

CELIS Institute

CFIS 24 Background Paper on Panel

A firm-level perspective on investment screening in the EU

Prepared by Floor Doppen

CFIS 24 Programme Sherpa and PhD Candidate at The University of Antwerp¹

The purpose of this Paper is to set the scene and provide the state of play and background information to the participants in the Panel.

Challenges in FDI Screening

Firm perspectives on FDI Screening legislation: Focus on SMEs

National Security vs. economic cost/costs to competitiveness

About CFIS 24 | 16 -18 October 2024 | On-site | In private | Paris (France)

The CELIS Forum on Investment Screening (CFIS) is the flagship event of the CELIS Institute, to be held in its 6th edition this year. CFIS is Europe's first and foremost forum to discuss questions on investment screening and economic security. Thought leaders in investment control and economic security from Europe, the US, and beyond discuss current practical challenges and influential ideas to sketch geoeconomic strategies for Europe.

This year space is very limited. If you would like to join, please get in touch with events@celis.intitute.

About the CELIS Institute

The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. The CELIS Institute enjoys the status of charitable enterprise under German law.

¹ The views expressed in the Background Paper do not necessarily reflect the views of the panellists and participants in CFIS 24 and cannot be attributed to them. The CELIS Institute, as a matter of institutional policy, does not take any position but provides a neutral venue for open exchange.



Table of Contents

A. Introduction	2
B. Challenges	4
I. Firm & industry/sector perspectives.....	7
II. Small & Medium sized Enterprises.	10
C. Conclusion	11
D. References	13

A. Introduction

In the European Union investment screening in most Member States (MS) is a relatively new phenomenon. When Regulation 2019/452 ('the Regulation') was adopted only 11 states had investment screening mechanisms (ISMs), and of those countries that had screening practices, most were limited, focused on ad hoc controls, and some specific sectoral laws.² By now almost all EU MS have their own screening legislation, which means that plenty of states with no or very little investment screening tradition very recently adopted their own. Moreover, investment screening in the EU is also decentralized as the competence to screen investment lies with the MS, leading to important variation between them. This leads to important challenges for firms seeking to invest in the EU, or for firms in the EU seeking to attract FDI.

While FDI screening always entails a number of challenges for firms and other stakeholders, EU-specific challenges are different from some of the challenges firms might experience in other jurisdictions such as the US. For starters, investment screening is a relatively new phenomenon, which means that firms and other stakeholders need to acquire the necessary

² Grieger, 2017.



know-how to deal with a lot of new legislation, red tape and administrative processes. Secondly, there exists plenty of variation across the EU when it comes to investment screening legislation, which can also pose important challenges for firms.

In the US, as opposed to the EU, investment screening has existed for quite some time. This has allowed firms, practitioners, policy makers, and academics to become intimately familiar with the system, or at the very least, aware of its existence. Practitioners that deal with review processes are oftentimes specialists with experience from the state department that helps them anticipate red flags in screening reviews by providing detailed knowledge of the process, concerns and considerations involved in the review process. The presence of this revolving door dynamic, which sees experts move between the public and private sector, allows for the presence of lawyers and consultants that are intimately acquainted with both sides of the coin and help firms navigate screening legislation. They are uniquely positioned to advise on potential pitfalls, anticipate problems, and help firms navigate a process that is inherently (geo)political in nature rather than market-based.³ However, the US screening system blurs the lines between the public and private sphere, effectively excluding those actors like small and medium sized enterprises (SMEs) who cannot tap into these enmeshed networks and lack the capacity to gain access to the privileged connections and knowledge these practitioners provide. Moreover, screening is also a federal competence in the US and traditionally centralized, allowing for a measure of consistency across the US in screening cases, facilitating the process for firms and practitioners.⁴

³ Conversation with one of the participants in the 1st CELIS edition in Uppsala.

⁴ Recently some states have started to impose their own restrictions on incoming FDI (e.g. Florida's Senate Bill 264 (2023)), but these are already becoming contested. Expectations are that for now states retain their limited role in this national security space (Gibson, Dunn & Crutcher LLP, 2024).



B. Challenges

In the EU, the challenges to firms are of a different nature than in the US. The competence for FDI screening in the EU rests squarely with the MS who are the sole actors who can decide to review, block or impose mitigation requirements on incoming FDI, which leads to important cross-country variation. The challenge is therefore that any firm or practitioner involved in a review process must learn to navigate not one, but often multiple national screening regimes that are often recently adopted, amended, or extended in scope. This poses a significant challenge to any firm subject to FDI screening. And, while in some EU MS the revolving door phenomenon is strongly present, allowing for informal cues pertaining to a potential security review (such as France or Spain), in other countries screening authorities retain an insulating arms-length distance from the actors involved in M&A or greenfield transactions.⁵ On the one hand, this limits the type of information firms and other stakeholders can acquire through hiring processes, as opposed to the US. On the other hand, retaining an arms-length distance might well level the domestic playing field for SMEs facing investment review.

Moreover, across the EU there is significant variation in legislation and interpretation of what constitutes (a risk to) national security, which poses a more material problem for firms that have to navigate different screening legislation and screening authorities.⁶ For starters, variation in legislation across the EU has led to significant differences when it comes to ISMs, especially relating to bureaucratic requirements, sectoral coverage, notification, review thresholds and time-lines.⁷ This inefficiency could formally be addressed through more harmonization of

⁵ Doppen et al. (2024).

⁶ See the latest Commission report on investment screening in the EU.

⁷ SWD, 2024; COM, 2023; Doppen et al., 2024.



legislation across the EU.⁸ Harmonization could be achieved through a minimal sectoral scope of ISMs, minimal thresholds and maximum review time-lines, but full-blown harmonization of the regime is unlikely to be realized in the next revision of the Regulation,⁹ and variation will persist in the near future.

Secondly, MS are in control of their own mechanisms, resulting in potentially diverging interpretations of security and public order, i.e. variation in practice. There is a stark difference in the institutional design of the different screening authorities, for example as to which governmental actors are formally required to be involved in the process.¹⁰ This can impact the type of concerns that screening authorities can and will take into account in their review processes. Since ISMs are typically located at the executive level, they are also prone to political shifts and politicization dynamics. This might also impact screening decisions as public pressure can lead policy makers to use investment screening as a signaling or electoral tool.

Furthermore, 'public order and security' is not a well-defined legal term and allows for significant MS discretion. In the past, the CJEU has limited interpretations of 'public order and security', in particular with regards to 'golden shares'¹¹. The CJEU in that respect might in the future provide more boundary limits and guidelines to due process when it comes to investment screening, but that will depend on the case-law that develops over the next few years, and it not impede all MS discretion. Narrowing down what precisely constitutes 'public order and security' will remain difficult, even if in the future there will be more legal certainty in the

⁸ See COM (2024): the consultation phase already saw both economic as well as other stakeholders calling for more harmonization in terms of deadlines, bureaucracy, thresholds, minimal sectoral coverage and the like.

⁹ See COM (2024)

¹⁰ Doppen et al., 2024.

¹¹ Dimitropoulos, 2021: p. 30; Muchlinski, 2009: p. 68; Warchol, 2021; p. 60 & footnote 24.



future. Coordination between MS through the exchange of opinions and information under the Investment Screening Framework (ISF) and its coordination mechanisms is an informal alternative to achieving harmonization between MS on the interpretation of public order and national security. However, accessing information and determining the extent to which this type of harmonization is taking place is difficult given the confidential nature of the review & decision making processes as well as the limited information available on reviewed cases.¹²

In sum, firms and practitioners, depending on the MS and their own size, have limited access to their domestic screening authorities to gain (in)formal cues as to the feasibility of a certain investment on national security and public order grounds. Due to the only recent expansion of screening mechanisms as well as sectoral coverage of investment screening in the EU, there are also only a few precedents to function as guides to future reviews, increasing uncertainty for the time being. Moreover, following the sensitive nature of investment screening reviews, there is also not that much information available for firms & practitioners. These challenges are compounded by the decentralized character of investment screening in the EU as well as the lack of harmonization of MS legislation on investment screening and a rapidly changing geopolitical environment. All of this leads to high administrative and increased compliance costs associated with navigating the political and judicial landscape.¹³

¹² Screening authorities for example don't need to inform fellow MS on the outcome of a screening procedure. This is one of the aspects that revision of the Regulation 2019/452 seeks to address.

¹³ Bauerle Danzman, 2023.



I. Firm & industry/sector perspectives

The combination of these 2 factors: (1) skill acquisition & administrative cost related to investment screening and (2) cross-country variation in legislation and practice, constitute some of the main challenges for firms and other stakeholders in the EU.

Firm lobby groups themselves have expressed frustration at the absence of a clear definition or ‘guidebook’ on which investments might become contentious and have called for clarification of the term ‘national security’. At the MS level, for example in the Dutch case, representatives of firm interests were unsuccessful in gaining clarity on this issue in the Dutch new screening law (Wet Vifo). BusinessEurope, the key representative of European business interests in Europe, also explicitly aimed for a clarification of the terms ‘public order and security’ to *“avoid different interpretations between Member States, therefore ensuring a harmonious implementation with the EU”*.¹⁴ These calls have fallen on deaf ears, mainly because what constitutes national security¹⁵ fluctuates across time and space, i.e. the (geo)political context states operate in. Consultations for the revision of Regulation 2019/452 also repeatedly mention the inefficiencies created through variation in legislation between different ISMs across MS.¹⁶ Overall, business associations worry about the administrative costs and uncertainty that ISMs might create due to *“bureaucratic complexity, costly regulation, and uncertainty”*.¹⁷

Take ports for instance. They have become front and center in the debate on state-led investments and screening mechanisms in the EU, starting with the controversy over the port of Piraeus following the financial crisis, to the involvement of Chinese terminal operators and

¹⁴ BusinessEurope, 2018.

¹⁵ National security here is used colloquially.

¹⁶ See SWD (2024).

¹⁷ Bauerle Danzman, 2023: p. 17.



shipping companies in most of Europe's largest ports.¹⁸ Anecdotal evidence suggests that these actors have difficulties anticipating which transactions might become contentious or embroiled in a lengthy review, which is made all the more complicated in light of a changing geopolitical environment.¹⁹

In September 2021 for example Hamburg Hafen and Logistics AG (HHLA) announced that they were in negotiations with Cosco Shipping Ports Limited. Only 6 months prior, the Comprehensive Agreement on Investment (CAI) between EU and China had been signed (December 2020). Driven by the German presidency of the European Council, it signaled Germany's willingness to intensify its investment relations with China.²⁰ COSCO's investment in the Tollerort terminal became embroiled in a review process for 2 years, during which time Germany's strategic relationship with China became gradually more publicly contested which politicized the review process itself.²¹ Ultimately the deal was still concluded although the acquisition was reduced to 24,9%. The experience raised questions in terms of acceptable time-lines in German FDI screening²², as well as the potential impact of public contestation in economic transactions. Interestingly, Germany's screening authorities reached out to other port authorities in the EU to inquire about their experience with COSCO, which port officials found very difficult to answer as they were pushed into a role that they did not know how to navigate themselves.²³

¹⁸ Ghiretti et al., 2023; Kardon & Leutert, 2022.

¹⁹ Ports and the shipping industry have been experiencing a new economic or geopolitical shock every 6 months: from the Covid 19 crisis, the China-US trade war, to the Russian invasion in Ukraine, the Israel-Hamas conflict and tensions in the South China Sea.

²⁰ Germany at the time held the presidency of the Council of the European Union and was the main motor behind the signing of the deal before passing on the presidency to Portugal.

²¹ Kienzle, 2023.

²² Interview with port authority officials.

²³ Interview with port authority officials.



Another illustrative case in which investment screening featured heavily was in Trieste, 2017, when China Merchants Holdings (CM) sought to acquire the Piattaforma Logistica S.r.l. (PLT), a local company constructing a multipurpose terminal. The negotiations took quite long, and by the time they came to a conclusion the geopolitical landscape had completely shifted. The Chinese bid was ultimately discarded by PLT who anticipated difficulties with Italy's golden power regime, even if the Italian government had signed a Memorandum of Understanding two years earlier identifying Trieste as one of the prime investment locations for the Belt and Road Initiative.²⁴ Eventually, PLT went into business with HHLA rather than CM or another Chinese partner²⁵. This case specifically showcases the importance of screening authorities providing transparent guidelines as to how they evaluate potential investors. Additionally, it *“would help promoting continuity over policy application in the instance of frequent changes in government”*.²⁶

The outcome in the Trieste case was the result of the deterrence effect of investment screening following uncertainty as to the result of a screening procedure. The changed political environment in Italy led PLT to believe that CM's bid would be blocked through the Golden Power regime. These concerns had not been present at the beginning of the negotiations, but they were by the end. Given Italy's close state-industry relations, it might also well be that informal channels were used to signal the screening authorities' intent to potentially block the investment.²⁷

²⁴ Luise et al., 2022.

²⁵ China Communications Construction Company (CCCC) also had expressed interest in PLT (Luise et al., 2022).

²⁶ Luise et al., 2022: p. 189.

²⁷ We cannot confirm that this actually happened, although there is some indication to that effect given Italy's governance ecosystem (Calcara & Poletti, 2023; Doppen et al., 2024).



II. Small & Medium sized Enterprises.

As discussed above, firms, investors, and practitioners face challenges when it comes to investment screening. These challenges are of particular importance to SMEs who often find their way into complex (strategic) supply chains, but can lack the necessary know-how and financial resources to efficiently navigate investment screening processes. As such, the challenges that are already difficult to deal with for large firms are more impactful for SMEs.

For starters, these types of firms often have limited financial resources to navigate the formal legislation that regulates the economic-security nexus and might struggle more with bureaucratic red tape than large companies. Additionally, in case of an adverse screening outcome, SMEs are also less likely to have the financial capacity to contest the screening process. They are therefore doubly vulnerable when it comes to investment screening. Secondly, SMEs might be less aware of their own geopolitical relevance, i.e. they might not even be aware that they have a notification requirement with their screening authorities. Lastly, due to their size SMEs also have lower levels of access to the political process when screening legislation is created, and where relevant, are also not embedded in those networks that allow them to receive informal cues from the authorities responsible for investment screening.

In France for example, which has a longer screening tradition than most EU Member States, SMEs were vocally opposed to a broadening on the screening scope following concerns that it would inhibit their access to foreign capital,²⁸ while in other countries SMEs were more successful in their lobbying activities and managed to be formally excluded from the investment screening process (e.g. Austria). BusinessEurope in that regard flags that if the revision of

²⁸ Doppen et al. (forthcoming).

Regulation 2019/452 were to include a mandatory sectoral scope, this might have adverse consequences for start-ups and SMEs, especially on its financing flows and competitiveness.²⁹

It has also been pointed out that any delays in access to capital for many EU start-ups and SMEs might prove impactful on their capacity to 'survive', harming innovation in its steps.³⁰

C. Conclusion

Overall many firms & practitioners are still internalizing the advent of a more geopolitical rationale to their markets, especially those firms located in sectors that traditionally operated relatively insulated from these types of concerns. These actors are used to making decisions based on economic profit-maximalization rationales rather than geopolitical ones, especially regarding incoming FDI.³¹ Identifying the challenges firms face when it comes to investment screening allows us to point out the potential cost of investment screening. The most costly challenges businesses face are (1) skill acquisition & administrative cost related to investment screening and (2) cross-country variation in legislation and interpretation. Lastly, uncertainty increases because national security by nature is also a concept in flux and heavily dependent on the geopolitical context of its time. Additionally, while geopolitical views change frequently, investments generally are there to stay.

It is important to discuss that a strategy of enhancing 'economic security' through investment screening can have consequences for the economic competitiveness of a country, i.e. a country's ability to drive growth, income and welfare through a sustained rate of productivity. This

²⁹ BusinessEurope, 2024. This would be the case for states that have established different rules for SMEs such as Austria.

³⁰ AmCham EU, 2024.

³¹ There is much more awareness of (geo)political risk when it comes to outbound investment as firms are often more aware of potential problems they might encounter abroad in e.g. authoritarian regimes as opposed to democratic regimes (Jensen, 2003).



is specifically because FDI screening might deter foreign investors as well as exclude certain actors from accessing the necessary capital to develop new technologies or grow, as discussed above.

Moreover, a decrease in competitiveness in and of itself might also affect a country's national security. Most straightforwardly because economic gains can be turned into military assets, because firms pay taxes which can then be used to expand or invest in the military, or develop products used in military assets. More indirectly, a decrease in competitiveness or ability to increase productivity in certain sectors might exacerbate certain economic vulnerabilities & dependencies. It is therefore important to pay attention to the cost of FDI screening in the short and long turn, and seek to minimize these costs as much as possible.

* * *

D. References

- AmCham EU (2024). Consultation response. Proposal for a new regulation on the screening of foreign investments. Retrieved from: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework/F3462717_en
- Bauerle Danzman, S. (2023). Shaping Investment Security Policy: A Guide for Business Associations. *Centre for Accountable investment. CIPE*. Retrieved from https://www.cipe.org/wp-content/uploads/2023/05/CIPE-investment-security_pages_8-May-2023.pdf
- BusinessEurope (2018). Screening of FDI into the EU – BusinessEurope’s views. *Position Paper*. Retrieved from https://www.businesseurope.eu/sites/buseur/files/media/position_papers/rex/2018-06-06_screening_of_fdi_into_the_eu_-_businesseuropes_views_v2_0.pdf
- BusinessEurope (2024). BusinessEurope Feedback to the European Commission on the proposal for a Regulation on the screening of FDI in the Union. Retrieved from: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13739-Screening-of-foreign-direct-investments-FDI-evaluation-and-revision-of-the-EU-framework/F3464623_en
- Calcara, A., & Poletti, A. (2023). Varieties of Anti-Globalism: The Italian Government’s Evolving Stance on the EU’s Investment Screening Mechanism. *Politics and Governance*, 4(11), pp. 177–187.



- COM (2023). Third Annual Report on the screening of foreign direct investments into the Union. *Report from the Commission to the European Parliament and the Council (590 Final)*. European Commission, Brussels.
- COM (2024). Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council (23 final). European Commission. Brussels.
- Dimitropoulos, G. (2020). National Security: The Role of Investment Screening Mechanisms. In J. Chaisse, L. Choukroune, & S. Jusoh (Eds.), *Handbook of International Investment Law and Policy* (pp. 1–37). Springer Singapore. https://doi.org/10.1007/978-981-13-5744-2_59-1
- Doppen, F., Calcara, A., & De Bièvre, D. (2024). Balancing security and economics: domestic state-firm relations and investment screening mechanisms in Europe. *Review of International Political Economy*.
- Ghiretti, F., Gunter, J., Sebastian, G., Gökten, M., Pindyuk, O., Zavorská, Z., & Tonchev, P. (2023). *Chinese Investments in European Maritime Infrastructure*. European Parliament, Policy Department for Structural and Cohesion Policies. [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747278/IPOL_STU\(2023\)747278_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747278/IPOL_STU(2023)747278_EN.pdf)
- Gibson, Dunn & Crutcher LLP (2024). Foreign Direct Investment Regimes: National Security Deference Given in the US and EU Foreign Direct Investment Regimes. In: *Adkins B & Beighton S (ed.) Foreign Direct Investment Regimes 2024*.



- Grieger, G. (2017). *Foreign direct investment screening: A debate in light of China-EU FDI flows* [Briefing]. European Parliamentary Research Service.
- Jensen, N. M. (2003). Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment. *International Organization*, 57(3), pp. 587–616. Cambridge Core. <https://doi.org/10.1017/S0020818303573040>
- Kiezle, M. (2023, August). Navigating the EU-China Controversy: Unravelling the Hamburg Harbour Investment Saga. *EIAS*. <https://eias.org/publications/navigating-the-eu-china-controversy-unravelling-the-hamburg-harbour-investment-saga/>
- Luise, C., Buckley, P. J., Voss, H., Plakoyiannaki, E., & Barbieri, E. (2022). A bargaining and property rights perspective on the Belt and Road Initiative: Cases from the Italian port system. *Journal of International Business Policy*, 5(2), pp. 172–193. <https://doi.org/10.1057/s42214-021-00122-9>
- Muchlinski, P.T. (2009). Trends in international investment agreements: balancing investor rights and the right to regulate. The issue of national security. In: *Sauvant KP (ed.) Yearbook on international investment law and policy 2008-2009*. Oxford University, Oxford, pp. 35-78.
- SWD (2024). Evaluation of 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 (SWD (2024) 23 final). *European Commission*. Brussels.



- Warchol, J. (2021). The Birth of the EU Screening Regulation. In S. Hindelang & A. Moberg (Eds.), *YSEC Yearbook of Socio-Economic Constitutions 2020. A common European law on investment screening* (CELIS) (pp. 54–75).