

THE FOREIGN
INVESTMENT
REGULATION
REVIEW

SEVENTH EDITION

Editors

Calvin S Goldman QC and Michael Koch

THE LAWREVIEWS

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PREFACE

This seventh edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions.

Foreign investment continues to garner a great deal of attention. This trend is expected to continue as the global economy further integrates, the number of cross-border and international transactions keeps increasing, and national governments continue to regulate foreign investment in their jurisdictions to an unprecedented degree. Reviews of cross-border mergers have, in some instances, been characterised recently by a rising tension between normative competition and antitrust considerations on the one hand, and national and public-interest considerations on the other; the latter sometimes weighing heavily against the former. As a result, more large, cross-border mergers are being scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Many factors are driving these emerging trends – the rise in populist political movements has increased the focus on national interest considerations such as protectionism; there are concerns over the export of jobs and industrial policy; heightened concerns over cybersecurity have led to enhanced national security protection measures; and an increased focus in some jurisdictions on the stream of capital flowing from state-owned enterprises has driven greater scrutiny of proposed investments, particularly those in economic sectors such as information technology and natural resources. Where, historically, national security concerns were limited to businesses involved in manufacturing or supplying military equipment and to infrastructure industries critical to national sovereignty, the scope of transactions reviewed on the basis of national security has broadened significantly. Transactions in sectors such as banking and finance, media, telecommunications, and other facets of the digital economy, as well as transportation industries and even real estate, may be potential focal points for foreign investment review.

Efforts to overhaul the regulatory landscape have been seen in the United States with the expansion of the review authority of the Committee of Foreign Investment in the United States (CFIUS), including a broadening of transactions under CFIUS's scrutiny. In turn, France is trying to generate support to revise the European Union's competition reviews to, among other things, more closely scrutinise mergers in the technology sector. Other major jurisdictions in Europe, including Germany and the United Kingdom, have shown greater interest in increased regulatory authority in regard to foreign investment reviews.

Differences in foreign investment regimes (including in the timing, procedure, thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) are contributing to the relatively uncertain and unpredictable

foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant ‘chilling’ effect on investment decisions and economic activity. Foreign investment regimes may be challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate.

The American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law has built on the work of the ABA ALS previous Task Force on Foreign Investment Review. It has looked more closely at the potential implications of national interest considerations and evolving breadth of national security reviews, including, in some cases, as they may relate to, or interface with, normative competition reviews. In so doing, the Task Force has examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In August 2019, the report of the Task Force was considered and approved by the Council of the ABA ALS.

These emerging trends and the evolving issues in the interface of foreign investment and competition reviews were the subject of panel discussions at the Annual Conference of the International Bar Association in Rome in October 2018 and the ABA ALS Global Seminar Series in Düsseldorf, Germany in May 2018, among others in recent years. The evolving issues have also attracted attention in recent years in international fora of public authorities, such as the International Competition Network and the Organisation for Economic Co-operation and Development’s Competition Committee.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 17 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition, or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients or the editors or publisher.

Calvin S Goldman QC and Michael Koch

Goodmans LLP
Toronto
September 2019

EU OVERVIEW

*Lourdes Catrain and Eleni Theodoropoulou*¹

I INTRODUCTION

This chapter provides an overview of the recently adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU² (the Framework Regulation) and discusses the importance of this new piece of legislation for foreign investors.

The Framework Regulation aims at addressing the growing concerns in the EU stemming from the rising number of acquisitions of EU companies by non-EU investors, in particular Chinese companies. Many of these acquisitions involved EU companies active in sensitive and strategic sectors.

Since the controversial acquisition in 2016 of KUKA AG, a German robotics engineering company, by Midea, a Chinese air-conditioning and home appliances company, there have been various controversial acquisitions by Chinese corporations into the EU. At the end of July 2018, Germany blocked a 20 per cent acquisition by the State Grid Corporation of China of 50Hertz, a transmission system operator in Germany, on national security grounds and the shares at issue were temporarily acquired by KfW, a government-owned development bank in Germany.³ Albeit Chinese foreign direct investment (FDI) into the EU has been declining in the past couple of years, from €37 billion in 2016 to €17.3 billion in 2018,⁴ concerns remain with respect to the sectors in which Chinese companies invest.⁵

The focus of Chinese investment flows in the EU is thus primarily on the sectors of advanced industrial machinery and equipment, information and communications technology,

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- 1 Lourdes Catrain is a partner and Eleni Theodoropoulou is an associate at Hogan Lovells International LLP in Brussels.
 - 2 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21.3.2019, pp. 1–14.
 - 3 Deutsche Welle, ‘Berlin beats Chinese firm to buy stake in 50Hertz power company’, 27 July 2018.
 - 4 Mercator Institute for China Studies, Chinese FDI in Europe: 2018 trends and impact of new screening policies, 6 March 2019.
 - 5 China’s strategic ambition of becoming a major player in the technological sector is reflected in (1) China’s 13th five-year plan for innovation-driven, green and inclusive growth, which sets out the country’s ‘strategic intentions and defines its major objectives, tasks and measures for economic and social development’, and (2) China Manufacturing 2025, which aims to raise the competitiveness of its industry by increasing the levels of local content in Chinese manufacturing by 70 per cent by 2025, and to create ‘national champions’ in 10 high-tech manufacturing sectors.

utilities, transport and infrastructure and energy.⁶ Certain Member States consider these sectors to be highly sensitive, as they are often linked to the defence industry and hence they raise national security considerations.

Against this background, in late July 2017, France, Germany and Italy launched the debate for the introduction of common rules in the EU for the scrutiny of FDI in strategic sectors. This debate eventually resulted in the adoption of the Framework Regulation, which provides for an enabling framework for Member States to review FDI on grounds of security and public policy and to increase cooperation among Member States, and between Member States and the European Commission (Commission).

II FOREIGN INVESTMENT REGIME

The Framework Regulation creates the legal framework to allow for greater coordination in screening FDI in the EU, without establishing a mandatory screening mechanism at EU level. To date, 14 Member States have adopted different policies for securing their vital national security interests against FDI, ranging from screening procedures to partial or total prohibition of FDI in specific sectors, notably defence.⁷

The legal basis for such mechanisms is the Treaty on the Functioning of the European Union (TFEU), which allows Member States to ‘take such measures as [they] consider necessary for the protection of the essential interests of [their] security that are connected with the production of or trade in arms, munitions and war material’, on the condition that the measures do not ‘adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes’.⁸

Article 63 TFEU prohibits all restrictions on the freedom of movement of capital and payments between Member States or between Member States and third countries.⁹ Article 65 TFEU provides for derogation from this prohibition, allowing Member States to take measures that are justified on grounds of public policy or public security.¹⁰ The invocation of public policy and public security reasons must not constitute ‘a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63’.¹¹

6 Merics Papers on China, No. 3, Update, January 2017, ‘Record flows and growing imbalances: Chinese investment in Europe in 2016’.

7 European Parliament Briefing, EU Framework for FDI Screening, January 2018, at p. 3; see also list of screening mechanisms notified by Member States, last updated on 20 June 2019, available at: http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (last accessed on 25 June 2019).

8 Article 346(1)(b) of the Treaty on the Functioning of the European Union (TFEU).

9 Article 63 TFEU states: (1) within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited; and (2) within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

10 Article 65(1)(b) TFEU states: (1) The provisions of Article 63 shall be without prejudice to the right of Member States: [...] (2) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

11 Article 65(3) TFEU.

According to the case law of the Court of Justice of the European Union (CJEU), national measures may be justified on the grounds set out in Article 65(1)(b) TFEU, namely public policy or public security¹² or by overriding reasons in the general interest 'to the extent that there are no [EU] harmonising measures providing for measures necessary to ensure the protection of those interests'.¹³ Those overriding interests have been held to include environmental protection, town and country planning and consumer protection,¹⁴ and exclude purely economic objectives.¹⁵

However, national measures must respect the limits provided by the TFEU and observe the principle of proportionality, in that restrictive measures must be appropriate to secure the objective that they pursue and not go beyond what is necessary to achieve it.¹⁶

The CJEU has also held that the scope of the public security exception must be interpreted strictly and cannot be unilaterally determined by the Member States without any control by the EU institutions.¹⁷ Member States may rely on this exception only in the presence of a 'genuine and sufficiently serious threat to a fundamental interest of society'.¹⁸ Moreover, such derogations must not be applied for purely economic purposes,¹⁹ while persons affected by such restrictive measures must have access to legal remedies.²⁰

Finally, Council Regulation 139/2004 on the control of concentrations between undertakings (Merger Regulation)²¹ aims at establishing whether appraisals of mergers and acquisitions within the EU are compatible with the common market and do not pose impediments to effective competition therein. For transactions with an EU dimension, the Merger Regulation affords the Commission with exclusive competence to make decisions.²² Once the Commission has taken jurisdiction over a transaction, Member States' domestic legislation does not apply.²³ However, Article 21(4) of the Merger Regulation explicitly provides that Member States 'may take appropriate measures to protect legitimate interests

12 Public security grounds for derogating from the freedom of movement of capital and payments has also been held to include the objective of ensuring a minimum supply of petroleum products at all times (Judgment of 4 June 2002, *Commission v France*, C-483/99, ECLI:EU:C:2002:327, paragraph 47), and the safeguarding of energy supplier in the event of a crisis (Judgment of 4 June 2002, *Commission v Belgium*, C-503/99, ECLI:EU:C:2002:328, Paragraph 45).

13 Judgment of 23 October 2007, *Commission v Germany*, C-112/05, ECLI:EU:C:2007:623, paragraph 72.

14 Judgment of 24 March 2011, *Commission v Spain*, C-400/08, ECLI:EU:C:2011:172, paragraph 74.

15 *ibid.*

16 Case C-112/05, *op.cit.*, paragraph 73; Judgment of 14 March 2000, *Église de scientologie*, C-54/99, ECLI:EU:C:2000:124, paragraph 18; Case C-483/99, *op.cit.*, paragraph 45; Case C-503/99, *op.cit.*, paragraph 45.

17 Case C-54/99, *op.cit.*, paragraph 17; Case C-483/99, *op.cit.*, paragraph 48; Case C-503/99, *op.cit.*, paragraph 47; Judgment of 13 May 2003, *Commission v Spain*, C-463/00, ECLI:EU:C:2003:272, paragraph 72.

18 *ibid.*

19 Case C-54/99, *op.cit.*, paragraph 17; Case C-400/08, *op.cit.*, paragraph 74.

20 *ibid.*

21 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, pp. 1–22.

22 *id.*, Article 1 and Article 21(2).

23 *id.*, Article 21(3).

other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law'.²⁴ Public security is listed as a legitimate interest in this regard.

III REVIEW PROCEDURE

The Framework Regulation establishes a common basis for the screening of FDI into the EU on grounds of security or public order, aiming at enhancing cooperation of Member States' national screening mechanisms. It sets out the requirements that national mechanisms must comply with. Importantly, it does not create a mandatory screening mechanism at EU-level, nor does it impose an obligation upon Member States to adopt such a mechanism. FDI screening remains within the competence of Member States. Further, it sets out a cooperation mechanism (1) among Member States, and (2) between Member States and the Commission, which aims at facilitating the exchange of information concerning potential investments that might have an impact on other Member States' national security or other strategic or sensitive areas, or on projects and programmes of EU interest.

The Framework Regulation applies to FDI, which is explicitly defined (thus excluding other forms of investment, such as portfolio investment). Consequently, it covers investments of any kind that aim to establish or to maintain lasting and direct links between the foreign investor and the acquired company to carry on an economic activity in a Member State, including investments that enable effective participation in the management or control of a company carrying out an economic activity.²⁵ This section analyses the main elements of the Framework Regulation.

i Member States' screening mechanisms

Member States are solely responsible for protecting their essential security interests.²⁶ As a result, they may maintain any existing mechanisms for the screening of FDI into their territory on security or public order grounds.²⁷ The Framework Regulation does not impose an obligation on Member States to have a screening mechanism in place. However, it sets out certain common principles by which any such mechanism must abide:

- a* procedures and rules, including time frames, must be transparent;²⁸
- b* relevant rules must set out the conditions for initiating a FDI review, the grounds for screening and the applicable procedural rules on a non-discriminatory manner between third countries;²⁹
- c* applicable time frames for the review must take into consideration potential comments by other Member States or Commission opinions, in accordance with the Regulation³⁰ (see Section III.iii below);

24 *id.*, Article 21(4).

25 Article 2(1) of the Framework Regulation.

26 Article 1(3) of the Framework Regulation; see also Article 4(2) TEU and Article 346 TFEU.

27 Article 3(1) of the Framework Regulation.

28 Article 3(2) of the Framework Regulation.

29 *ibid.*

30 Article 3(3) of the Framework Regulation.

- d* foreign investors must be able to have recourse to judicial review of the authorities' decisions;³¹
- e* any confidential information (including commercially sensitive information) made available to the Member State concerned in the context of its review must be protected;³² and
- f* Member States must provide for measures allowing the identification and prevention of circumvention of applicable screening mechanisms and decisions.³³

Any existing or newly adopted screening mechanisms must be notified to the Commission, which is responsible for maintaining an updated list of all mechanisms in the EU.³⁴ On 24 June 2019, the Commission published a list of screening mechanisms notified by 14 Member States.³⁵ Further, Member States must submit an annual report to the Commission, in which they include information about any FDI that took place in their territory in the preceding year, the operation of their screening mechanism, as well as any requests received by other Member States in the context of the cooperation mechanism (see Section III.iii below).³⁶ On that basis, the Commission will submit an annual report to the Parliament and the Council on the implementation of the Framework Regulation.³⁷

ii Screening factors

The Framework Regulation provides for an illustrative list of factors and criteria that Member States (or the Commission) may consider in determining whether a particular FDI may affect their security or public order. These factors include the potential effects of an FDI on the areas of:

- a* critical infrastructure, physical or virtual (such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, as well as land and real estate crucial for the use of such infrastructure);
- b* critical technologies and dual-use items (such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum and nuclear technologies, nanotechnologies and biotechnologies);
- c* supply of critical inputs (such as energy, raw materials or food security);
- d* access to sensitive information (such as personal data or the ability to control such information); and
- e* freedom and pluralism of media.³⁸

31 Article 3(5) of the Framework Regulation.

32 Article 3(4) of the Framework Regulation.

33 Article 3(6) of the Framework Regulation.

34 Article 3(7) and (8) of the Framework Regulation.

35 See List of screening mechanisms notified by Member States, last updated on 20 June 2019, available at: http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (last accessed on 25 June 2019).

36 Article 5(1) and (2) of the Framework Regulation.

37 Article 5(3) of the Framework Regulation.

38 Article 4(1) of the Framework Regulation.

Further criteria that may be taken into account include whether:

- a the foreign investor is controlled by a third country government, state bodies or armed forces (through ownership or significant funding);
- b the foreign investor has been involved in activities affecting security or public order of another Member State; or
- c there is a serious risk that the foreign investor engages in illegal or criminal activities.³⁹

iii Cooperation mechanism⁴⁰

An innovative element of the Framework Regulation is the establishment of a cooperation mechanism (1) among Member States and (2) between Member States and the Commission, aiming to the exchange of information about FDI in a Member State that may affect security of public order also in other Member States. The cooperation mechanism will work via contact points established in each Member State and the Commission respectively.⁴¹ It applies both to FDI already undergoing screening in a Member State⁴² and to FDI in a Member State not yet subject to screening,⁴³ with different nuances in each process.

The Member State in which the investment takes place must notify the other Member States and the Commission of such FDI⁴⁴ and may request that they provide comments or an opinion, respectively.⁴⁵ It must also provide information about the FDI, including, among others, on the ownership structure of the foreign investor; the value of the FDI; the products, services and business operations of the foreign investor; other Member States where the foreign investor conducts relevant business operations; the funding of the FDI and its source; and the date of (expected) completion of the FDI.⁴⁶ Such information is protected as confidential.⁴⁷ The other Member States and the Commission may, within 15 calendar days from receiving the above information, request more information and notify the Member State reviewing the FDI about their intention to provide comments.⁴⁸

If any other Member State or the Commission considers that the FDI at issue is likely to affect security and public order in another Member State, it can provide comments or an opinion,⁴⁹ within a 'reasonable period of time', and within a maximum of 35 calendar days from receiving the relevant information by the Member State concerned.⁵⁰ The deadline can

39 Article 4(2) of the Framework Regulation.

40 The European Commission graph, 'Factsheet on the EU investment screening Regulation', available at http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157683.pdf provides an overview of the cooperation mechanism procedure.

41 Articles 6(10) and 11 of the Framework Regulation.

42 Article 6 of the Framework Regulation.

43 Article 7 of the Framework Regulation.

44 Article 6(1) of the Framework Regulation.

45 Article 6(4) of the Framework Regulation.

46 Article 9(1) and (2) of the Framework Regulation. In exceptional circumstances where it is not possible to obtain such information, the Member State concerned must explain its inability to provide this information to the Commission and the other Member States (see Article 9(5) of the Framework Regulation).

47 Article 10(1) of the Framework Regulation.

48 Article 6(6) of the Framework Regulation.

49 Article 6(2) and (5) of the Framework Regulation.

50 Article 6(7) of the Framework Regulation.

be extended by 20 calendar days if additional information is requested from the Member State concerned.⁵¹ The Member State conducting the screening may make a decision earlier in exceptional circumstances requiring immediate action.⁵²

The cooperation mechanism applies also to FDI not undergoing screening, completed as of 10 April 2019.⁵³ The process is triggered if a Member State considers that a planned or completed FDI in another Member State is likely to affect its own security or public order. The Commission may also initiate the process if it considers that the FDI concerned might affect security or public order in another Member State. In these cases, Member States or the Commission may provide comments or an opinion, respectively.⁵⁴ Before issuing their comments, the other Member States and the Commission can request information about the FDI at issue.⁵⁵ The general time frame for submitting comments is the same (i.e., 35 calendar days from the receipt of relevant information), but the Commission has another 15 calendar days to issue its opinion.⁵⁶

In both types of the cooperation mechanism (i.e., for FDI undergoing screening and FDI not undergoing screening), the Member State in which an FDI is planned or completed must give ‘due consideration’ to other Member States’ comments and to the Commission’s opinion.⁵⁷ However, it is not bound by such comments or opinion in its final screening decision.

iv Projects or programmes of Union interest

An interesting element of the Framework Regulation concerns the review of FDI that is likely to affect projects or programmes of Union interest on grounds of security or public order. Projects or programmes of Union interest are defined as those ‘involving a substantial amount or a significant share of Union funding, or [...] covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order’.⁵⁸ Such projects and programmes are listed in an Annex to the Framework Regulation.⁵⁹ The Annex currently lists eight EU projects and programmes, such as the Horizon 2020, Galileo and the Trans-European Networks for Telecommunications.⁶⁰

51 *ibid.*

52 In that case, other Member States and the Commission must make an effort to issue their comments or opinion expeditiously (see Article 6(8) of the Framework Regulation).

53 Article 7(10) of the Framework Regulation.

54 Article 7(1) and (2) of the Framework Regulation. Comments by other Member States and the Commission’s opinion are mandatory if at least one third of the Member States consider that the FDI at issue is likely to affect their security or public order.

55 Article 7(5) of the Framework Regulation. Requested information must be duly justified, limited to information necessary to issue comments or an opinion and not unduly burdensome for the Member State where the FDI has been planned or completed.

56 Article 7(6) of the Framework Regulation. Comments cannot be provided after 15 months since the completion of the FDI in another Member State (see Article 7(8) of the Framework Regulation).

57 Articles 6(9) and 7(7) of the Framework Regulation.

58 Article 8(3) of the Framework Regulation.

59 Articles 8(3) and (4), and 16 of the Framework Regulation.

60 Annex to the Regulation. The full list of EU projects and programmes consists of: the European GNSS programmes (Galileo & EGNOS); Copernicus; Horizon 2020; the Trans-European Networks for Transport (TEN-T); the Trans-European Networks for Energy (TEN-E); the Trans-European Networks for Telecommunications; the European Defence Industrial Development Programme; and the Permanent structured cooperation (PESCO).

Where a project or programme of EU interest is likely to be affected by FDI, the Commission can issue an opinion addressed to the Member State concerned. The Commission must send its opinion to the other Member States (and not only to the Member State where the FDI is taking place). The Member State concerned must take 'utmost account' of the Commission's opinion and provide explanations to the Commission if it does not follow the opinion.⁶¹

v Other provisions

The Framework Regulation maintains the group of Member States' experts on FDI screening (Group) established in 2017 to provide advice and expertise to the Commission. The purpose of the Group is to share best practices and exchange views on current issues and common concerns pertaining to FDI. The Commission would also seek advice of the Group on systemic issues relating to the implementation of the Framework Regulation. The discussions of the Group are confidential.⁶²

The Framework Regulation also allows for the cooperation between Member States and the Commission with the competent authorities in third countries with respect to issues of FDI screening on security and public order grounds.⁶³

The Framework Regulation entered into force in 10 April 2019 and will become fully applicable as of 11 October 2020. In the period between its entry into force and its application, Member States should establish the necessary administrative structures that would allow cooperation at EU level with the other Member States and the Commission, in accordance with the Framework Regulation.

IV FOREIGN INVESTMENT PROTECTION

The EU investment policy aims at securing a level playing field and an open and transparent environment for investing in the EU on the basis of reciprocity. In the past few years, the EU has been negotiating and concluding FDI protection rules in Free Trade Agreements⁶⁴ or self-standing investment agreements,⁶⁵ covering issues such as market access and non-discrimination between EU and non-EU investors, creating a favourable regulatory framework for foreign investors and protecting established FDI in the EU, including through both substantive rules and investor-state dispute settlement mechanisms.

Article 207 TFEU sets out the Common Commercial Policy, over which the EU has exclusive competence by virtue of Article 3(1)(e) TFEU. In other words, the EU is exclusively competent to legislate and adopt legally binding acts, whereas Member States may do so only if they are empowered by the EU or for the implementation of such acts.⁶⁶ The CJEU confirmed that FDI falls within the EU exclusive competence in its 2017 Opinion on the EU–Singapore Free Trade Agreement.⁶⁷ The Court distinguished between FDI and other forms of investment (e.g., portfolio investment) and held that only FDI falls within the exclusive

61 Article 8(1) and (2) of the Framework Regulation.

62 Article 12 of the Framework Regulation.

63 Article 13 of the Framework Regulation.

64 See for example Chapter 8 in the EU – Canada Comprehensive Economic and Trade Agreement (CETA).

65 See for example EU – Vietnam Investment Protection Agreement.

66 Article 2(1) TFEU.

67 Opinion 2/15 of the Court (Full Court) of 16 May 2017, ECLI:EU:C:2017:376, at paragraph 80.

competence of the EU.⁶⁸ The criteria used by the CJEU to define FDI, namely the existence of lasting and direct links and the effective participation in the investment's management or control, now form part of the definition of FDI in the Framework Regulation.⁶⁹

On that basis, Member States cannot, in principle, conclude investment agreements with third countries on their own (or amend existing ones), unless authorised by the Commission.⁷⁰

V OTHER STRATEGIC CONSIDERATIONS

The key objective of the Framework Regulation is to ensure reciprocity in the acquisition of EU companies by non-EU investors and to introduce criteria of fair competition for such acquisitions, based on market rules. At the same time, it aims to strike a balance between maintaining an open environment to FDI in the EU, on the one hand, and the varying interests of its Member States on the other. Notably, many Member States have been tightening their FDI review mechanisms in recent years. The Framework Regulation does not aim at replacing existing Member States' mechanisms, but only at harmonising national mechanisms to streamline the scrutiny of FDI into the EU. For that reason, foreign investors must observe national requirements in the Member State or States in which they intend to invest (which may vary significantly) and engage with domestic authorities.

At the same time, the new rules would likely affect both the applicable time frames in national reviews and the substantive assessment of a reported FDI. On the one hand, applicable deadlines would have to take into account the time frame for Member States comments and the Commission opinion in accordance with the requirements of the cooperation mechanism. On the other hand, Member States will need to take into account the views expressed by other Member States or the Commission in their decision-making process.

Finally, the Framework Regulation complements the existing framework for mergers and acquisitions (M&A) in the EU⁷¹ and does not seek to replace it. As part of the cooperation mechanism for FDI already undergoing screening, the Member State concerned should indicate whether the FDI at issue is likely to fall within the scope of the Merger Regulation.⁷² While the Commission's role is merely coordination, it would be a relevant actor in the whole vetting process. As a result, companies engaged in M&A transactions would need to conduct a more thorough analysis of potential cross-border security issues to identify the EU Member States in which they would be required to make a filing.

68 *id.*, paragraphs 80 and 227.

69 *ibid.*; Article 2(1) of the Framework Regulation.

70 Regulation (EU) No. 1219/2012 of 12 December 2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, pp. 40–46.

71 Merger Regulation, *op.cit.*

72 Article 6(1) of the Framework Regulation.

VI CURRENT DEVELOPMENTS

During the past year, certain Member States have been intensifying the discussion about reforming the current EU merger rules to shape a European industrial policy. France and Germany are in the forefront of the request for such a reform, calling for a modernised competition policy apt to address the challenges of the twenty-first century economy through an improved EU industrial strategy with clear objectives by 2030.⁷³ Their proposal includes three main pillars that would allow the EU to compete on the global stage:

- a* investing in innovation, including through technology funding, supporting high-risk deep technology projects, becoming leaders in artificial intelligence, promoting research and development for cutting-edge technologies and ensuring that the EU financial markets support innovation;
- b* adapting the EU regulatory framework with a view to creating a global level playing field, through updating competition rules; and
- c* having in place effective measures to protect EU technologies, companies and markets, including through full implementation of the new FDI screening framework, an effective reciprocity mechanism for public procurement with third countries, promoting multilateralism and an ambitious EU trade policy, adapted to defend the EU's strategic autonomy.⁷⁴

While this manifesto has been officially dismissed,⁷⁵ it is an example of the general constructive discussion towards addressing global competition and securing a strong EU industry, including in sensitive and strategic sectors.

A further debate in the EU concerns the roll out of 5G networks. 5G networks are crucial for the maintenance and development of several critical sectors in the EU, including energy, transport, banking and health, as well as industrial systems transmitting sensitive information or electoral systems. They are also a powerful tool for the EU to compete in global markets. In this light, 5G networks have a paramount strategic importance for the EU as a whole and for Member States individually, as their security against espionage or cyber-attacks must be secured. Because of the interconnected nature of 5G networks, a cyber-attack in one Member State would most likely affect the whole EU.

The roll-out process is within the responsibility of Member States, which are currently working with operators to prepare it. Spectrum auctions of 5G mobile telecoms networks have been planned in 17 Member States in 2019 and 2020⁷⁶ and the ongoing debate revolves, among others, around the access of third country companies (notably, Chinese companies) in the auction process for establishing 5G networks in the EU. While other countries worldwide have imposed bans and restrictions on the access of Chinese companies to 5G networks, the EU seems to be taking a different approach away from bans and closer to measures to mitigate security risks (also in light of certain Member States' heavy reliance on Chinese parts and equipment in telecommunications). In March 2019, the Commission issued a non-binding

73 See Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century, 19 February 2019.

74 *ibid.*

75 See Johannes Laitenberger, Director-General for Competition, European Commission, Aktuelle Entwicklungen und Probleme des EU Kartellrechts: Anmerkungen zu den Fusionskontrollentscheidungen der Europäischen Kommission in den Fällen Wieland/Aurubis und Siemens/Alstom (in German), 15 February 2019.

76 European Parliament, 5G in the EU and Chinese Telecoms Suppliers, April 2019.

recommendation on the cyber-security of 5G networks,⁷⁷ setting out a common approach for Member States. The Commission recommendation provides for a road map for a coordinated EU risk assessment (based on Member States' individual risk assessment, which may be based on technical or 'other' factors) and for a common set of risk mitigating measures.⁷⁸

The new framework for FDI screening is one of the various tools of which the EU could avail itself to protect future 5G networks in an effective and coordinated manner, where there are risks for national security and other strategic areas in the EU.

⁷⁷ Commission Recommendation of 26.3.2019, Cybersecurity of 5G networks, C(2019) 2335 final.

⁷⁸ *ibid.*; see also Commission Fact Sheet, Questions and Answers – Commission recommends common EU approach to the security of 5G networks, 26 March 2019.

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