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Screening Foreign Direct Investment in the European Union: Prospects for a "Multispeed" Framework

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General Note about the Content

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Abstract

This Essay analyzes the prospects of a "multispeed" framework for screening foreign direct investment (FDI) in the European Union. A slew of takeovers of EU-based companies in recent years has raised concerns that European know-how and key technologies are being exported with few benefits flowing in the opposite direction. Some Member States have called on the European Commission to create a uniform screening framework across the Union and demand reciprocity in investment agreements with third countries. Other Member States worry that such intervention would deprive them of foreign capital and oppose a centralized screening framework. The deep split among Member States has hamstrung the European Commission in its policymaking role. Last year, the Commission put forth a proposal that sought to harmonize the existing patchwork of national regulations without imposing uniform standards.

As an alternative to seeking a compromise among all Member States, this Essay examines the possibility of allowing some Member States to cooperate on a common framework for screening foreign direct investment. The European Commission has recognized voluntary coalitions as an option for advancing the EU project. The principle has gained traction as Member States have become increasingly divided on the proper scope and mission of the EU as an institution. A "multispeed" option is particularly attractive in policy areas like FDI, where Member States are deeply divided. The Essay evaluates the opportunities for Member States to pursue such cooperation through the prism of FDI, one of the items at the top of the Commission's agenda.

The findings identify several hurdles, some perhaps insurmountable, to multispeed cooperation on FDI under current treaty law. Because Member States have conferred exclusive competence on the Union to craft a common commercial policy—which includes FDI—Member States have a limited scope of intervention. On the other hand, Member States remain competent to regulate indirect, or "portfolio" investments. While the European debate has focused on regulating FDI, indirect shareholdings constitute a significant component of total foreign investment. As Member States step up their enforcement against FDI, more investors are likely to structure their investments as indirect holdings, while still trying to exercise significant influence over EU-based companies. Member States are competent to control such indirect investments in sensitive technologies on security grounds.

Introduction

Recent years have witnessed a growing backlash against foreign direct investment (FDI) across several of the world's biggest economies. The United States, Canada, Australia, and the European Union have all amended existing laws or proposed new legislation for screening FDI in key industries.[1] A series of blocked or abandoned deals demonstrate that recipient countries have stepped up their enforcement and changed the international deal landscape in fundamental ways.[2] Countries that historically have made little effort to distinguish between domestic and international investors have strengthened their defenses against foreign parties. Meanwhile, countries that already subject investments to review have revamped their laws and broadened the scope of review to capture transactions structured to circumvent the review process.[3] Legislative proposals have emphasized the need to protect emerging technologies like artificial intelligence, wireless communications, and military technology.

Most proposals for stricter screening mechanisms have a common target in mind: China. Chinese outbound investment has increased in recent years, surpassing $180 billion in 2016.[4] FDI constitutes a central component of the Chinese government's "Made in China 2025" strategy, which aims to comprehensively upgrade the country's industries and capture high-value segments of the global production chain.[5] The Chinese government has promoted outbound investment in strategic industries while shielding many sectors of its domestic

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[1] *See* BAKER MCKENZIE, RISING SCRUTINY: ASSESSING THE GLOBAL FOREIGN INVESTMENT REVIEW LANDSCAPE 32-66 (2017).
[2] *See* discussion Part I *infra*.
[3] *See* Ana Swanson, *Targeting China's Purchases, Congress Proposes Tougher Reviews of Foreign Investments*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/us/politics/china-foreign-investments.html (describing a draft bipartisan bill that expands the scope of review for the Committee on Foreign Investment in the United States (CFIUS) by "requiring an automatic review of joint ventures that exceeded a certain threshold of foreign ownership and expand scrutiny of certain emerging technologies that could give countries like China an edge over the United States").
[4] EY, CHINA GO ABROAD: SOUND RISK MANAGEMENT BUILDS A SOLID FOUNDATION FOR CHINESE ENTERPRISES TO NAVIGATE THE GLOBAL LANDSCAPE 8 (2017).
[5] JOST WÜBBEKE ET AL., MADE IN CHINA 2025: THE MAKING OF A HIGH-TECH SUPERPOWER AND CONSEQUENCES FOR INDUSTRIAL COUNTRIES 8 (2016), https://www.merics.org/sites/default/files/2017-09/MPOC_No.2_MadeinChina2025.pdf.

economy from outside competitors. Because several recent cross-border transactions that involved a Chinese acquirer would not have been possible in the opposite direction, governments concerned about China's industrial strategy have made reciprocity a priority in negotiations with Beijing.[6]

The European Union is the primary destination for Chinese FDI. In 2016, total Chinese investment in the European Union surpassed €35 billion.[7] By contrast, EU investments in China have decreased in recent years and amounted to about €8 billion in 2016.[8] A confluence of economic and legal factors explains China's focus on European targets. The Union's long-lasting economic woes brought on by the Eurozone crisis provided Chinese companies with the opportunity to acquire assets in advanced manufacturing at favorable valuations.[9] Moreover, because the EU lacks a common legal framework for screening inbound FDI, Chinese companies have exploited discrepancies between national standards and employed a "divide and conquer" strategy to investing in the Union.[10] China has also leveraged its economic strength to create alliances with EU Member States, in particular with former communist states. By practicing this form of "economic statecraft," China uses FDI to upgrade domestic industries, gain support from other governments for its policies on the international stage, and influence public opinion abroad.[11]

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[6] Laurens Cerulus & Zoya Sheftalovich, *Brussels vs. Beijing's Buy-Out Barons*, POLITICO (Apr. 31, 2017), https://www.politico.eu/pro/future-of-china-relationship.

[7] THILO HANEMANN & MIKKO HOUTARI, RECORD FLOWS AND GROWING IMBALANCES: CHINESE INVESTMENT IN EUROPE IN 2016, at 4 (2017).

[8] *Id.* State-owned enterprises accounted for 78% of the total value of Chinese FDI between 2008-2013. *See* SYTEAM HANSAKUL & HANNAH LEVINGER, CHINA-EU RELATIONS: GEARING UP FOR GROWTH 13 (2014).

[9] Thilo Hanemann & Adam Lysenko, *Chinese Investment: Europe vs. the United States*, RHODIUM GROUP (Feb. 25, 2013), http://rhg.com/notes/chinese-investment-europe-vs-the-united-states.

[10] Yukon Huang, *Why China Invests More in Europe than in the US*, FIN. TIMES (July 24, 2017), https://www.ft.com/content/a7641d16-6c66-11e7-b9c7-15af748b60d0.

[11] THORSTEN BENNER ET AL., AUTHORITARIAN ADVANCE: RESPONDING TO CHINA'S POLITICAL INFLUENCE IN EUROPE 15-16, 22 (2018), https://www.merics.org/sites/default/files/2018-02/GPPi_MERICS_Authoritarian_Advance_2018_1.pdf; *see also* Luca Arnaudo, *On Foreign Investment and Merger Controls: A Law and Geo-Economics View*, OPINIO JURIS IN COMPARATIONE no. 1, 2017, at 59, 67 ("China's policy aims at directing the joint public State and private business agendas within the international arena, in view of acquiring information and economic resources, as well as for controlling the dominant narrative, along a soft clash that is psychological, media, and legal, at the same time.").

While the European Union has long trumpeted its openness to foreign investors, several high-profile deals in recent years have led Member States to enact stricter laws on screening FDI.[12] Some Member States have simultaneously advocated for EU action to create common standards across the bloc. Union heavyweights France, Italy, and Germany have called for greater EU intervention on FDI to level the playing field vis-à-vis China. In response to these requests, European Commission president Jean-Claude Juncker presented a proposal for a Union-wide screening framework during his State of the Union speech in September 2017.[13] The Commission's proposal aims to harmonize national review mechanisms while at the same time "allowing Member States to take into account of [sic] their individual situations and national circumstances."[14]

The EU treaties vest in the European Union the exclusive competence to create a common commercial policy for the Union. Given this competence, the Commission could have proposed a centralized, "one-stop-shop" review mechanism for all FDI entering the EU. It also had the option of making investments in certain industries subject to mandatory screening. Instead, the Commission chose a far less comprehensive approach that primarily calls for increased exchange of information between Member States. The proposal's limited reach reflects the tensions between Member States that support stricter vetting and other Member States that object to EU intervention either on ideological grounds or because of the positive effects that FDI has had on their domestic economies. The Commission's search for common ground on a contested issue thus resulted in a far less robust proposal than many national legislatures would have favored as a response to surging Chinese investment.[15]

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[12] *See* discussion Part I.A *infra*.
[13] *Proposal for a Regulation of the European Parliament and the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union*, COM (2017) 487 final (Sept. 13, 2017) [hereinafter Commission FDI Screening Proposal].
[14] *Id.* at 2.
[15] *Some Europeans Fear a Surge of Chinese Investment. Others Can't Get Enough of It*, ECONOMIST (Nov. 30, 2017), https://www.economist.com/news/europe/21731826-there-more-cheer-jeer-about-chinese-investment-eu-some-europeans-fear-surge.

At the same time that the Commission is under pressure to regulate foreign direct investment, it is also tasked with charting the path forward for the European Union over the coming decades. 2016 marked the 60th anniversary of signing the Treaties of Rome, which laid the foundation for the Union as it exists today. But although the treaties called for an "ever closer Union,"[16] economic turmoil and an influx of immigrants from conflict zones around the world have tested the ties between Member States. Brexit has led to greater reflection among Member States about the proper scope and objectives for the European project. To mark the Union's sixty-year anniversary, the Commission issued a white paper that laid out five scenarios for the Union's future.[17] One option, titled "Those who want more do more," encourages a "Europe of multiple speeds," in which some countries move forward and deepen their ties in specific areas.[18] The Commission identified security cooperation as one potential area for deepening collaboration through a "coalition[] of the willing."[19] While this method of cooperation has been used only rarely in the past, allowing some Member States to proceed with integration projects at a faster pace has become an increasingly attractive solution to overcome inertia at the Union level. Instead of spelling the end of the EU, a Europe of multiple speeds could foster greater integration by encouraging Member States to identify and pursue common interests while leaving the door open to other Member States to join over time.

This Essay builds on the Commission's "multispeed" scenario and asks whether this form of cooperation could be pursued in the area of foreign direct investment. As the debate on FDI has demonstrated, Member States have widely disparate preferences about the need for closer scrutiny of third-country investments. Integration at different speeds therefore seems like a promising alternative to a compromise among all Member States. Previous work

[16] Treaty of Rome Establishing the European Economic Community (EEC Treaty), Mar. 25, 1957.
[17] *Commission White Paper on the Future of Europe*, COM (2017) 2025 final (Mar. 1, 2017) [hereinafter Commission White Paper].
[18] *Id.* at 20.
[19] *Id.*

on investment screening in the EU has concentrated on the proper allocation of power between Member States and the Union, leaving unaddressed the potential for interstate cooperation that does not involve the EU as a whole.[20] As multispeed integration has received more attention, however, it has become increasingly relevant to analyze the prospects for this form of cooperation as it relates to a pressing issue on the EU's agenda.

The Essay proceeds in four parts. Part I describes the historical debate on FDI screening in the European Union. It reviews past proposals for screening FDI within the Union, and traces the political developments that led the Commission to put forth a proposal to regulate FDI in "record time" last year.[21] Part II gives an overview of the Commission's proposal and analyzes its benefits and drawbacks. Part III proposes an alternative screening mechanism for FDI, implemented through a "multispeed" mechanism. Building on the Commission scenario in which countries that wish to do more can do more together, this Part of the Essay examines whether countries that have advocated for more robust screening of FDI could join forces and adopt a common framework. The analysis anchors a common screening framework in treaty law, focusing on two different justifications for pursuing this project. Part IV posits a hypothetical in which some EU Member States create a common system of FDI screening. The first subpart addresses the appropriate scope of review for such a coalition of the willing in light of ECJ case law that has restricted Member States' ability to restrict inbound foreign investment. The second subpart examines the ways in which investors could try to circumvent screening and identifies potential weaknesses of this common review mechanism. The Essay concludes by reflecting on the value of a multispeed

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[20] *See, e.g.*, Anna De Luca, *The EU and Member States: FDI, Portfolio Investments, Golden Powers and SWFs*, *in* RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 178 (Fabio Bassan ed., Edward Elgar Publishing 2015); Lawrence Eaker & Sun Tao, *Chinese Investment in the European Union & National Security Review: Is the EU Legal Regime about to Follow the US Model?*, 9 FRONTIERS L. CHINA 43 (2014); Karl Von Wogau & Barbara Rapp-Jung, *The Case for a European System Monitoring Foreign Investment in Defence and Security*, 45 COMMON MARKET L. REV. 47 (2008).

[21] Cecilia Malmström, EU Commissioner on International Trade, Remarks at Public Hearing, Screening of Foreign Investment in the EU, http://web.ep.streamovations.be/index.php/event/stream/180123-1430-committee-inta.

framework not just for FDI, but also as a general method of cooperation between Member States in other areas of common interest.

I. The Debate over FDI: Changing Proposals and Priorities

Change is afoot across the global investment landscape. An increased wariness of FDI has led to calls for more government vetting of inbound investment in several countries. In the United States, President Trump exercised his veto power to prevent the takeover of Lattice Semiconductor by Canyon Bridge, a Chinese buyout fund, in September 2017.[22] Ant Financial, a company spun off from the Chinese e-commerce giant Alibaba, and U.S.-based MoneyGram called off their merger in January 2018 over their failure to gain approval from the Committee on Foreign Investment in the United States (CFIUS) "despite extensive efforts to address the Committee's concerns."[23] In March 2018, CFIUS took the extraordinary step of reviewing a transaction between Qualcomm and Singapore-based Broadcom before the latter's takeover proposal had been put to a shareholder vote.[24] In Australia, the federal government extended the mandate of the Foreign Investment Review Board (FIRB) to cover state and territory assets after the Northern Territory entered into a 99-year lease with a Chinese entity for operating the port in Darwin.[25] In February 2018, the Australian government took steps to restrict FDI in agricultural land by requiring foreign investors to

[22] Julie Steinberg & Kate O'Keeffe, *Trump's Lattice Rejection Highlights Growing Furor over Chinese Money*, WALL ST. J. (Sept. 17, 2017), https://www.wsj.com/articles/trumps-deal-rejection-puts-u-s-policy-on-chinese-investment-in-focus-1505640603?mod=searchresults&page=2&pos=15.
[23] *MoneyGram and Ant Financial Announce Termination of Amended Merger Agreement*, MONEYGRAM (Jan. 2, 2018), http://ir.moneygram.com/releasedetail.cfm?releaseid=1053096.
[24] Kate O'Keeffe et al., *U.S. Government Intervenes in Broadcom's Bid for Qualcomm*, WALL ST. J. (Mar. 6, 2017), https://www.wsj.com/articles/u-s-orders-qualcomm-to-delay-board-meeting-for-review-of-broadcom-offer-1520250104.
[25] *Critical Asset Sales Now Reviewed*, FOREIGN INV. REV. BOARD (last visited Jan. 11, 2018), http://firb.gov.au/2016/04/critical-asset-sales-now-reviewed ("[S]ales of critical state-owned infrastructure assets to private foreign investors are now formally reviewed by the Foreign Investment Review Board (FIRB). This required . . . removing the exemption [under Australian foreign takeover laws] for private foreign investors acquiring an interest in critical infrastructure assets purchased directly from state and territory governments.").

show that the land was "marketed widely to potential Australian bidders for a minimum of 30 days, and Australian bidders [had] an opportunity to participate in the sale process."[26]

Whereas the surge in FDI has generated forceful legislative responses in many countries, the European Union stands out for its failure to articulate a common position. The EU has long been known for its openness to foreign investment. Collectively, the EU Member States have the fewest restrictions on FDI on a global basis.[27] Of the current 28 Member States, only 12 have national screening procedures in place.[28] Subnational autonomy adds another layer of complexity to relationships between the Union and Member States. All EU Member States are parties to the European Charter of Local Self-Government,[29] and some have enshrined its principles in their constitutions.[30] This Charter recognizes a broad scope of rights for local governments to manage public affairs without federal oversight. Local governments have relied on this right to negotiate directly with foreign investors over investments in infrastructure, including ports[31] and electricity grids.[32] National governments

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[26] Press Release, Scott Morrison, Treasurer of the Commonwealth of Australia, Ensuring Australians Can Purchase Agricultural Land while Foreign Investment Is Geared Toward Jobs and Growth (Feb. 1, 2018), http://sjm.ministers.treasury.gov.au/media-release/006-2018.

[27] STEPHEN THOMSEN & FERNANDO MISTURA, IS INVESTMENT PROTECTIONISM ON THE RISE?: EVIDENCE FROM THE OECD FDI REGULATORY RESTRICTIVENESS INDEX (2017).

[28] Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom. *See Commission Staff Working Document Accompanying the Document 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*, at 7, SWD (2017) 297 final (Sept. 13, 2017).

[29] *Chart of Signatures and Ratifications of Treaty 122*, COUNCIL OF EUROPE (last visited Feb. 16, 2018), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122/signatures?p_auth=ML3scNTU.

[30] *See* Ewa Stenberg, *Regeringen får Svårt att Stoppa Kommuner som Vill Hyra ut Hamnar*, DAGENS NYHETER (Dec. 9, 2016), https://www.dn.se/nyheter/sverige/ewa-stenberg-regeringen-far-svart-att-stoppa-kommuner-som-vill-hyra-ut-hamnar (discussing the constitutional hurdles that prevent the Swedish government from intervening directly and blocking port-leasing agreements between foreign investors and local governments).

[31] Erik Matzen & Stine Jacobsen, *Denmark Passes Law that Could Ban Russian Pipeline from Going Through Its Waters*, REUTERS (Nov. 30, 2017), https://www.reuters.com/article/us-denmark-pipeline/denmark-passes-law-that-could-ban-russian-pipeline-from-going-through-its-waters-idUSKBN1DU19L.

[32] Latika Bourke, *Belgian Spies Urge 'Extreme Caution' on China Citing Australia's Ausgrid Decision*, SYDNEY MORNING HERALD (Sept. 28, 2016), http://www.smh.com.au/world/belgian-spies-urge-extreme-caution-on-china-citing-australias-ausgrid-decision-20160927-grpwn8.html (discussing the Chinese state-owned corporation State Grid's bid for a 14% stake in an electricity company co-owned by over 200 Belgian cities and local councils). The bid was eventually unsuccessful due to opposition on grounds unrelated to security, *see State Grid's Acquisition of 14% in Belgian Distributor Eandis Blocked*, ENERDATA (Oct. 6, 2016), https://www.enerdata.net/publications/daily-energy-news/state-grids-acquisition-14-belgian-distributor-eandis-blocked.html.

often have no other tools than soft power to try to fend off such forays by outsiders.[33] This highly fragmented landscape for FDI screening in the EU has created loopholes for foreign investors. Not infrequently, investors target countries with lax investment oversight as their entry point into the EU. Once established, these investors become indistinguishable from domestic EU companies and can rely on the treaty freedoms to conduct business in all Member States.[34]

A. Tensions over the EU's Role on FDI

The European Union holds exclusive competence over the Union's "common commercial policy."[35] This transfer of competence has meant that Member States have given up the power to conduct their own commercial policies with third countries. Article 207 of the Treaty on the Functioning of the European Union (TFEU) explicitly defines "foreign direct investment" as falling within the common commercial policy.[36] This treaty power has placed the EU at the center of the debate around regulating inbound FDI. Despite occasional calls for regulations to screen FDI, however, the EU has remained passive for much of the last decade. Concerns about the chilling effects on investment, especially during the long recovery from the global economic downturn in the late aughts, seem to have guided the Commission's policy in this area.

A notable increase in investments by sovereign wealth funds (SWFs) stirred a first round of debate on screening FDI. In response to Member States' concerns, the Commission

[33] *See* TT, *Regeringen Vill Inte Hyra ut Svenska Hamnarna*, VÄRLDEN IDAG (Dec. 13, 2016), http://www.varldenidag.se/nyheter/regeringen-vill-inte-hyra-ut-svenska-hamnarna /Bbbplm!ZsaG2taCvT2j9lEKpgKK1w (describing the Swedish government's attempts at persuading local governments to abandon port-leasing agreements with Russian state-backed entities).
[34] *See* discussion *infra* Part IV.B.
[35] Consolidated Version of the Treaty on the Functioning of the European Union art. 207, Oct. 26, 2012, 2012 O.J. (C 326) 140 [hereinafter TFEU].
[36] *Id.* ("The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.").

issued a communication in 2008.[37] In it, the Commission argued that certain options for reviewing FDI, including the creation of a EU committee on foreign investment, ran "the risk of sending a misleading signal—that the EU is stepping back from its commitment to an open investment regime."[38] Instead of proposing new screening mechanisms, the Commission argued for greater engagement with SWFs to increase their transparency and to ensure that they abide by a common code of conduct.[39] In 2011, FDI once more became a hotly debated topic after a Chinese firm made a bid for the Dutch cable maker Draka.[40] But even though the loudest cries for increased FDI screening at the time came from the very highest levels within the Commission,[41] no proposal for a common EU framework was made.

The tenor of the debate over the last year suggests that this time around is different. Whereas France has a long history of crying wolf over foreign investment, Germany has recently adopted a tougher stance on FDI.[42] Madeia's acquisition of Kuka Robotics, the largest-ever Chinese takeover of a German company, caused significant backlash in Germany and prompted a rewrite of the national takeover laws.[43] Sigmar Gabriel, then the German Economy Minister, cautioned that Germany was "sacrific[ing] its companies on the altar of free markets" while receiving no concessions from the Chinese government in return.[44]

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[37] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Approach to Sovereign Wealth Funds*, COM (2008) 115 provisional (Feb. 27, 2008).
[38] *Id.*
[39] *Id.*
[40] Juliane von Reppert-Bismarck, *Analysis: Rising Foreign Investment Fuels EU Vetting Debate*, REUTERS (Mar. 8, 2011), https://www.reuters.com/article/us-eu-industry-investment/analysis-rising-foreign-investment-fuels-eu-vetting-debate-idUSTRE72726P20110308.
[41] John W. Miller, *EU Mulls Board to Review Foreign Investments*, WALL ST. J. (Mar. 14, 2011, 1:24 P.M. ET), https://www.wsj.com/articles/SB10001424052748704893604576200521425783048 (describing a letter from Commissioners Antonio Tajani (Industry) and Michel Barnier (Internal Market) to then-president of the Commission, José Manuel Barroso, in which the two called for the creation of an EU-wide review board for foreign investment).
[42] Angela Stanzel, *Germany's Turnabout on Chinese Takeovers*, EUR. COUNCIL FOREIGN REL. (Mar. 21, 2017), http://www.ecfr.eu/article/commentary_germanys_turnabout_on_chinese_takeovers_7251 ("The letter reinforces a position France has long represented but illustrates a shift in Germany's traditionally open investment posture.").
[43] Guy Chazan, *German Angst over Chinese M&A*, FIN. TIMES (Aug. 9, 2016), https://www.ft.com/content/e0897e24-598e-11e6-8d05-4eaa66292c32.
[44] Janosch Delcker, *Sigmar Gabriel's Mission to Halt China's Investment Spree*, POLITICO (Nov. 1, 2016), https://www.politico.eu/article/sigmar-gabriels-mission-to-halt-chinas-investment-spree.

Meanwhile, the election of President Emmanuel Macron in France heralded a shift toward a more ambitious vision for Europe.[45] The stage was set for FDI skeptics, new and old, to make a show of unity at the EU level.

Concerned about an increasingly one-sided investment relationship with China, the French, Italian, and German governments drafted a joint letter to the European Commission in early 2017.[46] In the letter, the threesome called for "additional protection based on economic criteria taking into account and with reference to the Commission's expertise."[47] The letter proposed a mechanism for investment review at the Union level, which would apply the principle of reciprocity in evaluating investments from a country in which EU investors have limited market access.[48] The coalition also presented a common policy paper in which it urged the Commission to take into account their proposals to "adequately respond to the challenges presented by unbureaucratic European approaches and to work towards a fair market-based competitive environment."[49] The policy paper further emphasized the issue of state-driven investment schemes that are "geared towards making targeted direct investments in foreign companies in certain economic sectors in a bid to pursue overriding national interests."[50]

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[45] *See, e.g.*, Thorsten Benner & Thomas Gomart, *Meeting Macron in the Middle: How France and Germany Can Revive the EU*, FOREIGN AFF. (May 8, 2017), https://www.foreignaffairs.com/articles/europe/2017-05-08/meeting-macron-middle ("[Macron's] presidency offers a rare chance to revive the French-German relationship just when Europe needs it most. Together, Berlin and Paris can strengthen the EU and the eurozone, rally the continent against illiberalism, and better defend European interests on the world stage.").

[46] Italy might seem like the odd one out in this triumvirate, and its cooperation is even more astounding in light of President Macron's move to nationalize the country's shipyards to prevent a sale of the shipyard STX to its Italian competitor Fincantieri. *See* Helene Fouquet & Mark Deen, *Macron Nationalizes Shipyard, Spooking Outsiders*, BLOOMBERG (July 27, 2017), https://www.bloomberg.com/news/articles/2017-07-27/macron-nationalizes-shipyard-in-domestic-step-spooking-outsiders. Months later, the Italian government responded in kind when it moved to restrict the French telecoms company Vivendi from exerting more influence over Telecom Italia. *See* Giuseppe Fonte & Agnieszka Flak, *Italy Moves to Rein in Vivendi's Influence over Telecom Italia*, REUTERS (Oct. 16, 2017), https://uk.reuters.com/article/uk-vivendi-telecom-italia-golden-power/italy-moves-to-rein-in-vivendis-influence-over-telecom-italia-idUKKBN1CL1Z9.

[47] Letter from France, Italy, and Germany to the European Commission, Proposals for Ensuring an Improved Level Playing Field in Trade and Investment (Feb. 2017).

[48] *Id.*

[49] Policy Paper submitted by the French, Italian, and German governments to the European Commission, European Investment Policy: A Common Approach to Investment Control (July 28, 2017).

[50] *Id.*

The Franco-Italian-German coalition's letter triggered a new round of debate that exposed deep rifts between Member States. While the heavyweights among the "Inner Six" have pushed for more cooperation in the FDI space, Member States on the EU's periphery oppose any Union action that interferes with national investment priorities. Financially strapped Member States have benefited from capital infusions from FDI, particularly following the Eurozone crisis. In a way, the countries that proselytized for fiscal discipline[51] and privatization[52] in the last decade drove Member States with greater deficits into the arms of foreign investors ready to provide a jolt to moribund European economies.[53] Foreign investors have leveraged their capital to advance their governments' policy positions in the EU. China provides the most flagrant example of this strategy at work. Other Member States looked on with consternation as Greece blocked a resolution to condemn China's human rights record at the Council summit in June 2017.[54]

Fault lines between financially stable and heavily indebted Member States that emerged during the Eurozone crisis have thus persisted. While economic forecasts indicate a stronger and broader recovery among all Member States in coming years,[55] the Union is still

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[51] Neil Irwin, *How Germany Prevailed in the Greek Bailout*, N.Y. TIMES (July 29, 2015), https://www.nytimes.com
/2015/07/30/world/europe/how-germany-prevailed-in-the-greek-bailout.html ("Greece's economic crisis not only has done nothing to soften Germany's insistence on adherence to rules, fiscal austerity and dire consequences for countries that fail to live up to their obligations, but it has also actually reinforced the willingness of Germany's allies in Europe to impose even harsher conditions on Athens.").

[52] SOL TRUMBO VILA & MATHIJS PETERS, THE PRIVATISING INDUSTRY IN EUROPE 5 (2016) ("While Greece stands out as the most emblematic case of Troika [the Commission, ECB, and IMF]-forced privatisations, the Mediterranean country is not the only one being pressurised into implementing such programmes. Portugal, Italy, Spain, Ireland and the UK have all seen a renewed effort to privatise the last remaining state services.").

[53] Joaquim Ramos Silva, *Foreign Direct Investment in the Context of the Financial Crisis and Bailout: Portugal*, *in* FOREIGN INVESTMENT IN EASTERN AND SOUTHERN EUROPE (Béla Galgóczi et al. eds, 2015) ("A door was thus opened to foreign investors with relatively abundant financial resources, preeminently the Chinese companies that [gained] a crucial role in the Portuguese energy sector."); Jason Horowitz & Liz Alderman, *Chastised by E.U., a Resentful Greece Embraces China's Cash and Interests*, N.Y. TIMES (Aug. 26, 2017), https://www.nytimes.com
/2017/08/26/world/europe/greece-china-piraeus-alexis-tsipras.html ("Even as Berlin and Brussels grow wary of Chinese investment, Greece may not care, after suffering under German-enforced austerity attached to the international bailouts that have kept the country afloat since the 2010 debt crisis.").

[54] Laurens Cerulus & Jakob Hanke, *Enter the Dragon: Chinese Investment in Crisis-Hit Countries Gives Beijing Influence at the European Union's Top Table*, POLITICO (Oct. 9, 2017), https://www.politico.eu/article/china-and-the-troika-portugal-foreign-investment-screening-takeovers-europe.

[55] *See, e.g.*, INT'L MONETARY FUND, REGIONAL ECONOMIC OUTLOOK: EUROPE HITTING ITS STRIDE (2017).

divided between "frustrated market-openers" and "cash strapped deal-seekers" with widely disparate priorities on FDI.[56] The deal-seekers are joined by small, prosperous Member States that oppose restrictions on ideological grounds.[57] These divisions suggest that support for increased EU intervention on FDI is far from certain, and the "market-openers" may therefore struggle to prevail in a qualified majority vote.

Tensions over foreign direct investment came to a head at the European Council summit in June 2017. French President Emmanuel Macron pushed for including a statement in the meeting communiqué calling for the Commission to examine "ways to screen investments from third countries in strategic sectors."[58] The proposal was met with protests from pro-investment countries. Representatives of the Greek government explicitly mentioned lost FDI from China as a reason for them to oppose a common review mechanism.[59] The final communiqué included a watered-down statement welcoming a Commission plan "to analyze investments from third countries in strategic sectors, while fully respecting Members States' competences."[60] As these machinations demonstrate, the Union has struggled to unite around common policies on how to regulate foreign investment, and rancor at the Council thus threatens to derail attempts at reaching a compromise that will satisfy all Member States.

B. Different Methods of Screening FDI

In addition to a fundamental disagreement on whether the Union should have a role in screening FDI, there is little consensus among supporters of tighter restrictions on how the

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[56] FRANÇOIS GODEMENT & JONAS PARELLO-PLESNER, THE SCRAMBLE FOR EUROPE 5 (2011).
[57] *Id.*; *see also* Jim Brunsden, *EU Plan to Curb Chinese Takeovers Risks 'Trade War'*, FIN. TIMES (Sept. 17, 2017), https://www.ft.com/content/c0b3bdf0-9b94-11e7-9a86-4d5a475ba4c5 (quoting Kai Mykkänen, Finnish Minister for Foreign Trade and Development, as describing the Commission's proposal as a "protectionist provocation[]" that will "risk . . . a trade war").
[58] Hans von der Burchard, *Macron Misses Goal of Screening Foreign Investment in the EU*, POLITICO (June 23, 2017), https://www.politico.eu/article/macron-misses-goal-of-screening-foreign-investment-in-the-eu.
[59] Cerulus & Hanke, *supra* note 54.
[60] Council Conclusions, European Council (June 22-23, 2017), http://www.consilium.europa.eu/media/23985/22-23-euco-final-conclusions.pdf.

EU should screen investments. Proposals run the gamut from a wholly centralized system to more limited, harmonizing policies that would keep Member States in charge of the actual screening.[61] Scholars frequently invoke examples from abroad as models for how to regulate EU-bound investment. These examples rarely apply directly to the unique split of competences between the Union and Member States, however, and demonstrate the need for EU-centric initiatives that strike the proper balance between Brussels and national capitals.

Several commentators have looked to the United States as a model for investment screening in the EU.[62] Since the 1970s, the United States has reviewed foreign investment through an interagency committee chaired by the Secretary of the Treasury.[63] The Committee on Foreign Investment in the United States (CFIUS) is authorized to review all transactions that "could result in control of a U.S. business by a foreign person."[64] The Committee evaluates three main "threats" of FDI: leakage of sensitive technology; the foreign investor's ability to deny or place conditions on providing critical output; and the potential that a foreign investor will use a U.S. company's systems to for intelligence gathering or sabotage.[65]

The idea of a "CFIEU" modeled on the American system has garnered some support. In 2012, the European Parliament asked the Commission "to set up a body entrusted with the ex ante evaluation of foreign strategic investment, along the lines of the Committee on

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[61] *See, e.g.*, LARS-HENDRIK RÖLLER & NICOLAS VÉRON, SAFE AND SOUND: AN EU APPROACH TO SOVEREIGN INVESTMENT (2008) (arguing that an internal market directive could be introduced to "establish[] a framework and process for the security review by member states" with a clearly defined objective limited to "hard" security, including "national security of the country in which the investment takes place and security of the EU as a whole").

[62] *See* Fabrizio Di Benedetto, *A European Committee on Foreign Investment?*, COLUM. FDI PERSP. (Dec. 4, 2017), http://ccsi.columbia.edu/files/2016/10/No-214-Di-Benedetto-FINAL.pdf.

[63] *Composition of CFIUS*, U.S. DEP'T TREASURY (last updated Dec. 1, 2010), https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx.

[64] Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800.301(a) (2008).

[65] Theodore H. Moran, *CFIUS and National Security: Challenges for the United States, Opportunities for the European Union*, PETERSON INST. INT'L ECON. (Feb. 21, 2017), https://piie.com/commentary/speeches-papers/cfius-and-national-security-challenges-united-states-opportunities.

Foreign Investment in the United States."[66] A CFIUS-like review system would require transferring competences to the EU that it currently lacks. The U.S. committee has access to intelligence reports and vulnerability assessments for each transaction reviewed.[67] Without its own intelligence agency, the EU would have to rely on external sources to evaluate the security implications of foreign investments.[68] A lack of personnel at the EU level and the complexity of identifying relevant technologies that raise security concerns will further hamper attempts to create a CFIUS for Europe.[69] Ceding jurisdiction to a CFIUS-type committee would also require Member States to overcome "conflicting political and economic interests."[70] Skeptics argue that "neither the European Commission nor any other EU institution can be entrusted with ultimate responsibility for security assessments, now or in the foreseeable future," and eschew EU enforcement in favor of separating legislation and implementation between the EU and Member States, respectively.[71]

As an alternative to a stand-alone EU agency responsible for screening FDI, some have suggested expanding the Commission's review under the EU Merger Regulation (EUMR) to include matters of public policy.[72] The Directorate-General for Competition reviews transactions that meet certain revenue thresholds within the EU, regardless of where the companies are domiciled.[73] The review process is narrowly focused on competitive

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[66] *European Parliament Resolution of 23 May 2012 on EU and China: Unbalanced Trade?*, EUR. PARL. DOC. P7_TA-PROV(2012)0218 (2012).
[67] Samantha J. Mobley, *EU to Tighten Control over Foreign Investment*, BAKER MCKENZIE (Sept. 19, 2017), https://www.bakermckenzie.com/en/insight/publications/2017/09/eu-control-foreign-investment.
[68] FRANÇOIS GODEMENT & ABIGAËL VASSELIER, CHINA AT THE GATES: A NEW POWER AUDIT OF EU-CHINA RELATIONS 55 (2017); *see also* GODEMENT & PARELLO-PLESNER, *supra* note 56, at 5 ([I]n the case of public debt purchases, Europe has neither data nor regulations.").
[69] GODEMENT & VASSELIER, *supra* note 68, at 55 ("Europe is not well prepared to define investment screening, not to mention implementing it, given the lack of human resources at the EU level, the dependence on external intelligence sources, and the sheer difficulty of identifying key technologies that relate to national security.").
[70] Angela Huyue Zhang, *Foreign Direct Investment from China: Sense and Sensibility*, 34 NW. J. INT'L L. & BUS. 395, 435 (2014).
[71] *Id.*
[72] *See, e.g.*, Alison Jones & John Davies, *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate*, 10 EUR. COMPETITION J. 453, 475 (2014); Françoise Nicolas, *China's Direct Investment in the European Union: Challenges and Policy Responses*, 7 CHINA ECON. J. 103, 120 (2014); Zhang, *supra* note 70, at 435.
[73] Council Regulation 139/2004, art. 1, 2004 O.J. (L 24) 1-3 (defining economic thresholds for review).

effects in the internal market rather than other public policy objectives. The Commission has blocked mergers between foreign companies[74] as well as between EU-based companies that would have created "national champions" within Member States.[75]

Other countries have adopted a more holistic approach to competition review. The South African Competition Commission is explicitly authorized to take into account public policy objectives.[76] Once it exits the European Union, the United Kingdom is poised to expand its review of foreign takeovers to protect "strategic" interests.[77] Similarly, Chinese law requires that antitrust regulators consider the effects of proposed transactions on the country's industrial policy.[78] Whether the EUMR in its current form allows the Commission to consider strategic interests is subject to debate.[79] But even if it does, Competition Commissioner Margrethe Vestager has insisted that the competition review process be kept "clean" of political considerations.[80] Her position is well grounded. The European Commission is currently the primary regulator of competition worldwide.[81] Many of its headline enforcement actions have targeted foreign companies, several of which are based in

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[74] Press Release, European Commission, The Commission Prohibits GE's Acquisition of Honeywell (July 3, 2001), http://europa.eu/rapid/press-release_IP-01-939_en.htm (announcing the Commission's decision against a merger between General Electric and Honeywell, two American companies).

[75] Press Release, European Commission, The Commission Prohibits Volvo's Acquisition of Its Main Competitor Scania (Mar. 14, 2000), http://europa.eu/rapid/press-release_IP-00-257_en.htm (announcing the Commission's decision against a merger between Volvo and Scania, two Swedish companies).

[76] Kyriakos Fountoukakos & Molly Herron, *Merger Control and the Public Interest: European Spotlight on Foreign Direct Investment and National Security*, COMPETITION POL'Y INT'L (Dec. 11, 2017), https://www.competitionpolicyinternational.com/merger-control-and-the-public-interest-european-spotlight-on-foreign-direct-investment-and-national-security.

[77] ALLEN & OVERY, INCREASED SCOPE FOR INTERVENTION IN TAKEOVERS OF UK BUSINESSES? 2-3 (2016).

[78] Gisela Grieger, *China: Anti-trust Probes Targeting Foreign Firms*, EUR. PARLIAMENTARY RES. SERV. BLOG (Oct. 28, 2014), https://epthinktank.eu/2014/10/28/china-anti-trust-probes-targeting-foreign-firms.

[79] *Compare* David Reader, *At a Crossroads in EU Merger Control: Can a Rethink on Foreign Takeovers Address the Imbalances of Globalisation?*, EUR. COMPETITION & REG. L. REV. 127, 135 (2017) (arguing that Recital 23 EUMR provides the Commission with authority to consider public interest goals), *with* Jones & Davies, *supra* note 72 ("[The EUMR] provide[s] no explicit basis for distinguishing between concentrations depending on where the investment emanates from.").

[80] Aoife White, *EU Drafting Rules to Protect Technology from Foreign Takeovers*, BLOOMBERG (Sept. 2, 2017), https://www.bloomberg.com/news/articles/2017-09-02/eu-drafting-rules-to-protect-technology-from-foreign-takeovers.

[81] *See* Scott Galloway, *Silicon valley's Tax-Avoiding, Job-Killing, Soul-Sucking Machine*, ESQUIRE (Feb. 8, 2018), http://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley ("Margrethe Vestager, the EU commissioner for competition, is the only government official in a Western country . . . who is not afraid of, or infatuated with, big tech.").

the United States.[82] American commentators have chafed at what they perceive as politically tainted investigations into U.S. companies' conduct.[83] Providing the Commission with an explicit political mandate would add grist to these commentators' mills and could impair the Union's relations with third countries. As Commissioner Vestager is keenly aware, focusing exclusively on issues related to competition gives the Commission a better chance to stay above the political fray.[84]

Against the background of a contentious debate on the merits of centralized FDI screening in the EU and the proper form of such screening, the Commission crafted a proposal that sought an appropriate balance between "market openers" and "deal seekers". The following Part examines this proposal in detail. The Article thereafter turns to an alternative proposal that builds on the idea of a "multispeed" EU.

II. The Commission's Proposal for a Common FDI Screening Framework

The European Commission responded to demands for enhanced screening of FDI with a sense of urgency. In March 2017, the Commission issued a report titled "Harnessing Globalisation." In it, the Commission confirmed that remaining open to foreign investment is a "key principle" for the Union.[85] The Commission also emphasized, however, that state-supported takeovers of EU-based companies "need careful analysis and appropriate action," especially when the takeovers involve companies developing key technologies.[86] Following

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[82] *See Press Release Database*, EUR. COMMISSION (last visited Jan. 25, 2018), http://europa.eu/rapid/search-result.htm?keywords=antitrust&locale=en&page=1&size=50 (listing investigations and enforcement actions brought against, inter alia, Qualcomm, Google, and Amazon).
[83] *See* Farhad Manjoo, *Why the World Is Drawing Battle Lines Against American Tech Giants*, N.Y. TIMES (June 1, 2016), https://www.nytimes.com/2016/06/02/technology/why-the-world-is-drawing-battle-lines-against-american-tech-giants.html (describing the European response to the growing influence of American-based companies as "a taste of a coming global freak-out over the power of the American tech industry").
[84] David M. Herszenhorn, *The Transatlantic Guns that Didn't Fire over Google*, POLITICO (June 28, 2017, 5:00 A.M. CET) https://www.politico.eu/article/the-transatlantic-guns-that-didnt-fire-over-google ("In place of the EU-U.S. fight that didn't happen came a debate over how to finetune Europe's regulatory model for the digital age.").
[85] European Commission, *Reflection Paper on Harnessing Globalisation*, at 15, COM (2017) 240 (May 10, 2017).
[86] *Id.*

the contentious debate at the Council meeting in June, the Commission put forth its proposal for regulating FDI in the fall. In his State of the Union speech on September 13, 2017, Commission President Juncker stated that Europeans "are not naïve free traders" and that "Europe must always defend its strategic interests."[87] The speech marked the Commission's formal introduction of a proposal for "establishing a framework for screening of foreign direct investments into the European Union."[88] Reports had suggested that the Commission would introduce a regulation subjecting transactions in certain sectors to mandatory screening by a EU agency.[89] The final proposal stops short of consolidating power at the EU level, however, and primarily aims to increase the exchange of information between Member States.

The proposed regulation covers screening of foreign direct investment for reasons of security or public order by Member States and, in some cases, the Commission. "Foreign direct investment" is defined as any investment that aims to "establish or to maintain lasting and direct links" to an EU undertaking, including "investments which enable effective participation in the management or control of a company carrying out an economic activity."[90] The proposal does not cover passive, or "portfolio" investments, which are subject to regulation by both the Union and Member States as a shared competence.[91]

The Commission's proposed framework does not shift competence away from Member States, nor does it require Member States that currently do not screen foreign investment to create national screening authorities. The proposal does set out minimum procedural requirements for all national screening authorities, including clear triggers for

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[87] Jean-Claude Juncker, President, European Commission, State of the Union Address (Sept. 13, 2017).
[88] COM (2017) 487 final (Sept. 13, 2017).
[89] Jakob Hanke et al., *Juncker Aims to Slam the Brakes on Chinese Takeovers*, POLITICO (July 25, 2017, 10:38 P.M. CET), https://www.politico.eu/article/china-europe-technology-eu-juncker-aims-to-slam-the-brakes-on-takeovers.
[90] Commission FDI Screening Proposal, at 19.
[91] *See* discussion *infra* Part IV.A.2.

review, established timeframes, and the opportunity for investors to seek judicial appeal.[92] Member States that already screen FDI must submit an annual report to the Commission with information about ongoing and completed screenings during the year, including any investments prohibited or approved on a conditional basis.[93] Member States that do not screen inbound FDI must report to the Commission "on the basis of information available to them."[94]

While Member States remain the primary screening authorities for FDI, the proposal creates a supplementary role for the Commission in the review process. The extent of its involvement depends on the nature of the pending transaction. First, although Member States remain in charge of approving or rejecting investments, the Commission may issue advisory opinions to any Member State in which an investment is planned.[95] Second, if the Commission anticipates that an investment will affect "projects or programmes of Union interest," it may conduct its own screening and issue an opinion addressed to the Member State in which the investment is planned or has taken place.[96] Projects "of Union interest" are defined as those that involve "a substantial amount or a significant share of EU funding," as well as investments in industries that are covered by EU law regarding critical infrastructure, technologies, or input.[97] The Commission can request any information required for its review from a Member State and must issue its opinion within 25 days of making such a request.[98] In approving or rejecting investments "of Union interest," Member States "shall take *utmost account* of the Commission's opinion."[99] In case the Member State does not follow the Commission's opinion, it must submit an explanation to the Commission.[100] The proposal

[92] Commission FDI Screening Proposal, at 21.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 22.
[96] *Id.* at 20.
[97] *Id.*
[98] *Id.* at 22-23.
[99] *Id.* at 23 (emphasis added).
[100] *Id.*

includes a non-exhaustive list of factors that Member States may take into account in screening FDI, including possible effects on critical infrastructure, key technologies, and access to sensitive information.[101] National screening authorities may furthermore take into account whether the foreign investor is under government control, "including through significant funding."[102]

Article 5 of the proposal provides one of the most impactful changes to current screening practices. This article allows Member States to "maintain, amend or adopt measures necessary to prevent circumvention of the screening mechanisms and screening decisions."[103] The preamble explains that Article 5 aims to prevent "artificial arrangements within the EU that do not reflect economic reality."[104] This provision targets the practice among foreign investors to set up "Special-Purpose Entities" (SPEs), or letterbox companies, within the EU. An SPE is created in one of the Member States—often the Netherlands, given its liberal incorporation laws[105]—and the foreign investor then relies on the freedom of establishment to acquire a European company through the SPE.[106] The intermediary SPE transforms an investment that would have been subject to screening into a transaction between two entities incorporated within the EU. By allowing Member States to look through such arrangements and examine the de facto origin of investments, Article 5 could increase the number of transactions that come within the Member States' scope of review.

Because FDI falls within the EU's exclusive competence to craft a common commercial policy, the Commission's proposal is not subject to a "subsidiarity check" by

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[101] *Id.* at 20.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 12.
[105] George Kahale, III, *The New Dutch Sandwich: The Issue of Treaty Abuse*, COLUM. FDI PERSP. (Oct. 10, 2011), http://ccsi.columbia.edu/files/2014/01/FDI_48.pdf ("No real offices or employees are necessary, and visiting the country is optional.").
[106] *See* discussion *infra* Part IV.B.

Member States.[107] Nonetheless, the Commission submitted the proposed regulation to the Union's national parliaments as part of an informal political dialogue.[108] Responses varied. Whereas the French, Italian, and German governments welcomed the Commission's initiative,[109] their parliamentary counterparts showed no similar consensus on the merits of the proposal. The French Senate emphasized the importance of keeping open the list of factors that may be considered in screening FDI.[110] The Italian Senate called for more authority for the Commission to investigate FDI in the Union and advocated for an amendment to allow Member States to request Commission review.[111] By contrast, the German Parliament expressed concern over overly broad Commission powers.[112] It found the "notions of security or public order . . . vague" and considered the Commission's powers to intervene a source of legal uncertainty.[113]

Private-sector groups and academics have commented on the lack of clear definitions in the proposal;[114] the need to explicitly include reciprocity as part of the review;[115] and providing investors with greater certainty.[116] The Commission's decision to not undertake an impact assessment also raised eyebrows.[117] The Commission attributed this exceptional

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[107] GISELA GRIEGER, EUROPEAN PARLIAMENTARY RESEARCH SERV., BRIEFING: EU FRAMEWORK FOR FDI SCREENING 6 (2018).
[108] *Id.*
[109] *France, Germany, Italy Welcome EU Push to Curb Foreign Takeovers*, REUTERS (Sept. 13, 2017), https://www.reuters.com/article/us-eu-juncker-reactions/france-germany-italy-welcome-eu-push-to-curb-foreign-takeovers-idUSKCN1BO1ER?il=0.
[110] GRIEGER, *supra* note 107, at 6.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Nikos Lavranos, *Some Critical Observations on the EU's Foreign Investment Screening Proposal*, KLUWER ARB. BLOG (Jan. 2, 2018), http://arbitrationblog.kluwerarbitration.com/2018/01/02/critical-observations-eus-foreign-investment-screening-proposal.
[115] *Feedback from: Austrian Federal Economic Chamber*, EUR. COMM'N (Dec. 12, 2017), http://ec.europa.eu/info /law/better-regulation/initiatives/com-2017-487/feedback/F8154_en.
[116] FEPORT, REPLY TO THE CONSULTATION CONCERNING 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 2 (2017), https://www.feport.eu/images/downloads/public_documents /FEPORT_-_Reply_to_the_consultation_about_Foreign_investments_screening_final_doc_Dec_12th_2017.pdf.
[117] Thilo Brodtmann, *Don't Protect Us from Doing Business!*, EURACTIV (Sept. 21, 2017), https://www.euractiv.com

omission to "the rapidly changing economic reality [and] growing concerns of citizens and Member States."[118] By favoring speed over certainty, however, the Commission failed to allay concerns about chilling effects on investment from tighter FDI vetting.

Trade Commissioner Cecilia Malmström acknowledged that the proposal seeks a "balance" between Member States "who don't want anything at all and those that want something much more ambitious."[119] But seeking common ground under such circumstances is likely to produce suboptimal outcomes for Member States at both ends of the spectrum. As an alternative to regulating FDI at the EU level, the countries that support more forceful action could instead proceed as a group to develop common policies. President Macron has welcomed projects that allow the most ambitious Member States to move forward when a consensus among all 27 remaining Member States is difficult to achieve.[120] Union-wide policymaking may have been the best option in the past for moving the European project forward. It may not, however, make sense in the future, particularly as the EU membership expands further.[121] Rather than holding on to a "unity dogma," the Commission would be wise to let Member States experiment with projects in voluntary coalitions.[122] The following Part evaluates the merits of a "multispeed" framework in which those Member States that want to go further on FDI screening join forces by forming a voluntary cooperation mechanism.

/section/economy-jobs/opinion/dont-protect-us-from-doing-business.

[118] Commission FDI Screening Proposal, at 10.

[119] Malmström, *supra* note 21.

[120] Judith Mischke, *Emmanuel Macron: 'France Is Back at the Core of Europe'*, POLITICO (Jan. 24, 2018), https://www.politico.eu/article/emmanuel-macron-france-is-back-at-the-core-of-europe-davos-world-economic-forum ("If some people are ready to be more ambitious, to go further in terms of integration and ambition of what makes you sovereign as a power in this global environment, to defend your values and your interests, let's move . . . . Those who don't want to move forward should not block the most ambitious people in the room.").

[121] *Differentiate or Bust: Europe's Future Is Multi-Speed and Multi-Tier*, ECONOMIST (Mar. 23, 2017), https://www.economist.com/news/special-report/21719193-eu-must-embrace-greater-differentiation-or-face-potential-disintegration-europes ("A more differentiated Europe, based around the idea of variable geometry, a range of speeds or concentric circles, would be a good way to ease the tensions and problems that afflict the present, overly rigid EU.").

[122] Daniel Thym *"United in Diversity"—The Integration of Enhanced Cooperation into the European Constitutional Order*, 6 GERMAN L.J. 1731, 1731 (2005).

III. A Different Option: FDI in a "Multispeed" Europe

The idea of a multispeed Europe was put forward as one of five scenarios in the Commission's "White Paper on the Future of Europe," issued to mark the 60-year anniversary of signing the Treaties of Rome.[123] The scenario titled "Those who want more do more" envisioned a European Union in which "willing Member States do more together in specific areas."[124] The white paper highlighted defense, internal security, taxation, and "social matters" as potential areas where such cooperation may develop. On defense, the proposal outlined different modes of cooperation, including the creation of "a strong common research and industrial base [and] more integrated capabilities."[125] On social matters, the proposal described how willing Member States could strengthen their "[i]ndustrial cooperation . . . in a number of cutting edge technologies, products and services," and develop "rules on their usage" collectively.[126]

While the white paper was silent on foreign direct investment, the highlighted projects suggest a need for harmonized, if not uniform, screening of FDI across all participating Member States. A common industrial base in the defense sector could be undermined by disparities in FDI policies. Similarly, collective rules on how to employ cutting-edge technology should include clear directives on whether third-country nationals are allowed to invest in such projects. The need for a coherent FDI policy among Member States in a coalition of the willing (referred to below as a "high-speed coalition" or "HSC") is therefore clear. The discussion below turns to the legal challenges related to creating such a policy.

A. The Basis for a Multispeed Framework in Treaty Law

Promoting multispeed cooperation is consistent with the Union's external as well as internal policies. Externally, the EU has supported multispeed cooperation in multilateral

[123] Commission White Paper, at 7.
[124] *Id.* at 20.
[125] *Id.*
[126] *Id.*

fora. For example, the Commission proposed to "reinvigorate" the World Trade Organization (WTO) by allowing "a subset of WTO members" to "advance on a given issue, while keeping the door open for interested WTO members to join at a later stage."[127] Internally, the Union has developed a treaty framework that provides various options for cooperation that do not involve all Member States. The following analysis considers two such options for a coalition of willing Member States to pursue cooperation on FDI screening.

1. Enhanced cooperation

European Union law has traditionally been characterized by a strong emphasis on unity.[128] As the Union's membership has grown, however, differentiated development has been embraced by some as a solution to the "dilemma between enlargement and cooperation."[129] While some argue that "flexibility" concepts have been enshrined in the EU treaties from the very beginning,[130] the idea came to the fore beginning in the 1990s. The 1997 Treaty of Amsterdam enshrined the process of "closer cooperation" in the treaty framework.[131] The requirements varied considerably from one policy area to another, however, which led to "an unclear, uneven and unworkable scheme."[132] The Treaty of Nice amended the framework for multispeed policymaking three years later.[133] Aside from changes in terminology—"closer cooperation" became "enhanced cooperation"—the Nice treaty removed some of the inconsistencies in the Treaty of Amsterdam to make the multispeed option more accessible to Member States. The current framework allows a group of at least nine Member States to deepen their ties and "overcome paralysis" at the EU level

[127] EUROPEAN COMMISSION, TRADE FOR ALL: TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY 28 (2015).
[128] Thym, *supra* note 122, at 1731 ("The 'unity dogma' has long characterized the European law discourse.").
[129] *Id.* at 1734.
[130] Daniel T. Murphy, *Closer or Enhanced Cooperation: Amsterdam or Nice*, 31. GA. J. INT'L & COMP. L. 265, 268-69 (2003) ("[T]he concept of flexibility or differentiation has been embedded in the Treaties from the formation of the Community in 1957 . . . . The Treaty of Rome's transitional provisions and its allowance of a separate regional arrangement for the Benelux countries demonstrates this.").
[131] *Id.* at 265.
[132] *Id.* at 305.
[133] *Id.* at 266-67.

by entering into voluntary cooperation agreements on specific issues of common interest.[134] Authorization for such cooperation mechanisms shall be granted by the Council following consent by the European Parliament.[135] So far, Member States have pursued enhanced cooperation only in a limited number of areas. Examples include the Schengen agreement, the Eurozone, and the EU Financial Transaction Tax.[136]

Enhanced cooperation is subject to a number of restrictions. Article 20 TEU emphasizes that the Council shall authorize enhanced cooperation "as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole."[137] Enhanced cooperation must also "respect the competences, rights and obligations of those Member States which do not participate in it."[138] Economic spillover effects are similarly prohibited; participating Member States must bear all costs that result from implementing an enhanced cooperation initiative.[139] Finally, Article 329 TFEU provides that Member States may pursue enhanced cooperation in all areas covered by the treaties, "with the exception of *fields of exclusive competence* and the common foreign and security policy."[140] This carve-out poses a clear obstacle to enhanced cooperation on screening FDI.

As previously discussed, Article 207 places "foreign direct investment" within the Union's exclusive competence.[141] Despite the treaty's straightforward language, uncertainty long surrounded the exact boundaries of the Union's competence on FDI. Last year, the ECJ issued a much-awaited decision that defines the EU's competence in negotiating free-trade agreements with third countries. The Court was asked to resolve a dispute between the EU

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[134] *Glossary of Summaries: Enhanced Cooperation*, EUR-LEX (last visited Jan. 18, 2017), http://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html.
[135] TFEU art. 329.
[136] For a discussion of the Financial Transaction Tax, see Benjamin Cortez & Thorsten Vogel, *A Financial Transaction Tax in Europe?*, 20 EC TAX REV. 16 (2011).
[137] TEU art. 20.
[138] TFEU art. 327.
[139] *Id.* art. 332.
[140] *Id.* art. 329 (emphasis added).
[141] *Id.* art. 207.

and Member States regarding the Union's competence to enter into a free trade agreement with Singapore without ratification by national parliaments.[142] The Court came down strongly in favor of the Union, holding that only matters related to indirect, or "portfolio" investments, and dispute resolution between investors and Member States fall outside the scope of the Union's exclusive competence.[143] While the judgment preserved Member States' influence over potentially important areas of FDI screening,[144] it reaffirmed the obvious and significant obstacle for Member States that wish to pursue enhanced cooperation to screen inbound FDI.

The barriers to pursuing enhanced cooperation in areas where the EU is exclusively competent illustrates one of the criticisms of the Commission's white paper, that it neglects the need to amend the treaties to effectively achieve a multispeed Europe.[145] But Article 329 TFEU does not completely rule out enhanced cooperation on FDI. Member States could pursue such cooperation if the EU authorized such a project. Article 2 TFEU provides that Member States can "legislate and adopt legally binding acts" in areas of exclusive Union competence if they become "empowered" to do so.[146] Thus, the EU can empower Member States to pursue enhanced cooperation on FDI, even though the Member States transferred exclusive competence over this policy area to the Union in the first place by ratifying the treaties.

"Empowering" Member States to act in an area of exclusive EU competence is rarely done. So far, empowerment has been used primarily as a transitional mechanism in areas where the EU has recently gained exclusive competence. For example, following the

[142] Case C-2/15, EU:C:2017:376 (2017).
[143] *Id.* para 305.
[144] *See* discussion *infra* Part IV.A.2.
[145] *Editorial Comments: The EU-27 Quest for Unity*, 54 COMMON MKT. L. REV. 1, 12 (2017) ("A true multispeed Europe may be a desirable political model, but political feasibility aside, it requires fundamental changes to the EU treaties and the systems and models of decision-making and representation.").
[146] TFEU art. 2 ("When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if empowered by the Union . . . .").

ratification of the Treaty of Lisbon, the Union became exclusively competent over negotiating trade agreements with third countries. To clarify the legal status of Member States' existing bilateral investment treaties (BITs), the Union enacted legislation that allowed those BITs to remain in force until the Union negotiated its own treaties to cover the same areas.[147] From the Union's perspective, the disincentives to granting Member States competence through empowerment are obvious: The Member States, by ratifying the treaties, have agreed to relinquish some of their national sovereignty in exchange for greater integration and market expansion. Inviting Member States to seek empowerment could undermine the EU's unity and weaken its position internationally. Furthermore, excessive empowerment would potentially result in a Europe in which Member States choose which integration projects to join "à la carte."[148] Such a framework would be a far cry from the founding vision of an "ever-closer Union."[149]

But transferring competences between Member States and the EU need not be a one-way deal. Flexible arrangements that allow Member States to experiment should be encouraged, especially in areas where the Union as a whole has struggled to make progress despite being exclusively competent. The Commission's own proposal for screening FDI keeps Member States firmly in control of the screening process while creating a new role for the EU in overseeing investment in areas of particular interest to the Union as a whole. Although the EU has exclusive competence over FDI, it chose not to exercise its full authority. Instead, the Commission defined its goal as "promot[ing] convergence in policies, while respecting Member States' autonomy in choosing whether to screen foreign direct

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[147] *See, e.g.*, Commission Regulation 1219/2012, O.J. (L 351) 40 (establishing transitional arrangements for bilateral arrangements between Member States and third countries).
[148] *See, e.g.*, MARK LEONARD, FOUR SCENARIOS FOR THE REINVENTION OF EUROPE 9 (2014), http://www.ecfr.eu/page/-/ECFR43_REINVENTION_OF_EUROPE_ESSAY_AW1.pdf ("[T]he idea of opt-outs has been central to gaining consent for European Integration in the past. . . . But if each member opts for an à-la-carte approach to Europe, it will be impossible to have a strong-enough sense of common purpose for Europe to survive.").
[149] Treaty of Rome, *supra* note 16.

investment or not."[150] This position does not signal a concern on the EU institutions' part about Member States undermining the EU's credibility as a unified actor on the international stage. If the Commission does not perceive a corrosive effect of Member-State action in an area of exclusive EU competence, it is difficult to see what greater harm would ensue if a coalition of Member States sought to harmonize their policies in the same area. Furthermore, when Member States transfer powers to the EU but the Union does not exercise its exclusive competence, powers are effectively being left on the table.[151] Enhanced cooperation bridges the gap by giving Member States some benefits of scale without having to compromise in areas with minimal overlapping preferences across the Union as a whole.

A further argument in favor of empowering Member States to pursue enhanced cooperation on FDI is based on how that power was transferred to the EU in the first place. As Sophie Meunier has documented, foreign direct investment was included under Article 207 TFEU through a last-minute edit by a Commission representative.[152] In 2003, the Member States launched a "Convention on the Future of Europe," which had as its chief objective the introduction of a EU constitution.[153] The Convention divided the drafting among working groups covering different competence areas. The External Action Working Group was responsible for shaping the EU's common commercial policy.[154] This was just one of several responsibilities for the working group, which also directed the drafting process for policies including the EU's nascent external action service, foreign aid, defense, and

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[150] European Commission, *Welcoming Foreign Direct Investment while Protecting Essential Interests*, at 11, COM (2017) 494 final (Sept. 13, 2017).
[151] For a results-oriented argument in favor of "re-nationalizing" FDI, see Nikos Lavranos, *Why the EU's Foreign Direct Investment (FDI) Competence Should Be Re-Nationalized*, EFILA BLOG (Aug. 25, 2016), https://efilablog.org/2016/08/25/why-the-eus-foreign-direct-investment-fdi-competence-should-be-re-nationalized (pointing to the Commission's lackluster results in this policy area since 2009 and arguing that the transfer of competence over FDI to the EU has "not yielded any results" and should be "delete[d] . . . from the exclusive EU competence").
[152] *See generally* Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55 J. COMMON MKT. STUD. 593 (2017)
[153] *Id.* at 601-02 (2017).
[154] *Id.*

development.[155] Issues related to these areas overshadowed discussions of the common commercial policy.[156] During the late stages of the working group's meeting, one representative proposed adding the "removal of obstacles to foreign direct investment" to the draft constitution's objectives. Michel Barnier, at the time Commissioner for Regional Policy, then suggested operationalizing this objective by including "foreign direct investment" as part of the common commercial policy, which was agreed upon without further debate.[157]

"Foreign direct investment" made it from the draft text into the final version of the treaty under similarly serendipitous circumstances. At the full Convention, questions about other EU competences—such as the Common Foreign and Security Policy (CFSP) and the EU External Action Service—overshadowed questions about the scope of the Union's common commercial policy. While a total of 99 amendments were raised with regard to the common commercial policy, only a handful noted the Commission's stealth role in crafting the policy language.[158] This number also pales in comparison to the thousands of amendments that focused on the CFSP and External Action Service.[159] Meunier notes that the discussions took place around the time of the American-led invasion of Iraq, which made foreign policy a particularly fraught issue.[160] Thus, in addressing an expansive agenda that introduced many new areas of competence for the European Union, Member States "had to pick their battles."[161] FDI remained part of the common commercial policy in following rounds of negotiations over the EU Constitution, and was finally enacted under Article 207 TFEU as part of the Treaty of Lisbon.[162]

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[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 602.
[159] *Id.*
[160] *Id.* at 601.
[161] *Id.* at 604.
[162] For further discussion of the process by which competence over investment was transferred from Member States to the Union, see Robert Basedow, *A Legal History of the EU's International Investment Policy*, 17 J.

Meunier sees a clear consequence of the Commission's opportunistic move on FDI: "Because the supranationalization of foreign investment was not the result of bargaining prior to the institutional shift, the political debate is occurring in the implementation phase."[163] The lack of political debate preceding the transfer of competence is particularly striking with respect to inbound FDI.[164] In view of the stealth process by which competence over FDI was transferred to the EU, empowering Member States to pursue enhanced cooperation in this area seems particularly justified. This argument is further supported by how the Commission has exercised its legislative powers so far—keeping Member States in the driver's seat and confining the EU institutions to a supervisory role. Unless and until the EU opts for a fully centralized screening model, enhanced cooperation will not undermine its position. The Union would therefore be well advised to support enhanced cooperation on FDI screening.

2. Article 73 TFEU

A second option for Member States that wish to deepen their ties on FDI is to collaborate outside the framework for enhanced cooperation. Specifically, Member States could use their freedom to decide on national security policies to control inbound investments. Unlike the enhanced cooperation route, there is no outright obstacle in treaty law to pursuing this form of cooperation. On the other hand, the lack of ECJ case law means that there is much uncertainty about the extent to which Member States could rely on creative treaty interpretation to support a common FDI screening mechanism.

WORLD INVESTMENT & TRADE 743, 744 (2016) (arguing that "policy entrepreneurship by the Commission" was a "main factor[] shaping the EU's legal competences" and that "the authors of the European Treaties hardly intended to provide the EU with a firm legal competence in international investment policy"); Christoph Herrmann & Judith Crämer, *Foreign Direct Investment—A "Coincidental" Competence of the EU?*, 43 HITOTSUBASHI J.L. & POL. 85 (2015).

[163] Meunier, *supra* note 153, at 606.

[164] *See* Sophie Meunier, *Divide and Conquer?: China and the Cacophony of Foreign Investment Rules in the EU*, 21 J. EUR. PUB. POL. 996, 1007 (2014) ("Most of the preparatory work done by the Commission in order to transform the vague inclusion of foreign direct investment in the Lisbon Treaty into a coherent, implementable policy has focused on outbound investment.").

While Member States have achieved significant integration by transferring certain competences to the EU institutions, issues related to defense and security have remained subject to the Member States' exclusive competence. Article 4 TEU provides that "national security remains the sole responsibility of each Member State."[165] The Member States' comprehensive authority on national security matters is reinforced through other treaty provisions. Among the most important provisions is Article 73 TFEU, which states that "[i]t shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination *as they deem appropriate* between the competent departments of their administrations responsible for safeguarding national security."[166] Unlike enhanced cooperation, projects pursued under Article 73 need not be open to all Member States and the EU does not have any role in approving or monitoring such projects. Given the existing hurdles to enhanced cooperation on FDI, a high-speed coalition of states could rely on their exclusive competence on national security matters to avoid the obstacles presented by Article 329 TFEU along the enhanced cooperation path. Because the case law on Article 73 is anything but settled, however, such an attempt faces uncertain prospects.

The ECJ has never weighed in on the boundaries of Article 73.[167] Absent guidance from the Court, one must look at other factors to consider whether Member States could cooperate on screening FDI notwithstanding the cumulative blocking effect of Articles 207 and 329 TFEU. One objection to this "workaround" may be that Article 73 does not concern matters of investment at all. The article appears in Title V of the TFEU, which addresses the "Area of freedom, security and justice" within the EU. The title's chapters set out guidelines with respect to asylum and immigration, judicial cooperation in both civil and criminal matters, and police cooperation. Given this context, folding investment cooperation under

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165 TEU art. 4.
166 TFEU art. 73 (emphasis added).
167 INFOCURIA, http://curia.europa.eu/juris/recherche.jsf (last visited Apr. 10, 2018) (for "References to case-law or legislation," choose "Treaty," "TFEU (Lisbon)," and enter "73" under "Article.").

Article 73 might defy a reasonable reading. On the other hand, additional treaty provisions support the link between investment and security. For example, Article 346 TFEU provides that Member States have complete authority to take any measures they "consider[] necessary for the protection of the essential interests of [their] security which are connected with the production of or trade in arms, munitions and war material."[168] Moreover, as discussed further below, Member States may reject inbound investment on security grounds, provided that they demonstrate the need for such intervention.[169] While Member States are not completely free to define their national security interests without regard to EU law, the treaties make clear that trade and investment can have security implications. For these reasons, Member States have a basis in treaty law—admittedly an indirect one—for cooperating on FDI with a security dimension.

In sum, the circumstances by which competence over FDI was transferred to the EU as well as the way in which it has been exercised so far weigh in favor of empowering Member States to pursue enhanced cooperation in accordance with the treaty mechanism. Alternatively, Member States could exercise their authority under Article 73 TFEU to coordinate their security-oriented screenings. However Member States choose to proceed, they would have to overcome significant coordination hurdles and counteract attempts by foreign investors to circumvent their common screening procedures. The following Part turns to a more detailed discussion of how Member States could structure their cooperation in practice to address these issues.

IV. The Multispeed Hypothetical

Consider the following hypothetical: A number of Member States, frustrated by the lack of progress at the EU level, form a "high-speed coalition" (HSC) for screening foreign

[168] TFEU art. 346. This right is, however, subject to the right of the Commission or any Member State under Article 348 to initiate proceedings against any other Member State it believes to be abusing its Article 346 privilege.

[169] *See* discussion *infra* Part IV.A.1.

direct investment. The HSC, led by France, Italy, and Germany, creates a common investment board. Each HSC member state is represented by a high-ranking member of its national security apparatus. The board votes to approve or reject a proposed transaction involving a foreign investor according to a qualified majority voting system that mirrors the voting process at the Council.[170] The board's authority extends to FDI with a clear national security dimension in any member state, as well as highly regulated industries such as utilities and communications.[171] Moreover, all member states enforce a reciprocity mechanism. This mechanism provides that any investor from a country that subjects investors from a HSC state to heightened scrutiny will be subject to the same scrutiny when investing in a HSC state. An economic committee also reports to the board about how an investment is financed, including whether an investor is state-backed. The following sections analyze the legal issues raised by this hypothetical screening mechanism.

A. Issues of Scope and Definition

Two factors are central to the scope of FDI screening: the sectors in which investments are reviewed, and the substantive standards by which investments can be blocked. Some countries screen investments only in specific sectors, while others screen all investments that implicate certain host-country interests.[172] The latter model creates greater uncertainty for investors and can also be abused by governments that practice economic protectionism disguised as protection of security interests.[173] For example, U.S. law authorizes the President to block a takeover by a foreign company when "in the President's judgment, there is credible evidence to believe that [a] foreign person exercising control over

[170] *See Qualified Majority*, EUR. COUNCIL (last visited Jan. 25, 2018), http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority ("[A] qualified majority is reached if two conditions are met: 55% of member states vote in favour [and] the proposal is supported by member states representing at least 65% of the total EU population.").

[171] The scope of review would be limited to "hard" security questions, similar to in the model put forth by Röller and Véron but without supplementary EU legislation, *see* RÖLLER & VÉRON, *supra* note 61, at 7.

[172] *See* EVA RYTTER SUNESEN & MORTEN MAY HANSEN, SCREENING OF FDI TOWARDS THE EU 38-39 (2018).

[173] Deborah M. Mostaghel, *Dubai Ports World under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 607-14 (2007).

a U.S. business might take action that threatens to impair the national security."[174] The President's decision "shall not be subject to judicial review."[175] "National security" is not defined in the statute, and although the executive branch has historically focused on investments with relatively straightforward national security implications, the election of President Trump generated a shift in investment policies. As the President has ramped up his trade war rhetoric against China and others, he has also blocked several high-profile takeover proposals and pushed to make economic objectives part of CFIUS's review mandate.[176]

While the increased focus on economic factors is a novel development in the United States, Canada has long authorized the review of FDI on economic grounds under the Investment Canada Act.[177] The Canadian government has issued a set of guidelines to the act, including nine factors that may be taken into account. These factors include an investment's "potential impact . . . on Canada's international interests, including foreign relationships."[178] Moreover, Canada explicitly evaluates the economic impact of FDI by applying a "net benefit" test.[179] Among the factors included in the test are the investment's anticipated effects

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[174] 31 C.F.R. § 800.101.

[175] 50 U.S.C. app. § 2170(e). The finality of the President's decision is limited only in cases where investors affected by a negative decision can assert a Constitutional right. *See* Ralls v. CFIUS, 758 F.3d 296 (D.C. Cir. 2014) (recognizing foreign companies' due process rights to challenge a CFIUS recommendation).

[176] Bob Davis, *U.S. to Apply Tariffs on Chinese Imports, Restrict Tech Deals*, WALL ST. J. (Mar. 22, 2018), https://www.wsj.com/articles/u-s-to-apply-tariffs-on-50-billion-of-chinese-imports-1521723078 ("While Congress is debating whether to broaden the jurisdiction of CFIUS to include the acquisition of U.S. technology through joint ventures in the U.S. and abroad, the Trump administration wants to go further. . . . [T]he administration wants to consider economic harm, too."); Ana Swanson et al., *Trump's Killing of Chip Deal Pushes Protectionism as It Invokes Security*, N.Y. TIMES (Mar. 13, 2018), https://www.nytimes.com /2018/03/13/business/trump-qualcomm-security.html? ("The Trump administration, in ways that are largely unprecedented in modern history, has begun wielding national security as a club, using it to strike other nations with protectionist measures like tariffs, visa restrictions and curbs on foreign investment.").

[177] R.S.C. 1985, c. 28 (1st Supp.).

[178] *Guidelines on the National Security Review of Investments*, GOV'T CANADA (last visited Feb. 2, 2018), https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html; *see also* Subrata Bhattacharjee, *National Security with a Canadian Twist: The Investment Canada Act and the New National Security Review Test*, COLUM. FDI PERSP. (July 30, 2009), http://ccsi.columbia.edu/files/2014/01/FDI_10.pdf (discussing "uncertainty about the meaning of 'national security'" as one of the issues raised by the Investment Canada Act).

[179] Investment Canada Act, *supra* note 177.

on employment and "the contribution of the investment to Canada's ability to compete in world markets."[180]

In contrast to the sweeping scope of review adopted in certain third countries, EU Member States have far less liberty to block investments that do not pose a clear threat to national security. Member States do have more authority over regulating indirect, or portfolio investments, which may become an increasingly important form of FDI in the near future. Both areas of review are examined in the following subparts.

1. National security

The HSC investment board would face a significant challenge in defining the appropriate scope of review for FDI. So far, the EU Member States that have implemented national screening mechanisms have taken different approaches. Consider the controls imposed by the three main proponents of stricter FDI regulations: France, Italy, and Germany. Article R151-3 et seq. of the French Monetary and Financial Code make "[a]ctivities likely to jeopardise public order, public safety or national defence interests" subject to approval by the Minister of Economy.[181] Supplemental decrees have identified eleven sectors, ranging from gambling to cryptology, that are subject to heightened scrutiny.[182] The list has grown over time. The "Mountebourg Decree" of 2014 added energy, water, transport, public health, and communications to the list of sensitive sectors.[183] The decree was issued in direct response to General Electric's bid for the French energy company Alstom.[184] The French government's reactionary approach was similarly on display in 2005,

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[180] *An Overview of the Investment Canada Act (FAQs)*, GOV'T CANADA (last visited Feb. 2, 2018), https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00007.html#q8.
[181] CODE MONÉTAIRE ET FINANCIER [MONETARY & FIN. CODE] art. L. 151-3.
[182] BAKER MCKENZIE, *supra* note 1, at 54.
[183] *New Decree on Foreign Investments Subject to Prior Governmental Authorisation: Overview of New French Regime*, FRESHFIELDS BRUCKHAUS DERINGER (May 12, 2014), http://knowledge.freshfields.com/de/Germany/r/1108/new_decree_on_foreign_investments_subject_to_prior.
[184] *Id.*

when it was ridiculed for attempting to classify yoghurt as a strategic asset to prevent a foreign takeover of the dairy giant Danone.[185]

The Italian Foreign Investment Code lists specific sectors in which the government can exercise "Special Powers" to block foreign investors. In a series of decrees in 2014, the government identified assets in the defense, security, energy, transportation and communications sectors that are subject to a government veto or special restrictions.[186] By contrast, German authorities are empowered to evaluate investments on a case-by-case basis regardless of the sectors affected.[187] The German Foreign Trade and Payments Act authorizes both cross-sector and sector-specific reviews.[188] Transactions falling into the cross-sector category include all inbound FDI that can raise public order or security concerns.[189] Any acquisition of more than 25% of a company's voting rights by a non-EU/EFTA investor can be investigated by the German Federal Ministry for Economic Affairs and Energy.[190] Transactions in the defense or IT security sectors are subject to stricter standards. Any acquisition of 25% of more of the voting rights of a company operating in one of these sectors is subject to mandatory screening and must be approved by the Ministry for Economic Affairs and Energy.[191]

The optimal scope of review for a high-speed coalition investment board would likely combine elements of the French, Italian, and German laws. All three countries share a common "core" of protected sectors, which includes the domestic defense industry. Further sectors, including the "post, petroleum, electricity and telecommunications" could also be

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[185] Judy Dempsey, *Judy Asks: Should Europe Protect Its Strategic Sectors?*, CARNEGIE EUR. (Oct. 25, 2017), http://carnegieeurope.eu/strategiceurope/73531.
[186] BAKER MCKENZIE, *supra* note 1, at 61.
[187] GISELA GRIEGER, EUROPEAN PARLIAMENTARY RESEARCH SERV., FOREIGN DIRECT INVESTMENT SCREENING: A DEBATE IN LIGHT OF CHINA-EU FDI FLOWS 6 tbl.1 (2017).
[188] Anahita Thoms, *Germany Tightens Rules on Foreign Investments: What Are the Implications?*, BAKER MCKENZIE (Oct. 2, 2017), https://www.bakermckenzie.com/en/insight/publications/2017/10/germany-tightens-rules.
[189] *Id.*
[190] *Id.*
[191] *Id.*

included, since these are sectors that the ECJ has recognized as being of special interest to Member States.[192] The list should remain open-ended to allow the coalition to address changing investment flows. The HSC investment board should, however, avoid knee-jerk reactions to foreign takeovers of a nation's "crown jewels." The French government's propensity to shield domestic industries from foreign bidders demonstrates how protectionism deters all forms of foreign investment, not just unwanted investors.[193] Finally, limiting review to specific sectors and establishing ownership thresholds at which review becomes mandatory would remove uncertainty about which transactions are likely to require prior authorization.

In addition to finding common ground on the scope of review, HSC states must define their security interests to pass muster under treaty law. Articles 63-66 TFEU recognize limited exceptions to the free movement of capital that Member States may rely on to block investments. The free movement of capital is unique among the treaty freedoms in extending the same privileges to EU and non-EU citizens alike. Article 63 TFEU prohibits "all restrictions on the movement of capital between Member States and between Member States and third countries."[194] Article 65 TFEU provides that Member States may take measures that infringe on the free movement of capital only if they are justified on grounds of "public policy or public security."[195] Any such restrictions are furthermore subject to the principle of proportionality, which prohibit measures that "go beyond what is necessary to attain [a recognized] objective."[196]

In case a Member State blocks a planned foreign investment, the investor may challenge the decision through the Member State's national court system. National courts are

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[192] Jones & Davies, *supra* note 72, at 475 (summarizing case law).
[193] *Montebourg's Misérables: Foreign Investment in France Has Dropped 94% over the Last Decade*, WALL ST. J. (July 2, 2014), https://www.wsj.com/articles/frances-foreign-investment-problem-1404245780.
[194] TFEU art. 63.
[195] *Id.* art 65.
[196] Case C-436/00, Comm'n v. Spain, EU:C:2003:272 (2003), para 68.

obligated to apply EU law in deciding a dispute that concerns an individual or other entity's rights under the treaties.[197] The ECJ has stated generally that all articles in the TFEU providing for derogations based on public security "do not lend themselves to a wide interpretation."[198] The Court has adopted this stance to uphold the effectiveness of EU law, since "[t]he TFEU . . . would be undermined if a wide interpretation of the exemptions allowed Member States to justify most of their measures."[199]

The many ways in which Member States have sought to protect domestic industries from foreign investors has provided the ECJ with several opportunities to define the legitimate boundaries on the free movement of capital. Cases decided by the Court have often involved former state monopolies that were privatized over time. For example, in Case C-196/07, *Commission v. Spain*, the ECJ rejected Spain's restrictions on a takeover by the German energy company E.ON of Endesa, one of Spain's largest electricity companies.[200] In the midst of an ongoing tender battle between E.ON and a Spanish competitor for majority ownership in Endesa, the Spanish government issued Royal Decree Law 4/2006, which subjected acquisitions of undertakings in the energy sector to prior authorization.[201] Pursuant to the Decree, Spanish authorities imposed nineteen conditions on E.ON's takeover proposal, including divestment of a third of Endesa's capacity for generating electricity in Spain.[202] The Commission argued that the Decree restricted the free movement of capital and the freedom of establishment within the Union.[203] While recognizing the validity of safeguarding

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[197] John A. Usher, *The Evolution of the Free Movement of Capital*, 31 FORDHAM INT'L L.J. 1533, 1567 (2008) (summarizing ECJ case law).
[198] Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, EU:C:1986:206 (1986), para 26.
[199] MARTIN TRYBUS, BUYING DEFENCE AND SECURITY IN EUROPE: THE EU DEFENCE AND SECURITY PROCUREMENT DIRECTIVE IN CONTEXT 75 (2014).
[200] Bird & Bird, *ECJ Judgment of 17 July 2008 Declaring Spain's Failure to Fulfill Its Obligations under the EC Treaty*, LEXOLOGY (Sept. 29, 2008), https://www.lexology.com/library/detail.aspx?g=e4b7446d-69d9-45b8-894e-c1c994fb7a7a.
[201] *Id.*
[202] Robert A. Profusek et al., *Foreign Investments into the E.U.: Demystifying National Protectionism*, JONES DAY (Oct. 2014), http://www.jonesday.com/Foreign-Investments-Into-the-EU-Demystifying-National-Protectionism-10-29-2014.
[203] Bird & Bird, *supra* note 200.

a country's energy supply, the ECJ held that this justification could be invoked only in cases involving a "real and sufficiently serious threat, which affects the public interest."[204]

Another case in the energy sector reaffirmed the ECJ's commitment to an expansive reading of the freedom of establishment. In Case C-244/11, *Commission v. Greece*, the ECJ struck down Greece's prior authorization scheme for acquisitions of 20% or more of the voting rights in "strategic public limited undertakings," including those "owning, operating or managing national infrastructure networks."[205] The ECJ found that the Greek scheme contravened the freedom of establishment as well as the free movement of capital. The Court further held that Greece could not justify the authorization scheme as necessary to secure its energy supply. Such restrictions are valid, the Court held, only "if there is a genuine and sufficiently serious threat to a fundamental interest of society."[206] The Court furthermore held that the Greek law created too much uncertainty for investors. Because the criteria for prior authorization were described in general and imprecise terms, investors "were given no indication of the specific objective circumstances in which prior authorisation would be granted or withheld."[207]

This is not to suggest that the ECJ has read the public security exception so narrowly so as to render it moot. On the contrary, the Court has approved measures to block investments that would run counter to Member States' energy policies.[208] In contrast to the Spanish and Greek laws, however, these policies were found to be both proportional and clearly articulated. As is apparent in view of the ECJ's previous rulings, a review policy based on clearly articulated security interests is required, and cannot be phrased in "general

[204] *Id.*
[205] EU:C:2012:694 (2012), para 2.
[206] *Id.* paras 67-69.
[207] *Id.* para 53.
[208] *See, e.g.*, Case C-503/99, Comm'n v. Belgium, EU:C:2002:328 (2002), paras 49-60 (approving the Belgian government's investment screening mechanism as consistent with the goal of safeguarding energy supplies); Case 72/83, Campus Oil Ltd. v. Minister for Industry and Energy, EU:C:1984:256 (1984), para 51 (holding that Ireland may require petroleum importers to fill parts of their total volumes with purchases from a domestic refinery to maintain domestic refinery capacities).

and imprecise terms."[209] The Court will invalidate rules that "do not provide any objective and specific criteria such as to allow review of the exercise of . . . discretion enjoyed by . . . the administrative authorities."[210] Importantly, "economic grounds can never serve as justification for obstacles prohibited by the Treaty."[211] A system that enforces prior review of any investment that would raise a threat to public policy or public security without more does not fulfill the ECJ's requirement of clarity.[212]

Consider again the hypothetical HSC investment review board. If the board adopts a QMV voting system, the state receiving the foreign investment (the host state) could support the investor's plan but nevertheless be outvoted by other coalition states. In this situation, the investor could appeal the board's decision through the host state's national courts. The investor could argue that the host state failed to identify a sufficiently serious threat to *its* public order or public security, as required by Article 65 TFEU. A similar complaint could be made against a host state that sides with the majority in rejecting inbound FDI into its territory based on concerns raised by other member states over the investment. While the ECJ's existing case law does not apply squarely to these facts, the investment board would carry a heavy burden in demonstrating both a valid justification for the restriction and sufficient clarity for potential investors. In earlier cases, the ECJ has focused on public security interests asserted by individual Member States, not coalitions of Member States. Would the Court be open to expanding its interpretation of a "serious threat to a fundamental interest of society" if a coalition of states argues that its members constitute a common "society"? The argument seems like a stretch under the existing case law. Without clearly

[209] Case C-244/11, Comm'n v. Greece, EU:C:2012:694 (2012), para 78.
[210] *Summary of the Judgment: Case C-436/00,* Comm'n v. Spain, EUR-LEX (last visited Apr. 5, 2018), http://eur-lex.europa.eu/legal-content/EN/SUM/?uri=ecli:ECLI:EU:C:2003:272.
[211] Case C-367/98, Comm'n v. Portugal, EU:C:2002:326 (2002), para 52.
[212] Case C-54/99, Association Eglise de Scientologie de Paris v. The Prime Minister, EU:C:2000:124 (2000), para 21 ("In the present case . . . the essence of the system in question is that prior authorisation is required for every direct foreign investment which is 'such as to represent a threat to public policy [and] public security', without any more detailed definition. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required.").

articulated common security interests among all member states, a high-speed coalition would therefore face an uphill battle in court.

Existing case law related to the exceptions under Article 65 TFEU also raises questions about whether a HSC would have the authority to invoke reciprocity in its screening procedure. Reciprocal requirements were central to the Franco-Italian-German proposal to the Commission. Under the principle of reciprocity, if an EU investor is forced to create a joint venture with a local company in order to invest in a third country, the same rule will apply to investments by individuals or companies from that third country that invest in the EU. Currently, only Italy has implemented this principle in national legislation.[213] The European Union has invoked reciprocity sparingly. The EU rules on ownership in the air transportation sector provide that "third countries and their nationals are not eligible for majority owning or effectively controlling EU carriers, unless the EU has agreed otherwise with the third country concerned, i.e. through a corresponding (*in general reciprocal*) relaxation of ownership and control requirements."[214] Moreover, under the European Takeover Directive, directors on EU-company boards must remain neutral to takeover attempts.[215] If the bidder is based in a third country that allows active takeover defense measures, however, the board of an EU-based company may also defend against the takeover if the Member State in which the company is domiciled chooses to allow it.[216]

It is one thing to find support for reciprocity in the Union's policies, however, and quite another to identify a basis in ECJ case law for a coalition of Member States to invoke this principle when screening FDI. An investor from a third country that is blocked pursuant to a reciprocity rule can seek judicial review under EU law. If a case were to reach the ECJ,

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[213] JOHN GRAY ET AL., NEW FRONTIERS?: THE EMERGING REGULATORY LANDSCAPE FOR FDI 14 (2017), http://www.heringschuppener.com/wp-content/uploads/2017/11/New-Frontiers-The-Regulatory-Landscape-for-FDI_N.compressed.pdf.
[214] Interpretative Guidelines on Regulation (EC)1008/2008—Rules on Ownership and Control of EU Air Carriers, at 3, C (2017) 3711 final (June 8, 2017) (emphasis added).
[215] Commission Directive 2004/25/EC, art. 9, 2004 O.J. (L 142).
[216] *Id.* art. 12.

the HSC would find it difficult to justify blocking the investment. This is particularly so when the reciprocity argument is based on restrictions imposed by the investor's home country on *another* HSC member state that is not the contemplated host state. For example, suppose the HSC investment board blocks an investment in member state A based on restrictions imposed on investors from country B that invest in the foreign investor's home country C. This form of indirect reciprocity, when not imposed by the Union as a whole,[217] seems unlikely to survive judicial scrutiny.

In defending its right to apply reciprocal requirements, the HSC investment review board could point out that this policy does not suffer from some of the deficiencies the court has sought to rectify in past cases. For example, it would be difficult to argue that a foreign investor could not "determine the specific objective circumstances in which the power to oppose the acquisition . . . is capable of being exercised."[218] This argument falls flat, since the restrictions are based on the laws of the investor's home country. Nevertheless, the ECJ may not accept a sufficiently broad reading of "public policy" under Article 65 TFEU. While the Italian reciprocity rule has not been challenged so far, it could be struck down as an unjustified restriction on the free movement of capital.[219] Thus, reciprocity is reasonably conceived of as a power that Member States cannot invoke, either alone or through enhanced cooperation.

The discussion above demonstrates that a common HSC investment review board would have only limited authority to reject inbound foreign direct investment. The ECJ has repeatedly demanded that Member States provide investors with both objective and specific criteria for when an investment may be rejected. Requiring a "genuine and sufficiently

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[217] *See* TFEU art. 64 ("[T]he European Parliament and the Council . . . shall adopt the measures on the movement of capital to or from third countries involving direct investment . . . .").
[218] Case C-244/11, Comm'n v. Greece, EU:C:2012:694 (2012), para 77.
[219] For an analogous discussion of why the EU Takeover Directive's reciprocity rule runs afoul of Treaty law, see JONATHAN MUKWIRI, TAKEOVERS AND THE EUROPEAN LEGAL FRAMEWORK: A BRITISH PERSPECTIVE 111-13 (2009).

serious threat to a fundamental interest of society" imposes a significant burden on Member States that try to protect domestic businesses from third-country investors. The ECJ has not yet decided on the full extent to which Member States may invoke reciprocity against investors from non-EU countries. It seems like an uphill battle, however, to invoke this principle through enhanced cooperation on behalf of a subset of EU Member States. Thus, the ECJ's strong support of the freedom of establishment and free movement of capital, while providing investors with relative certainty, limits Member States' ability to impose their own restrictions on FDI.

2. Portfolio investments

The limited opportunities for intervention against FDI stands in contrast to the EU Member States' rights to craft their own rules on investment in the form of indirect, or "portfolio" positions. While screening such investments has not become a focus of debates in the European Union so far, it may be of significant importance in the future for two reasons. First, countries with more established systems of FDI screening have increasingly focused on investments that do not result in a change of control but nevertheless raise security concerns. The current debate in the United States suggests that non-controlling investment is the future frontier for FDI screening. Second, outright acquisitions of EU-based undertakings by foreign investors make up a relatively small share of overall foreign investment in the Union. A screening mechanism that follows actual investment flows should therefore cover foreign investments that give investors *access* without necessarily establishing *control*.

Whereas the current debate in Europe is focused on providing more structure to a patchwork of national regulations, countries with a history record of reviewing FDI have turned their attention to security risks that arise even when foreign investors do not gain control over domestic companies. The United States is a prime example. In 2017, Republicans and Democrats in the House of Representatives joined forces to back legislative proposals that modernize and enhance the CFIUS review framework. One of the bills, the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA),[220] expands the scope of review for CFIUS. Specifically, the bill aims to stem the rise in minority investments and licensing joint ventures that Chinese investors have used to circumvent the CFIUS regulatory process.[221] "Passive investment" is defined narrowly and excludes any transaction by which a foreign investor would gain access to "any nonpublic technical information," as well as "nontechnical information . . . not available to all investors."[222] Outbound joint ventures in which U.S. companies share technology with a non-U.S. entity abroad would likewise be subject to review.[223]

The United States is a global frontrunner in regulating FDI, and the debate in Washington portends issues that European legislators are likely to face in the future. Foreign investors do not access European technology solely through acquiring companies. This was one of the arguments President Macron relied on when nationalizing French shipyards to block a takeover offer by the Italian shipyard Fincantieri. According to Macron, the fact that Fincantieri had entered into a joint venture with the China State Shipbuilding Corporation increased the risk that French technology would be transferred to China.[224] As the EU bolsters its defenses against FDI, foreign investors are likely to look for ways to circumvent the review process through indirect or passive investing that nonetheless can lead to significant transfers of European trade secrets and know-how to third countries. To meet this challenge, the Member States and the EU must work together to develop strong anti-circumvention rules.

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[220] H.R. 4311, 115th Cong. (2017).
[221] *Id.*
[222] *Id.*
[223] Heidi Vogt, *U.S. Companies Brace for Wider Scrutiny of Chinese Deals*, WALL ST. J. (Jan. 29, 2018, 4:12 P.M. ET), https://www.wsj.com/articles/u-s-companies-brace-for-wider-scrutiny-of-chinese-deals-1517230800.
[224] Fouquet & Deen, *supra* note 46.

Second, while outright acquisitions by Chinese companies tend to dominate the news coverage of FDI in the EU, other forms of transactions are more common. The majority of large deals since 2011 "resulted in [Chinese-owned] stakes of the 20%-50% range,"[225] and investors from China have become "increasingly willing to buy smaller stakes in European companies instead of taking full control."[226] "False-flag" investments, whereby foreign companies acquire minority shares in EU-based companies but increase their investment capacity by injecting borrowed capital, have also become more common.[227] Regardless of whether these deals are done "simply as a way of strengthening the relationship with . . . European partners"[228] or to access sensitive technology, the EU has no framework for addressing portfolio investments. The EU has also not policed investments that, while non-controlling on paper, have given minority stakeholders substantial influence. For example, although non-EU investors can hold only minority positions in EU air carriers, Gulf-country carriers have exercised significant influence over their European partners, raising concerns that these foreign entities control parts of the European aviation industry.[229] More recently, investors were caught off guard when Li Shufu, the chairman of Chinese automotive giant Geely, disclosed a 9.7% stake in Daimler, the German parent company of Mercedes-Benz.[230] Li has stated that he made the investment to secure "friends, partners and allies,"[231] and that

[225] BAKER & MCKENZIE, REACHING NEW HEIGHTS: AN UPDATE ON CHINESE INVESTMENT INTO EUROPE 10 (2015).
[226] *Id.*
[227] GODEMENT & VASSELIER, *supra* note 68, at 56.
[228] Nicolas, *supra* note 72, at 105 ("Chinese firms also sometimes engage in minority stake acquisitions simply as a way of strengthening the relationship with their European partners.").
[229] Danielle Myles, *EU Airline FDI Caps Are Ineffective, Outdated*, INT'L FIN. L. REV., Jan. 2016, at 1 (describing concerns that Gulf-country carriers are not "truly act[ing] only as non-controlling minority shareholders.").
[230] Neal E. Boudette, *Chinese Auto Magnate Buys $9 Billion Stake in Daimler*, N.Y. TIMES (Feb. 23, 2018), https://www.nytimes.com/2018/02/23/business/daimler-chinese.html.
[231] Trefor Moss & William Boston, *How China's Geely Turned a Disassembled Mercedes into a Global Car Company*, WALL ST. J. (Mar. 4, 2018), https://www.wsj.com/articles/how-chinas-geely-turned-a-disassembled-mercedes-into-a-global-car-company-1520188109.

he is not seeking a seat on Daimler's board as part of his investment.[232] Li's actions provide an example of investing for access, not control, and is the kind of investment that does not qualify as FDI under the Commission's screening proposal. Nonetheless, Li stands to gain access to Daimler's key technology, which can bolster Geely's production in China and make it a stronger competitor abroad.

Member States have greater authority to regulate portfolio investments compared to FDI. In its ruling on the Singapore free trade agreement, the ECJ declined to extend the EU's exclusive competence on FDI to portfolio investments.[233] The Court's decision clears the path for Member States to pursue enhanced cooperation in this policy area. If the U.S. experience is any indicator, investment review will expand over time to include acquisitions other than those for outright control. Such transactions are currently a blind spot in EU law. The ECJ defines "portfolio investments" as "the acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking."[234] This definition does not, however, turn on what kind of access the foreign investor gains to non-public, technical or non-technical information about the investment target. The Commission's proposal similarly does not focus on the access an investor could secure through acquiring less than a controlling stake.[235]

The scope for enhanced cooperation on regulating foreign investment among a coalition of Member States can be conceptualized as a series of concentric circles. The core represents investments that affect a Member State's national security interests. As the treaties

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[232] *Geely Chairman Not Seeking Daimler Board Seat*, REUTERS (Feb. 28, 2018), https://www.reuters.com/article/us-daimler-geely/geely-chairman-not-seeking-daimler-board-seat-bild-am-sonntag-idUSKCN1GC23B.
[233] Case C-2/15, EU:C:2017:376 (2017), paras 226-244.
[234] *Id.* para 227.
[235] Commission FDI Screening Proposal, at 19 (limiting the scope of the proposed regulation to "foreign direct investment," defined as "investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity").

make clear, these transactions will continue to be subject to approval by Member States. At the same time, however, the legitimate grounds for rejecting investments to protect national security interests are limited by well-established ECJ case law. Importantly, Member States' authority does not extend to the adjacent circle covering investments that implicate "strategic" interests. As the Treaties are currently written, the EU alone can invoke strategic, as well as purely economic reasons, for rejecting inbound investment.

The Union has exclusive competence to regulate all circles between the inner core and the periphery. The outermost ring represents indirect, "portfolio" investments in companies. While these investments do not result in a change of control, they could lead to information-sharing with non-EU investors that raise strategic concerns. This area is one in which Member States remain competent even after the Treaty of Lisbon. Importantly, because portfolio investments lie outside the Union's exclusive competence on foreign direct investment, Member States could pursue enhanced cooperation within the treaty framework in this area.

This conceptualization demonstrates the significant hurdles the EU must overcome to speak with one voice on foreign investment. But a high-speed coalition should not be thought of as straying from the Union's message. Instead, because the EU currently has no coherent message, the HSC investment board should be thought of as a body that can come up with possible talking points that the Union could adopt over time. Such experimentation by the Member States has to some degree been hampered by an "excessive constitutionalisation"[236] of EU law, but the Union has the necessary tools to empower Member States that are willing to try new solutions where they do not interfere with the Union's own policies. To push the

[236] Fritz W. Scharpf, *De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe*, 23 EUR. L.J. 315, 316 (2017) (arguing that the Treaties "go far beyond . . . core functions" of a federal constitution "by regulating in considerable detail a wide range of matters that democratic constitutions would leave to be determine by political legislation.").

European agenda forward, the Union should encourage greater cooperation through voluntary coalitions that can establish best practices and experiment with different policy options.

B. Anti-Circumvention Rules

Investors are unlikely to take restrictions on their FDI activities lying down. Indeed, even if the hypothetical investment board were successfully implemented, a high-speed coalition of states would remain vulnerable to deals that circumvent their common review system. For example, a foreign investor could first invest in a Member State that has not joined the HSC, either through an acquisition or by establishing a new entity through a so-called "greenfield investment." By using this investment as its point of entry, the investor has control over a company that is duly incorporated under the laws of a EU Member State. This foreign-owned but EU-incorporated entity could thereafter rely on the freedom of establishment across the internal market to pursue a target in a HSC Member State. Such two-step transactions would undermine the cooperation mechanism because Member States can block intra-EU transactions only in very limited circumstances.

The transactional structure described above is not just of academic interest. Foreign investors often carry out takeovers in the EU through shell companies formed under the laws of a Member State. These shell companies are then used to acquire a company in another Member State. Such "Special-Purpose Entities" (SPEs) transform an investment by a foreign party into an intra-Union transaction, allowing the investor to avoid FDI review.[237] Furthermore, investors that prize access over control could target the weak link of a production chain. For example, increased scrutiny of FDI by German authorities could lead foreign investors to "buy[] companies from Central Europe operating as sub-vendors to German companies" in order to "gain[] access to German know-how."[238] The rights

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[237] *See* BASEL COMMITTEE ON BANKING SUPERVISION, REPORT ON SPECIAL PURPOSE ENTITIES 1 (2009).
[238] Karen Gilchrist, *Germany Is Trying to Stop China from Gobbling up Its Companies—But There May Be a Downside*, CNBC (Sept. 1, 2017), https://www.cnbc.com/2017/08/23/germanys-chinese-takeover-regulations-

guaranteed in the internal market facilitate these workaround strategies, and without the authority to screen the investment based on foreign ownership, Member States are highly dependent on each other to protect their domestic industries.

When screening investments carried out through shell companies, Member States suffer from a lack of reliable data. The widespread use of SPEs skews FDI statistics and has made it notoriously difficult for recipient countries to evaluate the size and origin of inbound FDI.[239] Intermediary SPEs obfuscate actual transaction values[240] and give false impressions of real-economy impact.[241] One estimate puts the share of total worldwide FDI made up of offshore shell companies at between 30-50 percent.[242] The effect is particularly notable in countries with favorable corporate codes. "[R]esident SPEs in Luxembourg, the Netherlands, Hungary, Austria, Iceland, and the United Kingdom account[ed] for 25% or more of their inward FDI" in 2016.[243] Moreover, "indirect" holdings that blur the lines between FDI and portfolio investments have important consequences given the different competences held by the EU and the Member States.[244]

Notwithstanding its many disadvantages from a screening perspective, the use of SPEs has firm support in treaty law. Article 49 TFEU prohibits "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State."[245] Article 54 TFEU further provides that "[c]ompanies or firms formed in accordance with the

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could-have-a-downside.html; *see also* Friso Stevens, *Europe Ponders How to Curb China's High-Tech Buying Spree*, DIPLOMAT (Feb. 16, 2018), https://thediplomat.com/2018/02/europe-ponders-how-to-curb-chinas-high-tech-buying-spree (arguing that Chinese investors may employ this strategy as a way to dodge the screening proposed by the Commission and "find 'points of entree' [sic] in eastern and southeastern EU member states.").

[239] *See* Kálmán Kalotay, *Indirect FDI*, 13 J. WORLD INV. & TRADE 542, 551 (2012) ("[T]racing back the ownership of firms requires resources, and raises legal issues about the confidentiality of information. It is also challenging for international cooperation between statistical services of dissimilar traditions.").

[240] EUROPEAN CENTRAL BANK, VALUATION OF FOREIGN DIRECT INVESTMENT POSITIONS 21 (2004).

[241] Karl P. Sauvant, *Beware of FDI Statistics!*, COLUM. FDI PERSP. (Dec. 18, 2017), http://ccsi.columbia.edu/files/2016/10/No-215-Sauvant-FINAL.pdf ("The real economic activity of SPEs and holding companies is very limited.").

[242] Daniel Haberly & Dariusz Wójcik, *Regional Blocks and Imperial Legacies: Mapping the Global Offshore FDI Network*, 91 ECON. GEO. 251, 252 (2014).

[243] OECD, FDI IN FIGURES 6 (2017), www.oecd.org/corporate/FDI-in-Figures-April-2017.pdf.

[244] Thilo Hanemann & Mikko Huotari, *Chinese Direct Investment in Europe: What Available Data Sources Tell Us*, *in* CHINESE INVESTMENT IN EUROPE: A COUNTRY-LEVEL APPROACH (John Seaman et al. eds, 2017).

[245] TFEU art. 49

law of a Member State and having their registered office, central administration or principal place of business within the Union shall . . . be treated in the same way as natural persons who are nationals of Member States."[246] Member States may restrict a company's freedom of establishment only for certain narrowly defined interests. Those interests, listed in Article 52, include "public policy, public security or public health."[247] The ECJ has rejected the notion that corporate citizenship can be made contingent on actual economic activity in the company's home state if this is not required by the national law in the Member State where the company is incorporated.[248]

The ECJ has extended the freedom of establishment to cross-border M&A transactions. In Case C-411/03, *SEVIC Systems AG*,[249] the ECJ found a German law that placed discriminatory restrictions on mergers involving non-German entities inconsistent with EU law. SEVIC was established in Germany. It merged with Security Vision Concept SA, a Luxembourgish corporation, and applied for registration in the German national commercial register. According to the merger terms, Security Vision would dissolve without liquidation and transfer all of its assets to SEVIC, and the merged entity would continue operating under SEVIC's name. A local court refused SEVIC's application, since the German law on company transformations covered only mergers between entities established in Germany. Following SEVIC's appeal, the German appellate court referred the question for a preliminary ruling by the ECJ. The ECJ held that "[c]ross-border merger operations . . . constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic

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246 TFEU art. 54.
247 *Id.* art. 52.
248 *See* Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, EU:C:1999:126 (1999), para 29 ("[T]he fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.").
249 EU:C:2005:762 (2005).

activities in respect of which Member States are required to comply with the freedom of establishment."[250] Granting different merger rights to German and non-German companies would "deter the exercise of the freedom of establishment." Because Germany had failed to show any circumstances that would justify the discriminatory measures on public policy, public security, or public health grounds, the ECJ held that Germany had violated Articles 49 and 54 TFEU.[251]

The EU need not have ended up with a *SEVIC*-type system. In an episode that foreshadowed present controversies over FDI, the French and Italian delegations proposed adding a paragraph to the predecessor to Article 54 during negotiations to finalize the Treaty of Rome.[252] Their amendment would have prohibited companies from relying on the freedom of establishment if they were controlled by third-country investors.[253] Companies that were foreign-owned but based within the EU would thus not have had the same rights as entities that were both EU-owned and EU-based. Delegates from other Member States opposed the amendment, however, and the proposal was not incorporated into the final treaty text.[254] Echoes of the past can now be heard in the European debate on FDI. In its comments on the Commission's proposal for screening FDI, the Committee on Industry, Research and Energy of the European Parliament (ITRE) pushed for a definition of an "undertaking of a third country" that would include "an undertaking constituted or otherwise organised under the laws of a third country *or an undertaking effectively controlled or owned by nationals of a*

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[250] *Id.* para 19.
[251] TFEU art. 52.
[252] PHILIP STRIK, SHAPING THE SINGLE EUROPEAN MARKET IN THE FIELD OF FOREIGN DIRECT INVESTMENT 58 (2014).
[253] *Id.* The French proposal read: "However, a Member State may request the Commission that companies, as referred to in the previous paragraph, be excluded from the benefit of those provisions when they are controlled by third country nationals or capital from outside the Community, even if they are established on the territory of one of the Member States and constituted in conformity with its legislation." *Id.* (quoting Proposal by the French delegation of 17 January 1957 (Doc MAE 47/57)).
[254] *Id.*

third country."[255] Similarly, the Committee on International Trade (INTA) issued its own draft report, recommending third-country classification of companies "of a third country intending to make or having already made a foreign direct investment, *whether they are the ultimate investor or an intermediary*."[256] Expanding the definition would make such EU-based but foreign-controlled companies subject to the same level of scrutiny as companies based in a third country. Members of Parliament have thus brought back the Franco-Italian proposal from the Union's legislative scrapheap.

While the Commission has signaled its support for a solution similar to the ones proposed by the ITRE and INTA committees, it has phrased its support in more restrictive terms. The Commission's proposal for FDI screening allows Member States to "maintain, amend or adopt measures necessary to prevent circumvention of the screening mechanisms and screening decisions.[257] The Commission's explanatory memorandum accompanying the proposal explained that "[s]uch measures may include the screening, in compliance with EU law, of direct investments carried out by an undertaking formed in accordance with the law of a Member State and owned or controlled by a foreign investor, when the investment is made through *artificial arrangements* within the EU that *do not reflect economic reality*."[258] The Commission thus seems to limit its proposal to SPE-style transactions, rather than all cases in which a company, even one responsible for real economic activity, is foreign-owned. The memorandum further limits this mandate by stating that Member States' measures should "not affect the fundamental freedoms established under the TFEU."[259]

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[255] COMM. INDUS., RESEARCH & ENERGY, DRAFT OPINION 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 13 (2018) [hereinafter ITRE Report].
[256] COMM. INT'L TRADE, DRAFT 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 24 (2018) [hereinafter INTA Report] ("The aim here . . . is to prevent the regulation from being circumvented by using undertakings situated in the Union to make investments on behalf, for example, of a foreign power.").
[257] Commission FDI Screening Proposal, at 20.
[258] *Id.* at 12.
[259] *Id.*

The Commission's proposal does not define what constitutes an "artificial arrangement" that would allow Member States to intervene in a planned investment. Moreover, requiring that Member States do not screen artificial transactions in a way that would infringe on the fundamental freedoms significantly constrains their responses to circumvention strategies. Corporate "citizenship" under EU law exists independent of the shareholders' nationality or the corporation's economic activity. Arguably, then, the Franco-Italian proposal that was not incorporated in the Treaty of Rome prohibits the kind of legislation some parliamentarians now support. As a result, Member States are limited to screening FDI based exclusively on a company's activities rather than its ownership.

The possibility to rely on the internal market freedoms to invest in companies based in countries with stricter FDI screening sets up a major roadblock to a multispeed Europe in the area of FDI. It may simply be the case that FDI regulation has "'leaky bucket' characteristics," such that "the effect of [a] common rule would be undermined by opt-outs."[260] But common standards among HSC member states to separate artificial from genuine transactions would nevertheless constitute a step in the right direction. A common investment review board could subject investors to more scrutiny, which alone could extract greater concessions from the investors or lead them to abandon planned transactions altogether. A high-speed coalition would not have the authority to completely stem the tide of foreign investment, but could leverage its soft power to protect domestic know-how and key technologies.

Conclusion

In view of the significant hurdles to multispeed cooperation on FDI, one may ask why it is relevant to analyze such a project within the EU framework. The answer is threefold: First, the debate within the EU has revealed some openness to a multispeed model. The

[260] Scharpf, *supra* note 236, at 332.

above-mentioned ITRE proposal recommended setting up an "Investment Screening Coordination Group" consisting of representatives from Member States that already have FDI screening mechanisms in place.[261] This Investment Screening Coordination Group "may serve as a platform to exchange views and information *and to assist each other on foreign direct investment*."[262] Similarly, the INTA draft report would allow nine Member States to object to a planned investment in another Member State, either on security or public policy grounds, or based on "the interests of the Union."[263] If such an objection were raised, the Member State receiving the FDI would be required to "find an alternative solution to simply authorising the investment."[264] While these parliamentary discussions do not signal an outright appetite for a multispeed framework among all key stakeholders, they demonstrate an openness to variable arrangements that do not depend on consensus-building across the Union as a whole.

Second, the political situation within the Union makes multispeed cooperation highly relevant. The tensions at the Council over how to address FDI are well known. Allowing some Member States to deepen their cooperation on FDI could resolve this standoff. This solution would by no means be a panacea; investors would still be able to circumvent screening by first investing in a Member State with lax vetting standards and enter more restrictive Member States in the guise of a EU-based entity. Nevertheless, the soft power of a common investment board for "high-speed" countries should not be underestimated. Admittedly, such a common board seems to violate the treaty as currently written. However, "foreign direct investment" was inserted into Article 207 at the last minute by Commission representatives, and scholars have made a convincing argument that "the authors of the

[261] Profusek et al., *supra* note 202, at 13 (arguing, in the context of national screening, that "a member state may be able to create enough heat and light to negotiate a bilateral arrangement with the foreign acquirer to secure protections.").
[262] ITRE Report, *supra* note 255, at 10-11 (emphasis added).
[263] INTA Report, *supra* note 256, at 41.
[264] *Id.*

European Treaties hardly intended to provide the EU with a firm legal competence in international investment policy" through the amended TFEU.[265] In view of this legislative history, it is worth asking whether the competence should remain exclusive to the Union or if Member States are better situated to address FDI challenges through enhanced cooperation.

Finally, although the Commission did not identify FDI screening as a potential area for multispeed cooperation, uniform screening standards may buttress integration in other areas, in particular in relation to industrial and R&D cooperation. It is of course an open question whether a common FDI cooperation mechanism should follow rather than lead other multispeed projects. Member States that have established cooperation on defense matters may be more capable of defining their common security interests that would underpin a common screening mechanism. On the other hand, they may also be reluctant to integrate their capabilities in the first place if one country is more open to foreign investment in defense-related areas.

If the EU continues to expand, multispeed cooperation will become the norm, not the exception, for a Union "united in diversity."[266] As the analysis above has shown, however, the current treaty framework is a poor match for such diversified policymaking. The Treaty of Nice introduced a new form of enhanced cooperation to improve on the "unclear, uneven and unworkable scheme" introduced in the Treaty of Amsterdam.[267] The next steps to improve enhanced cooperation will require streamlining the process for approving such projects. A further option would be to impose deadlines for the Commission to prepare legislation in areas where the Union is exclusively competent to act, after which Member States become automatically empowered to cooperate on their own proposals. Such initiatives would have the benefit of overcoming inertia and accelerating the legislative

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[265] Basedow, *supra* note 162, at 744.
[266] *The EU Motto*, EUR. UNION (last visited Feb. 21, 2018), https://europa.eu/european-union/about-eu/symbols/motto_en.
[267] Murphy, *supra* note 130, at 305.

process in Brussels. With recent speed bumps like Brexit and a general discontent among EU citizens slowing down the process of European integration, multispeed cooperation can help the Union shift into a higher gear.