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CHAPTER V

Legal Remedies against Investment Screening Decisions

Jochem de Kok LLM[1]

1. Introduction

The availability of effective legal remedies against investment screening decisions is of the essence for the rule of law.[2] The recent adoption of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (FDI Screening Regulation[3]) and the adoption and strengthening of investment screening mechanisms in many Member States has created a risk that investments may face disproportionate restrictions, based on concerns that are far removed from genuine threats to security. The risk of disproportionate interventions is exacerbated by the lack of clear substantive criteria or intervention thresholds for the application of the central screening criteria: security and public policy.[4]

In practice, parties to a transaction tend to abandon the transaction when faced with a prohibition decision (or an impending veto) based on security concerns.[5] As a result, investment screening decisions generally remain unchallenged and the case law involving challenges to investment screening decisions is highly

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2 Under the Treaties and the FDI Screening Regulation, the Member States may set up investment screening mechanisms and take measures prohibiting or restricting investments on the basis of security or public policy. Art 2(4), 3(1) and 4(2) TEU and art 1 and recitals 7, 8, 17 and 19 FDI Screening Regulation (defined in footnote below).

3 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79 I/1 (FDI Screening Regulation).

4 Investment screening regimes do not tend to define the concepts of security or public order, or the level to which the threat must rise in order to justify intervention. See also Jochem de Kok, 'Investment Screening in the Netherlands' (2021) 48 Legal Issues of Economic Integration 43, 64.

5 Organisation for Economic Co-operation and Development, 'Acquisition- and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies' <https://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf> para 238.

limited.[6] Litigation is often not attractive as court procedures can take years, and may provide limited chances of success due to the large margin of discretion enjoyed by the executive in the evaluation of threats to security and the adoption of measures to mitigate such threats.[7] Furthermore, given that screening decisions are likely to involve state secrets and other confidential information, access to the case file by the investor and the target may be limited.[8] A purchaser may also be hesitant to initiate a contentious procedure against the host state of the target business that it seeks to acquire, as this could result in difficult relationships with the political establishment or regulators even prior to establishment.

Legal remedies, whether under national or European Union (EU) law, are essential to ensure that prohibitions or restrictions taken based on national security or public policy are proportionate, necessary and based on genuine security concerns. External scrutiny ensures that state conduct is subject to the rule of law, and protects the integrity of the single market and common commercial policy by preventing the divergent conceptions of security and public order.[9] Judicial review of restrictive measures on the basis of security and public policy are also important to prevent that a large number of policy objectives are rebranded as security objectives in order to escape effective scrutiny.[10]

From the perspective of the private parties, the availability of effective legal remedies is essential in order to meet contractual obligations and to have a right to damages. It is not uncommon for investors to commit to the seller to use all

[6] An OECD study on investment screening regimes of 62 economies, identified only a single challenge to the application of an investment screening decision in the entire history of the field (ibid para 108 and 323); United States Court of Appeals for the District of Columbia Circuit, No 13-5315 (15 July 2014) *Ralls Corporation v CFIUS et al* and this case was ultimately settled. As will be discussed in further detail below, case law does exist on the EU level.

[7] See case law discussed below. More generally, see European Court of Human Rights Research Division, 'National security and European case-law' <https://rm.coe.int/168067d214>; Haldor Mercado, 'Resolving National Security Questions: A Comparative Analysis of Judicial Review in the United States, Israel, and Europe' (2020) 51 Georgetown Journal of International Law 597.

[8] Organisation for Economic Co-operation and Development, 'Acquisition- and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies' <https://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf> para 320.

[9] See Thomas Verellen, 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48 Legal Issues of Economic Integration 19, 36.

[10] See also Geraldo Vidigal and Stephan W Schill, 'International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception' (2021) 49 Legal Issues of Economic Integration 109.

reasonable or possible efforts to obtain the required regulatory approvals (a so-called hell-or-high-water clause). The investor may therefore have an interest in challenging unreasonable conditions or in compensation *vis-à-vis* the state for damages resulting from conditions.[11] An investor may also be under a contractual obligation *vis-à-vis* the seller to initiate legal proceedings against a prohibition decision. Likewise, the seller may have an interest in challenging a negative screening decision if the target company has lost significant revenues or value due to a negative screening decision.[12] Initiating litigation may also put pressure on the government to consider a 'settlement', for instance by means of approving the transaction subject to certain remedies. Whilst legal challenges against investment screening decisions are the exception,[13] the commercial or contractual interests associated with the investor may therefore be sufficiently strong to merit challenging a negative screening decision.

Under the FDI Screening Regulation, investment screening decisions are taken by the Member States. Consequently, these decisions must also be challenged before a national court. Nevertheless, EU law plays a relevant role in the context of legal remedies against screening decisions because investment screening decisions constitute restrictions on the free movement of capital and/or the freedom of establishment, and because screening decisions may interact with the Commission's exclusive competence to review transactions with an EU dimension under the EU Merger Regulation (EUMR).[14] Whilst decision practice is limited, there have been several cases at EU level dealing with restrictions on investments on the grounds of security by the Member States.

[11] Furthermore, the investor may have had to pay a break fee if it needs to transaction in case of a prohibition, in which case an investor may seek to claim damages resulting from the collapse of a transaction. A damages claim may be based on national or EU law. Under EU law, a breach of EU provisions that have direct effect, in the sense that they confer on individuals' rights that they are entitled to rely on directly before national courts, may give rise to a right to reparation. However, the right is significantly limited as Member State liability for breaches of EU law requires a sufficiently serious breach, which is the case if the Member State manifestly and gravely disregards of the limits on its discretion. See Joined Cases C-46/93 and C-48/93 *Factortame III* [1996] ECR I-01029, paras 20-23; Joined Cases C-6/90 and C-9/90 *Francovich and others v Italian Republic* [1991] ECR I-05357, paras 38-46; Case C-352/98 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Groupil v Commission* [2000] ECR I-05291, paras 43-44.

[12] For instance, the appetite by other investors will be significantly limited to acquire the target company after a government has issued a negative screening decision in relation to a previous acquisition attempt. This would likely result in a lower (future) purchase price. In addition, the target company may have lost customers due to uncertainty.

[13] Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 797.

[14] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (EUMR).

The purpose of this chapter is to provide an analysis of the role of EU law in ensuring that screening decisions are subject to external scrutiny. To this end, the central research question is how the EU legal framework helps ensure that restrictions undertaken on the grounds of security and public policy are subject to effective legal review. The chapter aims to build upon the limited scholarship on the role of judicial review (or legal remedies) in the area of investment screening.[15]

This chapter is structured as follows. First, it provides an overview of the scope of judicial review under national law, considering the right to a legal remedy under EU law, and the intensity of judicial scrutiny from a comparative perspective. Second, this chapter will review the case law of the Court of Justice on the notions of public security and public order and the relevance of EU law in national procedures. A review of these procedures illustrates that the Court of Justice has consistently strictly scrutinised whether investment screening mechanisms or screening decisions targeted genuine and sufficiently serious threats to security and complied with the principle of proportionality, legal certainty and the duty to provide reasons. Third, this chapter will conclude with a consideration of (*de facto*) administrative review by the Commission under Article 21 EUMR and the infringement procedure of Article 258 TFEU. This chapter concludes that EU law plays an important role in ensuring that

[15] The only full article on this topic is of Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 797, who notes that judicial review has been a peripheral matter, including also in the various memoranda submitted during the public consultation of the EU FDI Screening Regulation. Verellen, (Thomas Verellen, 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48 Legal Issues of Economic Integration 19, 24) makes a short reference to the right to recourse included in the EU FDI Screening Regulation, noting that 'the Regulation at the very least invites investors to act as private enforcers of EU law alongside the Commission, which, in addition, has the possibility to launch infringement proceedings against Member States that fail to comply with the Regulation'. Following *Ralls v CFIUS* (United States Court of Appeals for the District of Columbia Circuit, No 13-5315 (15 July 2014) *Ralls Corporation v CFIUS et al)*, certain articles were also published on judicial review from a U.S. perspective. It is noted, however, that this perspective will by its very nature differs, not in the least because under FINSA (and still under FIRRMA), '[t]he actions of the President (...) and the findings of the President (...) shall not be subject to judicial review' and because the EU legal framework brings about additional complexity due to the complex interaction between the European Treaty freedoms and the screenings that are undertaken in principle by the Member States. For literature on *Ralls v CFIUS* see, for instance, Yang Wang, 'Incorporating the Third Branch of Government into U.S. National Security Review of Foreign Investment' (2016) 38 Houston Journal of International Law 324; Christopher M Fitzpatrick, 'Where Ralls went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security' (2016) 101 Cornell Law Review 1087; Christina E Holzer, 'Committee on Foreign Investment in the United States and Judicial Review' (2014) 13 Journal of International Business and Law 169.

restrictions undertaken on the grounds of security and public policy are subject to effective legal review.

2. Judicial review before national courts

2.1 Right to judicial review under EU law

All Member States appear to allow for judicial review of screening decisions before an independent and impartial tribunal, whether it be explicitly or by virtue of general rules on administrative law.[16] The right of 'everyone' – including private legal entities – to an effective legal remedy before an independent and impartial tribunal is ensured by various human rights instruments.[17] The right to judicial review against screening decisions nevertheless caused particular controversy during the European Parliamentary discussions on the EU FDI Screening Regulation.

Under the EU FDI Screening Regulation, the Member States are required to ensure that '[f]oreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities'.[18] The rather vague term 'recourse' is a watered-down version of the Commission's original proposal, which provided that foreign investors and the undertakings concerned shall have the right to 'seek judicial redress'.[19] The

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16 This right is implicit in various jurisdictions, such as France, Germany and the Netherlands. See Carlos Esplugues, *Foreign Investment, Strategic Assets and National Security* (Intersentia 2018); Organisation for Economic Co-operation and Development, 'Acquisition- and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies' <https://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf> para 325; Oliver J Borgers, 'Foreign investment Review USA' (*Lexology*) <https://www.lexology.com/gtdt/workareas/foreign-investment-review>.

17 In particular art 47 of the Charter on Fundamental Rights provides that: '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented'. See also arts 6 and 13 of the European Convention on Human Rights. See also Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] 3 CMLR 16, para 36; Case C-72/15 *Rosneft* [2017] 3 CMLR 23, para 73. See also Thomas Verellen, 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48 Legal Issues of Economic Integration 19 and Manon Julicher and others, 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared' (2019) 15 (1) Utrecht Law Review 1, 6.

18 Art 3(5) FDI Screening Regulation.

19 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European

Parliament and Council settled on 'recourse', in an apparent attempt to allow Member States to offer appeal before an administrative authority, rather than an independent tribunal.[20] Considering that excluding 'redress' to an independent and impartial tribunal would be a violation of Article 47 of the Charter on Fundamental Rights, a potential limitation of judicial review is highly problematic from the perspective of legal protection and the rule of law. In practice, the Member States do permit judicial review before an independent and impartial tribunal.

The EU FDI Screening Regulation does not provide legal redress against the Commission's own opinions. Under the EU FDI Screening Regulation, the Commission may issue opinions to the Member States where it considers that a Foreign Direct Investment (FDI) is likely to affect security or public order in more than one Member State, or may affect projects or programmes of Union interest.[21] Whilst the opinions are not legally binding, they do have a legal effect, as the Member State concerned must give 'due consideration' to the opinion, or in the case of projects or programmes of Union interest, 'utmost account'.[22] Given that the opinions are addressed to the Member State, and because they likely qualify as an 'opinion' within the meaning of Article 263 TFEU, an opinion by the Commission cannot be challenged before the Court of Justice.[23]

Union' COM (2017) 487 final. The term 'legal redress' is also used by the Court of Justice. See for instance, Case C-54/99 *Église de scientology* [2000] ECR I-01335, para 17. See Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 797, footnote 22.

[20] See European Parliament, 'Report on the proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union' (A8-0198/2018) and European Parliament 'Position of the European Parliament adopted at first reading on 14 February 2019 with a view to the adoption of Regulation (EU) 2019/… of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union' (EP-PE_TC1-COD(2017)0224) adopted following an agreement between the Parliament and the Council, see European Parliament, 'Texts adopted. Framework for screening of foreign direct investments into the European Union' (P8_TA(2019)0121). See also Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 797, 799.

[21] Art 6(3), 7(2) and 8(1) FDI Screening Regulation.

[22] Art 6(9), 7(7) and 8(2)(c) FDI Screening Regulation.

[23] For a concurring opinion, see Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 797, 803 and 807 and Régis Bismuth, 'Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU' in Loukas Mistelis and Nikos Lavranos (eds), *European Investment Law and Arbitration Review*, vol 3 (Brill – Nijhof 2018) 55. Case 543/79 *Birke v Commission* [1981] ECR 02669, para

Whilst qualified as mere 'opinions', the assessment by the Commission in practise carries a strong 'power of fact',[24] as a mere informal announcement that a transaction should be restricted or prohibited can often be enough for the transaction to be abandoned.[25] The Member States concerned are under a legal obligation to give consideration to the opinion, which may in turn form a crucial basis for the prohibition or restriction of an investment. The opinion can serve as both a basis for the determination of facts and the (legal) qualification of the investment as constituting a threat to security or public order. An investor may only indirectly raise arguments against the validity of the Commission's opinion, namely in the context of a challenge against the (national) investment screening decision before a national court.

2.2 Scope of judicial review under national law

The possibility of successfully challenging a screening decision before a national court will be complicated due to the degree of deference by national courts to decisions of public authorities that are based on the exercise of discretionary powers.[26] The intensity of judicial review is generally connected with the amount of discretion attributed to the administrative institution and is strongly

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27. Bismuth even points out that from an international law perspective, the blocking decision – even if based on a Commission's opinion – is attributable to the Member State.

[24] Term derived from Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 797, 803.

[25] The recent opposition by the French state to the proposed acquisition of retailer Carrefour by Canadian-based Couche-Tard is a good example. According to the Financial Times, the French minister of Finance, Bruno Le Maire issued a 'courteous but clear and definitive No' at a cursory meeting between Couche-Tard, even before the transaction was notified. Le Maire publicly referred to the protection of food security and the French agricultural sector. According to the minister, the promotion of French products is part of Carrefour's *raison d'être*, and that there would have been no guarantee that this virtuous model would have been preserved. See Ben Hall, 'French corporate nationalism comes to fore with Carrefour veto' *Financial Times* (10 February 2021) <https://www.ft.com/content/9dd37ee4-abd7-4d8c-b876-5c6be9da4fd8> and Julie Delvallée, 'Carrefour Couche-Tard: Bruno Le Maire Justifie son veto' *LSA* (22 January 2021) <https://www.lsa-conso.fr/bruno-le-maire-la-grande-distribution-a-tous-les-atouts-pour-reussir-sans-avoir-a-se-vendre-a-des-concurrents-etrangers,370923>.

[26] Discretion pertains to the type of degree of leeway that the administrative authorities may be able to dispose of. Saskia Lavrijssen, Anna Gerbrandy and Oda Essens 'European and National Standards of Review: Differentiation or Convergence' in Saskia Lavrijssen, Oda Essens and Anna Gerbrandy (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 277. See also M Schimmel and R Widdershoven, 'Judicial Review after Tetra Laval; Some Oberservations from a European Administrative Law Point of View' in Saskia Lavrijssen, Oda Essens and Anna Gerbrandy (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 65.

influenced by national legal traditions.[27] The question of how to balance the executive's discretionary powers and ensuring effective judicial review ties into fundamental questions on the rule of law and the role of the judiciary.

Because public security is such an open-ended term, and due to the exceedingly vague thresholds for intervention, the executive is often given a very broad margin of appreciation to determine whether a certain measure is necessary for and proportionate to the security interests of the State.[28] An important factor resulting in the wide margin of discretion is the lack of any meaningful definition of 'security' (or similar terms such as national security). The concept of security is generally left largely undefined, but can be argued to cover various types of interests that go beyond 'traditional' interests, and may (be argued to) include economic, industrial, financial, monetary, political, diplomatic, scientific, ecological and public safety interests as well.[29] The lack of a definition of what does or does not constitute a security interest complicates judicial review.

Furthermore, a decision to restrict an investment due to a threat to 'security' furthermore typically involves a factual assessment and valuation of security risks and a balancing of interests. The principal role of the executive to protect the state from security threats (in line with the Hobbesian concept of the sovereign as a protector of peace and security) further reduces degree of judicial scrutiny in cases involving restrictive measures taken to protect the security of the state.[30] The lack of clear substantive criteria or intervention thresholds to determine whether intervention is necessary on grounds security (or similar interest) further complicates judicial review due to the lack of a concrete decision-making framework on the basis of which the measure can be assessed.[31]
A study carried out for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) on national security and secret evidence before

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[27] See also Christina Eckes, Päivi Leino-Sandberg and Anna Wallerman Ghavanini, 'Conceptual Framework for the Project Separation of Powers for 21st Century Europe (SepaRope)' *(2021)* Amsterdam Law School Legal Studies Research Paper No. 2021-06, Amsterdam Centre for European Law and Governance Research Paper No. 2021-01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777334>.

[28] Didier Bigo and others, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (European Union 2014) 32-35.

[29] ibid.

[30] ibid. See also Haldor Mercado, 'Resolving National Security Questions: A Comparative Analysis of Judicial Review in the United States, Israel, and Europe' (2020) 51 Georgetown Journal of International Law 597; Dominik Eisenhut, 'Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions'' (2020) 48 Archiv des Völkerrechts 431.

[31] The author recently published an article setting out some ways in which the Dutch framework for investment screening, despite its imperfections, could function as a model for more proportionate and clearer investment screening rules. See Jochem de Kok, 'Investment Screening in the Netherlands' (2021) 48 Legal Issues of Economic Integration 43.

courts in the EU moreover found that the 'disproportionate degree of appreciation for the executive and over-protection from independent judicial oversight' in cases involving national security is furthermore exacerbated by the extensive role of state secrets, and bilateral systems of mutual respect of state secrets with third countries, such as the U.S.[32] The role of state secrets significantly impacts the rights of the defence. Furthermore, the judicial authorities 'too often have to trust the quality and lawfulness of the information provided by the intelligence services and the legitimacy of state secret claims'.[33] According to this study, 'judicial authorities across the EUMS under examination have a high degree of trust in claims made by governments and intelligence communities in judicial proceedings that national security is under threat'.[34] Consequently, the courts of the Member States 'readily accept' that there are state secrets at play, which prevent judicial and legal oversight of the lawfulness of information used, and accept the 'legitimacy of executive claims on secrecy'.[35]

As a result, national courts tend to limit their review of cases involving measures taken to counter threats to security to procedural questions, whilst opting for a high-level review on the basis of fundamental rights or general principles of administrative law, such as necessity and proportionality.[36] Investors therefore

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32 See also Didier Bigo and others, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (European Union 2014) 7-8.

33 ibid 9.

34 ibid.

35 ibid. See also Vigjilenca Abazi and Christina Eckes, 'Closed evidence in EU courts: Security, secrets and access to justice' (2018) 55 Common Market Law Review 753, 761, 771 and 781; Federico Fabbrini, 'Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared' (2011) 2 Italian Journal of Public Law 315; Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

36 With respect to German law, Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 823, concludes rather pessimistically: 'In other words, judicial review is limited to methodological errors, for instance, whether they were taken into consideration correctly or whether the determination was based only on factors that fall under the (administrative understanding) of the legal concept'. See also Georg Nolte, 'General Principles of German and European Administrative Law – A Comparison in Historical Perspective' (1994) 57 The Modern Law Review 191; J Terhechte, 'Administrative Discretion and Judicial Review in Germany: New Tendencies in the Field of Economic Regulation' in Saskia Lavrijssen, Oda Essens and Anna Gerbrandy (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009); Jan S Oster, 'The Scope of Judicial Review in the German and U.S. Administrative Legal System' (2008) 9 German Law Journal 1267. With respect to French law, see N Petit and L Rabeaux, 'Judicial Review in French Competition Law and Economic Regulation: A Post-Commission v. Tetra Laval Assessment' in Saskia Lavrijssen, Oda Essens and Anna Gerbrandy (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing 2009) 110; Saskia Lavrijssen and Maartje de

only have a limited chance of success when challenging a decision that is technically sound but based on concerns that are somewhat related to, but relatively far removed from, genuine and serious security or public policy concerns. As is illustrated below, EU law plays an important role in ensuring legal protection against screening decisions.

3. Judicial review under EU law

3.1 Applicability of substantive EU law

Restrictions on foreign investments constitute restrictions of the freedom of establishment and/or the free movement of capital under the TFEU. Under the freedom of establishment, restrictions on the freedom of nationals of a Member State to establish themselves in another Member State are prohibited.[37] Under the free movement of capital, all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.[38] Both freedoms have vertical direct effect, meaning that they confer individual rights which can be directly relied upon before national courts when challenging investment screening decisions by a Member State.[39]

Visser, 'Independent administrative authorities and the standard of judicial review' (2006) 2 (1) Utrecht Law Review 111; Jean-Marc Sauvé, 'Le principe de proportionnalité, protecteur des libertés' (Speech at Aix-en-Provence) <https://www.conseil-etat.fr/actualites/discours-et-interventions/le-principe-de-proportionnalite-protecteur-des-libertes>; Federico Fabbrini, ''Reasonableness' as a Test for Judicial Review of Legislation in the Jurisprudence of the French Constitutional Court' (2009) 4 Journal of Comparative Law 39, 55-61; Athanasios Psygkas, 'Accountability' in Peter Crane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020) 456. For the Netherlands see Pim J Huisman and Niels Jak, 'Beslissingsruimte: handvatten voor de rechterlijke toetsingsintensiteit' (2019) 5 Nederlands Tijdschrift voor Bestuursrecht 212; A P Klap, 'Rechterlijke toetsing aan vage normen in Nederland en Duitsland' in A P Klap, F T Groenewegen and J R van Angeren (eds), *Toetsing aan vage normen door de bestuursrechter in het Nederlandse, Duitse, Engelse en Franse recht: preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking* (Wolf Legal Publishers 2014); Tom Barkhuysen, Willemien den Ouden and Ymre E Schuurmans, 'The Law on Administrative Procedures in the Netherlands' [2012] Netherlands Administrative Law Library 1. Támas Peragovics, 'Protection without Protectionism? Foreign Investment Screening in Europe and the V4 Countries Today – A Comparative Analysis' (2019) Centre for Economic and Regional Studies of the Hungarian Academy of Sciences Working Paper nr. 252 <http://www.vki.hu/files/download_1177.html>.

[37] Art 49 TFEU.

[38] Art 63 TFEU. The Court of Justice has adopted a broad interpretation of 'capital movements', see Case C-212/09 *Commission v Portugal* [2011] ECR I-10889, para 47 (golden shares) and case law cited; Case C-182/08 *Glaxo Wellcome v Finanzamt München II* [2009] ECR I-08591, para 40 and case law cited (corporation tax).

[39] Case C-101/05 *Skatteverket v A* [2007] ECR I-11531, para 27; Case C-163/94 *Sanz de Lera* [1995] ECR I-04821, paras 41 and 47; Case C-253/03 *CLT-UFA* [2006] ECR I-01831, para 12; Case C-57/95 *France v Commission* [1997] ECR I-01627, para 20; Case C-53/95 *Inasti v Kemmler*

The free movement of capital is unique in the sense that it not only applies within the EU, but also between the EU and third countries. In investment screening cases involving third country investors, EU law therefore applies if the free movement of capital is applicable.[40] In FDI cases involving investors from third countries, it must therefore first be determined whether the freedom of establishment and/or the free movement of capital are applicable (as only the latter is applicable to third country investors).[41] The central test to determine which freedom applies, is whether the national legislation is intended to exclusively apply to investments resulting in definite/decisive influence, or also to non-controlling minority investments. In particular, the Court of Justice has consistently held that national legislation intended to apply *only* to those shareholdings which enable the holder to exert a *definite/decisive* influence on a company's decisions and to determine whether its activities falls within the scope of the freedom of *establishment*.[42] For national legislation that is *not intended* to apply *exclusively* to situations which enable the acquirer to exercise decisive influence on a company's decisions and to determine the company's activities, the measure must be examined under the free movement of capital, or both the freedom of capital and the freedom of establishment.[43] In an intra-EU context, the Court of Justice will also take account whether the centre of gravity lies in that specific case in the area of the freedom of establishment or free movement of capital, but this step in the analysis has thus far been lacking in an extra-EU context.[44]

[1996] ECR I-00703, para 9; Case 6/64 *Costa v E.N.E.L.* [1964] ECR 01141, 596; Joined Cases C-46/93 and 48/93 *Factortame III* [1996] ECR I-01029, para 23.

40 Art 63 TFEU.

41 See Case C-35/11 *Test Claimants in the FII Group Litigation II* [2012] 1 CMLR 50, para 90; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-07995, paras 31-33; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paras 37-38; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-02107, paras 26-34.

42 See Case C-35/11 *Test Claimants in the FII Group Litigation II* [2012] 1 CMLR 50, paras 91 and 99; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para 37; Case C-168/11 *Beker v Finanzamt Heilbronn* [2013] 2 CMLR 52, para 25.

43 See Case C-35/11 *Test Claimants in the FII Group Litigation II* [2012] 1 CMLR 50, para 99 and Case C-168/11 *Beker v Finanzamt Heilbronn* [2013] 2 CMLR 52, para 26. For both the free movement of capital and freedom of establishment, see Case C-531/06 *Commission v Italy* [2009] ECR I-04103, para 40; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paras 36 and 38; Case C-157/05 *Holböck v Finanzamt Salzburg-Land* [2007] ECR I-04051, paras 23 and 25; and Case C-212/09 *Commission v Portugal* [2011] ECR I-10889, para 44 (golden shares).

44 See Case C-35/11 *Test Claimants in the FII Group Litigation II* [2012] 1 CMLR 50, paras 93-94; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paras 37-38. Steffen Hindelang and Andreas Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment' 57 Common Market Law Review 1427, 1441.

Investment screening mechanisms typically do not exclusively apply to acquisitions of decisive influence.[45] By and large, investment screening mechanisms apply to investments of 10% or 25% or more of the shares or voting rights. National screening mechanisms are therefore *not* intended to apply *exclusively* to situations which enable the investor to exercise decisive influence on a company's decisions or to determine a company's activities, but also to investments that involve non-controlling shareholdings not involving definitive or decisive influence over the company. This indicates that most regimes are likely covered by the free movement of capital, thus protecting investors from third countries.[46] In the FDI Screening Regulation and during the preparation thereof, the Commission took the view that foreign direct investments within the meaning of the FDI Screening Regulation constitute capital movements under Article 63 TFEU.[47] In most cases involving investments from third countries, national screening decisions should therefore be reviewed on the basis of the right to the free movement of capital.

3.2 Case law of the Court of Justice on public security and public policy exceptions in the internal market

Under the TFEU, the Member States may take measures restricting the free movement of capital and the freedom of establishment insofar as such measures 'are justified on grounds of public policy or public security'.[48] Settled case law of the Court of Justice provides that recourse to public security as a justification for a derogation from the fundamental freedoms requires a 'genuine and sufficiently serious threat affecting one of the fundamental interests of society', which must

[45] E.g. 10% in Austria; 10%/25% in Denmark; 10%/25% in Hungary; 10% in Italy; 10% in Finland; 25% in France; 10%/20%/25% in Germany; 20% in Poland; 10%/25% in Spain. Under the proposed Dutch regime, the threshold is 10% for sensitive technologies and control (under the definition of competition law) for certain (pre-designated) critical companies. For the abundance of caution, these are thresholds as understood by the author as of August 2021. Subsequent filing thresholds (i.e. a new filing requirement if a higher level of shareholding is exceeded) are not included in the above. The thresholds are subject to regular amendments.

[46] To the contrary, Teoman M Hagemeyer, 'Access to Legal Redress in an EU Investment Screening Mechanism' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening (CELIS)* (Springer 2021) 821, argues that investment screening mechanisms primarily target investments that provide definitive influence over the target, and that in most cases, the freedom of establishment will be applicable. Based on a comparative analysis of the thresholds triggering a notification obligation, it appears that most investment screening mechanisms in fact are not intended to apply exclusively to acquisitions of definitive control.

[47] See recital 4 FDI Screening Regulation; Commission 'Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the Union' COM (2017) 487 final; European Parliament, 'Answer given by Vice-President Dombrovskis on behalf of the Commission' (E-002312/2018).

[48] Art 65(1)(b) TFEU.

be interpreted restrictively.[49] Importantly, objectives of a 'purely economic' nature cannot justify restriction of a fundamental freedom.[50] The right of Member States to protect public policy or public security is, however, not intended to apply only to specific economic sectors.[51] Public policy or public security can therefore be invoked to restrict internal market freedoms in any economic sector, not just in traditionally sensitive sectors, such as energy, telecom or arms manufacturing.

In addition, the Court of Justice has held that that the term 'public policy' ('*ordre public*') should be interpreted strictly and that the Member States cannot determine the scope of this exception unilaterally. In particular, 'the classification of national provisions by a Member State as public order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'.[52]

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49 See also Jochem de Kok, 'Towards a European framework for foreign investment reviews' (2019) 44 European Law Review 24. Case C-98/01 *Commission v United Kingdom* [2003] ECR I-04641, para 21 (Special Share in BAA); Case C-54/99 *Eglisé de scientology* [2000] ECR I-01335, para 17 (authorisation FDI); Case C-114/97 *Commission v Spain* [1998] ECR I-06717, para 20 (private security activities); Case C-348/96 *Calfa* [1999] ECR I-00011, paras 21 and 23 (drug-using tourist); Case C-36/02 *Omega* [2004] ECR I-09609, para 30 ('playing at killing'); Case C-483/99 *Commission v France* [2002] ECR I-04781, para 48; Case C-503/99 *Commission v Belgium* [2002] ECR I-04809, para 47.

50 See case law in footnote directly above. Note that in Joined Cases C-105/12, C-106/12 and C-107/12 *Staat der Nederlanden v Essent and Others / Eneco Holding / Delta* [2013] OJ C367/8, para 52 (prohibition on privatisation), the Court of Justice notes it has 'accepted that national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest'; see also Case C-141/07 *Commission* v *Germany* [2008] ECR I-06935, para 60 (supply of medical products to hospitals) and the case-law cited. For instance, the Court of Justice has recognised that the objective of guaranteeing adequate investment in the electricity and gas distribution systems that is designed to ensure, *inter alia*, the security of energy supply, constitutes an objective which the Court of Justice has recognised as being an overriding reason in the public interest. See the *Essent* judgment (C-105/12, C-106/12 amd C-107/12), para 59 and case law cited. In the context of overriding reasons in the public interest: Case C-96/08 *CIBA* [2010] ECR I-02911, para 48 (vocational training levy); Case C-400/08 *Commission v Spain* [2011] ECR I-01915, para 74.

51 Case C-355/98 *Commission v Belgium* [2000] ECR I-01221, para 29 (private security activities); Case C-114/97 *Commission v Spain* [1998] ECR I-06717, para 42 (private security activities).

52 Case C-184/12 *Unamar* [2013] OJ C367/12, para 47; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-04323, para 29; Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-08453, para 30; Case 352/85 *Bond van Adverteerders v State of the Netherlands* [1988] ECR 02085, para 34. See in further detail Catherine Kessedjian, 'Public Order in European Law' (2007) 1 Erasmus Law Review 25; Alexander J Bělohlávek, 'Public Policy and Public Interest in International Law and EU Law' in Filip Cerny and others, *Czech Yearbook of International Law*

The Court of Justice has also consistently stressed that the possibility for a Member State to rely on the security or public policy derogations does not prevent judicial review of such measures by the Union courts. According to settled case law, the provision of effective judicial review is also of central significance in cases dealing with national security.[53] Furthermore, where a national authority opposes precise and full disclosure of the grounds constituting a decision refusing entry into a Member State for reasons of security, it is required to provide effective judicial review and prescribe rules related to that review.[54]

Given that the specific circumstances that may justify recourse to national security or public policy 'may vary from one country to another and from one era to another', the Court of Justice has held that the 'competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty'.[55] The Court of Justice has also held that in the absence of complete harmonization at the EU level, it is in principle for the Member States to decide on the level at which they intend to ensure the protection of security, public policy or overriding reasons in the general interest, and on the manner in which this level is to be achieved.[56] However, the Member States can only do so within the limits set out by the Treaty.

The Court's case law consistently stresses the importance of the observance of the principle of proportionality, which requires that the measures adopted are suitable for guaranteeing the attainment of the objective which they pursue, and do not go beyond what is necessary for that purpose.[57] Any decision by the Member States to derogate from the fundamental freedoms based on security must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure.[58] The Member States furthermore carry the burden of proof to establish, in a specific and detailed measure, that a certain activity presents a 'genuine and sufficiently serious threat affecting a fundamental

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(Juris Publishing 2012). An example of a recognised European public policy is competition law.

[53] See, for instance, Case C-387/05 *Commission v Italy* [2009] ECR I-11831, para 45; Case C-300/11 *ZZ v Secretary of the State of Home Department* [2013] 3 CMLR 46.

[54] See Case C-387/05 *Commission v Italy* [2009] ECR I-11831, paras 57-58, 65-66. For further detail see the report prepared for the European Parliament, Didier Bigo and others, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (European Union 2014).

[55] Case C-36/02 *Omega* [2004] ECR I-09609, para 31 ('playing at killing'); Case 41/74 *Van Duyn v Home Office* [1974] ECR 01337, para 18; Case C-54/99 *Eglisé de scientology* [2000] ECR I-01335.

[56] Case C-207/07 *Commission v Spain* [2008] ECR I-00111, para 45. Case C-274/06 *Commission v Spain* [2008] ECR I-00026, para 36 and case law cited.

[57] ibid, citing Case C-257/05, *Commission v Austria* [2006] ECR I-00134, para 18; Case C-112/05 *Commission v Germany* [2007] ECR I-08995, para 73 and Case C-463/00 *Commission v Spain* [2003] ECR I-04581, para 36.

[58] Case C-161/07 *Commission v Austria* [2008] ECR I-10671, para 36.

interest of society'.[59] The Court of Justice will thus substantively review whether there has been a genuine and sufficiently serious threat affecting one of the fundamental interests of society, but also whether the measure complies with the general principles of EU law, notably including the principles of proportionality,[60] legal certainty,[61] and the duty to provide reasons.[62] The case law of the Court of Justice thus demonstrates that the margin of discretion for Member States to restrict the Treaty freedoms is subject to strict conditions.

In the analysis of justification and proportionality, the Court of Justice noted *obiter dictum* in *FII Group v Commissioners of Inland Revenue*, concerning the payment of dividends, that 'it may be that a Member State will be able to demonstrate that a restriction on capital movements to or from non-member countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States'.[63] Similarly, AG Geelhoed has previously considered that the free movement of capital should be seen as a constitutive element of the Economic and Monetary Union, and that this context does not apply in the case of capital transfers between Member States and third countries.[64] Additional grounds for justifications may therefore potentially be acceptable in the case of restrictions of capital movements involving a third country. The Commission therefore argued, in its Guidance to the Member States on investment screening that was issued in the context of the COVID-19 pandemic, that the permissible grounds of justification and proportionality may be interpreted more broadly in the case of investments from third countries.[65]

The author is critical of expanding the concept of 'public security' to permit justifications which would normally not fall under the scope of 'public security'. It is rather the case that certain types of possible security threats are more likely to

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59 Case C-66/18 *Commission v Hungary* [2020] OJ C414/2, para 204; Case C-300/11 *ZZ v Secretary of the State of Home Department* [2013] 3 CMLR 46, para 61.

60 ibid, citing Case C-257/05, *Commission v Austria* [2006] ECR I-00134, para 18; Case C-112/05 *Commission v Germany* [2007] ECR I-08995, para 73 and Case C-463/00 *Commission v Spain* [2003] ECR I-04581, para 36.

61 See, for instance, Case C-207/07 *Commission v Spain* [2008] ECR I-00111, para 54 (*E.ON/Endesa*), discussed below.

62 Case C-161/07 *Commission v Austria* [2008] ECR I-10671, para 36; Case C-66/18 *Commission v Hungary* [2020] OJ C414/2, para 204; Case C-300/11 *ZZ v Secretary of the State of Home Department* [2013] 3 CMLR 46, para 61.

63 See Case C-35/11 *Test Claimants in the FII Group Litigation II* [2012] 1 CMLR 50, para 171.

64 Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, Opinion of AG Geelhoed, para 121.

65 Commission, 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)' (Communication) [2020] OJ C99I/01.

arise if the purchaser is not (ultimately) established in the EU. For instance, concerns over the security of supply of a critical input/product or over non-compliance with dual use export restrictions may in principle be less likely to arise if the purchaser is established in the EU. This does not mean, however, that the permissible grounds of justification should therefore be interpreted more broadly in the case of investments from third countries. The same applies to the application of the principle of proportionality. The author does not believe that the concept of proportionality should be interpreted to essentially allow restrictions that would typically be considered disproportionate or unnecessary. Rather, in practice, it may not be possible to adopt less restrictive measures if the investor is based in a third country, for instance due to the difficulty of monitoring compliance with mitigating measures (remedies) that might have been an option if the purchaser were established in the EU. Ultimately, however, restrictions based on national security must be based on a genuine and sufficiently serious threat to national security, irrespective of whether the investor is established in the EU or a third country.

In cases involving investment screening decisions, the Court of Justice has focussed its assessment on the (more procedural) question of whether the investment screening mechanisms as such meet the minimum requirements provided by general principles of EU law, rather the assessment of whether a particular measure is in line with the above.

Investment screening laws must in particular provide specific and precise criteria, allowing the investor to know in advance the cases in which authorisation is required, when such authorisation may be refused, and which conditions a transaction could be made subject to.[66] The Court of Justice has struck down various investment screening laws due to the lack of sufficiently clear indications in which circumstances prior authorisation of an investment was required, or the grounds on which approval could be refused.[67] For instance, in *Eglisé de scientology*, the Court of Justice ruled that the 1966 French law did not give investors any indication as to the specific circumstances in which prior authorization is required, violating the principle of legal certainty.[68] In *Commission v Greece*, the Court of Justice concluded that the authorization scheme left the authorities with too much discretion, and involved a risk of discrimination because of unclear evaluation criteria.[69] Consequently, the exercise of this discretion would

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[66] See, for instance, Case C-207/07 Commission v Spain [2008] ECR I-00111, para 54 (*E.ON/Endesa*), discussed below.

[67] See Case C-367/98 *Commission v Portugal* [2002] ECR I-04731, para 52 and Case C-423/98 *Alfredo Albore* [2000] ECR I-05965. The Court of Justice has also issued various judgments in the context of the 'golden share' case law. See also Case C-174/04 *Commission v Italy* [2005] ECR I-04933.

[68] Case C-54/99 *Eglisé de scientology* [2000] ECR I-01335.

[69] Case C-244/11 *Commission v Greece* [2012] 1 CMLR 46. See, for further detail, Thomas

be 'difficult to control by the courts', and entailed a risk of discrimination.[70] Similarly in *E.ON/Endesa,* the Court of Justice considered that the national screening mechanism that applied to investments in certain companies in the energy sector was disproportionate, not capable of guaranteeing the achievement of the security of the energy supply and resulted in 'excessively broad discretionary power'. The national legislation thus resulted in a breach of the free movement of capital and the freedom of establishment.[71]

3.3 Relevance for national procedures

Because the free movement of capital and the freedom of establishment have vertical direct effect, investors can directly rely upon these rights before national courts.[72] As a result, national courts must assess whether the restrictions on the freedom of capital and/or the freedom of establishment on the basis of security or public policy are based on a genuine and sufficient threat affecting one of the fundamental interests of society, and they must assess the compatibility of the measure with general principles of EU law, including proportionality, legal certainty and the duty to provide reasons.

Depending on the national legal tradition concerned, national courts may – in practice – allow the executive a margin of discretion that is broader than that provided by the Court of Justice. After all, the Court of Justice has consistently held that in reviewing decisions that involve a complex assessment, the relevant authority is allowed a margin of discretion, which is subject to a limited judicial review in the course of which the Union courts may not substitute their assessment of the facts for the assessment of the relevant authority.[73] The case law of the Court of Justice thus still provides significant leeway for national courts to adopt a limited scope of judicial review.

Papadopoulos, 'Greek Legislation on Strategic Investments; the Next Golden Share Case before the European Court of Justice?' (2009) 6 European Company Law 264.

[70] Case C-244/11 *Commission v Greece* [2012] 1 CMLR 46, para 56.

[71] Case C-207/07 *Commission v Spain* [2008] ECR I-00111, paras 50-55 (*E.ON/Endesa*). This case followed from an art 21 decision, see *Enel/Acciona/Endesa* (Case No COMP/M.4685) Commission Decision C(2007) 5913 final [2007]. See also the (rejected) interim measures in Case T-65/08 R *Spain v Commission* [2008] ECR II-00069. For further background Francisco Marcos, 'When Competition is the Last Concern: The Battle for the control of Endesa' (2012) Working Paper IE Law School AJ8-189 <https://cee.ie.edu/sites/default/files/AJ8-189.pdf>. See also Case C-274/06 Commission v Spain [2008] ECR I-00026.

[72] Case C-101/05 *Skatteverket v A* [2007] ECR I-11531, para 27; Case C-163/94 *Sanz de Lera* [1995] ECR I-04821, paras 41 and 47; Case C-253/03 *CLT-UFA* [2006] ECR I-01831, para 12; Case C-57/95 *France v Commission* [1997] ECR I-01627, para 20; Case C-53/95 *Inasti v Kemmler* [1996] ECR I-00703, para 9; Case 6/64 *Costa v E.N.E.L.* [1964] ECR 01141, 596; Joined Cases C-46/93 and 48/93 *Factortame III* [1996] ECR I-01029, para 23.

[73] Ibid, paragraph 34.

Furthermore, a national court has questions about the correct application of EU law, it may decide to make a reference for a preliminary ruling to the Court of Justice.[74] However, the average length of proceedings before the Court of Justice is 14 months. Whilst length of the preliminary ruling proceedings can be significantly shortened (to several months) if the national court asks the Court of Justice to agree to apply the expedited procedure, such requests are granted only exceptionally.[75] A preliminary ruling procedure may result in significant delays in the (national) legal procedure challenging an investment screening decision.

4. Administrative Review by the Commission

4.1 Article 21 EUMR

Discussions on legal remedies tend to focus on remedies before the Court of Justice. As a result, the importance of *de facto* administrative review by the Commission has been under-reported and its importance underestimated. In fact, a Commission investigation under Article 21 EUMR may be more likely to provide solace to the investor than a national court procedure.[76] The procedure under the EUMR can be seen as a type of administrative review by the Commission of decisions by the Member States restricting transactions with an EU dimension.

Under the EUMR, the Commission has the sole jurisdiction to assesses whether transactions with an EU dimension may result in a significant impediment to effective competition in the internal market.[77] This means that no Member State is allowed to apply its national merger control rules to any transaction with an EU dimension.[78] Transactions have an EU dimension if they meet the relevant turnover thresholds.[79] The EUMR therefore provides for a 'one-stop-shop' system, providing the Commission exclusive jurisdiction to review transactions with an EU dimension.[80]

By way of derogation from the exclusive competence of the Commission, Article 21(4) of the EUMR provides that the 'Member States may take appropriate

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74 Art 267 TFEU.

75 Art 105(1) Rules of Procedure of the European Court of Justice. Court of Justice, 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedures' (2019/C 380/01) OJ 380/1, 34. In 2020, the expedited procedure was accepted only for one preliminary ruling. See the Court of Justice of the European Union, *Annual Report 2020 Judicial Activity* (Court of Justice of the European Union in Luxembourg 2021).

76 Provided that the transaction has an EU dimension.

77 Art 2(2) and (3) EUMR.

78 Art 21(2) EUMR, as well as recitals 8 and 17, see art 21(3) EUMR.

79 Art 1 EUMR.

80 See also recitals 8 and 11 of the EUMR

measures to protect legitimate interests other than those taken into consideration by [the EUMR] and compatible with the general principles and other provisions of [EU] law'.[81] The EUMR therefore acknowledges that the public review of mergers and acquisitions may involve legitimate interests other than competition interests, and does not prevent Member States from taking appropriate measures to protect such other interests. In this respect, the EUMR provides for two types of legitimate interests. First, measures taken by the Member States on the basis of public security, plurality of the media and prudential rules are (automatically) regarded as legitimate interests and do not require review by the Commission.[82] Second, measures taken on grounds of any other interest must be communicated and approved by the Commission after an assessment of their compatibility with the general principles and other provisions of EU law. The Commission will inform the Member State of its decision within 25 working days from that communication.[83]

Therefore, measures taken on the basis of national security, plurality of the media or prudential rules – in principle – do not require prior communication to or approval by the Commission and are assumed to be in compliance with the Treaties and general principles of EU law. If the Commission has 'serious doubts' about whether the restrictive measures 'genuinely aim to protect a "recognised interest" and/or comply with the principles of proportionality and non-discrimination', it may open an investigation against the Member State.[84] The Member States therefore cannot invoke 'security' in order to entirely avoid scrutiny.[85] The Article 21 EUMR procedure is initiated and carried out by the Commission. Consequently, the notifying party cannot require or force the Commission to initiate an Article 21 EUMR investigation.

After an investigation, the Commission may issue a decision declaring the measure to be incompatible with EU law and requiring the Member State to withdraw the measure.[86] Importantly, the Commission can do so within a couple of months.[87] Ultimately, however, an Article 21 EUMR decision may be of

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81 See also recital 19 EUMR.

82 Art 21(4) EUMR.

83 ibid.

84 *E.ON/Endesa* (Case No COMP/M.4197) Commission Decision C(2006) 7039 final [2006], para 25; *BSCH/A. Champalimaud* (Case No IV/M.1616) Commission Decision [1999], paras 65-67.

85 This competence was confirmed in Case C-42/01 *Portugal v Commission* [2004] ECR I-06079 (*Secil/Holderbank/Cimpor*).

86 See for instance *E.ON/Endesa* (Case No COMP/M.4197) Commission Decision C(2006) 7039 final [2006], art 1 and 2.

87 Notably, three monts in *E.On/Endesa,* four and a half months in *Secil/Holderbank/Cimpor* (Case No COMP/M.2054) Commission Decision [2000], and five months in *Enel/Acciona/Endesa* (Case No COMP/M.4685) Commission Decision C(2007) 5913 final [2007]. In *BSCH/A. Champalimaud,* the Commission took a decision within one month. However, the measure had already been subject to an administrative appeal before. See

relatively little practical use if the Member State does not comply with the Article 21 EUMR decision. In such case, the Commission would have to start infringement proceedings pursuant to Article 258 TFEU for failure by a Member State to fulfil an obligation under the Treaties. This is such a lengthy process that the investment will have likely failed even if the Commission ultimately achieves success.[88] Therefore, an intervention by the Commission – even if legally successful – may be insufficiently timely for the parties to a transaction.

A Commission investigation may also be unable to prevent the Member State from *de facto* blocking a transaction, even if the Member State action is found by the Commission to violate EU law. In the case of *E.ON/Endesa*, the bid of E.ON ultimately failed. Instead, E.ON agreed with Enel (an Italian state owned enterprise) and Acciona (a Spanish investor with reportedly close ties to the government) to divide Endesa's assets.[89] In the case of *Cimpor*, the Portuguese government decided to sell Cimpor to the Portuguese conglomerate Teixeira Duarte, after Secil and Holderbank had withdrawn their offer.[90] Similarly, in the case of *Albertis/Autostrade*, the Commission's initiation of an Article 21 EUMR procedure against Italy did not save the transaction, as obstruction by the Italian government's highways agency (ANAS) resulted in the decision by Abertis and Autostrade to postpone their merger until further notice.[91]

BSCH/A. Champalimaud (Case No IV/M.1616) Commission Decision [1999].

88 This process took one and a half year in Case C-207/07 *Commission v Spain* [2008] ECR I-00111, para 54 (*E.ON/Endesa*) and three and a half year in see Case C-42/01 *Portugal v Commission* [2004] ECR I-06079 (*Secil/Holderbank/Cimpor*). The Portuguese legislation on which the opposition was based had already been challenged by the Commission under the freedom of establishment and free movement of capital, see Case C-367/98 *Commission v Portugal* [2002] ECR I-04731.

89 See *Enel/Acciona/Endesa* (Case No COMP/M.4685) Commission Decision C(2007) 5913 final [2007], Case T-65/08 R *Spain v Commission* [2008] ECR II-00069. For further detail see Francisco Marcos, 'When Competition is the Last Concern: The Battle for the control of Endesa' (2012) Working Paper IE Law School AJ8-189 <https://cee.ie.edu/sites/default/files/AJ8-189.pdf>. See also Organisation for Economic Co-operation and Development, 'Public Interest considerations in Merger Control – Note by the European Union' (DAF/COMP/WP3/WD(2016)(11) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)11&docLanguage=En>.

90 See Commission, 'Commission rules against Portuguese measures in a takeover bid for cement company Cimpor' <https://ec.europa.eu/commission/presscorner/detail/en/IP_00_1338>; Lennert Ritter and David W Braun, *European Competition Law: A Practitioner's Guide* (3rd edn, Kluwer Law International 2005) 553 and 877; Guillaume Delacroix, 'Lisbonne achève la privatisation de Cimpor' *Les Echos* (31 July 2011) <https://www.lesechos.fr/2001/07/lisbonne-acheve-la-privatisation-de-cimpor-723649>; Damien Gerard, 'Protectionist threats against cross-border mergers: Unexplored avenues to strengthen the effectiveness of Article 21 ECMR' (2008) 45 Common Market Law Review 987, 993.

91 Damien Gerard, 'Protectionist threats against cross-border mergers: Unexplored avenues to strengthen the effectiveness of Article 21 ECMR' (2008) 45 Common Market Law Review

Following *Endesa*, *Cimpor* and *Autostrade*, the Article 21 EUMR procedure was criticised as being ineffective in providing real opposition to Member States that seek to frustrate a transaction. Gerard noted that 'the Commission appeared powerless in the face of the Member States' inaction, which led to lasting uncertainties for companies and, in most cases, to the cancellation of merger plans'[92] and Harker considered that 'while the Commission has the formal powers to order the suspension of national measures likely to frustrate a transborder merger, in reality Member States have the ability to modify and even frustrate such a merger. Time being at a premium for the merging parties, Member States do not appear [fazed] by the prospect of infringement proceedings before the ECJ several years down the line'.[93] Marcos, in his commentary on *E.ON/Endesa*, recognises that whilst the impact of the Article 21 EUMR decisions may be considered limited in light of the timing considerations, he concludes that the 'Commission played an important role in the contest by limiting the Spanish Government's efforts to prevent any cross-border transaction resulting from the process'.[94]

After some years of dormancy, the Commission recently issued an Article 21 EUMR decision against Hungary for vetoing the acquisition of AEGON's Hungarian subsidiaries by Vienna Insurance Group (VIG).[95] The Commission

987, 993. The Commission preliminarily concluded that Italy violated art 21 EUMR due to the lack of authorisation for the transfer. Ultimately, however, no decision was adopted, and the Commission accepted that Italy adopted rules clarifying the regulatory framework for the authorisation of the transfer of motorway concessions. See Commission, 'Mergers: Commission sends new preliminary assessment to Italy on measures blocking Abertis-Autostrade merger' <https://ec.europa.eu/commission/presscorner/detail/en/IP_06_1418> and Commission, 'Mergers: Commission welcomes Italy's move to clarify authorisation procedures in toll motorway sector' <https://ec.europa.eu/commission/presscorner/detail/en/ip_07_1119>.

[92] Damien Gerard, 'Protectionist threats against cross-border mergers: Unexplored avenues to strengthen the effectiveness of Article 21 ECMR' (2008) 45 Common Market Law Review 987, 993.

[93] Michael Harker and Antje Kreutzmann-Gallasch, 'Universal service obligations and the liberalisation of network industries: taming the Chimera?' (2016) 12 European Competition Law Journal 236.

[94] Francisco Marcos, 'When Competition is the Last Concern: The Battle for the control of Endesa' (2012) Working Paper IE Law School AJ8-189 <https://cee.ie.edu/sites/default/files/AJ8-189.pdf>.

[95] See Commission, 'Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidies by VIG breached Article 21 of the EU Merger Regulation' <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258>; Commission, 'Mergers: Commission opens investigation into possible breach of Article 21 of the EU Merger Regulation by Hungary in the VIG/AEGON transaction' <https://ec.europa.eu/commission/presscorner/detail/en/mex_21_5664>; The Budapest Metropolitan Court rejected Vienna Insurance Group's (VIG) and AEGON's appeal against the prohibition of the proposed acquisition of AEGON's Hungarian insurance business by VIG on the basis national security interests. The judgment has not yet been published and will be

concluded that there were reasonable doubts as to the veto genuinely aimed to protect Hungary's legitimate interests within the meaning of the EUMR. According to the Commission, it was unclear how the acquisition by VIG of AEGON's Hungarian assets would pose a threat to fundamental interests of society, given that both parties were already well-established EU insurance companies with an existing presence in Hungary. The Commission therefore found that the Hungarian authorities should have communicated their intended veto to the Commission prior to its implementation and that failing to do so infringed Article 21 EUMR. The Hungarian state did not give any public explanations of the reasons behind the prohibition. Bloomberg considered that the decision ties in with Hungary's strategy of creating national champions.[96]

Given that the fate of the transaction ultimately lies in the hands of the Member State concerned, investors have often opted to instead opt to negotiate an amended transaction structure to address the concerns of the Member State concerned. For instance, in *BSCH/A. Champalimaud*,[97] concerning a 1999 prohibition decision regarding the proposed acquisition of joint control of several Portuguese banks by Spanish Banco Sandanter Central Hispano (BSCH) on grounds of prudential rules, the Commission's Article 21 EUMR decision arguably contributed to the settlement between Banco Sandanter and the Portuguese Authorities, involving the divestment of the insurance group Mundial Confianca to the state-owned bank Caixa Geral de Depositos.[98] In *Unicredito/HVB*,[99] the Polish authorities required Unicredit to divest its shares in the Polish bank BPH, which it acquired as part of its takeover of the German bank HVB. This divestment requirement was based on a non-compete clause

appealed before the Hungarian Supreme Court. See VIG, 'VIG's appeal against Hungarian veto on AEGON acquisition dismissed by Budapest Metropolitan Court' <https://www.vig.com/en/press/press-releases/detail/vigs-appeal-against-hungarian-veto-on-aegon-acquisition-dismissed-by-budapest-metropolitan-court.html>; AEGON 'An update on Aegon's sale of its Central and Eastern European business to VIG' <https://www.aegon.com/investors/press-releases/2021/update-on-sale-of-cee-business-september-2021/>.

[96] See Veronika Gulyas and Alberto Nardelli, 'Shock Veto of $1 Billion Aegon Deal Sparks Dutch Outcry' *Bloomberg* (20 April 2021) <https://www.bloomberg.com/news/articles/2021-04-20/shock-veto-of-billion-dollar-hungary-deal-sparks-dutch-complaint>.

[97] *BSCH/A. Champalimaud* (Case No IV/M.1616) Commission Decision [1999].

[98] *BSCH/A. Champalimaud* (Case No IV/M.1616) Commission Decision [1999]; Commission, 'EU competition law: Commission overrules Portuguese measures against BSCH/Champalimaud operation' <https://ec.europa.eu/commission/presscorner/detail/en/IP_99_774>. Organisation for Economic Co-operation and Development, 'Public Interest considerations in Merger Control – Note by the European Union' (DAF/COMP/WP3/WD(2016)(11) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)11&docLanguage=En>.

[99] *Unicredito/HVB* (Case No COMP/M.3894) Commission Decision [2005]. Carlta Vitzthum, 'Banco Santander Central Hispano, Champalimaud Read Agreement' *The Wall Street Journal* (Madrid, 12 November 1999) <https://www.wsj.com/articles/SB942326459434396779>.

that the Polish State Treasury had imposed on Unicredit when it acquired the Polish bank Pekao six years earlier. After the Commission issued a letter to Poland requesting the authorities to justify the actions pursuant to Article 21 EUMR,[100] a settlement was reached according to which UniCredit agreed to sell the BPH brand and 200 of the 480 branches of BPH to a third party (GE Money Bank, a Polish bank that is part of the General Electric group).[101] Unicredit furthermore pledged not to lay off any employees of Pekao or BPH for a two-year period.[102] As the time of writing, VIG has announced that it had reached an agreement with the Hungarian state holding Corvinus, providing for a participation of 45% by the Hungarian state in the Hungarian VIG and AEGON companies.[103]

Article 21 EUMR investigations by the Commission have therefore had mixed results in terms of practical use for the investor and compliance by the Member States in terms of fully protecting the integrity of the transaction. In *E.ON/Endesa*, *Cimpor* and *Autostrade*, the transactions failed despite intervention by the Commission.[104] Whilst in *BSCH*, *HVB* and *AEGON*, the investigation seems to have prevented a full collapse of the transaction, but ultimately divestments with questionable relevance to prudential rules or public security were required. In both *E.ON/Endesa* and *Cimpor*, the Member States decided to simply ignore the Article 21 EUMR decision, choosing instead to await an infringement procedure several years down the line. Whilst an Article 21 EUMR decision can therefore be adopted quite quickly, such a decision is of

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100 Commission, 'Mergers: Commission launches procedure against Poland for preventing Unicredit/HVB merger' <https://ec.europa.eu/commission/presscorner/detail/en/ip_06_277>.

101 See UniCredit, 'UniCredit finalizes the sale of a majority shareholding in Bank BPH to GE Money' <https://www.unicreditgroup.eu/en/press-media/press-releases-price-sensitive/2008/PressRelease0107.html>.

102 Mark Landler, 'UniCredit and Poland reach deal on 2 banks' *The New York Times* (Frankfurt, 5 April 2006) <https://www.nytimes.com/2006/04/05/business/worldbusiness/unicredit-and-poland-reach-deal-on-2-banks.html>; Damien Gerard, 'Protectionist threats against cross-border mergers: Unexplored avenues to strengthen the effectiveness of Article 21 ECMR' (2008) 45 Common Market Law Review 987.

103 VIG, 'Vienna Insurance Group and the Hungarian state holding Corvinus establish cooperation in Hungary' <https://www.vig.com/en/investor-relations/ir-newsinside-information/detail/vienna-insurance-group-und-die-ungarische-staatsholding-corvinus-fixieren-kooperation-in-ungarn.html>; VIG, 'Vienna Insurance Group and Hungary reach an agreement on the outlines of a cooperation and the further procedure regarding the Hungarian insurance companies AEGON and UNION' <https://www.vig.com/en/investor-relations/ir-newsinside-information/detail/vienna-insurance-group-and-hungary-reach-an-agreement-on-the-outlines-of-a-cooperation-and-the-further-procedure-regarding-the-hungarian-insurance-companies-aegon-and-union.html>; Boris Groendahl and Veronika Gulyas, 'Vienna Insurance Mulls Hungary Joint Venture to Save Aegon Deal' *Bloomberg* (27 April 2021) <https://www.bloomberg.com/news/articles/2021-04-27/vienna-insurance-mulls-hungary-joint-venture-to-save-aegon-deal>.

104 In the case of *E.ON/Endesa*, E.On did acquire parts of Endesa, as noted above.

little use for the investor if the Member States decides to challenge the Commission decision. Furthermore, Article 21 EUMR is only applicable in cases of transactions with a Union dimension.

Despite its limitations, the Article 21 EUMR procedure nonetheless constitutes a crucial legal tool for the Commission to ensure that screening decisions are subject to the rule of law. Given that investors are unlikely to challenge decisions before Court themselves, it is all the more important that there is an administrative authority that ensures that the Member States do not abuse the security or public order exception. Furthermore, investigations under Article 21 EUMR facilitate the development of a common European, as opposed to a purely national, conception of security and public order, and thereby help ensure the integrity of the single market and the common commercial policy.

4.2 Infringement proceedings under Article 258 TFEU

Lastly, the Commission can also initiate infringement proceedings under Article 258 TFEU for failure by a Member State to fulfil an obligation under the Treaties. The Commission will typically only initiate Article 258 TFEU proceedings in cases of a systemic issue, such as a general issue with the screening mechanism in question. The Commission may therefore be reluctant to take action under the infringement procedure, in the case of an individual negative screening decision without evidence of a broader failure, especially if proceedings can also be brought before a national court. The likelihood of action would be further reduced if a national court makes a reference for a preliminary ruling.[105]

Under the Article 258 TFEU infringement procedure, the Commission must first issue a reasoned opinion to the Member State.[106] If the Member State authorities fail to comply with the reasoned opinion, the Commission can refer the matter to the Court of Justice. Infringement proceedings may, where appropriate, be initiated in parallel with an action under Article 21 EUMR against the application of the national measures to a particular transaction.[107] The

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105 Commission, 'EU law: Better results through better application' (Communication) [2017] OJ C18/10, 14-15.

106 The infringement proceeding would be brought under art 258 TFEU.

107 This was the case in *Cimpor*, see Case C-42/01 *Portugal v Commission* [2004] ECR I-06079 (*Secil/Holderbank/Cimpor*). The Portuguese legislation on which the opposition was based had already been challenged by the Commission under the freedom of establishment and free movement of capital, see Case C-367/98 *Commission v Portugal* [2002] ECR I-04731. Also confirmed by the Commission in a note to the OECD: Organisation for Economic Co-operation and Development, 'Public Interest considerations in Merger Control – Note by the European Union' (DAF/COMP/WP3/WD(2016)(11) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)11&docLanguage=En>, footnote 19.

Commission could therefore initiate an action under Article 21 EUMR involving a specific infringement procedure, whilst targeting the investment screening mechanism in question under Article 258 TFEU. Given that infringement proceedings take years to conclude, these type of proceedings are primarily suited to tackle more systemic issues with the investment screening mechanism in a certain Member State.

Such systemic issues were the case in the investigations that resulted in the judgments *Commission v Greece* and *Commission v Portugal.*[108] The Greek measures consisted of a combination of *ex ante* and *ex post* screening of investments in strategic companies. Under the screening mechanism, the criteria for granting prior approval were imprecise and gave the authorities an overly wide margin of discretion, and no criteria existed for the *ex post* approvals.[109] Furthermore, the law did not clearly define the scope of the measure, thus creating legal uncertainty as to which companies and sectors are subject to the mechanisms currently or in the future. Consequently, the Commission considered that the scheme was not based on objective criteria known in advance and subject to judicial review, and went 'beyond what was necessary to ensure the objective pursued by the Greek government, i.e. ensuring that there is a continuous and uninterrupted supply of services and that the networks function well'.[110] In the case of Portugal, the screening mechanism targeted economic policy objectives, such as the modernisation and increased efficiency of production and strengthening of the competitive structure of the market, which were not valid justifications for a restriction of the freedoms under the Treaty.[111]

Many screening mechanisms that have been recently adopted and strengthened across the EU carry the same flaws, as these mechanisms often lack of clear substantive criteria for granting or refusal approval, have an unclear scope of application, accord the public authorities with a very wide margin of discretion that is subject to only a limited degree of judicial review. Furthermore, the

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108 Case C-244/11 Commission v Greece [2012] 1 CMLR 46 and Case C-367/98 *Commission v Portugal* [2002] ECR I-04731.

109 Commission, 'Free movement of capital: Commission contests Greek law on investment in strategic companies' <https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1784>; Case C-244/11 Commission v Greece [2012] 1 CMLR 46, paras 2 and 77-78. These nine criteria were: '(a) the experience of third-party shareholders in the field of activity of the companies above, (b) their solvency, (c) information relating to their investment strategies, (d) the transparency of their transactions, (e) their detailed business plans, (f) the size and type of their investment programme, (g) their system of ownership, (h) preservation of jobs, (i) the structure of their share capital and, in particular, the holdings of funds established outside the European Union, under the principle of transparency and reciprocity, (j) the decision-making procedure'.

110 ibid.

111 Case C-367/98 *Commission v Portugal* [2002] ECR I-04731, para 52.

screening mechanisms and specific screening decisions may often (*de facto*) pursue economic policy objectives. As Member States may start to increasingly restrict investments in the internal market, the Commission's recent encouragement to Member States to implement and making use of investment screening mechanisms,[112] may therefore at one point become less unreserved.

5. Conclusion

EU law plays an essential role in ensuring that screening decisions are subject to an effective remedy, by virtue of the direct effect of EU law and investigations by the Commission. Whilst the executive enjoys a margin of discretion in determining whether an investment must be prohibited or restricted on grounds of national security, EU law ensures – at least in theory – that the existence of a margin of discretion enjoyed by the executive may not preclude a review of the appropriateness, necessity and proportionality of such measures. EU law therefore plays an important role in requiring that screening decisions by the Member States are not *de facto* unamenable to judicial review.

The intensity of judicial scrutiny by national courts of decisions aimed at protecting security interests tends to be limited in scope. This increases the risk of disproportionate prohibitions or restrictions, as the executive enjoys relatively unfettered discretion. The lack of clear substantive criteria or intervention thresholds to determine whether an intervention is necessary on grounds of security or public order further amplifies the risk of measures adopted on the basis of concerns that are insufficiently related to security, and significantly complicates judicial review due to the lack of a concrete decision-making framework. Despite evident difficulties in the judicial review of decisions that are close to the heart of sovereignty and foreign policy, EU law provides important instruments for legal protection against screening decisions, preventing abuses of power and protecting the integrity of the internal market and common commercial policy.

The case law of the Court of Justice shows that investment screening decisions must be based on a genuine and sufficiently serious threat affecting one of the fundamental interests of society, and must comply with general principles of EU law, including the principles of proportionality, legal certainty, and the duty to provide reasons. Given the vertical direct effect of free movement of capital and/or the freedom of establishment, national courts must review investment screening mechanisms and decisions for their compatibility with EU law.

[112] See Commission, 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)' (Communication) [2020] OJ C99I/01.

Furthermore, the Court of Justice has held on various occasions that the Member States' investment screening mechanisms must provide a clear scope of application and evaluation criteria providing for sufficient legal certainty. The screening mechanisms may therefore not confer an overly broad discretionary power on the public authorities, which is difficult for courts to control.

The Commission has an important role in the *de facto* administrative review of investment screening mechanisms of and decisions by the Member States. Notably, the Commission may investigate screening decisions restricting transactions with an EU dimension. Under the EUMR, the Commission has the sole jurisdiction to assesses whether transactions with an EU dimension may result in a significant impediment to effective competition in the internal market. Whilst the Member States may take measures to protect legitimate interests other than competition interests, including public security, the Commission may investigate such measures if it has serious doubts about whether the measures genuinely target security concerns, or comply with general principles such as proportionality and non-discrimination. The Commission has demonstrated that it is able to initiate a procedure and adopt a decision within several months after the adoption of the restrictive measure. However, an Article 21 EUMR decision may be of little practical use if the Member State decides to challenge the validity of the Commission decision, resulting in a protracted legal battle. The prospect of multiple years of court proceedings generally results in the parties deciding to terminate the deal, and cut their losses, rather than to subject themselves to multiple years of uncertainty.

The Commission can also initiate infringement proceedings under Article 258 TFEU for a failure by a Member State to fulfil an obligation under the Treaties. The Commission has previously initiated such investigations against Member States for adopting screening mechanisms that did not provide for a clear scope of application or screening criteria, providing authorities with an overly wide margin of discretion, or for pursing economic policy objectives that could not justify restrictions of the free movement of capital.

Various screening mechanisms that have been recently adopted and strengthened across the EU carry the same flaws, as these mechanisms often lack a clear scope of application, do not provide detailed substantive criteria or thresholds for intervention, and accord the public authorities with a very wide margin of discretion that is subject to only a limited degree of judicial review. Given that investors are – for various reasons – unlikely to challenge a prohibition or restrictive screening decision, the Commission fulfils an important role in ensuring that investment screening mechanisms and decisions remain subject to the rule of law.