. Because the precise security threats posed by FDI were largely unspecified, there is a lack of meaningful indications in the law and the legislative history regarding the definition of security and public policy, as well as the broader objectives of the EU FDI Screening Regulation. Since its adoption, the official discourse on FDI screening has emphasised the importance of European strategic autonomy and economic security, which are used as a wide umbrella term for various industrial political interests. While the Russian invasion of Ukraine has shifted the attention to Russia, the impact of this shift is likely to be limited given the small number of Russian investments in the EU. At the same time, the EU has pursued cooperation with the United States on FDI screening, starting already during

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J. de Kok (✉)
Allen & Overy LLP, Amsterdam, The Netherlands

University of Amsterdam, Amsterdam, The Netherlands
e-mail: Jochem.deKok@AllenOvery.com

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J. H. Pohl et al. (eds.), *National Security and Investment Controls*,
Springer Studies in Law & Geoeconomics (2024) 3: 59–102,
https://doi.org/10.1007/17280_2024_30, Published online: 19 March 2024

the parliamentary debate and formalised by the conclusion of the EU-US Trade and Technology Council. Close cooperation with the United States is, however, hard to reconcile with the purported general objective of European strategic autonomy and the principle of non-discrimination, and risks dragging the EU into the increasingly hostile US-China rivalry.

1 Introduction

The distinction between foreign and non-foreign investors and the perception of the foreigner as a potential security threat is inherent in the legal framework for FDI screening as laid down by Regulation 2019/452, establishing a European framework for the screening of FDI in the EU (the FDI Screening Regulation).[1] Foreignness is thus a central tenet of EU foreign direct investment (FDI) screening law. The FDI Screening Regulation applies equally to different foreign investors, but in practice investments from certain jurisdictions are more likely to raise potential security or public order threat.[2] Concerns regarding Chinese investments have notably been at the forefront of the development of the EU framework for FDI screening and since the Russian invasion of Ukraine, the European Commission (Commission) has raised specific concerns with regard to Russian and Belarussian investments. At the same time, the EU and the United States have intensified transatlantic

[1] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79I/1).

[2] The EU FDI Screening Regulation uses the terms security and public order. The author will use these terms in this article. Instead of security, the term "public security" is sometimes used (e.g. in Article 65(1) TFEU) or "national security" (e.g. in Article 4(2) TEU). There does not appear to be any material difference or distinction between "security" and "public security". Notably, this distinction is not present in the German versions of the EU FDI Screening Regulation and Article 65(1) TFEU, which both refer to "security" (*Sicherheit).* There is a (minor) difference between "security" and "national security" (e.g. in Article 4(2) TEU), as the concept of "security" could be argued to include both "national security" and the "security of the Union". In practice, the potential distinction between "national security" and the "security of the Union" would be of limited relevance given that no interpretation of the term "security of the Union" can be imagined that would not wholly or partly overlap with the national security of one or more Member States, and vice versa. In other words, the security of the Union inevitably concerns the national security of one or more Member States, and the national security of a Member State inevitably concerns the security of the Union. Whilst the English version appears to make a distinction between "public order" (EU FDI Screening Regulation) and "public policy" (Article 65(1) TFEU), no such difference exists in the French and German versions, which both refer to public order (*l'ordre public* and *öffentlichen Ordnung*). The concept of "security of the Union" is included in Global Strategy for the EU's Foreign and Security Policy, see EEAS (2016). The distinction in between "national security" and "security of the Union" is also briefly discussed in de Kok (2019). For a comparative overview see OECD (2009).

cooperation on investment screening under the Trade and Technology Council (TCC). This raises the question to what extent EU law and official discourse on FDI screening explicitly or implicitly distinguishes between the nationality of foreign investors, and what type of particular security and public order threats are identified in respect of investments from specific jurisdictions.

Existing literature on the EU FDI Screening Regulation gives only a limited answer to these questions. Concerns regarding Chinese investments are typically placed in the context of geopolitical developments, notably the growing US-China conflict and the increase in Chinese outward investments. Chinese investments tend to be viewed as a particular challenge due to broader concerns regarding China's centrally guided economic system, single party political system, human rights, different conception of world order, different geopolitical interests, and growing Chinese geopolitical ambitions, whereby Chinese investments may be seen as a tool of economic statecraft in service of Chinese objectives.[3] Chinese investments carried out in the context of strategic policies such as the Go Out policy, Made in China 2025 or the Belt and Road Initiative are often cited examples of economic statecraft.[4]

The literature refers to a mix of security, economic and political threats emanating from Chinese investments.[5] Concerns regarding technology and innovation are a common theme, with various academics pointing to the possibility that Chinese investments could result in unreciprocated transfers of technologies and related economic activities to China,[6] and the resulting loss of the European technological edge or competitive advantage.[7] Some academics focus on ensuring a level playing field by addressing the lack of reciprocal market access, sometimes leaving open whether these concerns constitute purely economic or "economic security" concerns.[8] Whilst others point to the potential threat to European unity, notably involving risk that dependency on Chinese investments could be used to leverage those host Member States to act in line with China's ideas on political issues against broader EU consensus, such as the One-China policy or human rights.[9] These concerns relating to a "divide and conquer" strategy behind Chinese investments is

[3] See Zhang (2014); Meunier (2014a); Meunier and Nicolaidis (2019); Hooijmaaijers (2019); van Zon (2023). See, more generally Maher (2016).

[4] The Made in China 2025 strategy sets out ambitious goals for developing ten key industries for which Chinese central and local governments have announced support in the form of significant funding, subsidies and other types of support. See de Kok (2019); Meunier and Nicolaidis (2019); Hooijmaaijers (2019); Chan and Meunier (2022); van Zon (2023). See also, more generally, Reilly (2017); Christiansen and Maher (2017); Pacheco Pardo (2018); Santander and Vlassis (2021).

[5] A similar argument is made in Hindelang and Moberg (2020).

[6] In this respect, see in particular, Meunier (2014a); Chan and Meunier (2022).

[7] Christiansen and Maher (2017), pp. 124–125; Hooijmaaijers (2019); Sattorova (2023).

[8] In this respect, see in particular, Schill (2019); Hooijmaaijers (2019). See also (Meunier and Nicolaidis (2019); Hindelang and Moberg 2020) From a US perspective, see also Roberts et al. (2019).

[9] See, for instance, Meunier (2014b); Meunier and Nicolaidis (2019); Hindelang and Moberg (2020), p. 1433; Riela and Zámborský (2021), p. 68.

notably raised in the context of Chinese investments in critical infrastructures in Southern and Eastern Europe.[10] Concerns over Chinese industrial or political espionage or sabotage tend to be given less prevalent attention.

With respect to the potential threats posed by Chinese investments, literature often refers to other academic literature or think tank reports.[11] However, a comprehensive analysis of which concerns are expressed in official discourse is largely missing.[12] The FDI Screening Regulation itself does not offer a lot of guidance in terms of what particular security and public order concerns are identified in respect of investments from specific jurisdictions, or what specific type of threats screenings should address. Given the overall lack of meaningful indications in the FDI Screening Regulation, an analysis of the official discourse is important. This chapter illustrates that the extensive body of official EU policy documents, preparatory documents and speeches by Commissioners give insight into the objectives pursued under the FDI Screening Regulation, especially with respect to Chinese investments.

This chapter aims to contribute to existing scholarship by providing a detailed analysis of the EU law and official discourse on the treatment of investments from specific jurisdictions under the FDI Screening Regulation, with a notable focus on the objectives of the screening of Chinese, Russian and US investments. Where relevant, the chapter will contextualise these developments in the broader economic or political context. Given the lack of definitions and objectives stated in the EU FDI Screening Regulation itself, an in-depth review of the discourse regarding the FDI Screening Regulation is important to provide a better understanding of *official* EU policy under the FDI Screening Regulation, as opposed to the myriad concerns considered in academic literature and by think tanks. This chapter also challenges the common presumption that the FDI Screening Regulation necessarily aims to address "security" challenges. The development of the official EU discourse rather shows that economic objectives have been securitised, blurring the boundaries between the economic and security objectives. Over time, the objective pursued under the EU FDI Screening Regulation have also shifted towards broad considerations such as the protection of European strategic autonomy. This chapter also questions the intensification of cooperation with the United States from the perspective of consistency in terms of the quest for strategic autonomy and posits that official discourse risks resulting in a discriminatory application of investment screening rules.

This chapter is predominantly based on a legal historic research methodology (the history being a recent one), concluding with a normative assessment. The author has reviewed all identifiable public official EU level documents and speeches relating to

[10] In particular, Chinese investments in Greece (notably the investment in and expansion of the port of Piraeus), Hungary (notably. the construction of the Budapest-Belgrade rail link) and Croatia (notably construction of the Pelješac Bridge). For an illustrative example, see Reilly (2017).

[11] See, for instance, Casarini (2015); Garcia-Herrero and Xu (2017); Seaman et al. (2017); Godement and Vasselier (2017); Hanemann and Huotari (2018); Bickenbach and Liu (2018).

[12] With the exception of the published bachelor thesis of Talisha Schilder who focusses on the securitisation of these concerns, see Schilder (2022). See also Rogelja and Tsimonis (2020) and Sattorova (2023), who do discuss the discourse with a relatively high level of detail.

the EU FDI Screening Regulation for guidance on its objectives or screenings of investments from specific jurisdictions between 2008 and June 2023. Relevant sources notably include preparatory documents relating to the adoption of EU FDI Screening Regulation,[13] official EU documents such as Commission Communications and Staff Working Documents, and speeches by Commissioners relating to FDI screening. The concluding section offers a normative assessment of the official European discourse and the developments surrounding the screening of FDI under the EU FDI Screening Regulation. This normative assessment is based on the internal consistency and coherence of the law and discourse.

The chapter is structured as follows. The article will first provide doctrinal analysis of the regulation of foreignness under the EU FDI Screening Regulation. The following sections will provide an overview of the official debates and statements in response to growing Chinese investments preceding the proposal for the EU FDI Screening Regulation, with notable concerned calls for additional restrictions on the basis of economic considerations. The article will show that these economic concerns were securitised following the announcement of the proposed EU FDI Screening Regulation. After the adoption of the FDI Screening Regulation, the attention has shifted from undefined security concerns to strategic autonomy, notably from China, as the EU has simultaneously intensified the transatlantic cooperation in the area of investment screening. The article concludes with a normative assessment, with a call for the development of the regulatory framework for FDI screening to ensure a non-discriminatory application of the FDI screening rules so that only transactions that can reasonably pose a threat to security or public order are made subject to a filing obligation and are assessed on the basis of clearly defined substantive criteria.

2 Foreignness Under the FDI Screening Regulation

Investment screening law makes a distinction between foreign and non-foreign investors. The scope of application of the EU FDI Screening Regulation is specifically limited to "*foreign direct investments*", i.e. investments by "*foreign investors*" that aim to establish or maintain "*lasting and direct links*" between the foreign investor and the target company in order to carry on an economic activity, including

[13] Preparatory documents are "*Documents used to prepare EU legislation, produced during the various stages of the legislative and budgetary process*." Main document types are Commission legislative proposals, Council common positions, European Parliament legislative and budgetary resolutions and initiatives, European Economic and Social Committee opinions, Committee of the Regions opinions. The author has also viewed the publicly available presentation of the proposal for the EU FDI Screening Regulation before the European Parliament's Committee on International trade. See EUR-Lex (2022).

investments which "*enable effective participation in the management or control of a company carrying out economic activity*."[14]

A "foreign investor" under EU law means a natural person or undertaking from a third country.[15] The EU FDI Screening Regulation may also apply to indirect investments by foreign investors via EU companies, such as holding or bidding companies.[16] According to Article 54 and case law of the Court of Justice, the status of being an EU company (i.e. the nationality of a company) is based on the location of the corporate seat and the legal order where the company is incorporated, and not on the nationality of the shareholders.[17] Thus, a company that is incorporated in the EU, but is solely owned by foreign shareholders, has the status of being an EU company. With the aim of preventing circumvention, the EU FDI Screening Regulation also applies to investments carried out via EU entities that are ultimately owned or controlled by a natural person or company from a third country.[18] The Commission encourages the Member States to assess whether a "*scheme of circumvention*" is set up with the objective result of avoiding the application of the FDI Screening Regulation, for instance by setting up a European holding company for the purpose of the proposed transaction.[19] Given that it is standard practice in international M&A transactions to set up new holding companies for the purposes of a proposed transaction, qualifying such a structure as a "*scheme of circumvention*" is somewhat disingenuous and feeds into the image of the security or public order threat posed by insidiously scheming foreigners.

The EU FDI Screening Mechanism does not bind Member States to the European definition of "foreign". Member States may thus also subject intra-EU investments to screenings. Under the different screening mechanisms of the Member States,

[14] EU FDI Screening Regulation, art. 2(1).

[15] EU FDI Screening Regulation, art. 2(2).

[16] See for further detail Case C-106/22 *Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter* ECLI:EU:C:2023:568. Various amendments to the EU FDI Screening Regulation have been proposed under the revised Regulation on the screening of foreign investments, which was published on 24 January 2024.

[17] TFEU, art. 54 and Case C-80/12 *Felixstowe Dock and Railway Company Ltd and others v HM Revenue & Customs* ECLI:EU:C:2014:200. See also response to question 12 in Commission (2021a).

[18] FDI Screening Regulation, art. 3(6), provides that: "*Member States which have a screening mechanism in place shall maintain, amend or adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions.*" Recital 10 provides that the anti-circumvention measures by the Member States "*should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country.*" In the abovementioned 'frequently asked questions' document, the Commission notes that "*Investments by EU entities may nevertheless come within the scope of the Regulation when they fall under the anti-circumvention clause*."

[19] Commission (2021a). In this respect, the "*objective capability of the arrangements to avoid the rules*" in case of a "*lack of economic activity of the investor company*" is sufficient to create a presumption that the arrangement is artificial.

"foreign investor" can mean non-national,[20] non-EEA,[21] or non-OECD,[22] or a combination of those. For instance, in Germany a foreign investor in the defence sector is any non-German investor, while foreign investors in investments in critical infrastructures are non-EU investors.[23] In Denmark, the mandatory filing regime for investments in certain particularly sensitive sectors and activities applies to all non-Danish investors, whilst the additional call-in regime for investments any other sector or activity applies to only to investors from outside the EU/EFTA.[24] Some Member States, such as the Netherlands, have attempted to avoid a distinction on the basis of foreignness by expanding the scope of application of screening regulations to all investors, including nationals.[25] However, the nationality of the foreign investor remains relevant under the Dutch regime, as the screening should for instance take into account whether the investor is established in a country that has offensive programmes aimed at acquiring sensitive technologies in order to obtain a technological or strategic position of power, or aimed at affecting the integrity, security, safety or availability of critical processes.[26] The distinction between nationals and the foreigner is thus inherent in investment screening law.

The EU FDI Screening Regulation in particular addresses concerns with respect to state-owned, -controlled or -funded foreign investors, or investors that are seen as pursuing foreign state policies. Notably, the Member States and the Commission may take into account "*whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding*."[27] As will be discussed in further detail below, the reference to "ownership structure" or "significant funding" is a reference to the concerns regarding Chinese investments. Similarly, recital 13 of the FDI Screening Regulation furthermore provides that the "*context and circumstances of the foreign investment*" should be taken into account, including whether the investor is "*pursuing State-led outward projects or programmes*." The reference to "*State-led outward projects or programmes*" was included in response to concerns regarding the Made in China 2025 strategy and the Belt and Road Initiative. The EU FDI Screening Regulation thus contains only two

[20] This is the case, for instance, in France. See Monetary and Financial Code (*Code monétaire et financier*), art R. 151-1. In Hungary, the temporary regime has extended the scope of the FDI regime to all foreigners as well. Tóth (2022).

[21] This is the case, for instance, in Austria. Weiss and Schulz (2022).

[22] This is the case, for instance, in Poland. Pietrasik and Michalski (2022).

[23] Cotta et al. (2022).

[24] Fabricius (2022).

[25] For a detailed discussion on the framework of investment screening in the Netherlands, see de Kok (2021).

[26] Furthermore, the screening should consider whether there is a sufficient and transparent separation of civil and military research and development programmes in the host country, see the Dutch Act on the security screening of investments, mergers and acquisitions (*Wet veiligheidstoets investeringen, fusies en overnames*), art. 19–21.

[27] EU FDI Screening Regulation, art. 4(2)(a).

implicit references to Chinese investors, despite investments from China playing a central role in the adoption process.

3 Rise of Chinese Investments

The first discussions relating to a European security review mechanism concerned the regulation of investments by Middle Eastern sovereign wealth funds (SWFs) in 2008. At the time, there were increasing concerns that a growing number of investments by SWFs in the EU could interfere with the normal functioning of market economies. Whilst various suggestions had emerged that the EU should adopt an investment screening mechanism, the Commission rejected such suggestions, noting that they would "*run the risk of sending a misleading signal – that the EU is stepping back from its commitment to an open investment regime. They would also be difficult to reconcile with EU law and international obligations*."[28] The Commission instead proposed to promote a cooperative effort at the international level to establish a set of principles to ensure the transparency, predictability and accountability of SWF investments,[29] noting that Member States already had the ability to review investments on the basis of national security and public policy. The Council affirmed the Commission's approach to SWFs, but noted that "*if international negotiations were not to develop satisfactorily, further action should be considered at the EU level*."[30]

The discussions on the need for greater scrutiny over foreign investments reignited following the emergence of China as a major source of investment in the early 2010s. One of the first instances of such calls arising on the official level was the letter by Commissioners Antonio Tajani and Michel Barnier to President Barroso, calling for the creation of a European high-level board with powers to reject non-EU investments in February 2011, modelled on CFIUS.[31] The Commissioners also considered that the review should extend beyond mere security considerations to include interventions "*on behalf of European industrial*

[28] Commission (2008).

[29] In this respect, see for instance Sovereign Wealth Funds: Generally Accepted Principles and Practices "Santiago Principles." International Working Group on Sovereign Wealth Funds. For a critical note see Bismuth (2017).

[30] Council (2008). Similarly, the OECD welcomed the constructive contribution that SWFs make to the economic development of the home and host countries, and have been reliable long-term, commercially-driven investors and a force for global financial stability. The OECD recognised that legitimate national security concerns could arise where SWF investments were motivated by political rather than commercial objectives. However, the OECD countries called upon recipient countries not to erect protectionist barriers to foreign investments, should not discriminate among investors in like circumstances, and should safeguard national security concerns in a transparent, predictable, proportional and accountable manner. Council at Ministerial Level (2008).

[31] Commission (2011).

competitiveness".[32] In that respect Vice-President Antonio Tajani noted that he is "*highly favourable to non-EU investments in Europe, but I do not want to mask attempts to close down businesses after having stolen all of their 'know-how'*".[33] One year later, the European Parliament followed suit, requesting the Commission and Member States "*to set up a body entrusted with the ex ante evaluation of foreign strategic investment, along the lines of the Committee on Foreign Investment in the United States (CFIUS), in order to obtain a clear picture of businesses operating and investing in the territory of the EU, and to report to the parliament on a regular basis*".[34]

The (failed) acquisition of the Dutch company Draka, a market leader in cable systems for the energy and telecoms sectors, by China-based Xinmao appears to have been the direct cause of the abovementioned call by Tajani and Barnier, and the European Parliament. The bid by the unknown Chinese company prompted various media outlets to run stories on its founder and CEO, Mr Du Kerong, casting doubt in particular over his military background and the apparent close connections between Xinmao and the Chinese military.[35] Antonio Tajani raised alarm about the Chinese investments being a "*a camouflage to bring know-how to China*" and that Europe should "*support our know-how*".[36] In response to questions by the Dutch Parliament, the former Dutch Minister of Economic Affairs, Maxime Verhagen, however, strongly defended a policy of non-intervention as foreign investments bring in knowledge, skills and technology and result in a dynamic economy.[37] Whilst investments could result in a transfer of know-how to foreign countries, the former Minister considered that the objective to obtain technologies and research capacities is a legitimate objective in international M&A, not just for Chinese enterprises.[38] Furthermore, the transaction was to be funded by China Minsheng Bank, a privately owned bank that is listed on the Hong Kong stock exchange, and according to the Minister, there were no reason to suspect that the transaction was based on more than just commercial reasons. In the end, Xinmao withdrew its offer. Whilst the stated reason that it was unable to raise sufficient funds to finance the deal, the backlash in the media may played an important part in this decision.[39] It is perhaps no coincidence that the FDI Screening Regulation was (many years later) adopted under Antonio Tajani's presidency of the European Parliament.

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[32] Ibid.

[33] Ibid.

[34] European Parliament (2012).

[35] Peverelli and Song (2012).

[36] Chee (2010). Italy's former Minister of Industry, Paolo Romani, made a similar call for Draka to remain in European hands.

[37] Tweede Kamer (2010a, b).

[38] Ibid.

[39] This is, at least, argued by Peverelli and Song (2012), p. 5. Prysmian, the ultimate purchaser of Draka, argued that Xinmao did not have the funding, that no bank would have been willing to fund the EUR 1 billion bid, plus additional refinancing of EUR 500 to 600 million of debt. Mesters (2011).

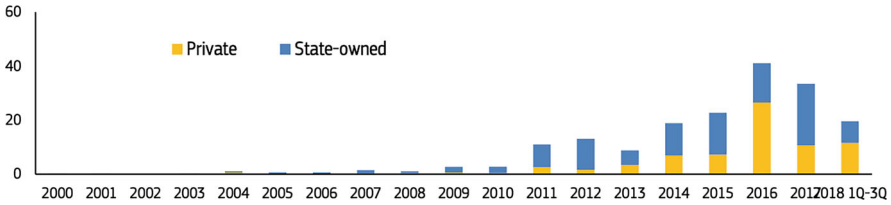

Fig. 1 Chinese FDI Transactions in the EU by Type, 2000–2018 Q3, in million US [Commission (2019a). Based on Rhodium Group data]

Concerns regarding Chinese investments intensified following the sharp increase in investments following the European monetary and financial crisis, with a sharp particularly sharp increase in Southern Europe. Over the course of the crisis, the share of Chinese FDI in southern Member States increased from 8% of total Chinese FDI in the EU in 2009–2011 to 33% in 2012–2014.[40] These Chinese investments were often made in various privatised state-owned companies in South European energy and transportation sectors.[41] These privatisations were among the main objectives of reform programmes, many of which were under the guise of the Troika of the Commission, the ECB and the IMF.[42] These privatisations were predominantly required to raise liquidity, but also partly justified by the alleged benefits of private ownership. The ironic effect of 'privatisation', however, was a transfer of public ownership from European Member States to Chinese state-owned enterprises (Fig. 1).[43]

In Greece, famous examples of a transfer of privatised companies to Chinese state-owned companies were the privatisation of the Athens port Piraeus to COSCO and the acquisition of a 24% interest in Greece national electricity distributor ADMIE by State Grid Corporation of China (SGCC) in 2016. In Portugal, 45% of the total privatised assets were purchased by Chinese investors, including the purchase of a 21% interest in the electricity producer Energias de Portugal by Three Gorges Corporation and an acquisition of a 25% interest in the gas and electricity transmission company, REN by SGCC.[44] These investments made Portugal the largest recipient of Chinese investments following the UK, Germany and France in the period between 2000 and 2014. In Italy, privatisations in the context privatisation programme to reduce national debt also resulted in investments in the

[40] Namely, in Portugal, Italy, Greece, Spain, Cyprus as well as Ireland. Baker & McKenzie et al. (2015); Corre (2018).

[41] Baker & McKenzie et al. (2015); Vila and Peters (2016).

[42] Papadopoulos (2015), p. 14; Papadopoulos (2018).

[43] This is referred to as the "*privatisation paradox*" by Vila and Peters (2016), p. 20.

[44] REN holds the concession for Portugal's two main energy infrastructure networks, the National Electricity Transmission Grid (RNT) and the National Natural Gas Transportation Grid (RNTGN). Baker & McKenzie et al. (2015); Chan and Meunier (2022).

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	*Total (2007-2017)*
EFTA	7	10	8	16	10	9	5	4	12	8	10	*99*
China, HK and Macao	0	3	0	1	6	5	5	8	6	17	9	*60*
GCC	1	1	1	1	6	7	16	17	17	7	6	*80*
Russian Federation	4	4	9	10	12	10	17	8	9	7	3	*93*
Dev. Asia	0	2	2	1	1	2	1	1	0	1	3	*14*
RoW	2	1	1	0	1	2	3	1	3	6	2	*22*
Central and South America	0	0	0	0	1	0	1	1	3	3	1	*10*
USA and CAN	1	0	1	1	0	0	0	0	1	0	0	*4*
India	0	0	1	0	0	0	0	1	0	1	0	*3*
Total	*15*	*21*	*23*	*30*	*37*	*35*	*48*	*41*	*51*	*50*	*34*	*385*

Source: EC-JRC Foreign Ownership Database

Fig. 2 M&A in the EU by public authorities, states and governments (typically via SOEs or SWFs) [Commission (2019a), p. 57]

energy sector, such as the acquisition of a 35% interest in CDP Reti by SGCC also,[45] and the acquisition of a 40% interest in Italy's power engineering company Ansaldo Energia by partially state-owned Shanghai Electric.[46] Concerns were raised as to the potential industrial policy objectives of the Chinese investments, notably under the Belt and Road Initiative that launched in 2013. The data on number of M&A transactions by foreign governments (usually via SOEs) in the period of 2007–2017 shows a clear increase in Chinese governmental controlled investments following the crisis, as well as from the Gulf Cooperation Countries (GCC) (Fig. 2).[47]

The Commission initially defended these investments. According to former Commissioner Karel De Gucht, Chinese investments were important because southern European Member States "*need[ed] investors to buy what they [were] selling*."[48] In his speech on *Chinese Investments in Europe*, De Gucht stressed that foreign investments benefit the economy in many ways and warned that "*we cannot accept – in Europe or elsewhere – that national security concerns are used as a false pretence to justify the protection of vested economic interests*."[49] According to the Commissioner, Member States already had sufficient mechanisms in place to screen

[45] CDP Reti owns approximately 30% of the Italian energy companies SNAM (Natural gas infrastructure company) and TERNA (Electricity transmission systems operator).

[46] Baker & McKenzie et al. (2015); Chan and Meunier (2022).

[47] In this report, published on the same day as the announcement of the proposal for the EU FDI Screening Regulation, the Commission notes that "*All Chinese acquisitions could be considered linked to the Chinese government since (1) investments are usually authorised by the government and targeted to specific sectors (e.g. those covering the China 2025 strategy), (2) investments generally involve loans given by Chinese banks (most of them directly controlled by the government). The same argument could be applied for Russian federation and for Gulf countries.*" Commission (2019a).

[48] De Gucht (2012).

[49] Ibid.

investments on the basis of national security, warning that concerns were often aimed at the protection of "*vested economic interests*" and that the national security exception should not be used by Member States to protect such interests. Instead, these mechanisms must be applied narrowly and transparently. Whilst Karel De Gucht considered that "*a more strategic overview of this at the European level could be useful [. . .] a full European screening of new investments is neither desirable nor feasible in my view*."[50]

Former Commissioner Malmström responded in a similar fashion to questions by then MEP Marielle de Sarnez on whether the Commission envisaged establishing an investment assessment body following a "*dramatic increase in Chinese direct investment in Europe between 2010 and 2012*".[51] Former Commissioner Malmström stressed that whilst the increase seems impressive, Chinese investments represented less than 1% of the total inbound FDI and that Member States already have mechanisms to screen investments. The Commissioner considered that the EU is a major beneficiary of the open world economic system and is committed to ensuring that markets remain open.

The consideration that Chinese investments represented merely 1.1% of all non-EU M&A in the EU was, however, an incomplete reflection of the nature of these investments. At that time, the relatively modest number of Chinese M&A represented 5.3% of the value of inbound FDI and involved controlling investments in various key European companies in the area of critical infrastructure and technology. By the year 2016, approximately 9.5% of non-EU controlled EU companies were controlled by investors from China, Hong Kong and Macao, representing 28.000 companies with a value of EUR 160 billion, amounting to 3.0% of the total asset value of non-EU controlled EU companies (Fig. 3).[52]

The increase of "state-led, strategic direct investments by non-EU investors in European key enabling technology companies, as well as issues around the reciprocity of investment conditions" led the ministers of economy of Germany, France and Italy to send two joint letters to the Commission.[53] The Ministers considered that there was a lack of a level playing field and threat to the "fair market-based environment", as European companies were acquired as part of strategic industrial policies—often with support of state subsidies—whilst other countries put up hurdles for European investors.[54] Germany, France and Italy therefore called for "additional protection based on economic criteria, taking into account and with reference to the Commission's expertise."[55] These Member States considered that

[50] Ibid. De Gucht concluded by noting that an EU-China investment agreement could address this debate, and could reinforce legal certainty and transparency about the way foreign investments may be screened.

[51] European Parliament (2015).

[52] Commission (2019a), p. 11.

[53] Germany, Italy and France (2017a); Germany, Italy and France (2017b).

[54] Germany, Italy and France (2017a).

[55] Ibid.

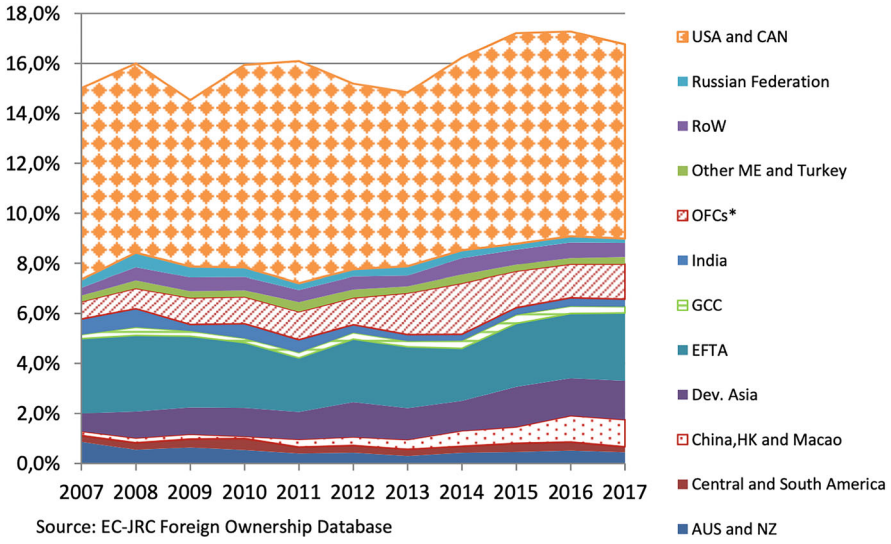

Fig. 3 Non-EU share of the number of M&A deals by origin (2007–2017) [Commission (2019a), p. 15]

an intervention is justified where the investment "does not comply with market rules (e.g. through investment instructions; through state-funded takeovers based on political programmes; through the requirement for state approval of investments)" or where an investment is subsidised and "results in a market disturbance".[56]

This call, which was clearly directed at Chinese investments,[57] followed a series of high-profile acquisitions of technology companies by Chinese investors, especially in Germany, such as the acquisition of the robotics manufacturer Kuka by Midea, a Chinese listed company, and semiconductor equipment supplier Aixtron by a consortium of Chinese investors.[58] Former Commissioner Günther Oettinger had urged European companies to make a counter offer for the strategically important company Kuka.[59] However, even though the sale of Kuka resulted in strong public concerns, the German government ultimately approved the transaction as it saw no grounds for intervention on the basis of national security.[60] In the United States, on the other hand, President Barack Obama required that Kuka divest its US subsidiary engaged in defence-related activities after a review by CFIUS. In the same year, after the United States had provided the German government with "*previously unknown security-related information*" the German authorities withdrew their earlier

[56] Ibid.

[57] See, similarly, Casarini (2022), p. 96; Sattorova (2023), p.704; Hoffmeister (2023), p.678.

[58] For case studies see Popławski (2017); Stanzel (2017); Hooijmaaijers (2019).

[59] Knop and Mihm (2016).

[60] Reuters Staff (2016a).

clearance for the proposed takeover of Aixtron, which had been blocked as well by the US President.[61] The Chinese investors subsequently withdrew their bid, and the transaction was abandoned.[62]

The European Parliament joined the discussion on investment screening and adopted a Proposal for a Union Act on "*the Screening of Foreign Investment in Strategic Sectors*".[63] This Proposal supported the call by the Member States, recognising the Member States' competence in the area of national security and public order and calling for additional protection based on economic criteria, reciprocity and foreign subsidisation. In particular, the European Parliament called for (i) the expansion of investment screenings on the basis of economic criteria with reference to the Commission's expertise, (ii) the adoption of a principle of reciprocity in EU investment policy, under which foreign investments may be restricted if similar investment opportunities are not offered to European companies in the home country of the potential investor, and (iii) the establishment of a "European Committee on Foreign Investment" which may intervene when a foreign investment in strategic sectors does not comply with market rules or is facilitated by foreign state subsidies.

Shortly after, the Commission announced in the *Reflection Paper on Harnessing Globalisation* that additional analysis and appropriate action had to be undertaken to address concerns "*about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons*."[64] Reflecting concerns regarding reciprocity, it considered that the EU "*should act to restore a level playing field*".[65]

4 Securitisation of Chinese Investments under the Proposal

In 2017, the proposal for the EU FDI Screening Regulation redirected concerns regarding Chinese investments from economic considerations and reciprocity to the security threats posed by these investments to the EU and its Member States. Thus, rather than tackle the issue through additional protection on "*economic criteria",* as had been proposed by Germany, France and Italy and the European Parliament, the Commission decided to tackle concerns over Chinese investments as a security threat. The Commission's proposal for an FDI screening regime based on security

[61] Reuters Staff (2016b); Obama (2016).

[62] Sheahan (2016).

[63] European Parliament (2017). See also Grieger (2019).

[64] Commission (2017a). See also European Political Strategy Centre (EPSC) (2016). As cited in (Valero (2017).

[65] The Reflection Paper on Harnessing Globalisation was welcomed by the European Council, which confirmed the need to fully respect Member States' competences. The topic of reciprocity also featured in a speech by the former Trade Commissioner Celia Malmström. Malmström (2017); European Council (2017).

and public policy considerations constituted a significant shift in the discourse on Chinese investments in the EU and a "securitization" of what had previously been viewed as a technical or political issue.[66]

Barry Buzan, Ole Wæver and Jaap de Wilde describe securitization as a process which takes an issue beyond the established rules by framing it as either a special kind of politics or above politics.[67] Through securitization, "*the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure*".[68] A key insight from securitization theory is that securitization does not necessarily reflect an objective reality, but reflects a social process whereby speech acts transform normal politics into a security concern.[69] The transformation of the concerns regarding Chinese or other foreign investments into an existential threat to Europe's security is an example of such securitization.[70]

In the context of the legislative process, the Commission and European Parliament were careful in avoiding referring to China by name. References to China were often implicit, but taken as a whole it is evident from preparatory documents and speeches that the EU FDI Screening Regulation in particular aimed to address concerns relating to investments from China, especially by state-owned enterprises.[71] The precise security concerns relating to these Chinese investments were, however, never specified in any detail. Illustrative of this is the announcement of the proposed EU FDI Screening Regulation by former President Jean-Claude Juncker during the 2017 State of the Union, where he stated:

> 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.[72]

The references to investments harbours and energy infrastructure are a clear reference to the significant number of Chinese investments in Southern Europe, including in the Athens port of Piraeus and various energy infrastructure companies. Juncker's speech depicts investments by (Chinese) state-owned companies in European infrastructure as having been carried out without transparency, scrutiny or without

[66] See, similarly, Sattorova (2022), p. 5.

[67] Buzan et al. (1998), p. 23.

[68] Buzan et al. (1998), p. 24. See, similarly, Vidigal and Schill (2021).

[69] Buzan et al. (1998); Lai (2021).

[70] See also Schilder (2022).

[71] Preparatory documents are "*Documents used to prepare EU legislation, produced during the various stages of the legislative and budgetary process*." Main document types are Commission legislative proposals, Council common positions, European Parliament legislative and budgetary resolutions and initiatives, European Economic and Social Committee opinions, Committee of the Regions opinions. See EUR-Lex.

[72] Juncker (2017).

debate, involving insidious aims that we must not be "naïve" about. As mentioned above, however, sale of the port of Piraeus and energy infrastructure companies in Southern Europe to Chinese SOEs occurred due to privatisations effectively imposed by the Troika. These investments thus occurred under the Commission's watch. The implication that "we" did not know what went on in "*our own backyard*" is therefore both incorrect and illustrates a paternalistic way of viewing countries like Greece, Portugal and Italy as the EU's backyard, implying a lack of agency and transparency by "the Southerners".[73] The speech also mentions "defence technology firms", even though concerns—at least based on public information—predominantly related to acquisitions of industrial and technology companies by private Chinese enterprises such as Draka (cables), Kuka (robotics), Aixtron (semiconductors) and Leifeld (engineering), which develop important technologies but are in themselves not defence companies. By emphasizing the "defence" related activities of these companies, the speech provided for a justification to shift the discourse from the abovementioned calls by Member States for screening based on additional economic criteria, to a discourse based on security and public order concerns. Juncker furthermore does not give any insights about the ways these investments threaten security and his reference to "collective security" is also noteworthy, given that this term was absent from the proposed or the adopted EU FDI Screening Regulation.

Similarly, the Explanatory Memorandum to the Commission's legislative proposal for the FDI Screening Regulation provided that "*Recently, a series of takeovers of European companies involved foreign investors with strong ties to their home governments which strategy focus on the purchase of European companies that develop technologies or maintain infrastructures that are essential to perform critical functions in society and the economy*."[74] With respect to the risks that such investments pose, the Explanatory Memorandum only referred to the general concept that "*such investment could be detrimental to security and public order of the Union or its Member States*." The Explanatory Memorandum considered that the combination of increasing number of strategic investments by foreign investors with strong ties with foreign governments, and the potential security impact of such investments, has "*triggered concerns of European citizens, companies and Member States*."[75] The Explanatory Memorandum, however, failed to specify the precise nature of these concerns and how they relate to security or public order.

The Commission Staff Working Document accompanying the proposal for the EU FDI Screening Regulation, and the Communication on *Welcoming Foreign Direct Investment while Protecting Essential Interests* similarly paid particular attention to state-owned or controlled investments, without specifying what threat to security or public policy emanates from such investments. The Commission considered that conditions or a prohibition may in particular be required "*where foreign investors – especially but not only when they are state owned or controlled,*

[73] See in similar vein, Schilder (2022).

[74] Commission (2017b).

[75] Ibid.

including through financing or other means of direction – may seek to acquire control of or influence in European undertakings whose activities have repercussions on critical technologies, infrastructure, inputs or sensitive information."[76] In such cases, the Commission considered that these transactions are not only to the detriment of the "*EU's technological edge but also its security and public order*."[77] The Staff Working Document furthermore makes a distinction between threats to security or public order and "*concerns regarding industrial policy*".[78] However, the Commission does not clarify the differences between the norm of avoiding security "*repercussions on critical technologies*" and avoiding repercussions on the "*EU's technological edge*", nor to what extent "*industrial policy*" may play a role in determining potential security threats. The Commission additionally recognised that most screening mechanisms go beyond the defence sector and are not "*limited to the protection of essential interest of national security, especially production of or trade in arms, munitions, military equipment, war material, etc.*".[79] The FDI Screening Regulation itself broadly provides that Commission and Member States may, in determining whether the FDI is likely to affect security or public order, consider potential effects of the investment on critical technologies, "*including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies*".[80] The consequence is a lack of meaningful indications in either the law or the legislative history that allow for a delineation between security and public policy interests and economic interests, and to what extent state-ownership or control gives rise to a threat to security or the public order.

The references to China became more explicit in the hearing on the proposal by the European Parliament's Committee on International Trade. In introducing the bill, the Chairman of the Committee on International Trade, Bernd Lange, noted that "*everybody is aware about the fact that in the last year we had a lot of foreign direct investment in the EU, in particular from one big Asian country. I think about three hundred companies were bought by companies and state-owned companies from this country and this was the reason for a stronger discussion about investment screening inside the European Union.*"[81] The former Commissioner Malmström was invited to explain the proposal before the Committee.[82] The Commissioner started her speech by referring to a Chinese proverb and linking this proverb to the need to protect security.[83] Reciting Chinese proverbs is not the usual way for a

[76] Commission (2017c). See similarly, Commission (2017d).

[77] Commission (2017c); Commission (2017d).

[78] Commission (2017c), p. 6.

[79] Commission (2019a).

[80] FDI Screening Regulation, art. 4(1)(b).

[81] Committee on International Trade (2018).

[82] Ibid.

[83] Ibid. "*There is a Chinese proverb saying that the best time to plant a tree was twenty years ago, but the second-best time is now. So, public order and security is not about being right one day. It is about being right all the time from day one*."

Commissioner to introduce legislative proposals before the European Parliament, and can be seen as a clear way to prime the listeners to the central concern being China. In sketching out the context, the Commissioner referred to the rise of state-controlled or supported investments in strategic companies, while major barriers to investments exist in those jurisdictions. These countries pursue their own interests, and "*these interests are sometimes compatible with ours, but not always*."[84] In clear reference to China, the Commissioner warned that "*new powerful players are emerging, not always having the same standards, not always having the same rules, not always playing fair, and some openly use investments to access technologies, infrastructure and information*."[85] She warned that for one Member State to hand energy infrastructure over to a foreign investor without considering the impact on its neighbours or the Union as a whole can be dangerous.[86] The Commissioner concluded with an implicit reference to COSCO's investments in Piraeus by concluding: "*As I started with a Chinese proverb, I will end with a Greek one, saying that: "a society grows great when old men plant trees whose shade they know they shall never sit in". In this case, things are more urgent than it might suggest in the proverb*."[87]

In the same meeting the former Chairman of CFIUS, Aimen Mir, was present to share reflections on the proposal on behalf of CFIUS.[88] The presence of a senior US governmental official was notable given that the proposal was (ostensibly) neutral in nature. Given that at the time of the proposal, 46% of the M&A transactions originated from the United States and Canada, as opposed to 6.5% from China, Hong Kong and Macao, the FDI Screening Regulation would subject a relatively large number of US-originated transactions to additional scrutiny.[89] The reflections of Aimen Mir on behalf of the US government, however, stressed a common interest, underscoring the new challenges brought on by the increasing number of state-directed investments aimed at achieving "*government objectives*", particularly in advanced technologies, manufacturing and infrastructure. Aimen Mir stressed that the security of US allies reinforces the security of the United States, because the "*loss of advanced capabilities in Europe may have a direct consequence not just for European security, but also for US security*."[90] Thus, rather than seeing FDI screening in Europe as a potential risk to US investments, the US representative expressed the hope that this new regime would in fact "*reinforce the deep and open economic relationship, as well as the strong security relationship that we have with you*".[91]

[84] Ibid.
[85] Ibid.
[86] Ibid, at 14:37:30.
[87] Ibid.
[88] Ibid, at 14:45:10.
[89] Commission (2017d), pp. 11–12.
[90] Committee on International Trade (2018), at 14:53:36.
[91] Ibid, at 14:54:10.

The European Economic and Social Committee (EESC) was also explicit regarding the focus on China. The EESC specifically refers to the *Made in China 2025* strategy, noting that Chinese investments in the EU "*increased tenfold!*", and warning that additional Chinese takeovers in these strategic sectors "*are to be expected*".[92] The EESC did not specify the concerns with respect to Chinese investments, other than that these are increasingly focused on strategically selected sectors, by companies that are larger than average and increasingly by state companies or investors with close ties to governments.[93] The EESC considered that there are FDI concerns "*with regard to more countries than just China*", pointing out that Russia's investments in the energy sector are raising concerns as well due to potential dependencies in this strategic sector.[94] The EESC considered the calls for instruments to protect security, industrial policy and reciprocity, noting that the Commission decided to limit the proposal to security and public order "*so as to reach a minimum level of agreement between the Member States*."[95] However, the EESC warned that "*The definition of 'security' and 'public order' alone are not clear enough to avoid problems and differing interpretations*".[96]

To the contrary, the European Parliament's Committee on International Trade considered the lack of definition of security and public order as positive. According to the report on the proposal, prepared by rapporteur MEP Franck Proust, it was difficult to define the key concepts under the FDI Screening Regulation in a way that left leeway for a flexible adaption to different situations.[97] Therefore, the Committee considered it unwise to define concepts such as security and public order, sensitive and/or strategic or the link between the foreign investment and security and public order by means of precise definitions, "*because this would mean that the mechanism would no longer be viable on a case-by-case basis and be subject to too many constraints*."[98] With respect to state investments, the Committee on International Trade considered that not only state control is relevant, but that the decision-making should also take into account "*the context and the conditions under which the investment is taking or has taken place, including the level of openness of the sector in the country of origin of the foreign investment*."[99] The FDI Screening Regulation was adopted on 19 March 2019, 14 months after the introduction of the proposal, and just a single reading by the European Parliament and Council.

In the same month as the adoption of the FDI Screening Regulation, the Commission issued its *EU-China – A strategic outlook*, in which China was qualified as a key global actor and leading technological power. In different policy areas, the

[92] European Economic and Social Committee (2017), para 2.2.
[93] Ibid, para. 2.11.
[94] Ibid, para. 2.31.
[95] Ibid, para 2.7.
[96] Ibid, para 2.7.
[97] European Parliament (2018), p. 49.
[98] Ibid.
[99] Ibid, p. 50.

Commission considered that China should be qualified as "*[1] a cooperation partner with whom the EU has closely aligned objectives, [2] a negotiating partner with whom the EU needs to find a balance of interests, [3] an economic competitor in the pursuit of technological leadership, and [4] a systemic rival promoting alternative models of governance*."[100] With respect to technological leadership, the Commission warned of "*China's increasing military capabilities coupled with its comprehensive vision and ambition to have the technologically most advanced armed forces by 2050 present security issues for the EU, already in the short to mid-term perspective*."[101] The *EU-China strategic outlook* specifically called for the detection and raised awareness of security risks posed by Chinese investments in critical assets, technologies and infrastructure, and the swift, full and effective implementation of the EU FDI Screening Regulation.[102]

5 The Quest for Strategic Autonomy

Following the adoption of the FDI Screening Regulation, the discourse on the objective of investment screening started to shift towards the achievement of European strategic autonomy, or open strategic autonomy, and economic security. For instance, Vice-President Valdis Dombrovskis stated that "*If we want to achieve an open strategic autonomy, having an efficient EU-wide investment screening cooperation is essential. We are now well equipped for that*."[103] Particular attention was given to the importance of "*mastery and ownership of key technologies*".[104]

The discussions on European strategic autonomy notably developed after calls for European autonomy in security and defence during the presidency of Donald Trump.[105] Already early into his presidency, the European External Action Service (EEAS) identified that "*[a] sustainable, innovative and competitive European defence industry is essential for Europe's strategic autonomy and for a credible [Common Security and Defence Policy]*."[106] The concept of strategic autonomy has since developed far beyond the scope of defence.

[100] Numbering added for clarity. Commission and High Representative (2019), p. 1.

[101] Ibid, p. 4.

[102] Ibid, p. 10.

[103] See, for instance, Commission (2020a); Commission (Undated).

[104] See, for instance, von der Leyen (2019).

[105] Borrell (2020a); Damen (2022). A report by ECFR in 2019 found that the relationship with the US played the most important role in the European debate on strategic autonomy. Franke and Varma (2019). See also Helwig (2022). The EU's focus on strategic autonomy was therefore welcomed by President Xi Jinping and Chinese Europe experts, who tended to characterise the objective as preventing the *"state of total dependence on the United States"*, Stec (2021). The concept of strategic autonomy is traced back to the wars in Libya and Syria in 2023 in Hoffmeister (2023), p.668.

[106] EEAS (2016), p. 47.

The concept of Strategic Autonomy notably plays a central role in the Commission's *New Industrial Strategy for Europe*, which was published in March 2020. Strategic autonomy was defined in the *New Industrial Strategy* as being "*about reducing dependence on others for things we need the most: critical materials and technologies, food, infrastructure, security and other strategic areas. They also provide Europe's industry with an opportunity to develop its own markets, products and services which boost competitiveness*."[107] Under the *New Industrial Strategy*, various policy objectives were subsumed under the objective of "*industrial and strategic autonomy*", including Europe's digital transformation, security and future technological sovereignty, the development of key enabling technologies, the defence and space sectors, the transition of European industry to climate-neutrality, recycling and use of secondary raw materials, sourcing of raw materials, and access to medical products and pharmaceuticals.[108]

Since adoption of the *New Industrial Strategy*, the concept of "strategic autonomy" started to feature in various Commission initiatives and speeches, such as "*Europe's moment: Repair and Prepare for the Next Generation*"[109] and the "*Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*."[110] In May 2021, the Commission updated the *New Industrial Strategy* by issuing an additional report on *Strategic dependencies and capacities*, which provides a detailed analysis of the EU's possible strategic dependencies and measures to reduce these dependencies.[111] In this update, the Commission also made the link with the importance of "*the ability of the EU to remain at the edge of innovation and transformation towards an increasingly green and digital economy and society*" as important for the "*functioning of the EU economy and the welfare of its citizens*" and notably relates it to critical inputs needed to support the digital and green transition and key enabling technologies.[112] The concept of strategic autonomy is thus used as a wide umbrella term for various industrial political interests with direct or indirect connections to security, including being "*at the edge of innovation",* the green and digital transformations, and welfare of European citizens.

Under the *New Industrial Strategy*, the FDI Screening Regulation plays a pivotal role, with the Commission announcing that it will "*make proposals to further strengthen this tool*."[113] The relationship between the *New Industrial Strategy* and

[107] Commission (2020b), p. 13.

[108] Ibid, pp. 13–14.

[109] Commission (2020c).

[110] Commission (2021b). See also speeches by former Commissioner Hogan and Vice-President Dombrovskis. Hogan (2020a); Dombrovskis (2020).

[111] Strategic dependencies are defined as "*dependencies that are considered of critical importance to the EU and its Member States' strategic interests such as security, safety, health and the green and digital transformation.*" (Commission 2021c).

[112] Commission (2021c), p. 10.

[113] Commission (2020b), p. 13.

the FDI Screening Regulation was also made by Vice-President Valdis Dombrovskis in response to questions by MEPs Silvio Berlusconi and Antonio Tajani (also known for the abovementioned Barnier-Tajani proposal) on "*Chinese capital penetrating Italy's and Europe's economic fabric*."[114] After pointing out the importance that all Member States should adopt investment screening mechanisms, Vice-President Valdis Dombrovskis points to the objective of the *New Industrial Strategy* "*to help EU industry lead the green and digital transformations and driving global competitiveness and open strategic autonomy*."[115]

The calls for strategic autonomy were amplified as lockdowns were implemented across the continent in response to Covid-19.[116] Following the outbreak of the global pandemic, the Commission issued a Guidance to the Member States on the application of the FDI Screening Regulation in the context of the Covid-19 emergency.[117] The Covid-19 crisis triggered two main concerns. Firstly, the concern that healthcare capacities and related industries would be purchased by foreign investors, hampering the EU's capacity to cover the health needs of its citizens. Secondly, the Commission was concerned that the "*volatility and undervaluation of European stock market*" would undermine the EU's broader strategic capacities, due to a sell-off of critical infrastructure or technologies.[118] The Guidance provides that the EU rules "*provide a framework to the protection of legitimate policy objectives*." The call to take measures to protect strategic assets and technologies that could "*threaten public policy objectives*" was welcomed by the European Council, which noted that "*[t]his will contribute to the EU's strategic autonomy, during the crisis and afterwards*."[119] The Guidance essentially called on the Member States to adopt a broad interpretation of security and public order when reviewing investments in the healthcare sector, taking into account broader strategic capabilities, volatility and undervaluation of stock markets, strategic autonomy and "*legitimate policy objectives*" in general.

In the update to the *New Industrial Strategy*, the Commission identified that of the 137 products on which the EU is highly dependent on foreign sources, Chinese imports represent 52% in terms of value of imports.[120] In the area of technologies, the Commission identified that the EU is lagging behind both China and the United States in a number of technological areas, in particular in AI, big data, robotics, and semiconductors.[121] The *New Industrial Strategy* also warns that the EU's R&D efforts in the digital ecosystem lag behind those in the United States and China,

[114] European Parliament (2020).

[115] See, for instance, European Parliament (2021a).

[116] See also Riela and Zámborský (2021).

[117] Commission (2020d).

[118] Commission (2020d); Hogan (2020b).

[119] European Council (2020). This reference to strategic autonomy was repeated by Hogan (2020b).

[120] Commission (2021c).

[121] The EU, however, is leading in the area of advanced manufacturing technologies, the internet of things and IT for mobility. Commission (2021c), p. 32.

providing indications for potential (future) dependencies. The link between strategic autonomy and China was also made in the *New EU-China Strategy* by the European Parliament, which designates the "*Fostering of open strategic autonomy, including in trade and investment relations*" as one of the six pillars of the strategy.[122]

In addition to strategic autonomy, de-risking and economic security are key terms in official discourse relating to investment screening. The concept of de-risking played a central role in President Von der Leyen's speech on EU-China relations of March 2023.[123] In an apparent response on increasing discourse on the decoupling of China and the US (or the West in general), the President underlined that it is neither viable nor in the EU's interest to decouple from China. Rather, the EU should focus on de-risking. The President considered that most trade remained "un-risky", but that there are some areas where trade and investment pose risks to "*our economic and national security, particularly in the context of China's explicit fusion of its military and commercial sectors."*[124] In her speech, the President stressed that this is true in particular for sensitive technologies, dual use goods or investments which come with forced technology or knowledge transfers. The President considered FDI screening mechanisms, as well as a new instrument for outbound investment screening as key tools in the context of this "economic de-risking strategy".[125] Another pillar of this strategy, as will be discussed in further detail bellow, is alignment with other partners, noting that "*On issues that concern our economic security, we have much in common with our partners around the world. This is especially true of our G7 and G20 partners and those in the region and beyond who are often more integrated with China and more advanced in their thinking on de-risking".*[126]

The FDI screening, and a proposed new instrument for outward investment screening, were also considered as a key tool in the EU's first Economic Security Strategy.[127] The Economic Security Strategy, amongst others, defines four (non-exhaustive) types of categories of risks to economic security, namely risks related to: (1) resilience of supply chains; (2) physical and cyber security of critical infrastructure; (3) technology security and technology leakage; and (4) weaponization of economic dependencies or economic coercion.[128] Examples of such risks in the third category notably include: risk to the "*EU's technological advancements, technological competitiveness, and access to leading-edge technology*", referring that "*in some cases"* technology leakage risks strengthening the military or

[122] European Parliament (2021b), art. 1(b)(5) and 41.

[123] von der Leyen (2023).

[124] von der Leyen (2023).

[125] Other tools in the toolbox are measures on 5G, the Foreign Subsidies Regulation and a new instrument to deter economic coercion. In addition, other 'pillars' of the economic de-risking strategy are making the economy and industry more competitive and resilient.

[126] von der Leyen (2023).

[127] Commission and High Representative (2023a), p. 2.

[128] Commission and High Representative (2023a), p. 4–5.

intelligence capabilities of those that could use them to undermine peace and security, implying that these type of risks are not necessarily limited to dual use and military technologies.[129] In announcing the new strategy, Executive Vice-President Vestager noted that "*In today's fierce competition for the technologies we need the most, Europe needs to have an active role to shape the course of events. Today's proposal sets out our plan to de-risk – rather than decouple – our economic interdependencies. And to assert our position as a leader in the global technology race."*[130]

The Economic Security Strategy notably does not specifically refer to China. The absence is notable given the specific reference to other jurisdictions. The strategy notably refers to Russia's war of aggression against Ukraine heightening risks to national security, to the intensive cooperation on economic security with various partners, including the US, India and Japan.[131] In the accompanying speech, however, Executive Vice-President Vestager references the abovementioned EU-China relations speech, referring to the "*technology security and technology leakage*" concerns relating to China. At the same time, according to the High Representative and Vice President Borrell "*It is not about China"*, though in the sense that "*we do not want to limit the development or prosperity of other countries, but we must be equipped to protect our economic security and our interests from the actions of some other countries.*"[132]

The focus on the protection of European strategic autonomy and economic security, including interests such as technological advancements, technological competitiveness and technologies leadership as objectives of investment screening raises the question of to what extent the EU can or should be autonomous from the outside world, and to what extent investments or cooperation in technology should be restricted or prohibited in order to protect technological leadership. These policy objectives are not specified, which results in a risk of inconsistent and disproportionate restrictions of investments. The elevation of industrial policy interests, such as strategic autonomy and technological advancements, competitiveness, and leadership, to (economic) security interests is also inconsistent with the Commission Staff Working Document accompanying the Proposal for the EU FDI Screening Regulation, which provided that security interests are separate from "*industrial policy*" and the "*EU's technological edge*".[133]

National decision practice indicates that Chinese investments in technologically sensitive areas have been at the forefront of the attention of investment screening authorities. Most transactions are not made public for confidentiality reasons or

[129] Commission and High Representative (2023a), p. 4−5.

[130] Commission and High Representative (2023b).

[131] Commission and High Representative (2023a), p. 1 and p. 12.

[132] Commission and High Representative (2023b).

[133] As noted above, the Commission explicitly referred to the importance of "*the ability of the EU to remain at the edge of innovation and transformation towards an increasingly green and digital economy and society"* Commission (2021c), p. 10.

because the Member States are eager to project openness to foreign investments.[134] Insofar as it is known, all publicly reported blocking decisions issued by the German and Italian governments related to Chinese investments in technologically sensitive sectors,[135] including in the automotive,[136] drone,[137] machinery,[138] robotics,[139] satellite and radio communication,[140] seeds,[141] and semiconductor sectors.[142]

In contrast, restrictions of US investments are exceedingly rare, at least based on public information. The United States is the largest foreign investor in the EU, with US investors accounting for 40% of the investments notified to the Commission under the EU FDI Screening Regulation in 2021.[143] Nevertheless, other than the French decision of December 2020 and May 2023 to block the proposed acquisitions of Photonis by US-based Teledyne and of Segault by US-based Flowserve, the author is not aware of any other recent publicly known cases of prohibitions of US transactions.[144] Photonis is active in the area of optronic technologies and supplier of night vision goggles to the French army and lasers used for nuclear weapon test simulations. According to the press release, the decision was "*motivated by the strong desire of the French government to protect and guarantee the French economic and industrial defence sovereignty.*"[145] Segault is active in the area of

[134] See also Kratz et al. (2021); Kratz et al. (2022).

[135] Kratz et al. (2021, 2022).

[136] The Italian and French governments opposed the proposed acquisition of Iveco by FAW Group. The German government opposed the proposed acquisition of Schmiedetechnik Plettenberg, Werkzeugtechnik Plettenberg, VVP Vermögensverwaltung Plettenberg by Zhejiang Shanghuan Transmission Machinery.

[137] The Italian government issued an *ex post* blocking decision of the acquisition of the Italian drone company Alpi Aviation by CRRC.

[138] The German government opposed the acquisition of Leifeld by Yantai.

[139] The Italian government blocked a technology transfer agreement between Italian based ROBOX and Effort Intelligent Equipment.

[140] The German government opposed to the proposed acquisition of satellite communication radar and radio technology ISMT by China Aerospace Science and Industry Corporation. The Ministry of Economic Affairs and Energy said that the transaction would endanger Germany's technological sovereignty.

[141] The Italian government blocked the proposed acquisition of the global seed producer Verisem by Syngenta (owned by the SOE ChemChina).

[142] The Italian government blocked the proposed acquisition of the Italian semiconductor company LPE by Shenzhen Investment Holdings, and blocked the proposed creation of a joint venture between Applied Materials and Zhejiang Jinsheng Mechenical relating to an Italian screen printing business. The German government reportedly blocked the proposed acquisition of PPM Pure Metals by Chinese Vital Material, blocked the proposed acquisition of Elmos Semiconductor by Silex Microsystems (owned by Chinese SAI MicroElectronics), and blocked the acquisition of ERS Electronic by an unknown Chinese company.

[143] Commission (2022a), p. 18.

[144] The French (pre-emptive) opposition to rumors of an attempted acquisition of Danone by Pepsi in 2005 is another, somewhat dated, example. See also Zhang (2014), p. 410.

[145] Ministère Des Armées (2020).

valves in the nuclear and petrochemical fields, including those used in the nuclear boiler rooms on board of all French nuclear submarines and the Charles de Gaulle aircraft carrier.[146] The decisions signals that US investors are not necessarily entirely in the clear either.[147]

The significant drop in Chinese investments in the EU since the adoption of the EU FDI Screening Regulation, especially investments by Chinese state-owned enterprises, can likely be at least partially contributed to the intensified scrutiny of Chinese investments. From October 2020 to 2021, the first year of operation of the EU FDI Screening Regulation, Chinese investments represented 8% of the notifications. At this time, Chinese investments had already dropped by 63% following the outbreak of the Covid-19 pandemic. The Commission notes that the drop in Chinese investments already started prior to the lockdown in Wuhan, which indicates that the fall in investments following the global pandemic cannot be solely attributed the strict Covid-19 policies in China.[148] Chinese investments continued to fall, and amounted just 4% of notified transactions under the cooperation mechanism in the second year of the Regulation's operation.[149] According to the Commission, Chinese investments failed to take off due to strict capital controls and the concentration of investment activities in core industry sectors.[150] The drop in investments lead Rhodium Group and MERICS to conclude that the "*era of massive Chinese investment in Europe seems over for now.*"[151]

6 Transatlantic Cooperation and the Russian Invasion

As Chinese investments have been placed under scrutiny, the EU simultaneously reached out to the United States to intensify cooperation in the area of trade and technology. In 2020, shortly after adoption of the EU FDI Screening Regulation and still during the Trump Presidency, former Commissioner for Trade Phil Hogan travelled to Washington to stress the EU's keenness to "*intensify our cooperation on technology, covering areas such as semiconductors, artificial intelligence, additive manufacturing and quantum technology. This cooperation will be massively important for our economies and our security*."[152] According to the Commissioner, the EU had followed the United States' example with the introduction of the FDI Screening Regulation. Stressing the importance of "*our trusted transatlantic trading*

[146] Sénat (2023); Bezat (2023).

[147] Bernard (2020).

[148] Commission (2021d), p. 5.

[149] Commission (2021d); Commission (2022a).

[150] Commission (2022a), p. 4.

[151] Kratz et al. (2022), p. 16.

[152] Hogan (2020c). Similarly, Phil Hogan noted in another speech that "*few challenges [are] more complex than China.*" Hogan (2020d).

and investment space", the Commissioner called for "*discussions on a possible agreement to "whitelist" each other when it comes to investment and export controls*" and even noted that "*[n]o other market is as free and open for US businesses as the EU. Where else are you as welcome?*"[153] On the other hand, the Commissioner warned of "*global struggle for technological supremacy*", "*[t]he rise of China*" and the distortion of markets and investment flows by China.[154] Similarly, President Ursula von der Leyen announced in her 2020 State of the Union address (also still during the Trump presidency) that the EU was ready to build a new transatlantic agenda on trade, technology and taxation.[155] Later that year, just one month after the election of President Joe Biden, the Commission and the High Representative put forward a proposal for a new transatlantic agenda, including the creation of a new EU-US Trade and Technology Council (TCC).[156]

In June 2021, President Ursula von der Leyen and President Joe Biden launched the TCC, thereby consolidating EU-US cooperation in investment screening.[157] The main goals of the TCC involve the deepening of bilateral trade and investment, cooperation on key policies on technologies, digital issues and supply chains, support of collaborative research, cooperation on the development of compatible and international standards, cooperation on regulatory policy, and the promotion of innovation and leadership by EU and US firms.[158] Unsurprisingly, one of the working groups established under the TCC is tasked with investment screening, including exchanging information on investment trends impacting security, on best practices with respect to areas such as risk analysis and systems for risks-mitigation measures, and with a focus on sensitive technologies and related sensitive data.[159] In the Pittsburg Joint Inaugural Statement, the EU and United States refer to "*common challenges*" in addressing risks related to foreign investments, which should be mitigated through investment screening mechanisms.[160] At the same time, the Joint Inaugural Statement takes note of the four trillion euros/dollars in investments linking both sides of the Atlantic, which illustrates the "*strength of the transatlantic partnership*".[161] The statement also provides that "*investment screening regimes should be guided by the principles of non-discrimination, transparency, predictability, proportionality, and accountability, as set forth in relevant OECD guidelines*."[162] The Commission's Economic Security Strategy and the European Parliament's *New EU-China Strategy* confirms the special position of the United

[153] Hogan (2020c).
[154] Hogan (2020c).
[155] von der Leyen (2020).
[156] Commission (2020e).
[157] Commission (2021e).
[158] Commission (2021e).
[159] Commission (2021e); Commission (2021f).
[160] Commission (2021f).
[161] Ibid.
[162] Ibid.

States with respect to strategic autonomy, noting that the EU should foster its strategic autonomy and capacity "*working together with the US and other like-minded partners*".[163]

Following Russia's military aggression against Ukraine, attention shifted to Russian investments as a specific threat, with the Commission adopting a specific Guidance calling on Member States to systematically use their screening mechanisms to assess and prevent the threats related to Russian and Belarussian investments on grounds of security and public order, to ensure compliance with EU sanctions and to prevent money laundering.[164] The Commission considered that in "*current circumstances, there is a significantly heightened risk that FDI by Russian and Belarusian investors may pose a threat to security and public order*."[165] While the Commission is not very precise, it considered that the governments of Russia and Belarus have a "*strong incentive to interfere with critical activities in the EU*", in particular via investors that are associated with, controlled by, or subject to influence by these two governments.[166] In the Commission's work plan for 2023, the Commission notes that Russia's war of aggression against Ukraine has highlighted the "*need to develop a strong set of strategic trade and investment to strengthen our economic security, while also working to diversify value chains.*"[167] In addition to strengthening strategic export controls, the Commission will examine whether additional tools are necessary in respect of "*outbound strategic investment controls."*[168] The overall impact on inbound investments into the EU is likely to be limited, given that Russian investments in 2021 accounted for less than 1.5% of the cases notified to the Commission under the EU FDI Screening Regulation cooperation mechanism.[169]

The invasion gave a push to transatlantic cooperation, with EU and US leaders meeting in Paris to strongly condemn Russia and reiterate the central role of the TCC for the renewed transatlantic partnership and the importance of investment screening.[170] In the Joint Declaration, the EU and the United States declared each other as "*trustworthy and reliable trade, technology, and investment partners as well as security partners*" stressing "*shared interests and values*". The Joint Declaration contains particularly strong wording against not only Russia, but "*autocratic countries*" in general, and broadens concerns regarding technologies beyond security to a

[163] Quote from European Parliament (2021b), par. 62. See also Commission and High Representative (2023a), p.12.
[164] Commission (2022b).
[165] Ibid, p. 2.
[166] Ibid, p. 2.
[167] Commission (2022d), p. 7.
[168] Ibid, p. 8.
[169] Commission (2022a).
[170] Commission (2022c).

wide range of interests, such as protecting the transatlantic joint technology leadership, democratic values, and human rights.[171] In particular, the Joint Statement provides that:

> We are acutely aware that trade in technologies can be pivotal to the ability of autocratic countries to implement authoritarian policies, perpetrate human rights violations and abuses, engage in other forms of repression, and undermine the security of other nations. We share a desire for cooperation through coordinated actions using our export control and investment screening tools in defense of our security. We are committed to deeply enhancing our cooperation and to supporting information exchange on dual-use technologies and export controls. The work of the TTC has already proven foundational in developing common approaches in response to Russia's aggression against Ukraine, including by facilitating an unprecedented level of cooperation on export controls.[172]

The Paris Joint Statement is the outcome of a gradual shift in discourse surrounding the risks relating to FDI following the adoption of the EU FDI Screening Regulation. Within a short period of time, official European discourse on the objectives of investment screening has shifted from the securitisation of investments by Chinese SOEs towards the protection of strategic autonomy, and with the adoption of the TCC, the EU has entered into a close alliance with the United States.

7 Reflections and Conclusion

Concerns regarding China have played a central role in the adoption and development of the framework for FDI screening in the EU. The precise concerns have shifted over time. Initially, concerns regarding Chinese investments, notably by Chinese SOEs, were predominantly discussed in economic terms. Common concerns related to the lack of reciprocal market access of European businesses in China, market disturbances due to subsidisations or non-compliance with market rules, and the concern that Chinese investors would transfer the know-how to China and close-down of European businesses.

Following the introduction of the EU FDI Screening Regulation, the official discourse regarding Chinese investments shifted from economic concerns to the (economic) security threat posed by China. The precise security threat posed by Chinese investments was, however, left largely unspecified. One prominent concern related to the links between Chinese investments and the Chinese state. However,

[171] TCC (2022), paras. 5–17.

[172] Similarly, in the press release Executive Vice-President Margarethe Vestager noted: "*Russia's war of aggression against Ukraine has further underlined the key importance of our cooperation with the US on economic and technology issues. This cooperation goes beyond our reaction to the war. Together with our transatlantic partners, we can create a positive vision for our economies and for a democratic governance of the internet based on the dignity and integrity of the individual. When we act together, we can set the standards of tomorrow's economy. We are joining forces and when two such determined partners take the lead, we can enable the tides to turn*." TCC (2022), par.15; Commission (2022c).

even though government ownership or control over an investment warrants additional scrutiny, the specific security threats arising from investments by Chinese SOEs are left unspecified. For instance, former Commissioner Malmström warned of (Chinese) state-owned enterprises "*openly*" using investments to acquire "*technologies, infrastructure and information*". However, the acquisition of technologies, infrastructure and/or information is an inherent feature of FDI that is not specific to Chinese investments, nor does an acquisition of technology, infrastructure or information necessarily result in a threat to security. The securitisation of the discourse on Chinese investments transformed industrial political questions relating to unequal market access and reciprocity and the importance of ownership or exclusivity over innovative companies into the far more pressing and worrying issue of Chinese investments posing an existential threat to Europe's security. The absence of a definition of security and public order was even explicitly viewed as a positive legislative choice in the report of the Committee on International Trade of the European Parliament, as vague criteria ensure that investment screenings would not be subject to too many constraints. Consequently, there is a lack of meaningful indications in either the law or the legislative history of the aims and objectives of the EU FDI Screening Regulation and the threats it seeks to prevent.

Following the adoption of the FDI Screening Regulation, the discourse on the objective of investment screening started to shift towards the achievement of European strategic autonomy, notably from China. Under the *New Industrial Strategy* and *Economic Security Strategy*, investment screening plays a pivotal role in ensuring strategic autonomy and economic security. In the area of key technologies, investment screening, amongst others, aims at ensuring that the EU has the critical inputs and key technologies necessary to be "*at the edge of innovation and transformation towards an increasingly green and digital economy and society*" which are important for the "*functioning of the EU economy and the welfare of its citizens*".[173] Furthermore, in the Economic Security Strategy, interests such as the EU's technological advancement, technological competitiveness, access to leading-edge technology and availability of the inputs linked to the green transition have been designated as economic security interests.[174] The concept of strategic autonomy and economic security are thus used as wide umbrella terms for various industrial political interests. Investment screening should be seen in the context of the broader, multifaceted "strategic autonomy" and "economic security" agenda.[175]

The shift from security to "strategic autonomy" and "economic security" is difficult to reconcile with the view of the Commission at the time of the proposal that security considerations are separate from "*industrial policy*" and the "*EU's technological edge*", and the Commission's earlier warnings against an overexpansive reading of security. The shift of official discourse implies that industrial policy considerations and the protection of the EU's technological edge,

[173] Commission (2021c), p. 10.

[174] Commission (2021c), p. 10.

[175] See also Helwig and Sinkkonen (2022), p. 19.

competitiveness and advancements will likely start to play a central role in security screenings. The subsumption of industrial political objectives as security considerations was perhaps a foreseeable expansion of the scope of the traditional concept of security to economic security objectives.[176] However, a broad use of the term strategic autonomy "*risks unmooring the EU from its collaborative and compromise-oriented essence because it depicts the world outside the EU as a swamp where danger lurks behind every tree*."[177] This risk disproportionately affects investments by non-Western investors.

It is clear from the discourse and publicly known practice that the FDI Screening Regulation has notably affected Chinese investments in sensitive sectors. The Russia's military aggression against Ukraine resulted in specific attention to Russia, with the Commission adopting a specific Guidance calling on Member States to systematically use their screening mechanisms to assess and prevent the threats related to Russian and Belarussian investments. However, given that Russian investments accounted for less than 1.5% of the cases notified to the Commission under the EU FDI Screening Regulation cooperation mechanism, and in light of the wide range of sanctions in place, Russian investments will likely continue to play a relatively minor role in the area of investment screening.[178] At the same time, the 'wake-up' call of undesirable dependency on Russian oil and gas may trigger additional scrutiny of investments in critical infrastructures in general. China's response to the Russian invasion of Ukraine, which is ambivalent at best and may be interpreted as *de facto* (lukewarm) support of Russia, could also increase skepticism towards Chinese ownership over critical European companies.[179] The decision to maintain the "no-limits friendship" between Russia and China following Russia's invasion of Ukraine was specifically considered in President Von der Leyen's EU-China relations speech, noting that "*How China continues to interact with Putin's war will be a determining factor for EU-China relations going forward*."[180]

As Chinese and Russian investments have been put under the spotlight, the EU has at the same time pursued cooperation with the United States on investment screening. During the parliamentary debate, the Chairman of CFIUS was invited to speak at the presentation of the EU FDI Screening Regulation by former Commissioner Cecilia Malmström, and US intelligence reportedly played an important role in the assessment of Chinese investments in Kuka and Aixtron. Even though the EU FDI Screening Regulation would bring a vast number of US investments under scrutiny, CFIUS considered that the adoption of the EU FDI Screening Regulation

[176] See de Kok (2019), p. 43. For a warning or critique against the expansion of 'security' to include 'economic security' considerations see also Nicolas (2014), p. 120; Editorial Comments (2018), p. 8; Snell (2019), p. 138; Bickenbach and Liu (2018), p. 18, Nettesheim (2020).

[177] van Veen and Langenberg (2022).

[178] Commission (2022a), p. 18.

[179] See in similar terms Kratz et al. (2022), p. 17.

[180] von der Leyen (2023).

would "*reinforce the deep and open economic relationship, as well as the strong security relationship that we have with you*".[181] Following the adoption of the EU FDI Screening Regulation, the EU and the United States intensified cooperation on trade and technology. Under the TCC, the EU and the United States cooperate on various key policies relating to technologies, digital issues and supply chains, support of collaborative research, international standards, regulatory policy and innovation and leadership by EU and US firms. In the recent Paris Joint Declaration, the EU and the United States declared each other to be "*trustworthy and reliable trade, technology, and investment partners as well as security partners*" stressing "*shared interests and values*".

The close cooperation with the United States on investment screening is hard to reconcile with the FDI Screening Regulation's purported objective of European strategic autonomy and economic security (which include interests such as the EU's technological competitiveness and advancement, or measures targeting the EU, its Member States and EU businesses through measures affecting trade or investments). The debate on European strategic autonomy after all developed following the presidency of Donald Trump, which illustrated that the United States may not always be a reliable security or trade partner. The privileged status of US investments in the context of the TCC, whereby US investments are *de facto* whitelisted, is also hard to reconcile with the principle of non-discrimination enshrined in Article 3(2) of the FDI Screening Regulation.[182] Evidently, the context of Chinese and Russian FDI differs from US investments in many ways and security cooperation with the United States in the context of NATO is clearly a relevant factor. After all, investments originating from a security ally are less likely to result in a threat to security or public policy. However, US investments may equally give rise to or exacerbate undesirable strategic dependencies that may result in a threat to security, at least as apparently perceived by the Commission.[183] For instance, the Commission's warning of increased risks of acquisitions of essential healthcare capacities and related (research) industries in its Covid-19 Guidance followed within days after reports that the Trump administration attempted to move the German coronavirus vaccine developer, CureVac, to the United States in order to get exclusive access to the vaccine.[184] Similarly, in *New Industrial Strategy*, the Commission identified various existing and growing strategic dependencies on American technologies. In this respect it is relevant that various US technological companies at

[181] Committee on International Trade (2018), at 14:54:10.

[182] This provision provides that "*Rules and procedures related to screening mechanisms, including relevant timeframes, shall be transparent and not discriminate between third countries*." The principle of non-discrimination is also referred to in recital 15.

[183] See also Nettesheim (2020), p. 16. Martin Nettesheim argues: "*For the sake of a coherent argument, concerns about the abandonment of high technology and fears of "falling behind" would also have to be expressed to investors from other Western countries in these sectors."*

[184] Commission (2020d), p. 1. This report also instantly prompted the Commission to offer up to EUR 80 million in financial support to CureVac. Commission (2020f); Reuters Staff (2020).

the edge of innovation enjoy significant government funding provided in the context of US industrial policy, a relevant factor under investment screening regulations.[185] In particular, the White House has authorised around USD 250 billion in funding for advanced technology research under the US Innovation and Competition Act, aiming to make American "*supply chains stronger and reinvigorate the innovation engine of our economy to outcompete China and the rest of the world for decades to come*."[186] Furthermore, around USD 370 billion in investments is made available under the Inflation Reduction Act to make sure that the United States "*remains the global leader in clean energy technology, manufacturing and innovation.*"[187] A non-discriminatory application of the EU FDI Screening Regulation (assuming a broad interpretation of security and public order) should therefore equally entail a development towards greater European "strategic autonomy" or "economic security" vis-à-vis the United States.[188]

The intensification of transatlantic cooperation on investment screening risks dragging the EU into the increasingly hostile US-China rivalry. Spurred on by concerns that China is "*the only country with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military and technological power to do so",* China has been designated by the Biden administration as "*the most serious long-term challenge to the international order.*"[189] The recent break by President Biden of the principle of strategic ambiguity, vowing that the United States would intervene militarily to defend Taiwan, which President Xi has vowed to "reunite" with China, even points to the no longer purely hypothetical possibility of this great power rivalry spilling over into military conflict.[190] The alignment between the United States and EU on FDI screening forms part of one the three pillars of the Biden's administration on China, summed up as "*invest, align, compete"*.[191] For instance, in an interview with CNBC just prior to the Pittsburg inaugural meeting of the TCC, US Secretary of Commerce Gina Raimondo said "*If we really want to slow down China's rate of innovation, we need to work with Europe.*"[192] The way in which the TCC forms part of a broader US coalition on China is illustrated in a recent speech setting out the US administration's approach to China by US Secretary of State Blinken. In this speech, Blinken listed the US-EU

[185] For instance, under the EU FDI Screening Regulation, art. 4(2)(a), significant funding may point to direct or indirect government control, and recital 23 provides that information about subsidies granted is relevant information for the assessment.

[186] The White House (2022). Similarly, see The White House (2020), which provides that the United States also has the objective "*to ensure that the United States continues to lead in innovation and setting standards."*

[187] The White House (2023).

[188] Commission (2021c), p. 10.

[189] Blinken (2022). See also Sinkkonen and Martin (2022).

[190] Garcia and Tian (2021); Boak et al. (2022); G7 Foreign Ministers (2022); Spokesperson of the Chinese Mission to the EU (2022).

[191] Blinken (2022).

[192] Macia and Tausche (2021).

TCC together with the security, economic and technology alliance with South Korea and Japan, the launch of the Indo-Pacific Economic Framework for Prosperity,[193] the alliance with the Quad countries (Australia, Japan, India the United States), the US partnership with ASEAN, and the security partnership between Australia, the UK and the United States known as AUKUS.[194] The EU must be vigilant that the TCC does not become a tool for US foreign policy vis-à-vis China.[195] In line with EU policy, Chinese investments should not just be viewed only through the lens of systematic competition, but also in the context of China as "*a cooperation partner with whom the EU has closely aligned objectives*" and "*a negotiating partner with whom the EU needs to find a balance of interests*".[196] In the EU-China relations speech, President Von der Leyen for instance specifically considered climate change and nature protection as important "islands of opportunity" on which the EU and China can work together productively "in the global system of the future".[197]

The recent TCC Paris Joint Statement is exemplary of the way in which discourse on investments is shifting away from a traditional confines of the security or public order exceptions. The Paris Joint Statement places the transatlantic cooperation in trade and technology in a broader context of protecting the transatlantic joint technological leadership, democratic values, and human rights, placing these values in contrast to the authoritarian policies, human right violations and abuses and other forms of repression by "*autocratic countries*". This focus on democratic values, human rights, repression and authoritarianism moves the discourse beyond security threats, strategic autonomy or technological leadership, and places investment screening in a broader actual or perceived conflict between democracies and autocracies at large. These broader considerations are, however, far removed from the question whether a specific investment poses a threat to security or public order of a Member State concerned. The incorporation of democratic values and human rights into investment screening policy furthermore does not necessarily imply a privileged position for the United States either. Democracy is clearly under pressure in the United States, where attempts by former President Trump to overturn the election results culminated in the storming of the Capital Building on the 6 January 2021. Without prejudice to the human rights record in China, the United States equally does not have a blank slate with respect to human rights violations and abuses and other forms of repression. UN working groups and rapporteurs have expressed a wide variety of concerns with respect to the human rights situation in the United States. Such concerns pertain to, amongst others, mass surveillance, racial disparities in the criminal justice system, excessive use of force by law enforcement officials,

[193] The current Member States are Australia, Brunei, Fiji, India, Indonesia, Japan, South Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, the United States and Vietnam. According to Blinken, the Economic Framework "*renews American economic leadership*".

[194] Blinken (2022).

[195] See more generally, Casarini (2022).

[196] Commission and High Representative (2019).

[197] von der Leyen (2023)

gun violence, condition of detention, the death penalty, treatment of immigrants, accountability for past human rights violations, targeted killings using drones, torture, detainment at Guantánamo Bay, prevalence of domestic violence, rights to sexual and reproductive health, LGBT rights, homelessness, voting rights and rights of indigenous peoples.[198] While the laws, regulations and policies of the home country of the investor are not irrelevant (for instance those relating to the protection of data privacy), these broad considerations are far removed from the core question of whether a certain (specific) foreign investments may pose a threat to security or public order.

The so-called "China threat" discourse from across the Atlantic, which appears to increasingly inform the EU framework for FDI screening, gives rise to the risk of disproportionate restrictions or prohibitions of Chinese investments for reasons other than genuine security and public order concerns. This risk is exacerbated by the lack of clear assessment criteria and a framework of assessment to determine which Chinese investments are beneficial, and which are not. More fundamentally, the trend towards securitisation pushes the EU ever closer towards competition, rivalry and conflict with China and hampers possible cooperation on common interests.[199] The China threat discourse may result in cooperation with Chinese partners being shunned by European governments, businesses, and universities, to avoid (deal) uncertainty and conflicts with governments and regulators, even if there is a mutual benefit and aligned objectives. The wholesale securitisation of European-Chinese relations moreover increasingly risks depicting politicians, employees, scholars, students, and citizens involved in European-Chinese economic or scientific cooperation as agents of a hostile social and economic order.[200]

At the official level, the case for a European approach—one that involves greater neutrality vis-à-vis China and the United States—has been most clearly made by Josep Borrell, High Representative of the Union for Foreign Affairs and Security Policy. His stress on the importance of the EU doing things "*in its own way*" was nicknamed as the "Sinatra Doctrine":[201] "*If the EU does not want to remain entrenched in the dispute between the US and China, it must look at the world from its own point of view and act to defend its values and interests, which do not always coincide with those of the US.*"[202] Josep Borrell warned against falling into "*the trap of seeing things in black and white*". Whilst strengthening the EU's

[198] For an overview, see, for instance, United Nations Human Rights Committee (2014); Office of the United Nations High Commissioner for Human Rights (2020); United Nations Office of the High Commissioner for Human Rights (2022).

[199] As also identified as a common interest in Commission and High Representative (2019).

[200] See also Rogelja and Tsimonis (2020).

[201] This led some commentators calling the approach the "*Sinatra doctrine",* which Josep Borrell did not mind "*as long as it makes it easier to get my message across. I could have said that Europe must increase its strategic autonomy or its sovereignty, but this would probably not have aroused as much interest."* Borrell (2020b) This article was also published on the website of the EEAS. Borrell (2020c).

[202] Borrell (2020b), p. 7. For similar calls, see Bermann (2021).

strategic sovereignty, by protecting technologies which are key in ensuring autonomy and promoting European values and interests, he highlighted the importance of continued cooperation with China to address global challenges, such as climate change, (at the time) combatting the coronavirus, regional conflicts and development in Africa.[203] In a possible attempt to desecuritise the discourse, Borrell points to the importance of "*ensuring that European companies have reciprocal access to its markets and innovation and research programmes. It is vital that we ensure a balance in our economic relationship and dispense with some of the naivety of the past*."[204] In addition, "*China subsidises its state-owned enterprises and has the largest series of trade and investment barriers*".[205] Independence from these "*two competitors/rivals*" does not equate equal distance from them: "*Our lengthy common history and shared values with the US mean that we are closer to Washington than we are to Beijing*."[206] However, the High Representative cautions that the EU must avoid arriving at the point where "*we Europeans have to choose between being a Chinese colony or an American colony*."[207]

In order to provide greater transparency and predictability in the application of the EU FDI Screening Regulation and national screening regimes, to ensure a non-discriminatory application, a broader reflection on the precise objectives of FDI screening is required. Clarity on the objective of the FDI screening regime helps to ensure that transactions are assessed on the basis of clearly defined substantive criteria. In this respect, additional public guidance would notably contribute to more transparent, accountable, non-discriminatory and fact-based screenings of investments on the basis of foreseeable criteria, resulting in decisions that are more amenable to judicial review, including a clearer interpretation of the concept such as strategic autonomy and economic security. Such guidance also helps to ensure that investment screening decisions are constrained by law, helps to avoid arbitrary exercises of executive powers and contributes to the development of a European conception of the security and public order exceptions under the Treaties and the EU FDI Screening Regulation. A clearer set of objectives also helps to shift the focus from open-ended security-based to more predictable economic screening criteria. The EU framework for investment screening should notably be developed so that it specifies the different types of risks or threats that are the object of protection under FDI screening, the criteria that may be used to assess such possible threats, the threshold for intervention, and the possibility of addressing such risks with mitigating measures.

[203] Borrell (2020b), p. 7.

[204] Ibid.

[205] Borrell (2020b), p. 8. Citing Commission (2019b), p. 7.

[206] Borrell (2020b), p. 7.

[207] Borrell (2020b), p. 9. Citing Letta (2019).

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