THE FOREIGN INVESTMENT REGULATION REVIEW

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THE LAWREVIEWS

Chapter 1

EU OVERVIEW

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I THE EVOLVING EU RULES ON FOREIGN DIRECT INVESTMENT SCREENING: A BALANCE EXERCISE SET IN MOTION

The past year has witnessed intense discussions at EU and Member State level on the need to review foreign investment flows in sensitive sectors. Following an initiative by France, Germany and Italy, the European Commission submitted a proposal to the Council of the European Union in September 2017 for a regulation establishing a framework for screening foreign direct investment (FDI) in the European Union (EU). This chapter reflects on developments in the legislative procedure during the past year and discusses the possibility of EU rules on the matter of foreign direct investment screening being introduced.

II BACKGROUND

The ever-increasing number of acquisitions of EU companies by non-EU investors, in particular Chinese companies, has been raising concerns in the EU business community and Member States, on the basis that many of these acquisitions involve companies in sensitive and strategic sectors. As a result, certain Member States have been asking for more protection against unfair competition and reciprocity in trade and investment between the EU and third countries. The impetus is growing.

Since the controversial acquisition in 2016 of KUKA AG, a German robotics engineering company, by Midea, a Chinese air-conditioning and home appliances company, there have been a series of similarly controversial acquisitions of European companies in strategic sectors by Chinese corporations. At the end of July 2018, a 20 per cent acquisition by the State Grid Corporation of China of 50Hertz, a transmission system operator in Germany, was blocked on national security grounds, and the shares at issue were temporarily acquired by KfW, a government-owned development bank in Germany.[2]

1 Lourdes Catrain is a partner and Eleni Theodoropoulou is an associate at Hogan Lovells International LLP. The chapter reflects events up to 2 August 2018.

2 See Deutsche Welle, 'Berlin beats Chinese firm to buy stake in 50Hertz power company', 27 July 2018, at https://www.dw.com/en/berlin-beats-chinese-firm-to-buy-stake-in-50hertz-power-company/a-44848676.

In many cases that have triggered the scrutiny of national authorities, the acquirer has been a Chinese company. This is not surprising considering that China's investment in the EU reached €28.5 billion in 2017,[3] while EU investment in China has been decreasing, from €11.8 billion in 2014 to €8 billion in 2016.[4]

This surge stems from China's strategic ambition of becoming a major player in the technological sector. This policy is reflected in (1) China's 13th five-year plan for innovation-driven, green and inclusive growth,[5] which sets out the country's 'strategic intentions and defines its major objectives, tasks and measures for economic and social development',[6] and (2) China Manufacturing 2025, which aims to raise the competitiveness of its industry by increasing the levels of local content in Chinese manufacturing by 70 per cent by 2025, and to create 'national champions' in 10 high-tech manufacturing sectors.[7]

The focus of Chinese investment flows in the EU is thus primarily on the sectors of advanced industrial machinery and equipment, information and communications technology, utilities, transport and infrastructure and energy.[8] Certain Member States consider these sectors to be highly sensitive, as they are often linked to the defence industry and hence they raise national security considerations.

However, the issue is broader. The EU is striving to strike a balance between its openness to foreign investment and the interests of its Member States. The current discussion revolves around the criteria and conditions under which proposed acquisitions of EU companies by non-EU investors should be dealt with at EU level, as well as whether such acquisitions should be prohibited in sectors that would be commonly specified.

3 See Mercator Institute for China Studies, 'EU–China FDI: Working towards reciprocity in investment relations', May 2018, at https://www.merics.org/sites/default/files/2018-07/180718_MERICS-COFDI-Update_final_0.pdf.

4 See EU Parliamentary Research Service (EPRS), 'Foreign direct investment screening: A debate in light of China–EU FDI flows', Briefing, May 2017, at www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017)603941_EN.pdf, at p. 3.

5 'The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China 2016–2020' – English translation available at http://en.ndrc.gov.cn/policyrelease/201612/P020161207645766966662.pdf.

6 Ibid., preamble.

7 See The European Union Chamber of Commerce in China, 2017 report, 'China Manufacturing 2025: Putting Industrial Policy Ahead of Market Forces', pp. 7 to 10 – available at http://docs.dpaq.de/12007-european_chamber_cm2025-en.pdf.
The 10 sectors are next-generation information technology, high-end numerical control machinery and robotics, aerospace and aviation equipment, maritime engineering equipment and high-tech vessel manufacturing, advanced rail equipment, energy-saving vehicles, electrical equipment, agricultural equipment, new materials, biomedicine and high-performance medical apparatus.

8 See Merics Papers on China, No. 3, Update, January 2017, *Record flows and growing imbalances: Chinese investment in Europe in 2016*, available at http://rhg.com/wp-content/uploads/2017/01/RHG_Merics_COFDI_EU_2016.pdf.

III WHAT LEGAL RULES ARE CURRENTLY AVAILABLE?

There is currently no EU instrument to screen foreign investments. Member States have different policies for securing their vital national security interests against FDI, ranging from screening procedures to partial or total prohibition of FDI in specific sectors, notably defence.[9] In the past year, some Member States have revised their screening rules.

On 12 July 2017, the German government expanded the list of sectors for which scrutiny of FDI is required, in order to include providers of software for 'critical infrastructure' to sectors such as hospitals, transport, energy, utilities and telecommunications.[10] These changes were prompted by the increased number and complexity of acquisitions in recent years and by the fact that Germany is 'often in competition with countries whose economic order is not as open as [the German one]',[11] with a view to ensuring reciprocity for critical infrastructure.[12] Germany has in place both cross-sector reviews if a transaction threatens public policy or security, and sector-specific reviews for companies that manufacture goods included on the War Weapons List, certain types of military vehicles and products with information technology security functions. The reviews apply to acquisitions by non-EU and non-European Free Trade Association (EFTA) investors of at least 25 per cent of the voting rights in the targeted companies.[13]

In October 2017, Italy amended its legislation to oblige foreign investors that build minority stakes of at least 10 per cent in Italian-listed companies to disclose, among other things, their goals with respect to final ownership of the investment.[14] The revision also extended the government's powers to block acquisitions by non-EU companies to include high-technology sectors.[15]

The matter of foreign takeovers of domestic companies was also brought before the Dutch Parliament last year, through a proposal for a plan offering a one-year grace period for companies, during which they can refuse to integrate with a foreign buyer.[16] In April 2018, the government proposed a law providing for government approval of any acquisition of a Netherlands-based telecommunications company, which would be applicable to telephone, internet, website hosting and data centre companies.[17]

9 See EPRS Briefing 2017, *op.cit.*, at pp. 6 and 7. For existing procedures in other countries worldwide, see Frédéric Wehrlé and Joachim Pohl (2016), *Investment Policies Related to National Security: A Survey of Country Practices*, OECD Working Papers on International Investment, 2016/02, OECD Publishing, Paris, available at http://dx.doi.org/10.1787/5jlwrrf038nx-en, at pp. 72 to 74.

10 Article 1 of the 9th Ordinance for the Amendment of the Foreign Trade and Payments Ordinance 2013 (*Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung*).

11 Ibid.

12 Ibid.

13 Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) of 2 August 2013, (Federal Law Gazette [BGBl.] Part I p. 2865), English translation available at https://www.gesetze-im-internet.de/englisch_awv/englisch_awv.html.

14 Law Decree No. 148 of 16 October 2017 ratified by Law No. 172 of 4 December 2017, Article 13(1)(a)(1).

15 Ibid, Article 13(1)(b)(2).

16 See Reuters, 'Dutch government to rethink plan to curb foreign takeover attempts', 4 July 2017, available at www.reuters.com/article/us-netherlands-m-a-protection-idUSKBN19P1J9?il=0.

17 See Reuters, UPDATE 1-Dutch government wants power to vet telecoms deals, 19 April 2018, available at https://www.reuters.com/article/netherlands-telecoms/update-1-dutch-government-wants-power-to-vet-telecoms-deals-idUSL8N1RW0XI.

The United Kingdom has also amended its legislation to introduce stricter merger control thresholds in certain sectors, following a Green Paper proposing reforms to its regime, issued in October 2017.[18] Under applicable rules, government intervention in an acquisition may occur if the transaction results in the creation or enhancement of at least a 25 per cent share of supply of goods or services in the United Kingdom, or with a turnover of more than £70 million. These amendments have expanded control to smaller transactions in certain sectors by (1) reducing the threshold of the target's turnover to £1 million[19] and (2) dispensing the requirement for an increase in the share of supply, thus requiring merely that the target company has a share of supply or purchase of at least 25 per cent of any goods or services in those sectors.[20] The sectors to which the new thresholds apply include the development and production of military and dual-use goods (restricted goods) and the holding of related information, and activities relating to computer hardware and quantum technology.

Under the Treaty on the Functioning of the European Union (TFEU), a Member State 'can take such measures as it considers necessary for the protection of the essential interests of its security that are connected with the production of or trade in arms, munitions and war material', on the condition that the measures do not 'adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes'.[21]

More specifically, Article 63 TFEU prohibits all restrictions on the freedom of movement of capital and payments between Member States or between Member States and third countries.[22] Article 65 TFEU provides for derogation from this prohibition, allowing Member States to take measures that are justified on grounds of public policy or public security.[23] The invocation of public policy and public security reasons must not constitute 'a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63'.[24]

Under the case law of the Court of Justice of the European Union (CJEU), national measures may be justified on the grounds set out in Article 65(1)(b) TFEU, namely public policy or public security grounds[25] or by overriding reasons in the general interest 'to the extent that there are no [EU] harmonising measures providing for measures necessary to ensure

18 Department for Business, Energy and Industrial Strategy, 'National Security and Infrastructure Investment Review: The Government's review of the national security implications of foreign ownership or control', October 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf.

19 The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (2018 No. 593), Section 2.

20 The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (2018 No. 578), Sections 2 to 4.

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

22 See Article 63 TFEU.

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

24 See Article 65(3) TFEU.

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

the protection of those interests'.[26] Those overriding interests have been held to (1) include environmental protection, town and country planning and consumer protection,[27] and (2) exclude purely economic objectives.[28]

However, national measures must respect the limits provided by the TFEU and observe the principle of proportionality, in that restrictive measures must be appropriate to secure the objective that they pursue and not go beyond what is necessary to achieve it.[29]

The CJEU has also held that the scope of the public security exception must be interpreted strictly and cannot be unilaterally determined by the Member States without any control by the EU institutions.[30] Member States may rely on this exception only in the presence of a 'genuine and sufficiently serious threat to a fundamental interest of society'.[31] Moreover, such derogations must not be applied for purely economic purposes,[32] while persons affected by such restrictive measures must have access to legal remedies.[33]

Finally, the Merger Regulation[34] aims at establishing whether appraisals of mergers and acquisitions within the EU are compatible with the common market and do not pose impediments to effective competition therein. The Regulation affords the European Commission (the Commission) with the exclusive competence to make decisions in this regard, while Member States are explicitly prohibited from applying domestic legislation on competition.[35] However, Article 21(4) of the Merger Regulation explicitly provides that Member States 'may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law'.[36] Public security is listed as a legitimate interest in this regard.

26 Case C-112/05, *Commission of the EU Communities v. Federal Republic of Germany*, Judgment of the Court (Grand Chamber), 23 October 2007, at Paragraph 72.

27 Case C-400/08, *European Commission v. Kingdom of Spain*, Judgment of the Court (Second Chamber), 24 March 2011, at Paragraph 74.

28 Ibid.

29 Case C-112/05 (see footnote 26), Paragraph 73; Case C-54/99, *Scientology Church*, Judgment of the Court, 14 March 2000, at Paragraph 18; Case 483/99 (see footnote 25), at Paragraph 45; Case 503/99 (see footnote 25), at Paragraph 45.

30 Case C-54/99 (see footnote 29), at Paragraph 17; Case 483/99 (see footnote 25), at Paragraph 48; Case 503/99 (see footnote 25), at Paragraph 47; Case 463/00, *Commission of the EU Communities v. Kingdom of Spain*, at Paragraph 72.

31 Ibid.

32 Case C-54/99 (see footnote 29), at Paragraph 17; Case 400/08 (see footnote 27), at Paragraph 74.

33 Case C-54/99 (see footnote 29), at Paragraph 17.

34 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L.24/1/29.1.2004.

35 Ibid., Article 21(2) and (3).

36 Ibid., Article 21(4).

IV COMMISSION PROPOSAL FOR SCREENING FOREIGN INVESTMENTS

On 22 June 2017, the European Council called for more reciprocity, emphasising that trade and investment 'can only be free if it is also fair and mutually beneficial'.[37] It also called on the Commission and the Council of the European Union (the Council) to 'deepen and take forward the debate on how to enhance reciprocity in the fields of public procurement and investment' and welcomed an initiative by the Commission 'to analyse investment from third countries in strategic sectors'.[38]

In late July 2017, France, Germany and Italy circulated a 'Common Approach to investment control' (the Common Approach).[39] The Common Approach proposed the introduction of new EU legislation to cover the acquisition by non-EU investors of 'sufficient voting rights' in an EU-resident company for the first time or the increase of an existing stake above this threshold. It also envisaged the extension of investment reviews to acquisitions by EU-investors controlled by non-EU parties, provided that the investment is abusive and made with the purpose of circumventing the due diligence acquisition review. Moreover, the Common Approach envisaged a consultative and monitoring role for the Commission, while the decision on whether an intervention should be made would still lie with the Member State concerned.

These initiatives have resulted in a Commission proposal for a regulation establishing a framework for the review of FDI into the EU (the Commission Proposal).[40] The Commission Proposal provides for an enabling framework for Member States to review FDI on grounds of security and public policy. It does not purport to establish an EU-wide screening mechanism.

It provides for certain common requirements that national review mechanisms must comply with, such as the possibility for judicial review, transparency and non-discrimination between third countries. Member States would be obliged to notify their existing mechanisms and provide an annual report of the application of such mechanisms. If a Member State does not have any review mechanisms, it would be required to submit an annual report on the FDI that took place in its territory.

The Commission may also undertake reviews on the grounds of security or public policy if a certain FDI is likely to affect certain projects and programmes of EU interest (e.g., Horizon 2020 or Galileo). In such a case, the Commission may issue an opinion addressed to the Member State concerned, which the latter must take 'utmost account' of and justify its decision should it decide not to follow it.

In reviewing FDI, Member States and the Commission may consider the potential effects of a proposed investment in certain sectors, including, *inter alia*, critical infrastructure,[41]

37 Conclusions of the EU Council meeting (22 and 23 June 2017), at Paragraph 17: available at http://data.consilium.europa.eu/doc/document/ST-8-2017-INIT/en/pdf.

38 Ibid.

39 See 'European investment policy: A common approach to investment control', 28 July 2017, available at http://politico.us8.list-manage.com/track/click?u=e26c1a1c392386a968d02fdbc&id=c0250f3c3d&e=db5bc20ea2.

40 Proposal for a regulation of the EU Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (2017/0224 (COD)), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:487:FIN.

41 See Article 4 of the Commission Proposal: Critical infrastructure includes energy, transport, communications, data storage, space or financial infrastructure and sensitive facilities.

critical technology,[42] the security of supply of critical inputs, or access to or the ability to control sensitive information. Factors such as control of the foreign investor by a third country government, including through significant funding, may be taken into consideration to determine whether the FDI concerned is likely to affect security or public policy.

Finally, the Commission Proposal provides for a cooperation mechanism between the Member States and the Commission to exchange information on FDI that might be a threat to security and public policy. This mechanism would also purport to contribute to the better coordination of review decisions taken by Member States and to increase awareness about proposed investments that might threaten those areas. The explanatory memorandum to the Commission Proposal provides that Member States would need to notify the Commission under Article 21(4) of the Merger Regulation if the review decision concerns public interests other than public security, and if the concentration falls within the scope of the Merger Regulation.

The Commission Proposal is being considered under the ordinary legislative procedure, which entails the involvement of the European Parliament (the Parliament) and the Council.[43] Under this procedure, once the Parliament and the Council form their respective positions on the Commission Proposal, the three institutions may start negotiations to reach a compromise on the text, which will be eventually adopted into EU law (trilogue negotiations).

i The responses of the Parliament and the Council

The Parliament's International Trade Committee (INTA) is responsible for reviewing and adopting amendments to the Commission Proposal. On 28 May 2018, INTA published a report with its proposed amendments,[44] which constitutes the basis on which the Parliament will enter into the trilogue negotiations (the INTA Report).

The INTA Report aims at strengthening the role of the Commission in the FDI screening process, by introducing mandatory Commission screening if an FDI is likely to affect EU programmes or projects, such as Galileo, Copernicus or Horizon 2020.

Furthermore, it proposes broadening the areas where screening on security or public policy grounds may occur by (1) increasing the indicative sectors in the four categories proposed by the Commission (i.e., critical infrastructure, critical technologies, security of supply of critical inputs, and access to sensitive information or the ability to control sensitive information), and (2) adding a fifth area, that of plurality and independence of media, services of general interest and services of general economic interest, as well as cultural services, sports facilities and cultural heritage. The Parliament also proposes making mandatory the consideration of certain criteria in the determination of whether an FDI is likely to affect security or public policy. These would include (1) the risk of supply disruption, (2) the direct or indirect ownership or control by a foreign government, and (3) the involvement of a foreign investor in a project threatening security or public policy in a Member State.

42 Ibid.: Critical technology includes artificial intelligent, robotics, semiconductors, technologies with potential dual-use applications, cybersecurity, space or nuclear technology.

43 Articles 289 and 294 TFEU.

44 See INTA Report on the proposal for a regulation of the EU Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (COM(2017)0487 – C8-0309/2017 – 2017/0224(COD)), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA8-2018-0198%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN.

Moreover, the INTA Report favours introducing new criteria that can be considered in the screening process. These include, among others, (1) the involvement of the foreign investor in criminal activities such as money laundering, (2) any change of ownership clauses in the statute of the foreign investor, (3) the possibility that FDI may reinforce or lead to a monopolistic structure or the control of a value chain, or (4) the lack of reciprocity in the country of origin of the foreign investor.

It also proposes introducing a role for economic operators, civil society organisations and trade unions, which would be able to request a Member State to screen an FDI and to provide information concerning an FDI that causes them substantial and duly justified concerns. Finally, the INTA Report provides for the establishment of an Investment Screening Coordination Group, comprising representatives of Member States and chaired by a representative of the Commission, to act as a forum where Member States would address concerns and share best practices.

For its part, the Council reached agreement on its proposed amendments to the Commission Proposal on 13 June 2018, thus forming its position for the trilogue negotiations.[45]

The Council's position reportedly aims to strengthen the role of the Member States in the process and to reiterate their responsibility with respect to the maintenance of national security as provided for in the EU Treaties. It also favours reducing the role of the Commission in the screening of FDI, by (1) allowing the Commission to issue an opinion only after the Member State concerned has determined that a proposed investment is likely to affect its security or public policy, and (2) making applicable the Member States' cooperation mechanism to proposed investments likely to affect EU programmes or projects, as opposed to the Commission issuing an opinion.

Similarly to the INTA Report, the Council proposes additional areas in which screening on security or public policy grounds may be carried out by Member States by (1) broadening the indicative sectors in the four categories proposed by the Commission, and (2) adding a fifth area, that of plurality of the media.

Further, the cooperation mechanism among Member States should be strengthened by introducing cooperation provisions concerning FDI not undergoing screening, beside the cooperation provisions in the Commission Proposal concerning FDI undergoing screening. The proposed amendments also include the possibility of Member States providing comments, and of the Commission issuing an opinion, to the Member State in which an FDI is planned.

Finally, the Council's position aims to strengthen the information exchange on critical FDI among Member States and the Commission, such as the ownership structure or funding of the foreign investor. It also introduces the possibility for Member States to request information from the foreign investor concerning a planned or completed FDI. Exchange of information would occur through an encrypted system set up by the Commission and the establishment of contact points in each Member State.

ii Where could the Commission Proposal take us?

The trilogue negotiations are continuing at the time of publication of this chapter and are expected to be finalised in the coming months.

45 See European Council press release, Screening of investments: Council agrees its negotiating stance, 13 June 2018, available at www.consilium.europa.eu/en/press/press-releases/2018/06/13/screening-of-investments-council-agrees-its-negotiating-stance/. The Council's position has been reported by Politico, Document: Council's compromise on investment screening, 15 July 2018.

The key objective of the Commission Proposal is to ensure reciprocity in the acquisition of EU companies by non-EU investors and to introduce certain criteria on fair competition of such acquisitions, based on market rules. At the same time, it aims to strike a balance between maintaining an open environment to FDI in the EU, on the one hand, and the varying interests of its Member States on the other.

The Commission Proposal does not establish a screening mechanism at EU level, but enables Member States to coordinate and complement existing national rules with provisions that would allow for the participation of the Commission in the reviews, thus contributing to the coherence of the applicable rules and criteria. However, Member States would ultimately be responsible for the decision to block a proposed FDI.

It is expected that the Commission Proposal will impose additional obligations on Member States that could change certain aspects of acquisition processes, with respect to both procedural obligations (e.g., the applicable time frame) and substantive elements (e.g., the exchange of information between Member States concerning the corporate structure and funding of the foreign investor).

A few observations shall be made in this regard. First, the Commission Proposal grants Member States flexibility in determining whether a review mechanism is necessary, the scope of that mechanism, and the criteria on the basis of which a threat to security and public policy can be ascertained. It does not provide for a pre-defined exhaustive list of sensitive or strategic sectors in which investment reviews would have to be effected. By contrast, reference to specific sectors is made in an indicative way.[46]

It thus aims at achieving a fine balance between the various interests of the Member States, which will have the final say on whether to block an FDI, and the interest of the EU for uniform principles in the application of its investment policy. The Commission has bypassed the political challenges that would arise if there were an exhaustive list of sectors subject to reviews, enabling Member States to tailor their foreign investment policy in accordance with their national industrial and economic policy.

Second, the cooperation mechanism will increase transparency and raise awareness among all Member States and the EU institutions with respect to the state of foreign capital in the EU in strategic sectors. The exchange of information and the requirement to notify the Commission in the context of Article 21(4) of the Merger Regulation for certain transactions could contribute to achieving an accurate record of all foreign acquisitions within the EU.

A question that arises is whether there would be any implications if a Member State were not to follow the Commission's opinion that a planned investment is likely to affect programmes of EU interest. The current wording of the Commission Proposal includes the provision that Member States 'shall take utmost account' of the opinion and provide explanations if they deviate from it. Although the Parliament's position aims to strengthen the Commission's role in this regard, it remains unclear whether this could effectively result in a more active role for the Commission in general or, progressively, to another form of foreign investment screening mechanism for EU projects at EU level.

Finally, the legal basis on which the Commission Proposal is based is Article 207 TFEU, which sets out the EU Common Commercial Policy. The EU has exclusive competence over it, by virtue of Article 3(1)(e) TFEU. In other words, the EU is exclusively competent to legislate and adopt legally binding acts, whereas Member States may do so only if they are

46 Commission Proposal, Article 4, 'may consider . . . *inter alia*'.

empowered by the EU or for the implementation of such acts.[47] This has been confirmed by last year's Opinion of the CJEU on the EU–Singapore Free Trade Agreement.[48] The Court distinguished between FDI and other forms of investment, including portfolio investment, and held that only FDI falls within the exclusive competence of the EU.[49] The criteria used by the CJEU to define FDI, namely the existence of lasting and direct links and the effective participation in the investment's management or control, now form part of the definition of FDI in the proposed regulation.[50]

V CONCLUSION

The Commission has proposed an enabling regulation that would set out a framework for the review of FDI in the EU. This comes at a time of increased debate on the necessity to have common EU rules on the matter and the direction that those rules should take. It purports to grant the Commission with an active role in the acquisition reviews, without depriving Member States of their existing powers and competences.

The increasing level of debate on the issue, coupled with surging inbound investment flows into the EU, make the adoption of rules on FDI screening more topical than ever before. The initiative for introducing such rules has clearly demonstrated the intention of the EU to develop a coordinated approach with respect to FDI that would further strengthen its common trade and investment policy with transparent and non-discriminatory rules.

47 Article 2(1) TFEU.

48 Opinion 2/15 of the Court (Full Court), 16 May 2017, at Paragraph 80, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=471126.

49 Ibid., Paragraphs 80 and 227.

50 Ibid.

Appendix 1

ABOUT THE AUTHORS

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Lourdes Catrain has achieved milestone successes in all areas of EU trade law and economic sanctions, including the completion on behalf of a sovereign government of free trade agreement negotiations with the European Union, judicial delisting of an entity from the EU Iran sanctions list, the termination of an anti-subsidy investigation on behalf of the government of Indonesia, and a series of voluntary disclosures in various EU jurisdictions on breaches of economic sanctions and export control laws. In the EU's largest trade dispute with China, regarding solar panels, she represents the interests of a key EU upstream supplier that forcefully opposes the continuation of measures against imports from China.

Lourdes led the foreign investment filings related to the €12.3 billion acquisition by GE of Alstom's energy activities. Alstom relied on Lourdes' expertise on complex foreign investment regimes involving multiple jurisdictions and Hogan Lovells International's unique ability to provide a 'one-stop shop' for all the key jurisdictions subject to foreign investment approval.

She regularly advises companies on complex business dealings with countries subject to EU sanctions and, with the anti-corruption and white-collar crime teams, conducts internal investigation and prepares voluntary disclosures to Member State authorities.

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Eleni Theodoropoulou focuses her practice on EU and international trade and investment law. She advises on EU sanctions and export controls, EU customs matters, as well as international trade and investment policy in the context of free trade agreement (FTA) negotiations. She has also participated in export control investigations and internal audits.

Prior to joining Hogan Lovells, Eleni gained experience at the European Commission's Directorate-General for Trade, the International Centre for Trade and Sustainable Development in Geneva, the Permanent Representation of Greece to the Council of Europe in Strasbourg, and in private practice in Athens. During her career to date, she has worked on various issues of World Trade Organization law, international and EU investment law and policy, including in preparation for FTA negotiations.

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