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Investment Screening in the EU: From Liberalisation to the State of Exception

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Abstract

Following the adoption of the FDI Screening Regulation, security has become a dominant paradigm in EU investment law. This article examines the EU framework for investment screening through the lens of Giorgio Agamben's theory on the 'state of exception'. The FDI Screening Regulation is characterised by vague and open-ended screening criteria and a wide margin of discretion. This results in a blurred boundary between public law and political fact. Moreover, investment screening decisions are largely insulated from effective judicial oversight. The FDI Screening Regulation exemplifies a transition away from the policy of liberalisation and the emergence of security as guiding principle of investment regulation. The institutionalisation of the security exception creates a state of exception in investment law, which poses significant challenges to legal certainty and the rule of law.

Keywords

Economic security – FDI Screening Regulation – Foreign Investment Screening Regulation – Giorgio Agamben – Carl Schmitt – investment screening – judicial review – legal certainty – national security – state of exception

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1 Introduction

Following the adoption of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (the FDI Screening Regulation),[1] security has become a dominant paradigm of EU investment law.[2] The security paradigm stands in contrast to the paradigm of liberalisation under the Treaties,[3] that is characterised by the objective of the progressive abolition of restrictions on foreign direct investments under the Common Commercial Policy and the free movement of capital and the freedom of establishment in the internal market.[4] The paradigm shift is characterised by a transition away from the policy of liberalisation and the emergence of security as guiding principle of investment regulation.[5] Illustrative this shift is the rebranding of the European Commission's (Commission) Directorate-General for 'Trade' to 'Trade and Economic Security'. The emergence of the security exception in investment and trade law has sparked academic interest in the security exception, with various scholars expressing concerns that the security paradigm undermines the rule-based international economic legal order.[6]

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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 [21 March 2019] OJ L 79I, 1.

2 Paradigm is defined as "*a philosophical and theoretical framework of a scientific school or discipline within which theories, laws, and generalizations and the experiments performed in support of them are formulated*". A paradigm shift is "*an important change that happens when the usual way of thinking about or doing something is replaced by a new and different way*". Definitions from Merriam-Webster.

3 Treaty on the European Union [26 October 2012] OJ C 326, 13 (TEU) and Treaty on the Functioning of the European Union [26 October 2012] OJ C 326, 47 (TFEU) (together, the Treaties).

4 See Articles 206, 56 and 46 TFEU, respectively.

5 For similar arguments, see Julian Arato, Kathleen Claussen and J Benton Heath, 'The Perils of Pandemic Exceptionalism' (2020) 114 AJIL 627, 633; Thijs De Cuyper, 'From Principal Openness Towards Reciprocity: Reorienting the Normative Foundation of the EU Investment Screening Practice in Light of Geoeconomic Competition' in J Hillebrand Pohl and others (eds), *Weaponising Investments*, vol 1 (Springer 2023); Julien Chaisse and Georgios Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order' (2023) 22 WTR 1; Bryan Mercurio, 'The Demise of Globalization and Rise of Industrial Policy: Caveat Emptor' (2024) 23 WTR 242; Mark P Thirlwell, 'The Return of Geo-Economics: Globalisation and National Security' (Lowy Institute for International Policy 2010); J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 The Yale Law Journal 1020; Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 JIEL 655.

6 Roberts, Choer Moraes and Ferguson (n 5) 657–58, 665; Geraldo Vidigal, 'WTO Adjudication and the Security Exception: Something Old, Something New, Something

The adoption and strengthening of investment screening mechanisms in the EU is reflective of a broader constitutional shift in international economic law, a theme that is considered in this Special Issue of the Journal of World Investment & Trade. The emergence of the security paradigm in investment regulation challenges foundational presumptions of market liberalisation and free capital movements not just in the European Union, but in jurisdictions across the world.[7] In this Special Issue, Kehinde Folake Olaoye and Junianto James Losari illustrate the global rise of investment screening mechanisms, demonstrating that investment screening is far from unique in the EU or US, even though these jurisdictions tend to receive most attention.[8] Similarly, Xueji Su demonstrates that inbound investment screening is increasingly coupled with outbound investment screening.[9] This article and the Special Issue further examines the expansive scope of economic security. Under the economic security paradigm, investment screening not only affects investment in critical infrastructures, such as maritime infrastructures as analysed by Christian Tietje and Philipp Reinhold,[10] but targets a wide range of novel threats. For instance, Jiaqi Huang argues that cybersecurity has become a 'critical consideration' in investment screening and Floriane Chang explores the integration of the protection of cultural sovereignty under the Canadian investment

Borrowed – Something Blue?' (2019) 46 LIEI 203, 219; Arato, Claussen and Heath (n 5); Wolfgang Weiß, 'Adjudicating Security Exceptions in WTO Law: Methodical and Procedural Preliminaries' (2020) 54 JWT 829; Heath (n 5); Kathleen Claussen, 'Trade's Security Exceptionalism' (2020) 72 Stanford Law Review 1097; Geraldo Vidigal and Stephan W Schill, 'International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception' (2021) 48 LIEI 109, 117; Jens Velten, *Screening Foreign Direct Investment in the EU: Political Rationale, Legal Limitations, Legislative Options*, vol 26 (Springer International Publishing 2022) 88 and 318; Julien Chaisse and Kehinde Folake Olaoye, 'United States – Origin Marking Requirement, WT/DS597/R' (2023) 117 AJIL 488, 493; Mercurio (n 5); Jonas Fechter and Janosch Wiesenthal, 'Open Strategic Autonomy: A New Concept Gaining Momentum' in Jonas Fechter and Janosch Wiesenthal (eds), *The Age of Open Strategic Autonomy* (Nomos Verlagsgesellschaft 2025) 11. With respect to the internal market, see Alexandr Svetlicinii, 'Foreign Investment Controls in the European Union: Fragmentation of the Internal Market in Four Steps' (2026) 27 JWIT 217–49.

7 See Christoph Herrmann, 'New Frontiers in Investment Screening Law' (2026) 27 JWIT 1–11.

8 Kehinde Folake Olaoye, 'The Global Rise of Investment Screening Mechanisms' (2026) 27 JWIT 12–41; Junianto James Losari, 'Global Geoeconomics and Geopolitics Development: Compliance Analysis of Selected Asian Countries' Investment Screening Mechanisms' (2026) 27 JWIT 98–128.

9 Xueji Su, 'Outbound Investment Control and Financial Protectionism: Rethinking the Adequacy of Capital-Exporting Investment Legal Regime' (2026) 27 JWIT 69–97.

10 Christian Tietje and Philipp Reinhold, 'The Control of Foreign Investment into Maritime Infrastructure in Europe' (2026) 27 JWIT 129–59.

screening regime.[11] While this article takes the EU as its focus, the developments in the EU and legal-philosophical critique of the security paradigm expressed in this article are of global relevance.

The Commission has historically pursued a policy of opposition to investment screening. This policy changed definitively when former Commission President Jean-Claude Juncker announced the proposal for FDI Screening Regulation in 2017, stating '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.'[12] Following the adoption of the FDI Screening Regulation, virtually all Member States adopted investment screening mechanisms or significantly expanded the scope of existing screening mechanisms.[13] In the past years, the Member States have screened thousands of investments on security grounds. The FDI Screening Regulation has furthermore facilitated greater EU-level cooperation, with the Commission playing a central role in coordinating investment screenings and providing opinions to the Member States.[14] In January 2024, the Commission proposed a new screening regulation, which will further expand the role and importance of investment screening in the EU (the Commission's Proposal).[15]

The FDI Screening Regulation forms part of a broader policy change that stresses the importance of strategic autonomy and economic security.[16] In

11 Jiaqi Huang, 'Cybersecurity Across the Supply Chain in Foreign Direct Investment Screening: A Comparative Analysis of the European Union's, China's, and the United States' Approaches' (2026) 27 JWIT 160–87; Floriane Chang, 'Screening Investments, Pure Protectionism or Cultural Securitisation? A Comprehensive Examination of Foreign Direct Investment Mechanisms in Canada' (2026) 27 JWIT 188–216, 200–07.

12 Jean-Claude Juncker, 'State of the Union Address 2017' (13 September 2017) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165> accessed 30 May 2025.

13 Commission, Fourth Annual Report on the Screening of Foreign Direct Investments into the Union (Report) [2024] COM(2024) 464 final.

14 Jochem de Kok, 'Towards a European Framework for Foreign Investment Reviews' (2019) 44 EL Rev 24.

15 The Commission's Proposal amongst others, proposes a mandatory minimum sectoral scope of investments that must be screened by the Member States, a requirement for Member States to adopt a screening mechanism, an expansion of the cooperation mechanism to foreign-controlled EU investments, and further harmonization to facilitate cooperation. This article was finalized and submitted prior to start of interinstitutional negotiations on the Regulation. Commission, Proposal for a Regulation on the Screening of Foreign Investments in the Union and Repealing Regulation (EU) 2019/452 of the European Parliament and of the Council [2024] SWD(2024) 23 final-SWD(2024) 24 final; Alexia Crivoi, 'EU FDI Screening – Level Up in Multilevel Governance?' (2024) 27 Zeitschrift für europarechtliche Studien 241.

16 See, similarly, Henrique Choer Moraes, 'Decoupling by Discrimination? Strategic Competition and the Limits of Trade Law' (2023) 51 Ga J Intl & Comp L 671, 678; Enrico Tinti, 'Open Strategic Autonomy, FDI Screening and Industrial Policy: What Geopolitical Role

addition to investment screening, the rise of the security paradigm can be identified in the area of export control,[17] outbound investment restrictions,[18] measures aimed at research security,[19] and measures aiming to restrict or exclude Huawei and ZTE from 5G networks.[20] Furthermore, security of supply considerations inspired a number of recent industrial policy instruments, notably including the Critical Raw Materials Act, the European Chips Act and the Net-Zero Industry Act.[21]

The increasing dominance of the security paradigm is reminiscent of the theory on the state of exception. The theory of the state of exception was (in)famously introduced by Carl Schmitt, who succinctly concluded in the opening sentence of his work on the concept of sovereignty: 'Sovereign is he who decides on the state of exception.'[22] In the context of Schmitt's

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for the European Commission?' in Jens Hillebrand Pohl and others (eds), *The Law and Geoeconomics of Investment Screening*, vol 4 (Springer 2025); Mavluda Sattorova, 'EU Investment Law at a Crossroads: Open Strategic Autonomy in Timers of Heightened Security Concerns' (2023) 60 CMLR 701.

17 Regulation (EU) 2021/821 of 20 May 2021 Setting up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-use Items [11 June 2021] OJ L 206, 1. See also Commission, White Paper on Export Controls [2024] COM(2024) 25 final. In the context of WTO law, see Chaisse and Olaoye (n 6) 493.

18 Commission, White Paper on Outbound Investments [2024] COM(2024) 24 final. See, in this Special Issue, Xueji Su, 'Outbound Investment Control and Financial Protectionism: Rethinking the Adequacy of Capital-Exporting Investment Legal Regime' (2025) 26 JWIT.

19 See, for instance Commission, White Paper on Options for Enhancing Support for Research and Development Involving Technologies with Dual-use Potential [2024] COM(2024) 27 final; Commission, Proposal for a Council Recommendation on Enhancing Research Security [2024] COM(2024) 26 final 2024/0012 (NLE).

20 See, for instance Commission, Communication on the Implementation of the 5G Cybersecurity Toolbox 2023, C(2023) 4049 final. On the relationship between cybersecurity and investment screening, including in the EU, see Jiaqi Huang, 'Cybersecurity Across the Supply Chain in Foreign Direct Investment Screening: A Comparative Analysis of the European Union's, China's, and the United States' Approaches' (2026) 27 JWIT 160–87.

21 Commission and High Representative, European Economic Security Strategy (Joint Communication) 2023, JOIN(2023) 20 final, 3 and 7. Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 Establishing a Framework for Ensuring a Secure and Sustainable Supply of Critical Raw Materials and Amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [3 May 2024] OJ L 2024/1252; Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 Establishing a Framework of Measures for Strengthening Europe's Semiconductor Ecosystem and Amending Regulation (EU) 2021/694 (Chips Act) [18 September 2023] OJ L 229, 1; Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on Establishing a Framework of Measures for Strengthening Europe's Net-zero Technology Manufacturing Ecosystem and Amending Regulation (EU) 2018/1724 [28 June 2024] OJ L 2024/1735.

22 '*Souverän ist, wer über den Ausnahmezustand entscheidet.*' Translation by the author. Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (9th edn, Duncker

work, a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures. In order to understand the nature of law or the constitutional order, Schmitt argued that one must study the exception, rather than the ordinary. According to Schmitt, the state of exception frees the executive from any legal restraints to its power that would normally apply.[23] In short: 'There exists no norm that is applicable to chaos.'[24]

Giorgio Agamben developed the 'state of exception' by bringing it outside the confines of national constitutional law. He warns that the state of exceptions tends to increasingly appear as the dominant paradigm of governance, whereby lines between what is inside or outside the legal system, or what is legal or illegal, are increasingly blurred.[25] To Agamben, the state of exception is neither external nor internal to the juridical order, but rather exists in – simply put – a blur of both.[26] For Agamben, the state of exception is different from anarchy and chaos because 'an order still exists in it.'[27] However, this juridical order in the state of exception is not 'of the ordinary kind'.[28]

This article argues that the FDI Screening Regulation is reflective of a state of exception as considered by Agamben. While the European framework of investment screening is not devoid of law, nor represents a system in which the sovereign power has been freed from any legal restraint, the institutionalisation of security as a central paradigm of governance represents a more gradual

& Humblot 2019) 13. In the English translation by George Schwab, Schmitt's reference to *Ausnahmezustand* (literally, "state of exception") is translated as 'exception', which broadens the meaning of the term. Schmitt's work does not pertain to exceptions to legal norms in general but focuses on the ultimate exception in the legal order, that allows for the suspension of the constitution order. The state of exception is often understood as a 'state of emergency', which has a strong connotation with the state of war (martial law etc.). A literal translation is, however, more appropriate, as Schmitt's work focuses not just on the declaration of a state of emergency itself (ie the decision to commence a state of exception), but to the resulting state of the constitutional order, in which the applicability of the constitution order is suspended. Furthermore, as Schmitt notes that 'the following will reveal that the state of exception should be understood here as a general concept of state theory, and not just any emergency decree or any state of siege.' Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005).

23 Schmitt, *Political Theology* (n 22) 6, 5, footnote 1.

24 ibid 13.

25 Giorgio Agamben, *State of Exception* (Kevin Attell tr, University of Chicago Press 2005) 1–2; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998).

26 Agamben, *Homo Sacer* (n 25) 15.

27 Agamben, *State of Exception* (n 25).

28 Schmitt, *Political Theology* (n 22) 12. See also Agamben, *State of Exception* (n 25) 23.

and subtle shift away from the rule of law. The state of exception allows for a legal-philosophical inquiry into the relationship between the legal order and the security exception.

The article contributes to the ongoing academic debate on investment screening and the growing role of the security exception by offering a fundamental critique of the security paradigm. The challenges relating to the security exception are typically recognised, but debate is often approached from the perspective of the need to balance security interests with the openness. For instance, the Commission's Proposal aims to strike an 'appropriate balance between, on the one hand, the objective of addressing legitimate concerns raised with regard to foreign investments, and on the other hand, the need to maintain an open and welcoming regime for such investment into the EU, while being fully compatible with EU law and international commitments.'[29] The author recognises that foreign investments may negatively affect public interests. However, rarely is the idea challenged that concerns should be addressed by means of the security or public order exception. This article warns of the fundamental challenges with the security paradigm and the need to consider an alternative paradigm for regulating public interests in investment law.

The article furthermore aims to develop the literature on the state of exception in international economic law by introducing Giorgio Agamben's theory on the state of exception in the field of international economic law. The securitisation of investment regulation gives cause for reflection as to what the advent of security exceptionalism implies for the norm of the investment regime.[30] The state of exception brings a new perspective and legal theory through which the broader paradigm shift from liberalism to securitisation in international economic law can be analysed.

This article will first provide an introduction to the theory on the state of exception. The article subsequently assesses the FDI Screening Regulation based on three key characteristics that reflect an Agambean state of exception.[31] The first aspect considers the increasing reliance on security as a normal

29 Commission Proposal for a Regulation on the Screening of Foreign Investments in the Union and Repealing Regulation (EU) 2019/452 of the European Parliament and of the Council (n 15) 2.

30 See also Heath (n 5) 1029.

31 These key characteristics are identified by the author on the basis of Agamben's writings. A notable characteristic that is not considered in this article is the reduction of political subjects to bare life (*zoe*). This biopolitical approach does not appear appropriate when applying Agamben's theory on the state of exception outside his own focus on states of

technique of government.[32] The second part of this analysis is the blurring of public law and political fact under investment screening.[33] The third element is a consideration of the limited degree of judicial oversight.[34] The article concludes with a reflection on the implications of this Agambean state of exception in EU investment law.

2 The State of Exception

While legal norms are invariably subject to exceptions,[35] the security and public order exceptions can be distinguished from other open-textured exceptions by virtue of their intrinsic relationship to sovereignty and the primary responsibility of the State to ensure public order and the safety of the nation and its citizens. Without safety and public order, the State may cease to exist, whether due to invasion by another State or the overthrow of the government.

Within the domestic legal context, national constitutions typically provide for the possibility to derogate from core constitutional provisions on the division of powers or fundamental rights in case of emergencies threatening the security or public order of the nation, often referred to as states of emergency or martial law. To Schmitt, the monopoly over the decision over the state of exception – the last decision – reveals the essence of a State's authority.[36] The concept of the 'state of exception' as developed by Schmitt thus focuses closely on the outermost sphere of the exception, namely the suspension of law or the constitutional order as such.[37] Schmitt argues that the 'state of exception' does not require a clear legal order as a reference point, because *necessitas non habet legem*.[38] According to Schmitt, the State's sovereignty is not the monopoly to coerce or to rule, but 'the monopoly to decide' on when the 'normal' legal norm ends, and to be able to produce law without being based on law.[39] It should be noted here that Schmitt's legacy is that of an advocate and facilitator

exceptions pertaining to civil liberties to the field of economic regulation, where the subjects targeted by security measures are undertakings or private investors.

32 Agamben, *State of Exception* (n 25) 14, 2, 6. See also Agamben, *Homo Sacer* (n 25) 9.

33 Agamben, *State of Exception* (n 25) 1, 29.

34 ibid 3–4.

35 See, for instance, Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (1st edn, OUP 2020) 1.

36 Schmitt, *Political Theology* (n 22) 13.

37 ibid.

38 Literally, 'necessity knows no law'. ibid 6, 5, footnote 1.

39 ibid 13.

of the permanent state of exception that existed under the Third Reich, and the atrocities that followed in its wake. Through the state of exception, Schmitt actively legitimised violence and oppression by the Nazi regime under the guise of protection of the law and as a more efficient system compared to the parliamentary politics and bureaucracy, proclaiming that '[d]er Führer schützt das Recht', i.e. '[t]he Führer protects the law'.[40] Since the World War II, the absolute legalised lawlessness as existing under the state of exception in the Third Reich has become uncommon.

In the context of international economic law, the rise of the security paradigm has been considered from the perspective of Schmitt's theory on the state of exception. One major cause for concern expressed in the literature is the position of several States, including the United States, that security exceptions are 'self-judging' and exempt from judicial review.[41] Geraldo Vidigal and Stephan Schill have pointed out that the argument that the security exception is unrestrained by judicial review is reminiscent of Schmitt's theory on the state of exception, and analysed the security exception in international economic law from that theoretical approach.[42] However, international courts and tribunals have largely rejected the argument that the security exceptions are immune from judicial review.[43] While broad and open-ended, the concepts of security and public order are legal concepts that exist in the juridical order

40 Carl Schmitt, 'Der Führer Schützt Das Recht: Zur Reichstagsrede Adolf Hitlers Vom 13. Juli 1934' (1934) 39 Deutsche Juristen-Zeitung 945. Schmitt, *Political Theology* (n 22) xxxi, xlix–l. See also David Dyzenhaus, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought' (2015) 16 Theoretical Inquiries in Law 337; William E Scheuerman, *The End of Law: Carl Schmitt in the Twenty-First Century* (2nd edn, Rowman & Littlefield 2020).

41 Vidigal and Schill (n 6) 110–11; Andrew Emmerson, 'Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?' (2008) 11 JIEL 135; Heath (n 5) 1025; Daria Boklan and Amrita Bahri, 'The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?' (2020) 19 WTR 123; Tania Voon, 'The Security Exception In WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45; Vidigal (n 6); Mona Pinchis-Paulsen, 'Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions' (2020) 41 Michigan Journal of International Law 109; Sebastián Mantilla Blanco and Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Springer 2020); Wesley A Cann, 'Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism' (2001) 26 Yale Journal of International Law 413; Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 Virginia Journal of International Law 365; Alexandr Svetlicinii, '"Trade Wars Are Good and Easy to Win": From Security Exceptions to the Post-WTO World' (2019) 9 KLRI Journal of Law and Legislation 29; Weiß (n 6) 831.

42 See, for instance, Vidigal and Schill (n 6).

43 See n 41, above.

and are thus subject to scrutiny and review, and do not result in the 'suspension of the entire existing juridical order'.[44] Geraldo Vidigal and Stephan Schill thus conclude that the rise of security-based exceptions does not represent a Schmittean state of exception in international economic law.[45] A similar conclusion is reached by Patrick Abel in this Special Issue. Abel illustrates that international investment law provides various restraints on investment screening and therefore calls for attention to the details of the limits imposed by international law, rather than subscribing to the discourse that investment screening is 'unbound' by legal restraints.[46] Given that the European Court of Justice has long held that a reliance by the Member States on the security exception as a justification for deviating from one of the fundamental freedoms is amenable to judicial review,[47] clearly no Schmittean state of exception exists in EU economic law either.

Giorgio Agamben developed Carl Schmitt's theory on the state of exception.[48] Agamben argues that contemporary states of exceptions rarely involve an exceptional all-encompassing abrogation of the constitution. He instead provocatively posits that the state of exception has become a 'dominant paradigm of government'.[49] The Agambean state of exception is not focussed on a sovereign decision to suspend the juridical order to a realm beyond judicial review, but to a lighter form of a state of exception as a technique of governance. Giorgio Agamben warns that the state of exception tends to increasingly appear as

44 Schmitt, *Political Theology* (n 22) 12; Agamben, *State of Exception* (n 25) 23. This Special Issue contains two articles assessing the limits of international law on investment screening, see Patrick Abel, 'International Law Limits to Investment Screening' (2026) 27 JWIT 42–68; Losari (n 8).

45 See Vidigal and Schill (n 6).

46 Abel (n 44) 66–67. On the complains of investment screening mechanisms in China, South Korea, Japan and Singapore, see also the analysis provided by Junianto James Losari in this Special Issue. Losari (n 8) 108–17.

47 See, for instance, Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568, para 66; Case C-387/05 *Commission v Italy* [2009] ECLI:EU:C:2009:781, para 47; Case C-212/09 *Commission v Portugal* [2011] ECLI:EU:C:2011:717, para 83; Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECLI:EU:C:2000:124, para 17; Case C-483/99 *Commission v French Republic* [2002] ECLI:C:2002:327, para 48; Case C-463/00 *Commission v Kingdom of Spain* [2003] ECLI:EU:C:2003:272, para 72; Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para 46; Case C-319/06 *Commission v Luxembourg* [2008] ECLI:EU:C:2008:350, para 28; Case C-33/07 *Jipa* [2008] ECLI:EU:C:2008:396, para 34; Case C-118/20 *JY v Wiener Landesregierung* [2022] ECLI:EU:C:2022:34, para 68.

48 Agamben, *State of Exception* (n 25) 23.

49 ibid 2.

the dominant paradigm of governance whereby lines between what is inside or outside the legal system, or what is legal or illegal are increasingly blurred.[50]

Agamben sees the state of exception as an ambiguous and uncertain zone in which *de facto* proceedings that are extra- or anti-juridical turn into law, and juridical norms blur with fact, so that public law and political fact seem to become undecidable.[51] In the prose that is characteristic to his writing, he argues that '[t]he suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order.'[52] While Schmitt believed in the importance of the state of exception to protect the State against its enemies, Agamben warns that the transformation of provisional and exceptional (security) measures into a technique of government threaten to radically alter – and have already palpably altered – the structure and meaning of the democratic constitutional form.[53]

The use of Agamben's theory on the state of exception to analyse the rise of the security exception in international economic law is novel.[54] The absence of Agamben's theory in international economic law can be contrasted to the rich body of literature available on Agamben in the area of civil liberties. Contemporary literature on the state of exception notably focuses on human rights and takes a Foucauldian biopolitical perspective, focusing on the way in which governmental power operates through the regulation of bodies and lives.[55] The link between his theory on the state of exception is made clear in his observation that 'it is significant that military emergency now ceded its

50 ibid 1–2; Agamben, *Homo Sacer* (n 25).

51 Agamben, *State of Exception* (n 25) 1, 29; Agamben, *Homo Sacer* (n 25) 15.

52 Agamben, *State of Exception* (n 25) 23.

53 ibid 2.

54 Giorgio Agamben's theory on the state of exception was used by Lorenzo Cotula to analyse special economic zones for industrial development and consistency and stabilization clauses in investor-state treaties for national resource investments. However, neither of such practices relate to security-based legal instruments. Lorenzo Cotula, 'The State of Exception and the Law of the Global Economy: A Conceptual and Empirico-Legal Inquiry' (2017) 8 Transnational Legal Theory 424. Furthermore, in the context of the global financial crisis, José Atiles-Osoria and David Whyte briefly consider that the state of exception would be a useful theoretical tool to understand the relationship between law, economic and sovereignty in the neoliberal era. José Manuel Atiles-Osoria and David Whyte, 'State of Exception, Law and Economy: A Socio-Legal Approach to the Economy of Exception in an Era of Crisis' (2018) 8 Oñati Socio-legal Series 808.

55 See, for instance Costas Douzinas, *States of Exception: Human Rights, Biopolitics, Utopia* (Edward Elgar Publishing 2023); Alexander G Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Duke University Press 2014); Subhabrata Bobby Banerjee, 'Necrocapitalism' (2008) 29 Organization Studies 1541.

place to economic emergency (with an implicit assimilation between war and economics).'[56]

3 Security as Dominant Paradigm of Investment Regulation

The FDI Screening Regulation is characteristic of the 'generalization of the paradigm of security as the normal technique of government' that Agamben warns about.[57] Agamben argues that contemporary governments prefer to issue exceptional laws, rather than to declare a state of exception.[58]

Until recently, the principal objective in European investment law and policy was 'the progressive abolition of restrictions on international trade and on foreign direct investments, and the lowering of customs and other barriers' under Article 206 TFEU. Furthermore, the internal market is premised on the market freedoms, including the free movement of capital under Article 63(1) TFEU, which prohibits 'all restrictions on the movement of capital between Member States and between Member States and third countries', and the freedom of establishment for EU nationals under Article 54 TFEU. For most of its history, the Commission aimed at abolishing restrictions of capital flows from third countries.

During this era of liberalisation, investment screening mechanisms did exist in a number of Member States. These mechanisms, however, were primarily limited to the control over privatised companies in tangible critical infrastructures in the areas of energy (generation and distribution), telecommunications, transport (ports and railroads), water, defence production, and real estate in border areas or near strategically important facilities.[59] The screening of investments on security grounds by the Member States is therefore not a new phenomenon. This is illustrated as well in Kehinde's Folake Olaoye' history of investment screening mechanisms, published in this Special Issue.[60]

56 Agamben, *State of Exception* (n 25) 2, 13, 21.

57 ibid 14, 2, 6. See also Agamben, *Homo Sacer* (n 25) 9.

58 See, for instance, Agamben, *State of Exception* (n 25) 21.

59 OECD, 'Current Trends in Investment Policies Related to National Security and Public Order' (2018) 1; OECD, 'Freedom of Investment, National Security and "Strategic" Industries: An Interim Report' in OECD, *International Investment Perspectives 2007* (OECD 2008) 59–63; OECD, 'Acquisition- and Ownership-Related Policies to Safeguard Essential Security Interests: Current and Emerging Trends, Observed Designs, and Policy Practice in 62 Economies' (2020) 11.

60 For a further analysis, see Olaoye (n 8).

Investment screening mechanisms, often implemented by means of 'golden shares' or 'approval schemes', however, were the target of opposition by the Commission on the basis that they violated the free movement of capital and/or freedom of establishment.[61] Between 2000 and 2013, the Court of Justice delivered at least 18 judgments concerning these golden shares or approval schemes, mostly concerning infringement proceedings initiated by the Commission, and sided with the Commission in all but two cases.[62] Privatisation and investment freedom were seen as important to European integration, competition, efficiency and private investments.[63] The 'golden shares' case law resulted in the abolition of many golden share regimes.[64] While some investment screening arrangements continued to exist following the Commission's challenges, these arrangements were characterised by a limited scope of application in order to comply with the Court's case law.[65] Furthermore, under these

61 For golden share cases see Case C-98/01 *Commission v UK* [2003] ECLI:EU:C:2003:273, para 1; Case C-503/99 *Commission v Belgium* [2002] ECLI:EU:C:2002:328 99; Case C-483/99 *Commission v France* (n 47); Case C-212/09 *Commission v Portugal* (n 47); Case C-58/99 *Commission v Italy* [2000] ECLI:EU:2000:280; Joined Cases C-282/04 and C-283/04 *Commission v the Netherlands* [2006] ECLI:EU:C:2006:608; Case C-112/05 *Commission v Germany* [2007] ECLI:EU:C:2007:623; Case C-171/08 *Commission v Portugal* [2010] ECLI:EU:C:2010:412; Case C-95/12 *Commission v Germany* [2013] ECLI:EUC:2013:676; Case C-543/08 *Commission v Portugal* [2010] ECLI:EU:C:2010:669. For general approval (screening) systems for privatised undertakings see Case C-463/00 *Commission v Spain* (n 47); Case C-244/11 *Commission v Greece* [2012] ECLI:EU:C:2012:694; Case C-367/98 *Commission v Portugal* [2002] ECLI:EU:C:2002:326; Case C-207/07 *Commission v Spain* [2008] ECLI:EU:C:2008:428; Case C-326/07 *Commission v Italy* [2009] ECLI:EU:C:2009:193; Case C-54/99 *Église de Scientologie* (n 47). See also the miscellaneous cases of Case C-174/04 *Commission v Italy* [2005] ECLI:EU:C:2005:350; Joined Cases C-463/04 and C-464/04 *Federconsumatori* [2007] ECLI:EU:C:2007:752; Case C-274/06 *Commission v Spain* [2008] ECLI:EU:C:2008:86. See also Thomas Papadopoulos, 'Privatizations of State-Owned Companies and Justifications for Restrictions on EU Fundamental Freedoms: Past, Present and Future Perspectives' in Julien Chaisse, Jędrzej Górski and Dini Sejko (eds), *Regulation of State-Controlled Enterprises* (Springer 2022).

62 See also Benjamin Werner, 'National Responses to the European Court of Justice Case Law on Golden Shares: The Role of Protective Equivalents' (2017) 24 Journal of European Public Policy 989; Tamás Szabados, 'Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union' (2015) 16 German Law Journal 1099.

63 See, for instance, Erika Szyszczak, 'Golden Shares and Market Governance' (2002) 29 LIEI 255.

64 Werner (n 62).

65 For instance, Germany maintained a screening mechanism that was limited to the defence sector. Following the *Église de scientologie* judgment, France narrowed down its investment screening regime under the Décret n° 2005–1739 du 30 décembre 2005 réglementant les relations financières avec l'étranger et portant application de l'article L. 151–3

regimes prohibitions or restrictions became very rare.[66] The protection of the free movement of capital and freedom of establishment were thus given precedence over the protection of (national) economic or political interests pursued by 'golden share' instruments that (disproportionately) hampered the exercise of the fundamental market freedoms, notably in an intra-EU context.[67]

Changes in the global economic order in the early 21st century resulted in reflections by the Commission about the challenges posed by globalisation.[68] For instance, in 2006, the Commission considered that these changes, marked by the economic rise of China, India, Brazil, Russia and others, created unprecedented opportunities for growth and development, but also put pressure on national resources, the climate, traditional industries and livelihoods, eroding old certainties and raising new fears.[69] These changes, however, did not yet result in a shift of paradigm and a sense of optimism remained.

In the course of the 2010s, a series of high-profile investments by Chinese investors resulted in 'a growing appreciation in Europe that the balance of challenges and opportunities presented by China has shifted.'[70] While the expressed concerns relating to Chinese investments were initially predominantly of an economic nature, these concerns were securitised when the Commission proposed the FDI Screening Regulation. The Commission thereby determinatively departed from its the long-standing reluctance

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du code monétaire et financier 2005. Italy similarly amended its golden share regime. Werner (n 62) 1000–01.

66 See also Pohl Joachim, Nicolás Rosselot and Faraz Moosa, 'Managing Security Implications of International Investment: Policy Developments in a Changing World' (OECD Secretariat Research Note 2024); Martin Nettesheim, 'Screening for What Threat: Preserving "Public Order and Security", Securing Reciprocity in International Trade, or Supporting Certain Social, Environmental, or Industrial Policies?' in Steffen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020* (Springer International Publishing 2020) 488; Tinti (n 16) 206; Henrique Choer Moraes, 'Foreword: The Dissemination of Investment Screening Mechanisms – The Vocabulary for a New Logic Driving Global Economic Relations' in Jens Hillebrand Pohl and others (eds), *Weaponising Investments: Volume I*, vol 1 (Springer 2023) xiii. With respect to Germany, see Jonas Fechter, 'Next-Level Screening? The Case of Outbound Investment Screening' in Jens Hillebrand Pohl and others (eds), *Weaponising Investments: Volume II*, vol 2 (Springer 2024) 80.

67 See similarly Szyszczak (n 63) 280–84.

68 Commission, Global Europe: Competing in the World (Commication) [2006] COM(2006) 567 final, 3.

69 ibid.

70 Commission and High Representative, EU-China – A Strategic Outlook (Joint Communication) 2019 JOIN(2019) 5 final.

and even opposition to investment screening. The Covid-19 pandemic shortly after the adoption of the FDI Screening Regulation amplified concerns that already existed with respect to the (growing) Chinese investments and general economic intertwinement with China, and acted as a catalyst of an existing movement towards notions of autonomy and sovereignty and concerns over economic interdependence.[71] In addition, the election of Donald Trump and Brexit, the intensification of the US-China trade and investment war, the Russian annexation of Crimea, subsequent full invasion of Ukraine and following energy crisis, consolidated the view that a liberal investment policy was no longer appropriate.[72]

The security exception thus responds to the insecure global economic and political order brought on by a series of crises and structural changes.[73] As Kehinde Folake Olaoye and Junianto James Losari illustrate in this Special Issue, this sense of insecurity and geopolitical rivalry has resulted in the adoption and strengthening of investment screening mechanisms across the world.[74] This shift towards the security paradigm coincides with the use of warlike terminology to describe foreign investments such as "weaponised

71 Tobias Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics' (2022) 27 European Foreign Affairs Review 61, 65. 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 C 991/1.

72 See similarly Nettesheim (n 66); Gehrke (n 71); Sarah Bauerle Danzman and Sophie Meunier, 'The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator' (2024) 62 JCMS: Journal of Common Market Studies 1097. See also Commission, Guidance to the Member States Concerning Foreign Direct Investment from Russia and Belarus in View of the Military Aggression against Ukraine and the Restrictive Measures Laid Down in Recent Council Regulations on Sanctions [2022] OJ C 151 I/1; Commission, Second Annual Report on the Screening of Foreign Direct Investments into the Union (Report) [2022] COM(2022) 433 final, 20. For further background, see Sergey Utkin, 'Suspicious Neighbour: Russia's Role in the Quest for the EU's Strategic Autonomy' (2022) 27 European Foreign Affairs Review 121.

73 See also Editorial Comments, 'The Passion for Security in European Societies: Reductio Ad Securitatem' (2024) 61 Common Market Law Review 283.

74 Olaoye (n 8) and Losari (n 8).

investments",[75] "weaponised interdependence",[76] "economic warfare",[77] "war by other means",[78] the "enemy at the gate",[79] and the "weaponization of economic dependencies".[80] The assimilation between investment regulation and the language of warfare is reflective of Giorgio Agamben's warning that it military emergencies have ceded its place to economic emergencies, with an implicit assimilation between war and economics.[81]

These fundamental geopolitical changes are reflected in a number of official reports and studies, such as the New Industrial Strategy,[82] the China Strategy,[83] and the Economic Security Strategy.[84] In the Economic Security Strategy, the Commission and High Representative consider that as a result of rising geopolitical tensions, certain economic flows and activities may more than ever present a security threat.[85] While recognising the importance of open and rule-based trade and investment, secure cross-border connectivity and collaboration on research and development, the Strategy sets out new priorities

75 J Hillebrand Pohl and others (eds), *Weaponizing Investments* (Springer 2023); Tom CW Lin, 'Financial Weapons of War' (2016) 100 Minnesota Law Review 1377.

76 Henry Farrell and Abraham L Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44 International Security 42; Maria Adele Carrai, 'The Rise of Screening Mechanisms in the Global North: Weaponizing the Law against China's Weaponized Investments?' (2020) 8 The Chinese Journal of Comparative Law 351; Sergio Mariotti, '"Open Strategic Autonomy" as an Industrial Policy Compass for the EU Competitiveness and Growth: The Good, the Bad, or the Ugly?' (2024) Journal of Industrial and Business Economics 7.

77 Teoman M Hagemeyer-Witzleb, *The International Law of Economic Warfare*, vol 16 (Springer International Publishing 2021).

78 Robert D Blackwill and Jennifer M Harris, *War by Other Means: Geoeconomics and Statecraft* (Harvard University Press 2016).

79 Hagemeyer-Witzleb (n 77); François Godement and Abigaël Vasselier, 'China at the Gates: A New Power Audit of EU-China Relations' (European Council on Foreign Relations 2017); François Godement, Jonas Parello-Plesner and Alice Richard, 'The Scramble for Europe' (European Council on Foreign Relations 2011) 37.

80 Commission and High Representative European Economic Security Strategy (Joint Communication) (n 21).

81 Agamben, *State of Exception* (n 25) 2, 13.

82 Commission, A New Industrial Strategy for Europe (Communication) [2020] COM(2020) 102 final; Commission, Strategic Dependencies and Capacities Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe's Recovery [2021] SWD(2021) 352 final.

83 Commission and High Representative EU-China – A Strategic Outlook (Joint Communication) (n 70).

84 Commission and High Representative European Economic Security Strategy (Joint Communication) (n 21).

85 ibid 2.

of promoting competitiveness, protecting against economic security risks, and partnering with countries that share concerns or interests on economic security.[86] The Economic Security Strategy notably identifies threats to supply chain resilience, critical infrastructure, technology security and technology leakage and the risk of weaponisation of economic dependencies and economic coercion.[87] The Draghi Report on '*The Future of European Competitiveness*' takes this analysis one step further concluding that 'the foundations on which we built are now being shaken. The previous global paradigm is fading.'[88] The Report warns of dependencies being transformed into vulnerabilities a world characterised by greater international competition and waning geopolitical stability.[89]

The FDI Screening Regulation has transformed investment screening mechanisms from niche instruments, affecting a limited number of transactions in the area of defence and critical infrastructure, into generally applicable regulatory frameworks that cover a significant share of foreign investments into the EU.[90] Consequently, every year, investment screening notifications are required for hundreds of investments in the area of – amongst others – semiconductors, artificial intelligence, quantum technology, biotechnology, advanced connectivity, navigation, energy, telecom, robotics, advanced materials and manufacturing.[91] Chinese investments have notably been subject to a various prohibitions and restrictions.[92] The security paradigm will further

86 ibid.

87 ibid 4–5.

88 Mario Draghi, 'The Future of European Competitiveness: Part A: A Competitiveness Strategy for Europe' (2024) 1 <https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en> accessed 30 May 2025.

89 ibid 1.

90 Commission Fourth Annual Report on the Screening of Foreign Direct Investments into the Union (Report) (n 8). See also Arato, Claussen and Heath (n 5); Tinti (n 16) 206.

91 In 2023, the Member States screened 1,808 foreign direct investments, of which approximately 55% were deemed potentially sensitive and required in-depth screening. The Commission identifies around 1,900 to 2,200 foreign direct investments as taking place in the EU each year (excluding greenfield projects, which tend not to require screening). See Commission, Third Annual Report on the Screening of Foreign Direct Investments into the Union (Report) [2023] COM(2023) 590; Commission, Fourth Annual Report on the Screening of Foreign Direct Investments into the Union (Report) (n 8) 11. The screening of investments in cultural industries under Canadian investment screening law is considered in this Special Issue in Floriane Chang, 'Screening Investments, Pure Protectionism or Cultural Securitisation? A Comprehensive Examination of Foreign Direct Investment Mechanisms in Canada' (2025) 27 JWIT 188–216.

92 Jochem de Kok, 'Foreignness in EU Investment Screening Law' in Jens Hillebrand Pohl, Thomas Papadopoulos and Janosch Wiesenthal (eds), *National Security and Investment Controls*, vol 3 (Springer 2024).

grow in relevance as investment screening regimes continue to expand after the adoption of the Commission's Proposal and as new technologies emerge.[93]

4 Legal Certainty

The central tenet of the Agamben's state of exception is the blurring of law and political fact.[94] The framework of investment screening is reflective of such a zone of indistinction in which public law and political fact fade into each other.[95] The FDI Screening Regulation can be seen as an expression of the ambiguous and uncertain zone identified by Agamben, in which *de facto* proceedings that are extra- or anti-juridical turn into law, and in which juridical norms blur with political fact, so that these seem to become indistinguishable.[96]

In legal terminology, this critique pertains to legal certainty. The FDI Screening Regulation notably does not provide clear thresholds for which investments require screening, nor does it provide for a definition of the screening criteria of 'security and public order'.[97] The Regulation merely provides a list of non-exhaustive factors that may, amongst others, be taken into consideration by Member States or the Commission in determining whether an FDI is likely to affect security or public order.[98] The list of factors that may, amongst others, be taken into account with respect to the target company refers to critical infrastructures, critical technologies and dual use items, critical inputs, sensitive information and freedom and pluralism of the media.[99] With respect to the investor, the Member States may take into account government control, the investor's track record and the risk of illegal or criminal activities.[100] The FDI Screening Regulation therefore only provides a general and broad overview of the type of factors that are relevant in determining whether an investment may be considered sensitive, but does not specify under what circumstances an investment may negatively affect critical infrastructures, technologies, critical inputs or sensitive information in a way that threatens security or public

93 See similarly De Cuyper (n 5) 18. Mariotti (n 76) 7.
94 Agamben, *State of Exception* (n 25) 1, 29.
95 ibid 1.
96 ibid 29.
97 The same conclusion applies to the Commission's Proposal. See also Andrea Gemmi, 'Certainty and Predictability in FDI Screening Regulations' in Jens Hillebrand Pohl and others (eds), *The Law and Geoeconomics of Investment Screening*, vol 4 (Springer 2025).
98 FDI Screening Regulation, art 4. See, similarly, Commission's Proposal, art 13.
99 FDI Screening Regulation, art 4(1). See, similarly, Commission's Proposal, art 13(3).
100 FDI Screening Regulation, art 4(2). See, similarly, Commission's Proposal art 13(4).

order.[101] The proposal for the revised Foreign Investment Screening Regulation does little to clarify the circumstances in which an investment may be deemed to constitute a threat.

At the time of the adoption of the FDI Screening Regulation, the European Parliament considered the lack of a definition of security and public order as positive. According to the report on the proposal, it was difficult to define the key concepts of security and public order in a way that left leeway for a flexible adaptation to different situations.[102] 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.'[103] The criteria of security and public order are therefore purposefully vague and open-ended.[104] The lack of a definition of security and public order under the FDI Screening Regulation and the Proposed Regulation is exacerbated by the subsequent endorsement by the Commission of a broad understanding of security that includes strategic autonomy and economic security.[105]

An expansive reading of security covering various economic and political interests does not appear to have been the intention of the Commission at

101 See similarly, Nettesheim (n 66). Marek Jaśkowski, 'National Security and Essential Security Interests in CJEU Jurisprudence' in *Weaponising Investments* (Springer 2023) 3.

102 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 by the Committee on International Trade. Rapporteur: Franck Proust [2018] COM(2017)0487-C8-0309/2017-2017/0224(COD) 143 49. See also Gemmi (n 97) 153.

103 European Parliament INTA Report (n 102) 49.

104 See also Sarah Bauerle Danzman and Gabriella Couloubaritsis, 'Balancing Risks: Investment Screening Mechanisms, Essential Security Definitions, and Standards of Evidence' in Hillebrand Pohl and others (n 5) 2; Gemmi (n 97) 153.

105 With respect to strategic autonomy, for instance, Commission, Strategic Dependencies and Capacities Updating the 2020 New Industrial Strategy (n 82). See also ART – Analysis and Research Team, 'Strategic Autonomy, Strategic Choices' (General Secretariat of the Council of the European Union 2021) Issues Paper 2. See also Gehrke (n 71); Frank Hoffmeister, 'Strategic Autonomy in the European Union's External Relations Law' (2023) 60 CMLR 667; Mario Damen, 'EU Strategic Autonomy 2013–2023: From Concept to Capacity' (European Parliament 2022) Briefing PE.733.589; Niklas Helwig, 'The Ambiguity of the EU's Global Role: A Social Explanation of the Term "Strategic Autonomy"' (2022) 27 European Foreign Affairs Review 21; Niklas Helwig and Ville Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term' (2022) 27 European Foreign Affairs Review 1.

the time of the proposal for the FDI Screening Regulation. In the explanatory memorandum, the Commission considered it important to make a distinction between threats to security or public order and 'concerns regarding industrial policy'.[106] Nevertheless, at the time, the Commission had already considered the close relationship between technological competitiveness and security interests, noting that investments by State-controlled entities may not only negatively affect the 'EU's technological edge but also its security and public order.'[107]

Following the announcement of the FDI Screening Regulation, the Commission has shifted its discourse towards strategic autonomy (or open strategic autonomy) and economic security. Particular attention was given to the importance of 'mastery and ownership of key technologies'.[108] The concept of strategic autonomy notably played 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.'[109] Various policy objectives are subsumed under the objective of strategic autonomy, including Europe's digital transformation, security and future technological sovereignty, the development of key enabling technologies, remaining at the edge of innovation, the defence and space sectors, the transition of European industry to climate-neutrality, access to critical inputs, recycling and use of secondary raw materials, access to medical products and pharmaceuticals and the welfare of EU citizens.[110] The concept of strategic autonomy is thus used as a wide

106 Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union (Commission Staff Working Document) [2017] SWD/2017/0297 final-2017/0224 (COD), 6.

107 Commission Staff Working Document Accompanying the Proposal (n 106); Commission, Welcoming Foreign Direct Investment While Protecting Essential Interests (Communication) [2017] COM(2017) 494 final.

108 See, for instance, Ursula von der Leyen, 'Speech in the European Parliament Plenary Session' (27 November 2019).

109 Commission A New Industrial Strategy for Europe (Communication) (n 82) 13.

110 ibid 13–14; Commission Strategic Dependencies and Capacities Updating the 2020 New Industrial Strategy (n 82) 10. See also Commission, Europe's Moment: Repair and Prepare for the Next Generation (Communication) [2020] COM(2020) 456 final; Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy (Communication) [2021] COM(2021) 66 final.

umbrella term for various industrial political interests with direct or indirect connections to security,[111] and has been qualified as an 'indeterminate policy concept more than a normative legal term' that can be understood as a 'proxy for sovereignty.'[112]

The FDI Screening Regulation is also a key tool in the Economic Security Strategy.[113] The Economic Security Strategy, amongst others, defines four (non-exhaustive) types of categories of risks to economic security, namely risks related to: the resilience of supply chains, the physical and cybersecurity of critical infrastructure, technology security and technology leakage, and the weaponisation of economic dependencies or economic coercion.[114] Under the Economic Security Strategy, the concept of security has been expanded to cover interests such as technological competitiveness, technological advancement, the digital and green transitions, price surges, a stable and reliable provision of goods and services and data security.[115] The interests protected under this security paradigm go far beyond traditional defence and security interests. This broad understanding of security has inspired restrictions and prohibitions of investments in various industries, including in the semiconductor, robotics, drone, machinery, aerospace, satellite communication, ports, medical devices, seeds, supermarket, tyres, and automotive sectors.[116]

The investment screening mechanisms adopted and strengthened following the adoption of FDI Screening Regulation do not appear to meet the strict requirements provided by the Court in its case law on golden share regimes and investment screening mechanisms. Given that various foreign investments fall under the scope of the free movement of capital and/or the freedom of establishment, the Court's case law remains relevant after the adoption of the FDI Screening Regulation. In short, the free movement of capital – which can be relied upon by third country investors – applies to national legislation that is intended not only to apply to shareholdings that enable "*definite influence*",

111 See sources listed above and Commission, 'Answer Given by Executive Vice-President Dombrovskis on Behalf of the Commission' (*E-006143/20*, 2021) <https://www.europarl.europa.eu/doceo/document/E-9-2020-006143-ASW_EN.html> accessed 30 May 2025.

112 Tinti (n 16) 212.

113 Commission and High Representative European Economic Security Strategy (Joint Communication) (n 21) 2.

114 ibid 4–5.

115 ibid 5.

116 For further detail see de Kok, 'Foreignness in EU Investment Screening Law' (n 92) 83. With respect to the control of maritime infrastructure in Europe, see also Tietje and Reinhold (n 10).

which is covered by the freedom of establishment, but also lesser type of controlling interests, including those that enable effective participation in the management of a company. This is the case for many investment screening regimes.[117] Furthermore, foreign investors may be able to rely on the freedom of establishment indirectly via subsidiaries established in the EU, except (in short) in cases of artificial arrangements.[118]

This conclusion is unaffected by the slight difference in wording under the FDI Screening Regulation ('security or public order') and the Treaties ('public security and public policy'). Notably, the FDI Screening Regulation specifically refers to the right of Member States to derogate from the free movement of capital on the basis of public policy and public security and considered that several Member States already had investment screening mechanisms in place.[119] Furthermore, according to the Court's general principles of interpretation, EU regulations must furthermore be interpreted, as far as possible in such a way as not to affect its validity and in accordance with primary law as a whole.[120] An interpretation of 'security' that would be broader or more permissible than the 'public security' exception under the Treaties would therefore be problematic. It is also noteworthy that the distinction between 'public security' and 'security' is not made in the German versions of the FDI Screening Regulation and the Treaties, with both the Treaties and the FDI Screening Regulation referring to security (*Sicherheit*). More generally, it is questionable whether a material

117 A detailed discussion of the relationship between the FDI Screening Regulation and internal market law lies outside the scope of this article. For further detail, see Jochem de Kok, 'Legal Remedies against Investment Screening Decisions' in Bas de Jong and others (eds), *The Rise of Public Security Interests in Corporate Mergers and Acquisitions* (Wolf Legal Publishers 2022) 94–102; Jochem de Kok, 'Book Review - "Screening Foreign Direct Investment in the EU: Political Rationale, Legal Limitations, Legislative Options" by Jens Velten' (2023) 50 LIEI 451; de Kok, 'Towards a European Framework for Foreign Investment Reviews' (n 14) 27–32; Velten (n 6) 61; 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: A Common European Law on Investment Screening* (*CELIS*) (Springer 2020) 821; Steffen Hindelang and Andreas Moberg, 'The Art of Casting Political Dissent in Law: The EU'S Framework for the Screening of Foreign Direct Investment' (2020) 57 CMLR 1427; Régis Bismuth, 'Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU' (2018) 3 European Investment Law and Arbitration Review 45; Jaśkowski (n 101); Crivoi (n 15) 253.

118 See, for instance, Case C-106/22 *Xella Magyarország* (n 47) paras 44–48. FDI Screening Regulation, Article 3(6) and Recital 10. A detailed discussion, see articles cited in (n 117) above.

119 FDI Screening Regulation, Recital 4.

120 Joined Cases C-402/07 and C-432/07 *Sturgeon and Böck* [2009] ECLI:EU:C:2009:716, paras 47–48.

difference can be identified between 'public security' or 'security', or what the practical implications would be if 'security' would include non-public or private security interests. Lastly, the distinction between 'public order' under the FDI Screening Regulation and 'public policy' under the Treaties is particular to the English language versions. Identical terms are used in other language versions, namely *openbare orde* in Dutch, *javni poredak* in Croatian, *ordre public* in French, *öffentliche Ordnung* in German, *közrend* in Hungarian, *ordine pubblico* in Italian, *porządek publiczny* in Polish and *orden público* in Spanish.[121]

In a number of cases, the Court has considered that national screening mechanisms *as such* are non-compliant with the fundamental principle of legal certainty. The Court considered that investment screening regimes must provide a clear scope of application and assessment criteria. The Court has held that the Treaties preclude a system of prior authorisation for direct foreign investments 'which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.'[122] In addition, prior approval schemes must provide the investor with an indication of the specific, objective, non-discriminatory circumstances in which a prior approval will be granted or withheld.[123] These criteria must be known 'in advance to the undertakings concerned.'[124] The Court has stressed that the circumstances in which the Member States have the right to object should not be 'undetermined and indeterminable' nor 'leave the national authorities too much discretion.'[125] The Court has held that screening mechanisms that do not provide such precision do not allow individuals to be apprised of their rights and obligations under the Treaties,

121 Based on a review of the different language versions of Article 65(1)(b) TFEU and the FDI Screening Regulation. The author thanks Ana-Maria Sunko, Balazs Sahin-Toth and Agnieszka Kolasinska for assisting with a review and providing translations from Croatian, Hungarian and Polish.

122 Case C-54/99 *Église de Scientologie* (n 47). Case C-367/98 *Commission v Portugal* (n 61) para 49. Case C-503/99 *Commission v Belgium* (n 61) para 45.

123 Case C-483/99 *Commission v France* (n 47) para 46; Case C-463/00 *Commission v Spain* (n 47) paras 74–75; Case C-212/09 *Commission v Portugal* (n 47) para 88; Case C-326/07 *Commission v Italy* (n 61) paras 66–73.

124 Case C-483/99 *Commission v France* (n 47) para 46; Case C-367/98 *Commission v Portugal* (n 61) para 50; Case C-244/11 *Commission v Greece* (n 61).

125 Case C-244/11 *Commission v Greece* (n 61) para 86; Case C-463/00 *Commission v Spain* (n 47) para 76; Case C-207/07 *Commission v Spain* (n 61) paras 50–55; Case C-212/09 *Commission v Portugal* (n 47) para 90; Case C-326/07 *Commission v Italy* (n 61) para 70.

'with the result that such rules must be regarded as contrary to the principle of legal certainty'.[126]

The investment screening mechanisms envisaged under the FDI Screening Regulation are not unlike the screening mechanisms that the Court has previously criticised for providing the national authorities with too much discretion.[127] In fact, 'the ambiguity of the notion of national security has rendered the FDI screening mechanism in national law notorious for its lack of legal certainty and predictability.'[128] In this Special Issue, Alexandr Svetlicinii also points to the Court's consistent emphasis on legal certainty, non-discrimination and proportionality and considers that broad mandatory notifications requirements under modern investment screening mechanisms may fail to meet the Court's proportionality standards.[129] An illustrative expression of the broad discretion in contemporary investment screening law is the judgment of the Italian Council of State (*Consiglio di Stato*) in the *Verisem* case, which held that the 'distinct and broad discretionary profile' of the Italian golden power regime was 'not by chance', given the very nature of national security being the protected interest, which the cannot be defined in advance and which requires a geopolitical assessment of future scenarios.[130]

The blurring of law and politics also follows from the decision-making process under the FDI Screening Regulation and the lack of transparency. The responsibility for investment screening in the Member States has been vested with the ministers of the economy or prime minister's offices.[131] The decision-making process at the heart of politics significantly differs from the approach in merger control law, the other key transaction review mechanism, which granted decision-making power to independent agencies shielded from

126 Case C-463/00 *Commission v Spain* (n 47) para 75; Case C-483/99 *Commission v France* (n 47) para 50. See also Szabados (n 62) 1125.

127 Case C-244/11 *Commission v Greece* (n 61) para 86.

128 Cheng Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity' (2021) 22 JWIT 561, 570.

129 Svetlicinii (n 6) 246–48.

130 Italian Council of State, *Psp Verisem Luxemburg Holding Sàrl v President of the Italian Council of Ministers* (2022) N. 00289/2023REG.PROV.COLL. N. 05813/2022 REG.RIC, para 14.

131 For instance, the Minister of the Economy, Finance and Economic Sovereignty and Federal Minister of Economic Affairs and Energy are responsible for investment screening in France and Germany, respectively. The Presidency of the Council of Ministers is responsible for investment screening in Italy. See Article L151-3 of the French *Code monétaire et financier*; Section 55 of the German *Außenwirtschaftsverordnung* (Foreign Trade and Payments Ordinance) and Article 1, paragraph of the Italian Decree-Law 21/2012, as converted into Law No. 56/2012.

political interference. While merger control is treated as a technical issue, the investment screening is highly political.[132] The French *de facto* prohibition of the acquisition of the French retailer Carrefour by the Canadian retailer Alimentation Couche-Tard in January 2021 is an illustrative example of the political nature of investment screening. The announcement that the French government would prohibit the transaction was made in public interviews on radio and TV just one day after talks between the Carrefour and Couche-Tard were revealed, and prior to the transaction having been notified to the French government. Referring to food security and the investment screening regime, the Minister announced: 'My answer is extremely clear: we are not in favour of the deal. This no is polite but it's a clear and final no.'[133] In this Special Issue Tietje and Reinhold furthermore illustrate the 'not unproblematic political influence on the decision-making process' in the case of the investment by the Chinese company COSCO in the Port of Hamburg, which was ultimately approved subject to the requirement to reduce the intended shareholding from 35% to 24.9% as a result of a political compromise.[134]

The FDI Screening Regulation moreover provides no obligation to publish decisions. This lack of transparency is justified on the ground of protecting State secrets. As a result, decision practice is limited to what is known from occasional press releases, statements made in parliament, or leaks to the media. The Commission and various Member States do publish annual reports on their investment screening practice. However, such annual reports only provide information on an aggregated and anonymised basis. The OECD thus notes that 'Investment screening regimes tend to operate outside public scrutiny and provide limited levels of transparency to those involved in the screening process.'[135]

A number of scholars have warned about the lack of definition of security and public order, the expansive view of economic security and the political decision-making process. Across the Atlantic, Anthea Roberts, Henrique

132 Hagemeyer (n 117).

133 Giorgio Leali, 'France Shields Carrefour from Takeover in Food Security Battle' (*POLITICO*, 15 January 2021) <https://www.politico.eu/article/france-carrefour-takeover-food-security-battle/>; Reuters, 'French "no" to Canada's Couche-Tard Regarding Carrefour Is "Final" -Minister' (*Reuters*, 15 January 2021) <https://www.reuters.com/world/americas/french-no-canadas-couche-tard-regarding-carrefour-is-final-minister-2021-01-15/> both accessed 30 May 2025.

134 Tietje and Reinhold (n 10) 146.

135 OECD, 'The Evolution of FDI Screening Mechanisms: Key Trends and Features' (2023) Issue 25 13–14.

Choer Moraes and Victor Ferguson warn that the concept of economic security 'has the potential to swallow the rule.'[136] In seemingly Agambean terms, they consider that: 'Treating economic security as national security may also create a permanent state of exception justifying broad protection/protectionist measures across time and space. By mixing notions of competition, conflict, and rivalry across economic, political, and security realms, it is hard to know when a threat might be understood as starting or finishing.'[137] Thijs De Cuyper considers that the lack of legal constraints and the political dimension of decision results in a 'a grey zone between law and politics.'[138] According to De Cuyper, it is difficult to answer whether investment screening mechanisms are used to achieve their ' goal of security and public order, because identifying the arguments on which a screening decision has been taken is not straightforward.[139] Reflective of the Agambean theory on the state of exception, he concludes: 'Essentially, it appears that law ends where politics begins.'[140] While all administrative decisions exist within a political context and require an interpretation of open norms, the vague and open-ended screening criteria, the political decision-making process and role of State secrets pose substantial challenges to legal certainty and the rule of law.

5 Judicial Review

An Agambean 'state of exception' involves not only a removal of the subject from the law, but also from judicial oversight.[141] The limitations on judicial scrutiny of investment screening decisions point to a Agambean type of situation where 'law is in force in the figure (…) of its own dissolution, and in which

136 Roberts, Choer Moraes and Ferguson (n 5).

137 ibid 665. See in similar terms Heath (n 5) 1024.

138 De Cuyper (n 5) 2. See also Enrico Zonta, 'From Economic Security to Legal Uncertainty: Exploring the Impact of the FDI Screening Regulation and Foreign Subsidies Regulation on Mergers and Acquisitions in the EU' (2025) Journal of European Competition Law & Practice 1, 12; Federica Marconi, 'Geopolitical Challenges beyond the European Union: The Evolution of FDI Screening Mechanisms and the Quest for European Security' in Jonas Fechter and Janosch Wiesenthal (eds), *The Age of Open Strategic Autonomy:* (Nomos Verlagsgesellschaft 2025); Guilherme Schneider Rasador and André Moreira Cunha, 'The New Security Grey Zone: Export Controls, Emerging Technologies and US-China Technological Rivalry' (2025) The Pacific Review 1.

139 De Cuyper (n 5) 16.

140 ibid 19.

141 Agamben, *State of Exception* (n 25) 3–4.

everything that the sovereign deems de facto necessary could happen.'[142] Given that there are no clear *ex ante* definitions of security and public order, judicial scrutiny of the limits of these concepts is important for preventing the securitisation of a large number of policy objectives.[143] However, the open-ended, vague and political nature of the security and public order exceptions paradoxically complicates *ex post* judicial review.

It is settled case law that the possibility for a Member State to rely on the security or public policy derogations does not prevent judicial review of such measures. Under settled case law of the Court, recourse to the 'public security' exception 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 be interpreted restrictively.[144] Therefore, whereas security is the 'sole responsibility' of the Member States, it is settled case law that Member States cannot 'unilaterally' determine the scope of these derogations without control by the Union institutions and that the possibility for a Member State to rely on the security or public order does not prevent judicial review of such measures by the Union courts.[145] Therefore, the FDI Screening regime does not result in a Schmittean exception amounting to a 'self-judging' exception that is unamenable to judicial review, which results in the 'suspension of the entire existing juridical order'.

According to settled case law, while the security and public order exceptions should be interpreted restrictively, the Member States enjoy a margin of discretion when relying on these exceptions. In particular, 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 competent national authorities must therefore be allowed a margin of discretion within

142 Agamben, *Homo Sacer* (n 25) 38. See also Agamben, *State of Exception* (n 25) 29.

143 See in similar terms Vidigal and Schill (n 6).

144 Case C-98/01 *Commission v UK* (n 61) para 21; Case C-54/99 *Église de Scientologie* (n 47) para 17; Case C-114/97 *Commission v Spain* [1998] ECLI:EU:C:1998:519, para 20; Case C-36/02 *Omega Spielhallen* [2004] ECLI:EU:C:2004:614, para 30; Case C-483/99 *Commission v France* (n 47) para 48; Case C-503/99 *Commission v Belgium* (n 61) para 47; Case C-212/09 *Commission v Portugal* (n 47) para 83.

145 See, for instance, Case C-387/05 *Commission v Italy* (n 47) para 45; Case C-461/05 *Commission v Denmark* [2009] ECLI:EU:C:2009:783, para 51; Case C-273/97 *Sirdar* [1999] ECLI:EU:C:1999:523, para 15; Case C-285/98 *Kreil* [2000] ECLI:EU:C:2000:2, para 15; Case C-54/99 *Église de Scientologie* (n 47) para 17; Case C-483/99 *Commission v France* (n 47) para 60; Case C-463/00 *Commission v Spain* (n 47) para 72; Case C-184/12 *Unamar* (n 47) para 46; Case C-319/06 *Commission v Luxembourg* (n 47) para 28; Case C-434/10 *Aladzhov* [2011] ECLI:EU:C:2011:750, para 34.

the limits imposed by the Treaty.'[146] Furthermore, the Member States are in principle 'free to determine the requirements of public policy and public security in the light of their national needs'.[147] The Court has notably held that in the absence of complete harmonisation 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.[148] Furthermore, the Court has held that 'it is for Member States to take appropriate measures to ensure their internal and external security.'[149] Moreover, the Commission has argued that the permissible grounds of justification and proportionality can be interpreted more broadly in the case of investments from third countries.[150]

The wide range of factors that can be taken into account under the FDI Screening Regulation and expansive interpretation of security under the Economic Security Strategy and related policies supports a broad understanding of the security exception.[151] These development illustrate how circumstances that may justify recourse to security and public order may, in the words of the Court, vary 'from one era to another.'[152] The present era supports a broad understanding of the circumstances that may justify recourse to the security and public order exceptions, especially vis-à-vis third country investors.

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146 Case C-36/02 *Omega Spielhallen* (n 144) para 31; Case 41–74 *Van Duyn v Home Office* [1974] ECLI:EU:C:1974:133, para 18; Case C-326/07 *Commission v Italy* (n 61) para 42; Case C-463/00 *Commission v Spain* (n 47) para 34.

147 Case C-106/22 *Xella Magyarország* (n 47) para 66.

148 See, for instance, Case C-274/06 *Commission v Spain* (n 61) para 36; Case C-367/98 *Commission v Portugal* (n 61) para 49; Case C-503/99 *Commission v Belgium* (n 61) para 45; Case C-463/00 *Commission v Spain* (n 47) para 68; Case C-112/05 *Commission v Germany* (n 61) para 73; Case C-207/07 *Commission v Spain* (n 61) para 45.

149 Case C-387/05 *Commission v Italy* (n 47) para 45; Case C-461/05 *Commission v Denmark* (n 145) para 51; Case C-273/97 *Sirdar* (n 145) para 15; Case C-285/98 *Kreil* (n 145) para 15.

150 Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net* [2020] ECLI:EU:C:2020:791, para 99; Case C-300/11 *ZZ v Secretary of State* [2013] ECLI:EU:C:2013:363, para 38. See also, in the context of essential security interests Case C-187/16 *Commission v Austria* [2018] ECLI:EU:C:2018:194, para 76; Case C-337/05 *Commission v Italy* (n 61) paras 43 and 46. See also Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* [2020] ECLI:EU:C:2020:257, para 143.

151 See Commission Covid-19 Guidance (n 71). This interpretation appears to be confirmed by the Court, which held in *Xella* that an objective relied on to justify a restriction on the freedom of establishment by an EU company must be 'particularly serious.' Case C-106/22 *Xella Magyarország* (n 47) para 70.

152 Case C-36/02 *Omega Spielhallen* (n 146) para 31; Case 41–74 *Van Duyn* (n 146) para 18; Case C-326/07 *Commission v Italy* (n 61) para 42; Case C-463/00 *Commission v Spain* (n 47) para 34.

The *Xella* case illustrates that the Court still sets limits on the type of interests that Member States may take into account, especially in an intra-EU context. Notably, the Court rejected that the freedom of establishment precludes investment screening regimes that allow for the prohibition of an intra-EU investment on the grounds that it 'harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials such as gravel, sand and clay.'[153] However, even Advocate General Ćapeta considered in her opinion in *Xella* that the such restrictions could in principle be justified. The Advocate General considered that if she had received a question on restrictions of investments in the field of the extraction of construction aggregates on security grounds 20 years ago, 'there would have been little doubt in my mind that it concerned protectionism of the kind not tolerated by a free and open market economy. However, in those days, concepts like 'friend-shoring' or 'outbound investment screening' were less well known outside national security circles, and would certainly have been deemed dirty by the convinced globalisationist. Now, however, those concepts are set to shape the European Union's new trade policy objectives.'[154] Referring to the FDI Screening Regulation, the Advocate General did not exclude from the outset that the protection of the construction aggregates at the regional level could be an interest falling under the scope of the security exception.[155] Instead, the Advocate General considered the measure did not respond to a 'genuine and sufficiently serious threat to the security of supply for either a particular region or Hungary as a whole',[156] given that the producer just accounted for 0.52% of the Hungarian national production of sand, gravel and clay.[157]

However, as Svetlicinii considers in this Special Issue, it remains uncertain whether national courts will be able to effectively hold their governments accountable when issuing security-motivated decisions.[158] The impact of the wide margin of discretion provided Member States under EU law in the national context can also be illustrated by the *Verisem* judgment of the Italian Council of State (*Consiglio di Stato*).[159] The dispute pertained to an appeal by Verisem against a prohibition decision by the Italian Prime Minister of the acquisition of Verisem by Syngenta.[160] The Council of State considered that

153 Case C-106/22 *Xella Magyarország* (n 47) para 76.
154 Case C-106/22 *Xella Magyarország* Opinion of AG Ćapeta, paras 3–4.
155 ibid 82–83.
156 ibid 87.
157 ibid 84.
158 Svetlicinii (n 6) 242.
159 *Psp Verisem Luxemburg Holding Sàrl v President of the Italian Council of Ministers* (n 130).
160 ibid 2.a1.

the decision-making process by the Prime Minister under the FDI screening regime is of a discretionary nature involving an assessment of the transaction from a broader political perspective, including general aims of national policy, economic structure of the sector concerned, financial interests and a global strategic perspective.[161] According to the Council of State, this broad discretionary power follows from the FDI Screening Regulation.[162] The Council of State stressed that the wide margin of discretion is an intentional feature of the system in order to allow the most effective protection of very important national security interests.[163]

Judicial review of investment screening decisions is further complicated by the highly political nature of investment screening decisions, which not only involve a complex factual assessment of security risks involved, but also a balancing of a wide range interests. In investment screening procedures, governments must balance effects on security and public order with other interests, such as effects on international relations, the impact on the companies concerned, and the effects on the broader investment climate. As a result, legal procedures involving screening decisions tend to focus on the question of whether procedural requirements were complied with, sometimes in combination with a high-level review of whether the measure complies with fundamental rights or general principles of law, such as the principle of proportionality.[164] With respect to the review of investment screening decisions under German law, Hagemeyer concludes pessimistically that while the 'mechanisms and the legal technicalities that limit judicial review vary (…) the result is uniform: a black box from the perspective of adjudicators, a Pandora's Box from the perspective of states.'[165]

For an investor, the opportunity to seek meaningful judicial redress will be further limited due to the important role of State secrets and other confidential information in the context of investment screening procedures. The limited degree of transparency and redaction of information results from

161 ibid 14.

162 ibid 14.2.

163 ibid 16.

164 See also de Kok, 'Legal Remedies against Investment Screening Decisions' (n 117). Jaśkowski (n 101) 15. With respect to two recent German cases, see Jonas Fechter, 'Taking Due Process Seriously – The Administrative Court of Berlin Doubles down on FDI Procedural Rules' (*CELIS Institute*) <https://www.celis.institute/celis-blog/taking-due-process-seriously-the-administrative-court-of-berlin-doubles-down-on-fdi-procedural-rules/> accessed 30 May 2025.

165 Hagemeyer (n 117) 819. Bian and Vranes also refer to investment screening as having a "black box" character. Bian (n 128) 565; Erich Vranes, *Investment Screening and WTO Law: The Example of the EU Screening Regulation* (Springer 2023) 27.

the largely legitimate interest of the State in protecting the confidentiality of certain information, such as State secrets.[166] The Court of Justice permits the Member State not to disclose certain information to the person concerned on the basis of security considerations.[167] As a result, access to the case file by the investor and the target company may be limited, which can significantly impede the right to judicial review.

It is for the national court to determine whether security stands in the way of disclosure.[168] If security stands in the way of disclosure, judicial review must aim to strike a balance between the interest of the State and the right to effective legal protection.[169] Nevertheless, a study carried out for the European Parliament on national security and secret evidence before courts in the EU found a 'disproportionate degree of appreciation for the executive and over-protection from independent judicial oversight' in cases involving national security.[170] According to the study, courts of the Member States too easily accept the argument that judicial oversight of the relevant decision should be limited.[171] Moreover, judicial authorities tend to place too much trust in the quality of information by intelligence services and claims that national security is under threat.[172] The role of State secrets thus not only limits judicial review from a procedural perspective, but also increases the hurdle of successful challenges to the substance of the decision.

Restrictions or prohibitions imposed by procedurally sound decisions invoking good faith, but extensive, security claims are therefore typically exceedingly difficult to challenge in court. In this respect, Heath argues that these 'good faith but novel' security claims may pose a more significant and permanent

166 See also Jaśkowski (n 101) 15.

167 Case C-300/11 *ZZ v Secretary of State* (n 150) para 54; Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* [2008] ECLI:EU:C:2008:461, para 342.

168 Case C-300/11 *ZZ v Secretary of State* (n 150) para 62.

169 ibid 64. See for further detail, paras 65 to 68.

170 Didier Bigo and others, 'National Security and Secret Evidence in Legislation before the Courts: Exploring the Challenges' (2014) Study for the LIBE Committee of the European Parliament PE 509.991 7–8.

171 ibid 9. See also Vigjilenca Abazi and Christina Eckes, 'Closed Evidence in EU Courts: Security, Secrets and Access to Justice' (2018) 55 CMLR 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 255; Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2009) 28 Yearbook of European Law 664; Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights : Comparative Judicial Engagement* (Hart Publishing 2014).

172 Bigo and others (n 170) 9.

threat to the international legal framework for trade and investment than clear cases of abuses.[173] While Agamben's assessment that in the state of exception 'everything that the sovereign deems de facto necessary could happen' lacks some nuance,[174] the underlying warning that the security paradigm renders it exceedingly difficult to challenge executive decisions is valid. The convergence of the open-ended nature of the security and public order exception, its expansive interpretation in related policy, the executive's margin of discretion, the important interests at stake, the complexity of the analysis, the balancing of different of interest involved, the geopolitical context and the role of State secrecy that significantly limits the intensity of judicial scrutiny of investment screening decisions.

In practice, investment screening decisions remain largely unchallenged.[175] Investors typically decide to abandon the transaction prior to the adoption of the decision when faced with the prospect of a prohibition decision or conditions that would be unacceptable to the investor.[176] In the EU law context, is it noteworthy that most of the case law on investment screening mechanisms, notably those in the golden shares context, resulted from Commission infringement decisions rather than preliminary references. An investor 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 its actual investment. It is only in exceptional cases that the commercial or contractual interests associated with the investment are sufficiently strong to merit challenging a negative screening decision.

Moreover, legal review processes will typically take longer than the average time horizon of an investor.[177] For instance, in the case of *Xella,* the Court of Justice issued its judgment two and a half years after the initial prohibition

173 Heath (n 5) 1024.

174 Agamben, *Homo Sacer* (n 25) 38. See also Agamben, *State of Exception* (n 25) 29.

175 OECD, 'Acquisition- and Ownership-Related Policies to Safeguard Essential Security Interests: Current and Emerging Trends, Observed Designs, and Policy Practice in 62 Economies' (n 59) paras 108, 323; Hagemeyer (n 117); Fechter (n 164); Thomas Verellen, 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48 LIEI 19, 34.

176 See also Hagemeyer (n 117) 797; Verellen (n 175) 35; OECD, 'Acquisition- and Ownership-Related Policies to Safeguard Essential Security Interests' (n 59) para 238.

177 Bálint Kovács, 'National Interest and Freedom of Establishment: The CJEU's Judgment in Xella' (CELIS Institute, 14 August 2023) <https://www.celis.institute/celis-blog/national-interest-and-freedom-of-establishment-the-cjeus-judgment-in-xella/> accessed 30 May 2025.

decision.[178] Assuming that the Budapest High Court will decide to annul the (second) prohibition decision by the Hungarian government, the government will have to take a third decision. Even if the transaction is ultimately approved, approximately three years will have passed since the signing of the deal. Investors and selling shareholders will typically be unlikely to tolerate the prospect of years of litigation with an uncertain outcome.[179]

6 Conclusion

The institutionalisation of security as a technique of governance in the regulation of investments creates a permanent state of exception that is characterised by security as dominant paradigm of governance and a blurring of public law and political fact due to a lack of legal certainty and limited scope for judicial review. The institutionalisation of the security exception as central paradigm of governance results in significant challenges to legal certainty and the rule of law. This Special Issue illustrates that this development is not unique to the FDI Screening Regulation, but reflects a fundamental paradigm shift in the regulation of foreign investments in international economic law.

First, the FDI Screening Regulation is characteristic of a generalization of the security exception as a normal technique of government. The security paradigm developed in the context of a series of crises and structural changes in the global economic and political order. The institutionalisation of security as paradigm of governance stands in contrast to the paradigm of investment liberalisation under the Common Commercial Policy and the basic rule of the free movement of capital and free movement of establishment in the internal market. Following the adoption of the FDI Screening Regulation, the security exception has expanded to cover a wide range of industrial-economic interests, such as technological competitiveness, technological advancement, ownership over key technologies, the digital and green transitions, price surges, a stable and reliable provision of goods and services, and data security. The institutionalisation of the security exception is reflective of Agamben's warning that while formal declarations of states of exceptions are rare, the security exception is increasingly generalised as a regulatory instrument.

178 Case C-106/22 *Xella Magyarország* (n 47) paras 19–20.

179 See, similarly, Kovács (n 177); Bas De Jong and Wolf Zwartkruis, 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' (2020) 31 European Business Law Review 447, 467.

Second, the FDI Screening Regulation is characterised by an open-ended scope of application and screening criteria and a decision-making process that results in a blurring of law and political fact. The FDI Screening Regulation provides a list of non-exhaustive factors that may, amongst others, be taken into consideration by Member States or the Commission, including effects on critical infrastructures, critical technologies, critical inputs, sensitive information and the media. The Commission has endorsed this broad understanding of security and public order that includes open-ended concepts such as strategic autonomy and economic security. Since the adoption of the FDI Screening Regulation, Member States have prohibited or restricted investments in numerous economic sectors, ranging from supermarkets and ports to tyres and semiconductors. As a result of the open-ended legal framework and the political decision-making process, the boundaries of the security or public order criteria are largely determined by politics.

Third, the Agambean state of exception in the EU investment screening regime is reflected in the significant limitations of judicial oversight. It is settled case law that the possibility for a Member State to rely on the security or public policy derogations does not prevent judicial review of such measures. However, the broad margin of discretion of the Member States in the area of security and public order significantly limits the scope of meaningful judicial review. The intensity of judicial scrutiny in cases involving restrictive measures taken to protect the security tends to be very low. The possibility of meaningful judicial redress for investors is further limited due to the important role of State secrets and other confidential information in investment screening procedures.

The FDI Screening Regulation is not representative of state of exception as envisaged by Carl Schmitt, which is devoid of law and in which sovereign power has been freed from any legal restraint. After all, investment screening in the EU is subject to a legal framework and screening decisions are subject to judicial review. However, viewed from the perspective the Agambean state of exception, the institutionalisation of security as a central paradigm of governance represents a more gradual and subtle shift away from a rules-based system. The combined lack of defined interests and the shift of bureaucracy to sovereign power in the decision-making process results in a blurring between law and politics, especially given that this exercise of sovereign power is hardly amenable to judicial review. Rather than resulting in the suspension of the legal order as such, the existing legal framework represents an uncertain legal zone that is characteristic of a state of exception as considered by Agamben, in which legal norms blur with fact, so that fact and law seem to become

indistinguishable. This conclusion does not imply that the public interests pursued in investment screening are not important, but rather highlights the risks that the expanding scope of the security exception in investment law poses to the rule of law and the importance of developing an alternative paradigm for regulating public interests in investment law.

The security paradigm could notably be replaced with an investment screening model that is guided by specific objectives and grounds for approving, restricting or prohibiting investments that is inspired by the wide range of security, economic and geopolitical interests that are relevant to investment regulation. Investment screening criteria could in particular include the security of supply by critical infrastructure, supply chain resilience, access and control over critical technologies, technological competitiveness, preventing misuse of technology for human rights violations, protection of sensitive data, and freedom and pluralism of the media. A revised framework that specifies the grounds for approving, restricting or prohibiting investments would help transform investment screening from an exceptional legal framework that operates in a state of exception, to regular law that is characterised by specific, objective and non-discriminatory legal norms that specify the circumstances in which investment approval will be granted or withheld.